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Jennings & Marsh, Jr: Securities Regulation: Cases and Materials (2d ed.)

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SECURITIES REGULATION: CASES AND MATERIALS (2d ed.). By *Richard W. Jennings* and *Harold Marsh, Jr.* Mineola, N.Y.: Foundation Press. 1968. Pp. xxxv, 1261. \$15.

Thirty-six years after the passage of the Securities Act of 1933, the first of the federal statutes, it is almost unbelievable how rapidly the subject of securities regulation is still changing in some areas and how slowly in other areas. The elapsed time is important because it means that the 1933 Act is more than half as old as the onset of modern times, which can be dated for this purpose from the beginning of mass production of the automobile and other consumer goods at the turn of the century. This statute was one of the achievements of the first hundred days of Franklin D. Roosevelt's first term, a period that marked the assumption of an active role for the federal government in stimulating the economy, controlling financial affairs, and promoting public welfare. Today, securities regulation has become a substantial portion of the content of corporation law.

Just as Professor Loss' treatise¹ is the almost indispensable book for the study of securities regulation in the law office, the Jennings and Marsh casebook is the almost indispensable volume for the study of this topic in the classroom.² Thus, we may welcome the appearance of an improved and updated second edition.³

The editors have provided compilation of really necessary working data for a "cases-and-materials" student book. The text includes many of the important SEC interpretative releases. On occasion they could have chosen different cases—for example, I would have preferred the leading "first *Hughes* case"⁴ and the "second *Hughes* case"⁵ both of which announce doctrines, rather than some of the later follow-up decisions, in which the basic doctrine is never clearly stated. But these are matters of judgment, and on the whole the selection is clearly right and provides the indispensable cases.

1. L. LOSS, *SECURITIES REGULATION* (2d ed. 1961) (3 vols.).

2. The only rival casebook seems to be H. BLOOMENTHAL, *SECURITIES LAW* (1966). This book has undeniable merits, but one may comment that it is heavily weighted toward matters which reflect its author's Western and enforcement experience, and that it is one of the most discouraging layout jobs ever produced by a printer.

Professor Loss also has a one volume edition designated "Temporary Student Edition," but this is in no sense an abbreviated form of the monumental treatise. While whole chapters of the treatise are left out, the chapters which are included appear without abbreviation or even repaging; therefore, by reason of its tremendous detail this edition is just as difficult for student use as his three-volume treatise.

3. R. JENNINGS & H. MARSH, *SECURITIES REGULATION: CASES AND MATERIALS* (2d ed. 1968).

4. *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944) (the first judicial recognition of the "shingle theory").

5. *Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949) (the first judicial formulation of the fiduciary theory).

The editors were lucky enough to catch the *BarChris* case;⁶ unlucky enough to close the book too early for the Second Circuit's opinion in *Texas Gulf Sulphur*⁷ and the district court decision in *Globus v. Law Research Service*,⁸ and, in my opinion, unlucky enough to catch *North American Research*⁹ without the time necessary to edit it down to a size digestible by a student.

The treatment of the Securities Act exemptions is basically unchanged. While the materials are there, I have great difficulty teaching the section 4 exemptions under the editors' divisions of the material: chapter 6, *Offerings by an Issuer or Underwriter*; chapter 7, *Secondary Distributions*; and chapter 8, *Private Offerings*. My students and I get lost along the way. I find the same material much easier to teach if organized by problems: (1) the mechanism of the statutory hold on a controlling person; (2) the single-level private offering to a limited group; and (3) the double-level offering that turns out to be public when the limited group lacks investment intent. The latter leads naturally into a preliminary discussion of the section 3(a)(9) exemption and then of convertible securities, which I pull from the end of chapter 9 and teach with the foregoing.

The second edition runs 1251 pages compared to 984 in the first edition. Yet, to keep the book within bounds after this expansion, Professors Jennings and Marsh have had to omit not only the *Jones* case,¹⁰ which some of us old-timers remember with nostalgic resentment, but also the *Columbia General* case,¹¹ which appeared in the first edition. They have omitted such old stalwarts as the *Tucker* case,¹² the Statement on Pegging, Fixing and Stabilizing,¹³ *In re NASD*,¹⁴ and the *Halsey Stuart* case¹⁵—all to make room for the expansions discussed below.

Part of the new bulk of the book comes from the inclusion of materials on the developing frontiers of securities law: the anti-trust laws; the rate structure and exclusionary practices of the New York Stock Exchange; the third market; the impact of mutual fund and other institutional trading on the foregoing; variable annuities and bank efforts to enter the mutual fund field; and some other current principal problems of mutual funds. There is no time in a three-hour SEC course designed to follow a single corpora-

6. *Escott v. BarChris Constr. Co.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

7. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied sub. nom.* *Coates v. SEC*, 37 U.S.L.W. 3399 (U.S. April 21, 1969).

8. *Globus v. Law Research Serv., Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968).

9. *SEC v. North American Research & Dev. Corp.*, 280 F. Supp. 106 (S.D.N.Y. 1968).

