

REVIEWS

THE FINANCIAL POLICY OF CORPORATIONS. By Arthur Stone Dewing. New York: The Ronald Press, 1953, 5th Ed. 2 vols. Pp. xxx, 1538. \$15.00.

DR. DEWING'S handbook —grown into a classic¹—has now emerged in its fifth edition. The two volumes, constituting a short encyclopedia of the conception, birth, life and death of a corporation, reproduce the virtues and defects of the third (1934) and fourth (1941) editions.

A world war and an atomic age have altered the America in which Dr. Dewing studies the life cycle of the corporation, but the corporation itself emerges as continuing essentially unchanged from a golden era before Franklin D. Roosevelt became President of the United States, except insofar as particular types of corporate life are regulated and specific activities unduly restricted by governmental action. The impact of the Republican administration's relaxations² is too recent to be considered.

As exemplified in the instant tomes, the former professor of finance at Harvard, now corporate executive, continues to show: (1) a parochial approach to corporations which italicizes their internal stresses and strains and gives the impression at times of management operating almost in a socio-

1. Some thirteen years ago the late A. H. Feller, in reviewing the fourth edition of this book, traced its growth from "a practical little book on the way in which corporations raise the money needed for their business" to "the stature of a classic." 51 YALE L.J. 359 (1941).

2. Perhaps the most incisive piece of regulatory legislation of the New Deal was the Public Utility Holding Company Act of 1935, 49 STAT. 838 (1935), 15 U.S.C. § 79a (1941). Dr. Dewing deals at great length throughout his volumes with various aspects of this legislation. One of the decisive acts of the Securities and Exchange Commission in administering this statute was its promulgation of what is now known as Rule U-50, providing for competitive bidding with respect to the issue and sale of securities of holding companies as well as of their public utility subsidiaries. The rule thus applied even to situations where, under § 6(b) of the statute, the issue and sale by a public utility are technically exempt since specifically approved by a state regulatory agency. The Commission is permitted, in that instance, to apply "terms and conditions." Implicit, however, throughout the statute, and something which a "laissez-fairest" like Dr. Dewing permits himself to forget, is the inefficiency and ineffectiveness of state regulatory bodies, even though one of them may have been the New York Public Service Commission under Chairman Maltbie. It would appear that a number of state regulatory commissions are not permitted to require competitive bidding. In addition, the state regulatory commissions often are not empowered to reject security issues unless a finding is made that such security issue is adverse to the consumer. Investors as such are rarely considered. On the whole, despite invasions and "liberalizations" of the competitive bidding rule and its application in the late years of the recent Democratic administrations, the rule remained in effect. The present administration's move to amend Rule U-50 [see *e.g.*, H.C.A.R. 12217 -X (Nov. 25, 1953), H.C.A.R. 12336 (Feb. 4, 1954)] has resulted in certain repercussions and accusations. See, *e.g.*, Robert R. Young in N.Y. Times, Feb. 19, 1954, p. 35, cols. 6-7.

economic vacuum;³ (2) a pervasive and avowed hostility toward regulatory devices, allegedly standing in the way of a never-never land's free market play;⁴ (3) for a layman (and this is not patronizing on the part of a lawyer) a remarkable application of legal principles to financial policies, but also often an untidiness and lack of essential refinement of legal tools and juristic dicta;⁵ (4) a redundancy, even within the small scope of this brief encyclopedia; a failure to excise the irrelevant, combined with an undisciplined tendency toward "inebriation with the exuberance of his own verbosity" and bourbon tendentiousness;⁶ (5) an astonishing erudition, often marred by its showiness and rococo presentation and a certain carelessness as to its appearance.⁷

The worst has been said. Dr. Dewing's work is a comprehensively annotated dissertation on the struggle for financial existence of our most important form of commercial endeavor. No dilettante flitting from theme to theme, Dr. Dewing has presented in this compendium supplement⁸ to his edition of more

3. See Dodd, Book Review, 48 HARV. L. REV. 540, 541 (1935).

4. See, e.g., pp. iv-v, 999. And see Dodd, *supra* note 3; Feller, *supra* note 1, at 360-1; Buchanan, Book Review, 30 CALIF. L. REV. 495-8 (1942).

