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Securities Regulation, by Louis Loss

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BOOK REVIEWS

SECURITIES REGULATION. By Louis Loss.* Boston: Little, Brown and Company, 1951. Pp. xxvii, 1283. $17.50.

Here is the one volume reference library on most of the legal and a good many of the financial problems arising from the buying and selling of securities in America today. Its components are chiefly common law summary, state legislative and administrative condensation, and extensive commentary on federal regulation by or in cooperation with the Securities and Exchange Commission.[1] Previously, as all are aware, there had been no such textual compendium. The present work will surely serve as a splendid consulting tool at the start of any problem-solving task in the field with which it deals. Very frequently, it will be the only link with primary source material needed.

The author informs us that he set out to attain three goals: to tell the story of government regulation of securities; to paint a picture of administrative law in action; and to provide a teaching tool.[2]

Synthesis of the story of governmental regulation, even with the available loose-leaf services, calls for welding together a mass of statute, administrative rules and orders, and several well-packed filing cases of various S.E.C. releases.[3] It is doubtful if any author who had not Mr. Loss' 14 years of service with the Commission would have had the courage to attempt the task. Yet, the book, with rare exceptions, is not an "Inside S.E.C."[4] What is presented is, for the most part, what an

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1. There is also a modicum of reference to the work of the Interstate Commerce Commission. The only relevant S.E.C. jurisdiction muted is that over public utility holding company structures, on the theory it is passing from the scene. P. 92. Still, there is a clear exposition of the market phenomenon that holding companies are worth more dead than alive. Pp. 91-92. There are also many more references to utility holding company problems, *e.g.* pp. 255-269.

2. Preface, pp. v-vi.

3. The Securities services of Commerce Clearing House and Prentice-Hall have hitherto been the best sources for this material. Principally, they tend to be digest-indexes.

4. These exceptions seem chiefly to be: on coverage by the 1933 Act of solicitations to enter a substitute voting trust (P. 362); on exemptions from conflict of interests provisions applicable to the indenture trustee (P. 429); on coverage of open-end investment companies and trust companies by over-the-counter broker-dealer registration requirements (Pp. 721-722); on comparative rigidity of Commission views as between

outsider with Teutonic patience, probably working twice as long as the author, might have dug out of the libraries.

The organization of the story is remarkably clear. The usual sequence within a subdivision starts with a description of the financial practices treated, followed by a summary of judge-made law here and in England, a collation of state provisions, and detailed exegesis of the clause by clause provisions of the applicable federal statutes and the record of action taken thereunder. There is also an appended presentation of non-English law. While it could well be submitted that the financial practice material merely duplicates what has already been described in other publications, the author is not defenseless.[5] If the "story" is to be told between the same covers we need to know how it came that Little Red Riding Hood happened to converse with the wolf. Certainly, it helps if all readers start with the same understanding. It just may be that those who inhabit law libraries exclusively (not all law libraries, of course) may not have heard. In addition, there are no more understandable descriptions of the processes of public distribution of a security issue and "puts" and "calls" than Mr. Loss gives us.[6]

Sometimes the judge-made law is hastily canvassed.[7] But where judicial action is more significant, as with federal statutory civil liabilities, more space is usually afforded.[8] State laws are collated most ingeniously.[9] Their inadequacies are of course part of the story. One should not expect Mr. Loss, ordinarily, to help solve a problem under the Georgia statute; but after one has limned it out he will find it convenient to consult the book for leads to legislative analogies and precedents.

It is when he comes to Mr. Loss' discussion of federal securities regulation by the S.E.C. that the reader will really have the reward of his pluck. For example, the author's explanation of the 1933 Securities Act registration and prospectus requirements reduces an incredibly involuted statute to graspable compass.[10] The author illuminates a very large number of tough interpretative problems, particularly under the

1933 Act and over-the-counter exemptions for intrastate activity (P. 724); purpose of broker-dealer inspection program (P. 759); and sufficiency of certain publications as evidence of manipulative purpose under the 1934 Act (P. 912).

5. *E.g.*, topics covered in DEWING, FINANCIAL POLICY OF CORPORATIONS (4th ed. 1941); GUTHMAN AND DOUGALL, CORPORATE FINANCIAL POLICY (2d ed. 1948); TWENTIETH CENTURY FUND, THE SECURITY MARKETS (1935).

