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A Great Opportunity for Lawyers

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A GREAT OPPORTUNITY FOR LAWYERS

On the morning after election, a prominent member of the South Bend Bar said, "I am proud of my American citizenship. The people of my country can have a revolution in a day and that without bloodshed." Yes! A revolution in a day! To this lawyer as well as to countless Americans this election was a bloodless political revolution. The result of the recent election proves without cavil that we went through a bloodless political revolution and that the American voter has achieved an independence such as never before demonstrated. With this revolution over and independence at the ballot box thus achieved, will the American lawyer heed an opportunity and meet a responsibility, or will he sit supinely by, letting "matters take their course," letting conditions drift along hoping for a better day? Will he contribute nothing toward the placing of our industrial system on a more equitable, more stable and permanent basis? To my mind, as great an opportunity and a responsibility for service has befallen the profession today, as befell that array of lawyer-statesmen who framed our constitution and safely piloted the Ship of a new State over yet uncharted seas.

Undoubtedly many lawyers have been chosen by the people to represent them in Congress and the state legislatures. Some were elected as chief executives, and many more were called to the judiciary. With a large representation in every department of government, it is the lawyer who will be expected to lead the nation out of the present situation. Will he hearken the cry in the wilderness and triumphantly lead the American people into that comfort and prosperity, that justice and security, and that liberty and equality as is only possible under our Constitution, and under such laws as will guarantee "equal opportunity to all and special privileges to none"?

What are the domestic problems that confront America today? What can be done to solve them without impairment of the American constitutional government and American institutions? These are the questions that confront the executives and legislators that were commissioned by the people last November. In order to understand these problems and meet them as lawyer-legislators and lawyer-executives ought to meet them, a little thinking about the present conditions, a little study of some of the causes, in which lawyers undoubtedly participated, may help us point the way and lead the American people out of a chaos.

Let us briefly examine the situation. No one will dispute that nature in the past three years has been most bountiful; that the natural wealth of America remains unimpaired; that the general health and moral conduct of the American people is still maintained; that our government departments, our schools, and institutions still function. But, no one will dispute that there are unemployed today in gainful occupation twelve million of industrious Americans; that this unemployment directly affects one-third and indirectly the whole, of our population; that this unemployment has burdened to the breaking point every governmental as well as every social agency; that this unemployment is ruining our basic industry, agriculture. Because of the inability of the unemployed to purchase the very necessaries of life,—food, clothing and shelter,—millions of dollars worth of farmers' products are decaying and wasting for the want of a ready market. We are starving in the land of plenty. Privation and starvation are stalking in the midst of great wealth. All this due mainly to the breakdown of our industrial system. Prosperity will not return to America as by magic. The twelve million men must be returned to their jobs. Their purchasing power and the purchasing power of millions of farmers must be restored. There can be no doubt that when the idle men of America return to

gainful occupation; when they and their families become consumers again, prosperity will then appear "Around the corner."

What has brought about this unemployment, and consequent paralysis in American industry? Many causes have been discussed. Among these let me enumerate a few usually mentioned, for some of which the lawyer, as practitioner and jurist and as legislator, may be partly responsible: (1) Over-expansion in production; (2) Unequal distribution of the profits of industry; (3) Substitution of the machine for labor; (4) Inadequacy of our currency system; (5) Burdensome taxation of industry; and (6) Governmental interference with industry. Although all these causes have contributed to the breakdown in industry, it cannot be successfully disputed that over-expansion in business and manufacturing and the unequal distribution of the profits of business and manufacturing are the two main causes that have brought about the unemployment of so many of our industrious citizens. Nor can it be disputed that during the last half of the 19th century and the first quarter of the 20th century there have been many causes and *stimuli* that have made this over-expansion in business and in manufacturing possible. One of the main causes and devices that has promoted this enormous growth in business and the over-production in manufacture has been "the corporation," undoubtedly the discovery of some legal genius. It has been the use and abuse of this device in business and in manufacturing that has been responsible for piling capital upon capital; factory building upon factory building, and thus has plunged the American people into a maelstrom of over-capitalization and over-production. This *soulless* entity, instead of being a servant of the people for their good and their material prosperity has become a monster of their destruction.