10. *Jones v. SEC*, 298 U.S. 1 (1936).

11. *Columbia Gen. Inv. Corp. v. SEC*, 265 F.2d 559 (5th Cir. 1959).

12. *In re Tucker Corp.*, 26 S.E.C. 249 (1947).

13. Statement of Policy on the Pegging, Fixing and Stabilizing of Securities Prices, SEC Securities Exchange Act Rel. No. 2,446 (1940).

14. *In re National Assn. of Securities Dealers, Inc.*, 19 S.E.C. 424 (1945).

15. *In re Halsey, Stuart & Co., Inc.*, 30 S.E.C. 106 (1949).

tion law course to take up such advanced materials, but the book provides much of the necessary fodder for a seminar in these and other advanced securities problems.

While the book has been expanded, it is still regrettable that some of the editors' footnotes are as short and condensed as they are. Those on fiduciary obligation have been rewritten and are reasonably lengthy and helpful, but my students seem to get very little out of the ones in the exemption chapters of the book, which have not been expanded from the first edition and which I believe suffer from undue compression. This is, however, a small matter. No one could learn securities law solely from this book or the Loss treatise or both in combination; students must have a teacher or an older lawyer experienced in the field with whom to interact. Every teacher must bring to the text his own practical background, and when he does, the general excellence of this book will outweigh its very minor deficiencies.¹⁶

I will conclude this Review by presenting some thoughts on teaching securities regulation in relation to the corporation law segment of the curriculum. Such reflection is made timely by the almost simultaneous appearance of this second edition of the securities regulation casebook and a new edition of a casebook on corporations¹⁷ with Professor Richard W. Jennings of the University of California at Berkeley appearing as a co-author of both. It is particularly interesting to note the correlation between the two books and to compare this correlation with the earlier editions of the SEC casebook¹⁸ and the corporations casebook.¹⁹ Together the two pairs of books illustrate the difficulty of determining a clear position as to the allocation of SEC materials between the two courses. First, the earlier edition of the corporations book has nothing on distribution of securities, while the 1968 edition has about sixty-five pages. Of course, both editions of the securities regulation casebook deal with this topic at length. Second, the earlier edition of the corporations book has only eleven pages of non-SEC material, and no SEC material, on the use of inside information, but the 1968 edition has about twenty-five pages of rule 10b-5 material. The securities regulation book contains much more extensive treatments of rule 10b-5 in both editions, and the 1968 edition is heavily reorganized and on

16. The book is nearly but not quite impeccable in readability and mechanical care. One strike should be called on the publisher's staff for having obliterated in the Table of Cases to the first edition the distinction between Securities Act Releases and Securities Exchange Act Releases, and two more strikes must be called on them for having perpetuated the error in the present edition.

17. N. LATTIN, R. JENNINGS & R. BUXBAUM, *CORPORATIONS, CASES AND MATERIALS* (4th ed. 1968).

18. R. JENNINGS & H. MARSH, *SECURITIES REGULATION, CASES AND MATERIALS* (1st ed. 1963).

19. N. LATTIN & R. JENNINGS, *CASES AND MATERIALS ON CORPORATIONS* (3d ed. 1959).

the whole more useful for instruction than was the first edition.²⁰ Third, in the earlier edition of the corporations book, the SEC proxy rules were inadequately treated, and the first edition of the SEC book failed to deal with them. This latter omission was a mistake that I felt I had to rectify with mimeographed materials. The treatment in the 1968 edition of the corporations casebook is somewhat expanded. Some material has also been introduced into the SEC casebook, but its focus is more upon the problem of liability, tying into rule 10b-5, than upon a broad view of the functions of the proxy machinery; this matter is presumably left to the corporations course. Fourth, section 16(b) of the Securities Exchange Act of 1934 is treated inadequately in the earlier edition of the corporations casebook and not at all in the first edition of the SEC casebook. Again, I felt that, to teach the SEC course, I had to supplement the casebook with mimeographed materials. In the new 1968 editions, the corporation casebook contains about the same coverage, but the SEC volume has a new and reasonably adequate treatment of the subject.

It is clear that many of these topics fell unsatisfactorily between the two stools in the older editions, but Professor Jennings and his co-editors have now found a generally acceptable solution to the problem of how to teach securities regulation—that is, a warning dose of “the federal law of corporations” in the corporations course and an integrated treatment in a separate securities regulation course. But this approach is by no means universal. The former Chairman of the SEC, Professor Cary of Columbia Law School, takes a somewhat perplexing position on this question of teaching securities regulation. His 1959 tome on corporations, written in collaboration with the late Professor Ralph J. Baker of Harvard,²¹ contains a smattering of SEC material, leaving a need for a separate securities regulation course. This, of course, fits naturally into the program at Harvard, the fief of the redoubtable Professor Loss. But the Columbia Law School catalogue shows only a seminar—not a basic course—in securities regulation. Moreover, the matter gets more puzzling upon consideration of Professor Cary’s 1968 supplement to the corporations book.²² It contains a great deal of SEC material, but there is neither the comprehensiveness that is necessary to obviate the need for a full SEC course nor the compactness needed for an introduction to

20. By saying “more useful,” I do not mean to say that rule 10b-5 has become more understandable. Professor Marsh’s article, *What Lies Ahead Under Rule 10b-5?*, 24 BUS. LAW. 69 (1968), predicting that the future of Rule 10b-5 is “more chaos,” was written before the court of appeals decision in *Texas Gulf Sulphur*, but one would guess that he would not be disposed to withdraw the characterization.

