

# Commission and the Corporation Laws

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### Recommended Citation

Carlos L. Israels, *Commission and the Corporation Laws*, 40 Cornell L. Rev. 686 (1955)  
Available at: <http://scholarship.law.cornell.edu/clr/vol40/iss4/4>

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## THE COMMISSION AND THE CORPORATION LAWS

*Carlos L. Israels\**

In many fields of law, statutory and judge-made, New York has been a leader. The field of corporation law has not been one of these despite our State's pre-eminence in commerce and finance. This fact is illustrated, for example, on the statutory side by the comparative rarity of New York incorporation among the many large national and international business enterprises of which New York City is the financial and executive nerve center. The why and wherefore, historically, is foreign to the subject of this article. Nor would the writer maintain that we should meekly follow Delaware, Maine or Nevada just to ease the burden of the corporation lawyer. The fact, however, is important because it has circumscribed the Commission's contribution: limiting its scope primarily to modernization to bring New York into line with other states, and definitely inhibiting pioneering. Within these limitations the Commission has accomplished a good deal in the corporate field.

In the area of judge-made law the pattern is similar. In the last ten years our Court of Appeals has decided three important corporate cases by a majority of one—and in the writer's view, each time the prevailing opinion was contrary to the modern realistic trend of corporation law. These cases we shall discuss below, for one of them was the direct moving cause of a Commission study and recommendation; the second was interpretative of the legislation which resulted, and the third serves to highlight the need for further Commission work in a specific area which it studied some ten years ago.

We shall not attempt here detailed analysis of each of the Commission's recommendations or even of all the statutory changes adopted at its instance. Every New York lawyer who has had to struggle through the process of amendment of a certificate of incorporation, to revive a corporate life, or to prove the terms of a certificate "with all amendments to date" has reason to be grateful for the Commission's careful work.<sup>1</sup>

The Commission's effort in the corporate field began in 1936 and resulted a year later in the enactment of section 359 (i), (j), and (k) of

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\* See Contributors' Section, Masthead, p. 764, for biographical data.

<sup>1</sup> See in these areas Leg. Doc. No. 65 (A), Report of Law Rev. Com. 19-32 (1944), Laws 1944, c. 591; Leg. Doc. No. 65 (F), Report of Law Rev. Com. 415-608 (1949), Laws 1949, c. 805; Leg. Doc. No. 65 (P), Report of Law Rev. Com. 857-884 (1949), Laws 1949, c. 804; and Leg. Doc. No. 65 (N), Report of Law Rev. Com. 389-401 (1950), Laws 1950, c. 368, 729, and 768.

the General Business Law,<sup>2</sup> designed to ease the process of registration of transfer of corporate securities standing in fiduciary names or in the names of decedents, wards, or the like. The problem was presented by the fact that historically in American law the issuer of registered securities is required to police transfers. Thus, the presentation for transfer of securities registered, for example, in the name of "A as Trustee" was regarded as notice of all the terms and provisions of the trust instrument. The issuer or its transfer agent, therefore, in order to protect itself, had to be satisfied not only that "A" was the Trustee and had power to transfer the securities, but also that his transfer was rightful, i.e., within the four corners of the instrument. In practice, this meant that if a decedent had specifically bequeathed the shares to "Cousin Jane," a New York bank acting as transfer agent, before registering transfer out of the name of the executor would require proof that "Cousin Jane" and no one else was to receive the shares. The Uniform Fiduciaries Act attacked the problem by Section 3, dispensing with the necessity of proof of rightfulness where securities actually were registered in a fiduciary name. However, the Uniform Act did not deal with the precisely similar problem presented with respect to securities registered in the names of decedents, wards, etc., presented by the executor, administrator, or guardian. On Commission recommendation, our New York statute embodies not only the Uniform Act but an additional provision covering the latter situation. Unfortunately, the problem was not one that legislation in a single state could solve. Our statute works well where issuer, transferor, and transferee are residents. But where the issuer is a foreign corporation and the rule in the state of organization is more stringent than our rule, the New York transfer agent must still insist upon all the technical requirements necessary to protect the issuer under the laws of its home state. The conflicts problem is ubiquitous. Indeed, it presents itself today in similar context in connection with the proposed Uniform Commercial Code.<sup>3</sup>