Lord Coke said this of corporations:

"The opinion of Manwood Chief Baron, was this, as touching corporations, that they were invisible, immortall, and that they have no soule; and therefore no subpoena lieth against them, because they have no conscience nor soule; a corporation is a body aggregate; none can create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in person, by attorney." [1]

Although these *soulless* and conscienceless persons are of ancient origin, prior to the 19th century their field was confined mainly to public, ecclesiastical and charitable affairs. There has always been opposition to the creation of corporations. At times the opposition reached revolutionary proportions. In early American history, the granting of charters and franchises to corporations was looked upon with great suspicion and disfavor. Only a few English trading companies operated in America during the colonial period, and there were only twenty-six American private corporations doing business at the time of the adoption of the constitution. The business of these corporations was confined to trading, transportation, insurance and banking. Practically all manufacturing activities were conducted by individuals, partnerships, and joint stock companies. A private manufacturing corporation was practically unknown prior to the 19th century.[2]

Corporations can only be created by consent of the sovereign power, and, in America, can only be created by the legislative branches of our government. During the first half of the 19th century, nearly all corporations were created by special acts. In 1819 came the decision in the celebrated *Dartmouth College Case*[3] which held that the charter of a corporation was a contract within the meaning of Section 10

1 Tipling v. Pexall, 80 Eng. Rep. 1085, 14 C. J., p. 49, footnote 1.

2 1 Fletcher, Cyclopedia Corporations, pp. 2-10.

3 The Trustees of Dartmouth College v. Woodword, 4 Wheat. 518, 4 L. Ed. 629 (1819).

of Article I of the United States Constitution which in part provides that "no State shall pass any . . . law impairing the obligation of contracts . . ."

Chancellor Kent, in commenting on this decision, said:

"The decision in this case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of the government; and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country." [4]

However, not without protest from the people was this decision received. Legislatures throughout the country, in every special act creating a corporation, reserved the right to alter, amend and repeal the act. Even with this reservation, the rapid development of the country brought about the creation of many private corporations by special acts. Many abuses such as lobbying, legislative log-rolling and even bribery surrounded the passage of these acts and many times valuable rights of the people were thus bartered away.

Deady, J., of the United States Circuit Court of Oregon, in an opinion in the case of *Wells Fargo & Co. v. Northern Pacific Railway Company* [5] thus refers to these practices:

"Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature."

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4 1 Kent's Comm., 14th ed., pp. 415, 418.

5 23 Fed. Rep. 469, 473, 474 (1884).

We would be blind to history if we did not add, that, in the procurement of the passage of these special acts, the lawyer of that day took a prominent part.

Because of these practices, there grew up a universal protest against special acts creating corporations; and about the middle of the 19th century, by constitutional amendments and by provisions in new constitutions, legislatures were prohibited from enacting special acts creating private corporations. Since then, private corporations have been organized under general incorporation laws, all with reserve powers in the legislatures to alter, amend and repeal such laws.

Following the Civil War came the 14th amendment to the United States Constitution. That amendment reads in part as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Anyone, familiar with the history of our reconstruction period, knows that the purpose of this amendment was to secure equality and protection to those individuals who were made citizens under the 13th amendment. In the *Civil Rights Cases*,[6] decided by the United States Supreme Court on October 15th, 1883, Justice Bradley, in the opinion of the court, thus referred to the 13th and 14th Amendments:

"Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary,

6 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 18 (1883).

operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

When Congressmen voted to submit the 14th Amendment to the states, and the state legislators voted to ratify it, they had no thought that this amendment would be employed as a refuge for the protection of franchises and property of private corporations. When the United States Supreme Court, by a line of decisions,[7] held that corporations were "persons" within the provisions of the 14th Amendment, it practically annulled the reserve powers for alteration, amendment or repeal of general incorporation laws. These decisions sounded the death-knell to any control over corporations by the people through their legislatures. In a recent bar examination in one of the middle-western states, this question was asked: "How does a state control the corporations?" One applicant answered the question: "The state does not control the corporations, the corporations run the state." This may sound to be a humorous answer but in a measure a correct one. Although corporations are the creatures of our legislatures, when once created, the legislatures lose practically all control over them. These decisions of our Supreme Court have done more to promote the use of corporations for the over-expansion in business and in industry than any other cause.