5. Earlier reviewers, while taking Dr. Dewing to task, excused infelicities in his use of legal materials. Thus, Stanley Law Sabel, reviewing the third edition, commended the writer's "legal approach to business problems. This approach involves a certain amount of sacrificing of accuracy of legal statement." 19 MINN. L. REV. 493 (1935). Former reviewers admired Dr. Dewing for his vast legal research, but gagged at specific references. E.g., Hatfield, Book Review, 23 CALIF. L. REV. 373, 374 (1935). That this "veritable encyclopaedia of information," in which readers will strike "pay dirt" in one factual vein after the other [Halsted, Book Review, 36 ILL. L. REV. 479 (1941)], cannot serve as a legal document is demonstrated continuously by the inability of Dr. Dewing to differentiate between holding and dictum, between judicial self-abnegation and legislative policy, between one legal concept and another. A lawyer is appalled by the number of errors, incompleteness, and anachronisms in citation. E.g., at pp. 31, 80, 190-1, 357, 971, 1040, 1045, 1068, 1073, 1271, 1273, 1315. For lawyer as well as non-lawyer, the index is woefully inadequate. And there is no table of cases.

6. Feller has pointed out Dr. Dewing's corrosive comments on the Securities and Exchange Commission's Protective Committee Study headed by the present Mr. Justice William O. Douglas (in collaboration with such eminent attorneys as Abe Fortas, Martin Riger, and Samuel H. Levy). See Feller, *supra* note 1, at 360 n.6. In precise orotund phrase Dr. Dewing repeats these comments in this edition. Pp. 170, 1196, 1235.

7. This reviewer, being himself a footnote addict and a parentheses amateur, was nonetheless more than slightly exasperated by the footnote on footnote system employed by Dr. Dewing—and like a first year property scholar could limit his thinking to "a use on use." A not untypical page, p. 1293, has 16 lines of text, part of a paragraph, which runs from page 1292 to 1294. The text contains footnote references "239," "rrrrr," "241," "242," "sssss," "ttttt," and "247." The three lettered footnotes contain textual material. Footnote "sssss," which incidentally includes several legal statements which could be greatly refined, refers in turn to subfootnote 243. The numbered subfootnotes usually contain solely references, but often there is some deviation. See, e.g., n.239. Some reviews, perhaps less addicted than this one to allusive addenda, commended the system of footnotes and sub-notes. E.g., Sabel, *supra* note 5, at 494.

8. Students of the Dewing editions will find not only the essential material of the fourth edition unrevised, but also the order and language of the former impression unaltered in any material respect. No rewrite job, the fifth edition is an accretional

than a dozen years ago a solid and profound, if somewhat oracular, exegesis of all phases of corporate life and theory. In addition, Dr. Dewing has reflected ponderously (but then, too, frequently tangentially only) on economic history,⁹ the complexities and essential simplicity of twentieth century American life, and the use and abuse of governmental interference. He has also here written an extensive and allusive, if not perceptive, history of the Securities and Exchange Commission and to a lesser extent of the Interstate Commerce Commission.

The author divides his work, like the *Pentateuch*, into five books: Corporate Securities, Valuation and Promotion, Administration of Income, Expansion, and Financial Readjustments.

As befits a genesis, Dr. Dewing starts with the early cultures of Sumeria and Akkadia,¹⁰ but rushes through the centuries with apocalyptic haste, anxious to reveal the modern corporation. But in his haste, here as elsewhere, Dr. Dewing shows himself no master of brachylogy.¹¹

In getting down to corporate securities, Dr. Dewing first plunges into capital stock. By this time he must have as little stomach as the reader for the cold soufflé disputes over par and no par stock.¹² When he comes to the "fundamental rights of the corporation stockholder," Dr. Dewing approaches

and to some small extent a condensatory and re-arrangement effort. The major shifting of materials occurred in Part IV on Expansion, and especially in the chapters on the investment banker, statements and agreements in merchandising of securities, and the merchandising of securities. In the deuteronomic part on Financial Readjustments, chapters have been coalesced (see, *e.g.*, present c. 39) and tolerance of space given to new material, such as the Mahaffie Act (at p. 1407). If Dr. Dewing were a trifle clairvoyant, he probably would not have ripped out of this edition his former inclusion of the *Norfolk Southern Railways* case as "illustrative . . . of reorganization following failure," in view of the I.C.C.'s review and reprimand of the McGinnis group in its control of that freight enterprise. INTERSTATE COMMERCE COMMISSION, INVESTIGATION OF PRACTICES OF NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN BUS CORPORATION, (Rep. No. 30980, Feb. 1, 1954). But Dr. Dewing makes no redomantade claim to clairvoyance. Indeed, changes in editions are often brought about by time disproving his prediction. See p. 1443, n.47 ("creditor committee reorganization").