Much of the Commission's important work in the corporate field has been done in what might appropriately be characterized as the technical area—involving no important change in substantive law, but removing uncertainties, generally "cleaning up" the statutes and definitely making them easier to interpret and to work under. Thus, in 1951 ambiguities in our Stock Corporation Law as to limitation of voting rights were straight-

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<sup>2</sup> Laws 1937, c. 344.

<sup>3</sup> Pt. 4 of Art. 8 of the Code is a complete statutory scheme to govern registration of transfer. However, § 1-105 as recently revised (See U.C.C. Supplement No. 1, January 1955) specifically adopts the rule of the case law to the effect that the issuer's liability for wrongful registration is governed by the law of the state of organization.

ened out on Commission recommendation.<sup>4</sup> In 1952 the law respecting payments and distributions to and exercise of rights by infant stockholders was modernized as proposed by the Commission<sup>5</sup> and in 1953 the Legislature enacted Commission-drafted amendments relating to irrevocable proxies, consolidations of membership corporations and requirements for inspectors of election.<sup>6</sup>

How valuable—one is almost tempted to say “invaluable,” can be the work of a revising body on the technical aspects of a statute is nowhere better illustrated than by the 1949 revision of sections 35 and 36 of our Stock Corporation Law dealing with the grounds for and techniques of amending a certificate of incorporation.<sup>7</sup> The epithet “hodgepodge” would be a mild one to describe the state of our law prior to 1949 in this regard. Said the Commission in its recommendation:

Thus as many as five separate certificates might be required to accomplish changes in the several provisions of a certificate of incorporation. . . . [The certificates] . . . constitute, in effect, amendments of the certificate of incorporation. They do not, however, have [that] form . . . .<sup>8</sup>

The basic purpose of the recommendation was to remedy this “to permit the filing of a single certificate by which a corporation may amend any of the provisions of its certificate of incorporation, by setting forth the complete text of the amendment.”<sup>9</sup> The amendments not only accomplished this, but also clarified the law with respect to classification or reclassification of shares, and our statute now clearly states the methods by which reduction of capital may be effected, distinguishes between a method which requires amendment of the certificate of incorporation and one which does not, and in line with other modern corporate statutes requires that the certificate filed show the reduction of capital. The 1949 amendments were based on a Commission study.<sup>10</sup> I cite that study specially because it illustrates the high standard to which the Commission seeks to hold itself. Not only was the research itself encyclopedic, but the analysis of the research material is scholarly, painstaking and practical.

On the substantive side of corporation law, the Commission's work has concentrated principally in the fields of derivative actions, litigation ex-

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<sup>4</sup> Laws 1951, c. 170; Leg. Doc. No. 65 (G), Report of Law Rev. Com. 227-250 (1951).

<sup>5</sup> Laws 1952, c. 825; Leg. Doc. No. 65 (I), Report of Law Rev. Com. 259-298 (1952).

<sup>6</sup> Laws 1953, c. 538, 843, 863; Leg. Doc. No. 65 (G) (1953). [At printing, Report of Law Rev. Com. (1953) unbound. No page citations available—Ed.]

<sup>7</sup> Laws 1949, c. 805; Leg. Doc. No. 65 (F), Report of Law Rev. Com. 415-608 (1949).

<sup>8</sup> *Id.* at 433.

<sup>9</sup> *Id.* at 434.

<sup>10</sup> *Id.* at 453-608.

penses of corporate officials, and corporate government particularly of so-called "close-corporations." The work in each merits separate review.