Although in some of our general incorporation acts, there are limitations as to duration of private corporations, there are practically no limitations as to size. In this respect,

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7 Santa Clara County v. Southern Pacific Railroad Company, 118 U. S. 394, 30 L. Ed. 118, 6 Sup. Ct. 1132 (1886); Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 Sup. Ct. 737 (1888); Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. Ed. 536, 30 Sup. Ct. 287 (1910).

the sky has been the limit. Our manufacturing corporations have grown and expanded and within the past twenty years, many of them have doubled and trebled their capitalization and their capacity to produce. At first their activity was local and confined to one state; but under a liberal licensing system their activities have become national and in recent years have been extended to all corners of the earth.

To promote this growth and expansion in industry other factors contributed. The trusts,—devices for profit and for profit alone, conceived undoubtedly in the mind of the lawyer,—appeared on the scene. By these devices, competition was destroyed. The little industries which were the pride of many communities in America were eliminated. Then came the anti-trust laws, then the devices and subterfuges to evade them and feeble efforts to enforce them. And now, we have the holding-companies engaged in the business and pastime of holding on to the investments of countless citizens who have been duped and lost their all in this maelstrom of unchecked, uncontrollable corporate business and industrial expansion. Time and space do not permit a discussion of the trusts and the struggle of the government to control them.

In addition to the cases cited which held that corporations were "persons" within the meaning of the Fourteenth Amendment, let me discuss a few additional decisions of the Supreme Court of the United States and many of them 5 to 4 decisions, which to my mind have promoted over-capitalization and over-production in industry and retarded the equitable distribution of the profits of industry.

The *Pollock Case* [8] was decided on May 20, 1895, with Justices Harlan, Brown, Jackson and White dissenting. This case held the Federal Income Tax Act of 1894 unconstitutional. This decision was followed by a political agitation

[8] Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. 912 (1895).

for nearly twenty years, which, on February 13, 1913, culminated in the ratification of the Sixteenth Amendment to the Constitution of the United States, which gave Congress the "Power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." Under this amendment, on March 1st, 1913, Congress enacted the first valid Income-Tax law. Soon after its enactment suits were started to test the question whether or not stock-dividends were taxable as income. To settle this question, Congress, in the Revenue Act of September 8, 1916, expressly provided for the taxation of stock-dividends derived from profits, and to the amount of the cash value of such dividends.

On March 8, 1920, the Supreme Court of the United States, in the case of *Eisner v. Macomber,*[9] by a 5 to 4 decision, held that a stock-dividend, declared lawfully and in good faith against accumulated profits, was not income and that Congress had no power under the Sixteenth Amendment to tax such dividends as income. Justices Holmes, Day, Brandeis, and Clarke dissented.

What has been the effect of this decision? It is my opinion that this decision of our Supreme Court has done more to promote over-capitalization in business and in industry and over-production than all other causes combined. To escape taxation under the Income Tax Law, stockholders in profitable corporations, instead of accepting dividends in cash, took the surplus profits in stock-dividends,—thus increasing capitalization, and necessarily, extending and expanding the activities of these corporations. Had these surplus profits in our large manufacturing corporations been distributed to the stockholders in cash, there would have been a greater dissemination of wealth among the many

[9] 252 U. S. 189, 64 L. Ed. 521, 40 Sup. Ct. 189, 9 A. L. R. 1570 (1920).

thousands of stockholders, a greater consumption of the products of industry and less expansion in production. It has been recently reported that the next Congress would consider the taxation of corporate surplusses which today amount to four billions of dollars. Had one more justice of the Supreme Court voted with the minority in the *Eisner* case, there would have been no occasion for the consideration of such legislation.