9. Dr. Dewing has received hardly flattering mention as an economic historian. See Buchanan, *supra* note 4, at 498.

10. P. 3. Even though no mere sciolist, he would make no claim to the pre-classical legal studies being publicized and made viable for twentieth century scholarship by Professor E. A. Speiser of the University of Pennsylvania and others. See Speiser, *Early Law and Civilization*, 31 CAN. BAR REV. 863 (1953); *The Ancient Near East and Modern Philosophies of History*, 95 PROC. AM. PHILOSOPHICAL Soc. 583, 586 (1951).

11. While Berle and Means were not straining for the definitive, it is refreshing to reread their simple chapter on "the appearance of the corporate system." THE MODERN CORPORATION AND PRIVATE PROPERTY c. II (1932). On the other hand, for specialized study, see Dodd, *The First Half Century of Statutory Regulation of Business Corporations in Massachusetts*, HARVARD LEGAL ESSAYS 124 (1934).

12. In early editions Dr. Dewing baldly made statements about no par stock that caused one reviewer to invoke the half-forgotten shades of Paciolo and Charles E. Sprague. Hatfield, *supra* note 5, at 374. Now, one is just not excited. In his rehash, Dr. Dewing does not sufficiently point out that in practice it is often the transfer taxes on the

the holy ground of the age of the common man. The principles enunciated here permeate the entire study.¹³ Every reviewer, like the critics of short story anthologies, will deplore deletions and inclusions.¹⁴ Perhaps with authorial malice, Dr. Dewing on this subject has preferred to be allusive rather than analytical or thorough.

Into the Dewing detailed presentation of capital structures a conceptualism, strange for a functionalist, has crept.¹⁵ The rigid dichotomy between debt securities and equity is maintained.¹⁶

In the chapters on valuation and promotion, once Dr. Dewing gets past his neo-Spencerianism, he posits and answers problems which often stall the

no par shares that vitiate their advantageous use. When he descants on consideration paid for stock, he slides over such rough constitutional surfaces as are presented, for example, by the still persistent Pennsylvania Constitution Art. 16, § 7.

13. At various places the author stops to reflect on the underlying postulates of succeeding chapters. See, *e.g.*, c. 40. On the whole, this procedure is useful. Its drawback is repetition, that blocks the flow of the life history of the corporation—a form of presentation that has been preferred by reviewers of past editions to what has been described as a more logical format. Buchanan, *supra* note 4, at 496.

14. Amplification of the delineation of the obligations of directors and controlling stockholders to the corporate stockholders and to the corporation would have been appreciated.

While Dr. Dewing purports to lump various legal rights in a single paragraph, he in effect spreads them throughout his two volumes. In a discussion of this sort, a lawyer cannot expect to obtain many of the fine points which might be derived from a learned law review article. Yet the discussion by the author points up again one of the underlying disconcerting uses of materials by Dr. Dewing. His encyclopaedic mind is eclectic without being selective. The author shows no nice ability to discriminate between what is interesting and what is important, between what is feasibly true and what is an incidental fact or dictum.

15. For instance, apodictical statements as to the non-deductibility of preferred stock dividends fly in the face of recent determinations involving the sale to an insurance company of an issue with compulsory retirement provisions and other attributes of demand. See *Choctaw, Inc. v. Commissioner*, 12 T.C.M. 1393 (CCH Dec. 20029(M), entered Dec. 9, 1953); see also *United States v. Title Guaranty & Trust Co.*, 133 F.2d 990 (6th Cir. 1943).

16. P. 171. Dr. Dewing does not close his eyes to the metempsychosis involved in a "Deep Rock" situation. See *Taylor v. Standard Gas and Electric Co.*, 306 U.S. 307 (1939). But he leaves untouched some of the most interesting aspects of affiliate relationships and the transmigration of the securities of dead corporations. In life and death, the Associated Gas and Electric Company (Ageco) crawled with anomalous debt securities, or as the Securities and Exchange Commission called them at the time of their expiration, "pseudo-obligations." Stanley Clarke, 15 S.E.C. 743, 748 (1944). These were the so-called convertible debenture certificates, convertible certificates, and convertible obligations. These securities, some of which did not even appear in Ageco's capital structure, followed fixed interest debentures, income debentures and several series of sinking fund income debentures; were substantially on par with matured and maturing scrip; and preceded the preferred, preference, Class A, Class B, and common stocks of the holding company. With the present vogue of convertibles as a financing vehicle, see *Convertible Preferreds; a "Call" on the Future*, 14 THE EXCHANGE 19 (1953), it would appear that Dr. Dewing's treatment pp. 256-71 in extension and in analysis was not proportionately adequate.

lawyer's train of thought. His adumbrations on public utility valuation traverse recent as well as ancient ground. Thus, with just a modicum of nonsense in his approach,¹⁷ he adverts to recent theories such as that of the "cost-of-money" of an economically sound rate of return.¹⁸ In his analysis of industrial corporations, he does perhaps give too little attention to evolving appraisal statutes and court interpretations which may make a market barometer of valuation if there is a market for the securities of affected corporations.