6. Pp. 106-120, 305-306.

7. *E.g.*, litigation between investors and market manipulators, p. 889.

8. Pp. 956-962. But some of this is still meagerly treated, *e.g.*, "deceit", p. 959.

9. *Esp.* c. 2.

10. Pp. 121-142, 148-166. Preceding historical discussion here, as well as elsewhere, is first rate. See also pp. 763 *et seq.* on the origins of the Maloney Act, 52 STAT. 1070 (1938); 15 U.S.C. § 78 0-3 (Section 15A of the Exchange Act: "co-operative" regulation of the over-the-counter market).

1933 and 1934 Acts and rules, such as a buyer's right against an "inside seller" of a registered security under the X-10B rules.[11] Here also is an explanation which one can follow, though he may think it an absurd wedding to an early Federal Trade Commission mistake, of why a registration statement need not be kept up to date for material post-effective date changes while the public distribution is in progress.[12]

The comparative law material frequently dangles.[13] It is hard to see the utility of the notation that, "In all the Canadian provinces except Prince Edward Island a broker who reduces the amount of a particular class of securities under his control below the amount which should be carried for all his customers with outstanding margin contracts is subject to civil and criminal liabilities."[14] The plain fact is that, however much one may yearn for Prince Edward Island, this is no part of the story line. The case is different with the successive English Companies Acts. They are, consequently, well integrated into the treatment.[15] But it is good to know the book contains these stories outside a story in condensed and presumably accurate form for possible future reference.

Of course the author has presented a host of problems in the story line which were never before a part of the reviewer's lexicon.[16] But he also seems to have omitted a few, at least, which are arguably within his frame of reference and upon which it would be desirable to have the author's views. I find no discussions of, for example, the precise risk a lawyer takes in furnishing his opinion in response to Registration Form S-1's exhibit instruction six, to submit an opinion as to the legality of the securities being registered, even though the problem appears in the index under "Attorneys."[17] There is a similar close miss precisely to discuss whether, as a matter of statutory interpretation, the Commission has the *power* to promulgate X-10B rules for the benefit of a buyer from a corporate "insider".[18] These items, however, prove little

11. Pp. 832-844.

12. Pp. 180-190. See Charles A. Howard, 18 F.T.C. 626 (1934).

13. In particular, see discussions beginning at p. 489, n. 74, p. 669, n. 124, and p. 761, n. 192.

14. P. 708, n. 242.

15. *E.g.*, pp. 3-7, 278-285.

16. The discussion of some of the problems of amending Section 5 of the 1933 Act to permit tentative commitments by investors prior to the effective date while still affording ample disclosure was particularly revealing to the reviewer. Pp. 246-255. The same was true of the comparison, from the purchaser's point of view, between exchange and over-the-counter facilities. Pp. 609-613.

17. See mention p. 1028 (eleven words).

18. In view of other remedies for fraud which the buyer is given by other federal securities regulatory statutes, pp. 1054-1065. This may be an omission fostered by the organizational scheme. The pages, *supra*, are a full discussion of the liability of seller on the level of literal interpretation.

except that an author's first edition can't cover everything and that a reviewer who cudgels his brain hard enough can dream up a few twists in the heroine's path through the woods that the story-teller left out.

The vantage point of the story-teller is usually significant in evaluating his story. It is especially interesting where, as here, the story-teller remains in the cast of characters as Associate General Counsel, though he has one foot temporarily in Harvard. Aside from not having furnished much inside scuttlebutt (there may not be much to furnish) there is evidence that the author has managed to a degree to remain independent and academically detached. Except for a few spots, he does not even yield to the temptation to write a "how to" book.[19] He ventures views other than the Commission's on such matters as the "no sale" theory prior to the effective date of registration under the 1933 Act.[20] He is frank about the necessity of treading softly with rule making power to avoid fanning the flames of repeal in tinder-box areas.[21] He is forthright in his views of the operation of the National Association of Securities Dealers, although here he probably finds the majority of the Commission in accord.[22] The pendency of *United States v. Morgan* in Judge Medina's court does seem to have cramped his independence, however.[23] But this is not to suggest that, like most good advocates, he is not personally convinced of the soundness of the government's evidence against the investment bankers.[24]

One more word on the technique of the story line: the author has aspired to produce a book "to be read and not used merely for research."[25] Probably, this was a quixotic hope. Had it been realized, it would have been most extraordinary. There is too much unavoidable miniscule detail in the subject. To be sure, the author might have omitted a few of the dreary enumerations the text contains without detracting from its prime reference value.[26] Certainly he is aware of these flat

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19. *Cf.* how to "stabilize" legally without "manipulating" illegally. Pp. 933-948.