The case of *Dodge v. Ford Motor Company* [10] is a good illustration of what becomes of surplus profits of corporations that are not distributed to the stockholders. In that case the Ford Motor Company had a surplus of $112,000,000, about $54,000,000 cash on hand and had made profits of $59,000,000 in the past year (1916) with expectations of $60,000,000 of profit the coming year. The directors declared a dividend of only $1,200,000. The Supreme Court of Michigan held that the lower court did not err to require the directors to declare an extra dividend of $19,000,000. Even with this additional dividend, more than half of the yearly surplus profits of that company went into expansion in production. In corporation law the matter of declaration of dividends is left largely to the discretion of the directors. Courts are very reluctant in compelling the declaration of dividends at the suit of stockholders. There are many cases where the courts of equity have not gone as far as the Michigan court. Other cases could be cited where large surplus profits were not distributed as dividends, but were used for over-expansion in industry.

There are decisions of our Supreme Court that have had a tendency to promote the security of capital rather than to promote the welfare of labor and the consumer. The two decisions, declaring unconstitutional the two Federal child-

10 204 Mich. 459, 170 N. W. 668, 3 A. L. R. 413 (1919).

labor laws: *Hammer v. Dagenhart,*[11] decided June 3, 1918, and *Bailey v. Drexel Furniture Company,*[12] decided May 15, 1922, are examples. In the first Child-Labor Case Justices Holmes, McKenna, Brandeis and Clarke dissented.

We hear today a good deal about a shorter work-day for labor and thus providing some opportunities for jobs for the unemployed millions. In 1905, in the case of *Lochner v. The People*[13] our Supreme Court, by another 5 to 4 decision, in which Justices Harlan, White, Day and Holmes dissented, has practically closed the door to any such relief. The court held unconstitutional a statute of New York which limited the employment of employees in bakeries and confectioneries to not more than sixty hours per week or ten hours in one day.

As to legislating for a minimum wage and thus bringing about a more equitable distribution of the profits of industry, the door is also closed by the recent decision in the case of *Adkins v. Children's Hospital*[14] declaring unconstitutional an act of Congress fixing the minimum wage for women in the District of Columbia. This was a five to three decision, Justice Brandeis taking no part. The late Chief Justice Taft wrote one of the dissenting opinions. Justices Sanford and Holmes also dissented.

I do not cite these cases with a purpose of criticism. I cite them to show how in the past half a century, our capital investments in business and manufacturing corporations have been made so secure by court decisions that capital was attracted to these corporations and thus brought about over-expansion and over-production.

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11 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. 529, Ann. Cas. 1918 E, 724 (1918).

12 259 U. S. 20, 66 L. Ed. 817, 42 Sup. Ct. 449, 21 A. L. R. 1432 (1922).

13 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539, 3 Ann. Cas. 1133 (1905).

14 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. 394, 24 A. L. R. 1238 (1923).

Besides the loss of peoples' control over corporations; besides the promotion of security of investments in them and the destruction of competition, there have been other *stimuli* to production. Government agencies have given aid to production. Subsidies and tariffs have been provided. Add to these our labor-saving machinery and the efficiency experts. Resources of government and law, and of science and education have been devoted to production. Through corporate devices, business and manufacturing were organized for profit and profit alone; and the more profitable they became, the more capital they attracted. Is it any wonder that this led to over-expansion in business and over-production in industry? Ought it be any surprise that we were plunged into an abyss of inactivity in 1929?

A prominent American economist said, that there are three essentials to a successful and prosperous industry: capital, labor and consumer. We have done everything for the promotion and security of capital. What about labor during our *spree* of production? What about the consumer made up largely of the laboring men and farmers of America? What efforts were made for them to obtain a share in the profits of industry of which they were essential parts? Has it not been the neglect of labor and the farmer that has been partly responsible for the business and industrial cataclysm in 1929? Has it not been an unequal struggle between capital on the one hand and labor and consumer on the other? It has been only through the combined efforts of organized labor and organized farmers that they were able to obtain some share of the fruits of business and industry. Although aids were given to capital, the great mass of laborers and consumers were left to fight their own battles. Here are a few examples of contests between capital and labor: the struggle for minimum wage laws, for shorter hours of labor, for child labor laws, for work-

men's compensation laws, for income tax laws, for unemployment insurance laws, for farm reliefs, and the contests over the use of injunctions in labor disputes.