While in previous editions the Dewing chapters on accounting have been alternately praised and censured, this reviewer was required to test them with the litmus paper of legal worth. They bore that test well. For specialized students of utility financing, a fuller reference to accounts established by regulatory agencies and their influence on substantive law might be required.¹⁹

Part III deals with the administration of income. This follows closely the valuation section and encompasses Dr. Dewing's postulates on accounting for income, depreciation, obsolescence, contingent reserves, the cost of borrowed capital, surplus, and current capital. The climax is the chapter on the distribution of profits to stockholders. The case histories there considered are analytically informative and provocative.²⁰ The chapter is for the guidance of management and does not touch the legal problems, considered throughout the book, involving compulsion to declare and pay dividends. Ideally, it might have been helpful to have included such a section in this particular place and to have differentiated among the various types of compelled dividend payments.²¹

Volume 2 begins with a discussion of expansion. It is in this section that Dr. Dewing deals with the merchandising of securities and accordingly with the administration of the Securities Act of 1933, as amended. This treatment is on the whole superficial; a number of the references are not current.²² The author's attempt to condense the provisions of the acts administered by the Securities and Exchange Commission is only partially successful.²³ In the

17. P. 349.

18. P. 335. (1952 action of the Federal Power Commission). See also Public Service Co. of New Hampshire, 33 N.H.P.U.C. 134 (1951); Public Service Co. of New Hampshire, Case D-R3152, Public Utilities Comm'n of New Hampshire (May 20, 1952).

19. In 1944 Homer Kripke contributed an exhaustive analysis of Federal Power Commission Accounts in *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 HARV. L. REV. 434, 693 (1944). Ten years have passed, and it is time Mr. Kripke revisited Accounts 100.5 and 107.

20. It would have been helpful, however, if the various tabulations were brought up to date. It is disconcerting to find tabulations of statistics and references twenty to thirty years old. *E.g.*, pp. 745, 759, 763, 766, 771, 773, 779, 785, 789-90, 792.

21. Patently, Dr. Dewing has no room for such fine jurisdictional considerations as may arise frequently in the corporate life which he studies, namely, the compulsion for the payment of dividends when personal jurisdiction cannot at the same time be gotten over a majority of the board of directors and over the corporation. See *Kroese v. General Steel Castings*, 179 F. 2d 760 (3d Cir. 1950).

22. See pp. 1046-7, 1069, 1136.

23. Again and again Dr. Dewing seems to have a typographical blindness in presenting the accurate name of the agency with which he is dealing. See, *e.g.*, pp. 1073, 1115.

chapter on special subscriptions²⁴ one might have anticipated a fuller discussion of pre-emptive rights²⁵ and underwriters' stand-by agreements.

Spenglerian-like, Dr. Dewing now approaches his final book. It is called *Financial Readjustments*; and, while it considers various patching recapitalizations and capital readjustments,²⁶ it is essentially concerned with the failure of the enterprise. This is one place where Dr. Dewing might have been more helpful by being less legal and by charting the reorganizations through more detailed analyses. We must, however, be thankful to him for his case studies

Dr. Dewing praises only one book [CHERRINGTON, *THE INVESTOR AND THE SECURITIES ACT* (1942)]. Perhaps it is significant of Dr. Dewing's attitude toward the Federal Government's attempt to regulate entrepreneurs seeking the use of the public's money that Cherrington's book has been criticized for its "timidly querulous note," its oversimplified and pedestrian presentation "with reference to the socio-economic and legislative framework" of the Securities Act of 1933, its too brief and simplistic discussion, and its failure of synthesis or analytical clarification of the problem. See L. Forer, *Book Review*, 56 *HARV. L. REV.* 327 (1942).

24. P. 1140 *et seq.* See also p. 103 *et seq.*

25. See pp. 1140-1.

26. As a tool for voluntary readjustment and as an independent subject, one corporate maneuver—"the purchase and redemption by a corporation of its own shares"—receives astonishingly niggardly treatment. Law and practice have traveled far from the dictum in *Ex parte Holmes*, 5 *Cow.* 426 (N.Y. Sup. Ct. 1826) and the holdings in *Barton v. Port Jackson*, 17 *Barb.* 397 (1854), and *Dupee v. Boston Water Power Co.*, 114 *Mass.* 37 (1873). At the present time this practice is a well established, if at times a hazard-fraught, corporate and stockholder-corporate-stockholder financial technique. See Dodd, *Purchase and Redemption by a Corporation of its own Shares: the Substantive Law*, 89 *U. OF PA. L. REV.* 697 (1941); Campos, *The Purchase by a Corporation of its Own Shares*, 27 *PHIL. L.J.* 686 (1952). The problems involved have not always been settled and often not sufficiently delineated.