20. P. 336. *Per contra,* he is a most able proponent of views which are probably also the official S.E.C. positions. In fact, here he has the fervor of one who has helped shape those views, regardless of the fact of his participation. See pp. 158-168, contending that the 1933 Act has not slowed down the speed of public distribution and that the present prospectus-length compromise is eminently rational.

21. P. 593.

22. Pp. 783-784. He also has independent views as to the efficacy of the Investment Advisers Act. Pp. 801-802. But the author passes up a fine opportunity to be critical of the Commission's leniency in some "stabilization" matters. P. 931.

23. S.D.N.Y. Civ. Doc. No. 43-757 (1949-date).

24. Note the author's hedged position on resale price maintenance, probably required by the case. P. 954.

25. Preface, vi.

26. See the first paragraphs on what the proxy statement must contain and how many copies must be filed where and when in what kind of type. P. 530 *et seq.* The

places in the manuscript, for he has occasionally tried to enliven it with some cuteness which does not quite come off.[27] There are not too many of these cute places, however, and they will not bother the reader who consults the book episodically. The style as a whole is not so much lively as dignifiedly lucid, which more befits the subject.[28] Abundant careful cross-references enhance the utility of the discussion.

In reaching for his second objective of painting administrative law in action, Mr. Loss makes at least three points on a scale more grand than mere securities regulation. He provides a demonstration of delegated powers in action with the forces of legislation and private group action nicely adjusted.[29] It is hard to recall how little was known of the over-the-counter market when the Congress first delegated powers to the Commission concerning it. The delegation was necessarily indeterminate. Later, the Commission was able to assist in the formulation of more detailed legislation and work out a more or less cordial *entente* with the industry regulated—all to the advantage of the investor in a democratic-capitalist State. Second, Mr. Loss lets his readers clearly appreciate that presidential appointment of the members of an "independent" regulatory commission enables, in practice, enough executive influence to be exercised in divers ways so that "independence" becomes more self-respect and initiative than a "headless fourth branch of government unresponsive to democratic controls".[30] Third, he makes the status of an informal interpretation by a member of an administrative agency's staff abidingly clear—something it has not always been to the bar.[31]

It would have been a most welcome contribution had the author seen fit, also, to appraise the general problems of "shopping around" for interpretations. An agency such as the Securities and Exchange Commission, with numerous regional and branch offices, must surely have a record of experience on the point to offer.[32] The reviewer, at least, came to the book hoping for some searching appraisal of the criteria governing choice between administrative action by rule or by order. This hope was raised by the fact that the famous *Chenery* case arose from

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same kind of thing occurs in the discussion of the registration statement under the 1933 Act. Pp. 166 *et seq.*

27. See p. 319, *e.g.* (silver fox pups as a true stock dividend). Borderline, but more successful, attempts are found at pp. 49-50, 76, and 958. 'Twere better not tried, I think.

28. A sample of great stylistic merit begins at p. 613.

29. Pp. 614 *et seq.*, 762-783.

30. The quotation is not from Mr. Loss but is a synthetic summary of a good deal of literature in administrative law. Mr. Loss' discussion is at p. 1115.

31. Pp. 1121-1124.

32. On the Commission's organization, see pp. 1113-1121.

S.E.C. action.[33] However, this choice is not fully examined, perhaps because of the decision to play down public utility holding company problems, in whose soil *Chenery* grew. However, numerous statutory provisions within the frame of reference emphasized give the Commission a similar choice.[34] The impact of the Administrative Procedure Act upon the S.E.C. is well enough discussed, although the author seems to betray an understandable impatience with some of its niceties.[35]

The author's final objective was the production of a teaching tool, although, as he writes in his preface, this aim was not entirely consistent with his first, or story-telling, objective.[36] To be sure, he includes ten or so sample opinions, but his intention can hardly have been to produce a book for everyday class room use. Rather, he chose, none the less indispensably, to furnish the basic reference material for taught law in securities regulation. Students of the subject, whether tuition-paying or not, needed his presentation. It advances the efficiency with which we can work in the field a good long step. Dubbing Mr. Loss the Diderot of his subject would not be too extravagant.

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