This discussion has been limited to the use of the corporate entity in private business and manufacturing. The use of the corporate entity in the field of public service is an entirely different problem. The people still retain control over the profits of public service corporations by the power over granting certificates of necessity, of regulating their conduct, and the fixing of the rates for their services; while the people have no power of regulation nor control over the profits of private corporations.

In an issue of the South Bend News-Times of Friday, January 6, 1933, appeared an editorial entitled "Back to Simpler Production Where Man Plays Large Part." Although the editorial refers to the use of machinery in production on a large scale, the same might be said of the use of the corporate entity on a large scale. The writer of this editorial says in part:

"Close students of present day economics point out that many of the anticipated profits of the complete machining of industry are not materializing, and that the trend instead of towards bigger and better machinery, is certain to be back towards simpler production methods where man power will play a larger part. . . . We have been through an era of striving for largeness. . . . Even Ford says that production will go to small units located in smaller towns. He has found that his elephantine machine at Dearborn is too costly. The original cost of building the equipment and the interest on the capital involved oftimes absorbs all the other savings."

Would not production be made "simpler" and better if our corporation entities engaged in private business and manufacturing were smaller and gave more consideration to man than to profits?

What conclusions may be drawn from facts and history here recited? The corporation—this *soulless* entity—has, under our laws, grown so enormous and so powerful that in-

stead of being a servant of the people, it has become a monster of their destruction. Because of its size, its complexity and the multifariousness of its conduct, it has destroyed all human relations in business and in industry. Being organized for profit and for profit alone, it has promoted greed, made men lose all sense of human values, and led them to worship at the shrine of mammon. In the mad rush for profits and wealth, human rights and human welfare have been forgotten. These *soulless* creatures of our legislatures which have destroyed man's humanity to man, which have brought about a paralysis in business and industry, must be brought to subjection and control if we are to restore business and industry to an honorable, equitable and sound foundation.

How shall it be done? Shall we resort to expediencies and continue longer a business and an industrial system that is sure to lead us into a greater cataclysm and destroy our institutions, our rights and liberties under our constitutional government? Balancing budgets, organizing reconstruction finance corporations, reducing taxes, revising our currency system, providing employment on public works, and repealing prohibition, may for a time, all, help to supply work for many of those out of employment, and thus partly pull us out of the present depression; but, unless we build on a better and firmer foundation, unless we re-organize our business and industrial system for the service of men rather than for their exploitation, our recovery from the depression will be temporary indeed. Business-men and industrialists today realize that production by large units and on a large scale must give way to production by small units, and production that will give more consideration to the welfare of men not only as laborers but consumers as well. The lawyer, through whose learning, sagacity and advice, corporations grew in size and importance, trusts and combinations and holding companies were created, must by that same

learning, sagacity and advice, lead American business men and manufacturers back to a simpler, saner, more equitable and a sounder business and industrial structure.

In over forty states, legislatures have opened their regular sessions. What can they do in this emergency? True, under the decisions of our courts, as to existing corporations, legislatures cannot destroy vested rights, impair contractual obligations, nor deny to corporations due process of law and the equal protection of the laws. But, legislatures can repeal or amend general incorporation laws and provide for their future conduct; they can limit the capitalization and size of private corporations; can forbid one corporation dealing in stock of another corporation; can forbid common and interlocking directorates; can compel the distribution of surplus profits in cash, and can impose restrictions on the licensing of foreign corporations.

The details of legislation to accomplish the desired result must be left to the leadership of our lawyer-legislators. The lawyer-statesmen who drafted our Constitution had a greater task. The lawyer-statesmen who piloted us through a Civil War, through a Reconstruction Period, and through the World War, had equally difficult problems. Will the lawyer of today assume a leadership? Will he assume a duty and a responsibility for service? Will he heed an opportunity and thus bring a lasting tribute to the profession?

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