#### DERIVATIVE ACTIONS

Although the law of derivative actions developed first in England, no one can doubt that in the period between World War I and World War II New York became its broadest battleground. Here were myriad corporate enterprises, large and small. Here were myriad investors, large and small. Here was an active corporate bar. New York law prior to the 1940's was in some respects more liberal than that of other jurisdictions as to the rights and privileges of plaintiffs in derivative actions. Thus we did not require that the plaintiff show that he had been a shareholder at the time of the acts which he complained of, though the Federal Rules did so require.<sup>11</sup> Moreover, we had by decision, as early as 1898, and again in 1940<sup>12</sup> permitted what was unquestionably the greatest evil in the field—the private "buy-out" settlement, of which more below. On the other hand, our law on limitations in a derivative action was and is rigid and uncompromising in favor of the defendants.

Both these aspects came into the Commission's purview in 1940 and it listed in its 1941 Report as "work in progress" a study on "compromise with plaintiff stockholders in class actions." In 1942 the Commission published studies on limitations in and termination of such actions.<sup>13</sup> In 1944 the subject of termination of derivative actions was restudied.<sup>14</sup>

As to limitations, the Commission recommended a ten-year statute, except where the defendant officer or director was charged with negligent rather than wilful malfeasance and had not personally profited from the transaction attacked, in which case a six-year statute would be applicable. In the writer's view, these recommendations should have been adopted. Our New York law on limitations in this field has been and is unduly strict—three years for an action for waste of corporate assets.<sup>15</sup> Nor is our rule tempered, as it is in many states, by equation of concealment of the facts to "fraud," enabling action to be brought within a stated period after discovery of the facts. "Fraud" in our Civil Practice Act, section 48, has been judicially interpreted as limited to a case of actual mis-

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<sup>11</sup> As our law does now. N.Y. Gen. Corp. Law § 61.

<sup>12</sup> *Hirshfield v. Fitzgerald*, 157 N.Y. 166, 51 N.E. 997 (1898); *Manufacturers Mutual Fire Insurance Corp. v. Hopson*, 176 Misc. 220, 25 N.Y.S.2d 502, aff'd, 288 N.Y. 688, 43 N.E.2d 71 (1941).

<sup>13</sup> Leg. Doc. No. 65 (E) at 15-18, 21-38, Report of Law Rev. Com. 143-146, 149-166 (1942); Leg. Doc. No. 65 (J), Report of Law Rev. Com. 471-563 (1942).

<sup>14</sup> Leg. Doc. No. 65 (C), Report of Law Rev. Com. 75-114 (1945).

<sup>15</sup> N.Y. Civ. Prac. Act §§ 48, 49.

representation.<sup>16</sup> Rare indeed, under our statutes, is the case in which a ten-year period of limitations will apply. Under the rule in the majority of states, concealment of the facts of the transaction on which the derivative action is based will of itself toll the statute. This is but recognition of the nature of large corporate enterprise, inherent in which is the ability of management with comparative ease, to accomplish concealment of the facts. That being the case, what we do in New York is to let successful concealment for a comparatively short period provide insulation from liability.

With respect also to termination of derivative actions, New York lagged behind. In 1941 and again in 1944 the Commission recommended legislation adopting the practice which by that time had been embodied in the Federal Rules, requiring notice to all stockholders of any proposed compromise which would extinguish the corporate right asserted, and court approval for any termination of the action. The evil aimed at was the private settlement or "buy-out" of the plaintiff's shares, often at a price higher than their market or investment value, followed by a quiet stipulation of discontinuance and perhaps even a purported "release" of the corporate claim, without notice to anyone and without court review. The bills based on the Commission's recommendations failed of passage. However, the results sought have been attained by decision. The bankruptcy of the Associated Gas & Electric Company system in 1940 brought to light a long record of "buy-outs," often with the funds of the very corporation for whose "benefit" the action had been brought. The bankruptcy trustees took one such case to the Court of Appeals and there established the salutary principle that for the "proceeds" of a derivative action, no matter how obtained, the plaintiff is accountable to the corporation for whose benefit he sued.<sup>17</sup> The writer doubts that since the *Clarke* decision any substantial "buy-out" settlement of a derivative action has been attempted in New York.