21. R. BAKER & W. CARY, *CASES AND MATERIALS ON CORPORATIONS* (3d rev. ed. unabr. 1959).

22. R. BAKER & W. CARY, *CASES AND MATERIALS ON CORPORATIONS* (3d ed. Supp. 1968).

federal securities regulation in the first corporations course. In a recent conversation, Professor Cary indicated, I believe, that he is swinging toward the view that a full securities regulation course will be necessary.

There remain, however, other teachers whom I respect who use still another approach. They tell me that their schools simply do not offer an SEC course, but that they teach the necessary materials on fiduciary obligation as part of the corporations course, and the exemptions and other materials as part of courses on corporation finance or the like.²³ I cannot believe that this approach is satisfactory. I strongly doubt that one could give enough attention to fiduciary obligation in a corporations course of ordinary length. Certainly rule 10b-5 looks very different if one leads up to it through common-law liability and the express statutory liability than it does when taught standing in isolation in a corporations course. One cannot teach section 16(b) adequately in a corporations course with a hasty treatment that emphasizes only its function as a prophylactic against breach of fiduciary obligation, instead of providing enough detailed analysis to expose its remaining fearful traps.²⁴ Moreover, I feel that to a student who has learned only a smattering of the Securities Act exemption system, a little knowledge can be a dangerous thing. The subject is so bogged down with elusive interpretative "theology"²⁵ that one who has not been immersed in it deeply enough to be ordained had better not think he can grant dispensation from the registration requirement.

Finally, after thirty-five years during which securities regulation theology has been ramifying in complexity and lack of predictability, we face both the urgent need for a house-cleaning effort and the certainty that programs for reform will be an important concern during the next five years. The result of the Disclosure Policy Study

23. For a book constructed on this theory, see D. HERWITZ, *BUSINESS PLANNING* (1966).

24. Notably, (1) corporate reorganizations, see Lang & Katz, *Liability for "Short Swing" Trading in Corporate Reorganizations*, 20 SW. L.J. 472 (1966); Marsh, *What Lies Ahead Under Rule 10b-5?*, 24 BUS. LAW. 69, 72 (1968); (2) the possibility that trading in an option or warrant might cross trading in the stock, see *Chemical Fund, Inc. v. Xerox Corp.*, CCH FED. SEC. L. REP. [Transfer Binder 1964-1966] ¶ 91,653 (S.D.N.Y. 1966), *rev'd on other grounds*, 377 F.2d 107 (2d Cir. 1967); Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 612, 617-24 (1953); SEC Securities Exchange Act Rel. No. 8,325 (1968), amending rule 16a-2; SEC Securities Exchange Act Rel. No. 8,229 (1968), adopting rule 16b-11 and expressly reserving this question.

25. The word "theology" is in such common use among practitioners that I cannot recall where it first appeared. It appears in Schneider, *Acquisitions Under the Federal Securities Acts—A Program for Reform*, 116 U. PA. L. REV. 1323, 1340 (1968). Former Chairman Demmler referred to the "priesthood" of practitioners in the *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 832 at 833 (1967).

Former Chairman Cohen's approach is more decorative than religious. He refers to "the many decorative curlicues and imaginative interpretations with which it has been embellished over the years." Cohen, *The Lawyer's Role in Securities Regulation*, 24 BUS. LAW. 305 (1968).

by an internal SEC committee headed by Commissioner Wheat has just been published.²⁶ In addition, the Council of the American Law Institute has voted to work on a study and revision of the securities laws, subject to obtaining financing of the cost.²⁷ Given this focus on reform, students can receive proper preparation in the topic of securities regulation only in a separate, carefully integrated survey course.

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26. REPORT AND RECOMMENDATIONS TO THE SEC FROM THE DISCLOSURE POLICY STUDY, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS (March 1969).

27. For the leading discussions chronologically, see Knauss, *A Reappraisal in the Role of Disclosure*, 62 MICH. L. REV. 607 (1964); Cohen, "Truth in Securities" Revisited, 79 HARV. L. REV. 1340 (1966); *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793 (1967); Schneider, *Reform of the Federal Securities Laws*, 115 U. PA. L. REV. 1023 (1967); Schneider, *An Administrative Program for Reforming the Federal Securities Laws*, 23 BUS. LAW. 737 (1968) (with colloquy); Wheat, *The Disclosure Policy Study of the SEC*, 24 BUS. LAW. 33 (1968); Knauss, *Disclosure Requirements—Changing Concepts of Liability*, 24 BUS. LAW. 43 (1968).