The subject of redemption has been usually limited to preferred stocks. See, *e.g.*, Jones, *Redeemable Corporate Securities*, 5 *So. CALIF. L. REV.* 83 (1931). More fascinating are problems arising in connection with the redemption of common stocks. Redeemable common shares occur as a frequent feature in open-end investment companies. Under Section 18f of the Investment Company Act of 1940, 54 *STAT.* 789, 820 (1941), 15 *U.S.C.* § 80a-18 (1946), registered investment companies are substantially limited to the issuance of one class of stock; and this class of stock, common, is the one which is redeemed.

Once past the stock provisions or lack of provisions (which raise problems of interpretation), there is the matter of applying them in the particular situation. The seminal force may spring from contractual relations. At the present time it frequently involves an aspect of personnel relations: the corporation acquires its own stock with the end in view of later giving or selling at reduced prices as part of a profit-sharing plan or employee stock-purchase plan. Or it may be a roundabout way to pay off promoters. In reverse it has been used for officer donations, as when the late Julius Rosenwald donated a large block of stock to Sears, Roebuck & Company in 1921, to wipe out a deficit. BRADLEY, *FUNDAMENTALS OF CORPORATION FINANCE* 116 (1953). Sometimes the purpose is hidden in corporate Machiavellianism, as when several classes of stock are outstanding and the one with voting power is redeemable. GERSTENBERG, *FINANCIAL ORGANIZATION AND MANAGEMENT* 86 (3d ed. 1951).

Dr. Dewing too cavalierly skirts the congeries of impacts of the reacquisition of stocks. To take one minor example directly within Dr. Dewing's purview, the existence

which are of great merit and which constitute perhaps the most thorough factual consideration of this complicated end-of-the-road field.

In its totality, Dr. Dewing's work is one of substantial merit. Its faults are those of an all-embracing mind. Its merits are solidity of scholarship, provocativeness of practical approach, illumination of a mainspring of our American economic society. The two volumes have an organic coherence. There is hardly an aspect of corporate finance, or for that matter corporate law, that cannot be initially researched in this small encyclopedia. Often it may serve only as a glorified index to legal periodicals; often it will give the complete and instructive answer. If we are not to succumb to the illusory quest for perfection, then to the corporate executive and the lawyer, Dr. Dewing's fifth edition will serve as a comprehensive textbook and study of the financial policy and needs of the modern corporation.

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SEXUAL BEHAVIOR IN THE HUMAN FEMALE. By Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin and Paul H. Gebhard. Philadelphia and London: W. B. Saunders Company, 1953. Pp. xxx, 842. \$8.00.

IN the United States almost everybody reads the Kinsey Reports—or reports about them. Thus, almost everybody knows that of the 5940 white females (let's call them women) whom Kinsey and his associates studied:

- 1) 62% had masturbated;¹
- 2) 53% had petted to orgasm before marriage;²
- 3) 50% had had premarital relations³ and 69% of the 50% had no regrets;⁴

of a possibility of reacquisition by a corporation of its own shares radically affects the marketability of its shares and the resultant market. Thus, redemption features may keep the price of a stock down or even pull it lower.

While emphasis has been placed in the past on the redemption of stock, it is obvious that in the future the techniques of market purchases and tenders will predominate; at least, they will result in the most taxing legal questions. It is at this point that guidance both from the existing cases and from his wealth of practical erudition might have been obtained from Dr. Dewing. But the help is slight.

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1. These raw figures in no sense reveal the information about female masturbation which is contained in this book. There are significant data on how girls and women learn to masturbate, occurrence by age and marital status, variation in frequency, duration of masturbation period, relation to educational level and parental occupational class, rural-urban background, religious affiliation, techniques of masturbation, speed of response, accompanying fantasies, etc. More males (93%) masturbated.

2. This figure is for those women born in the second decade of the century (1910-1919). See p. 275, Table 65. Again, there are all sorts of breakdowns as to frequency, religious background, age, techniques, etc.

3. P. 333, Table 75; p. 337, Table 79. Here too, many factors entered into the situation. For example, among the women who were born before 1900, less than half as many had premarital intercourse than those born in any subsequent decade. P. 298; p. 339, Table 83.

4. This figure applies to the unmarried women, 77% of whom did not desire virginity