#### LITIGATION EXPENSES

The rising volume of derivative actions throughout the country prior to the 1940's gave rise to the question whether the corporate official, either successfully defending or settling an action in which he was charged with breach of duty should be entitled to reimbursement of the expenses, counsel fees, etc. incurred by him individually in the process.

<sup>16</sup> *Gobel v. Hammerslough*, 263 App. Div. 1, 31 N.Y.S.2d 23 (1st Dep't 1941), aff'd, 238 N.Y. 653, 42 N.E.2d 746 (1942); cf. *Druckerman v. Harbord*, 31 N.Y.S.2d 867 (Sup. Ct. N.Y. County 1940) (not officially reported).

<sup>17</sup> *Clarke v. Greenberg*, 296 N.Y. 146, 71 N.E.2d 443 (1947).

Wisconsin and New Jersey cases permitted reimbursement on successful defense in analogy to a trustee's right to reimbursement for the expenses of successful defense against a surcharge of his account.<sup>18</sup> New York cases twice denied it on the theory that no benefit to the corporation could be shown.<sup>19</sup>

Following these decisions California, New Jersey, Kentucky, Delaware and New York enacted statutes. Ours were sections 27-a and 61-a of the General Corporation Law. Section 27-a permitted a New York corporation to adopt a by-law providing for indemnity except where the official was held liable for negligence or malfeasance, but provided no machinery for determining the right to indemnity in a particular case or the amount properly payable. Section 61-a provided for the allowance of "special costs" in an action maintained in the New York courts in which the applicant was successful in whole or in part or settled with the approval of the court.

Contemporaneously, many corporations, particularly those whose securities were widely held, began adopting indemnity by-laws. Some of the statutes<sup>20</sup> and by-law provisions were broad enough to permit reimbursement not only of actual expense but under certain circumstances, of amounts paid in compromise of alleged liability.

In 1945 the Commission proposed and the Legislature adopted a revised statutory system for the assessment and payment by corporations of the proper litigation expenses of officers, directors or employees sued for breach of duty who either successfully defended themselves or settled with court approval.<sup>21</sup> The statute is so drawn as to permit reimbursement by any New York corporation unless its stockholders have taken inconsistent action, in an amount determined either by a disinterested board majority or in a court proceeding, and by a foreign corporation in connection with an action or proceeding brought in a New York court or in a federal court sitting in New York. In all cases reimbursement is limited to expenses only and either successful defense or court approved compromise is a condition precedent to the right to reimbursement.

With but one exception, the cases indicate the scheme works well. That one exception is the recent case of *Schwartz v. General Aniline & Film*

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<sup>18</sup> *Figge v. Bergenthal*, 130 Wis. 594, 109 N.W. 581, 110 N.W. 798 (1906); *Solimine v. Hollander*, 129 N.J. Eq. 264, 19 A.2d 434 (1941).

<sup>19</sup> *Wood v. Noma Electric Corp.*, N.Y.L.J. Oct. 11, 1936, p. 1121, col. 7 (N.Y. City Ct. 1936) (not officially reported); *New York Dock Co. v. McCollom*, 173 Misc. 106, 16 N.Y.S.2d 844 (Sup. Ct. Onondaga County 1939).

<sup>20</sup> E.g. Kentucky L. 1942, c. 40.

<sup>21</sup> Laws 1945, c. 869, N.Y. Gen. Corp. Law §§ 63-68; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 131-175 (1945).

*Corp.*<sup>22</sup> decided four to three by the Court of Appeals two years ago. Schwartz had been indicted with the corporation of which he had been an officer, for violation of the Anti-Trust Laws. He pleaded not guilty, and retained counsel to defend himself. Eventually his plea of *nolo contendere* was accepted and the case dismissed as to him. A majority of the Court of Appeals thought the statute not intended to apply to expense incurred in the defense of a criminal action. The writer does not believe that was the intent, and much prefers Judge Fuld's vigorous and well-reasoned dissent.

#### CORPORATE GOVERNMENT—CLOSE CORPORATIONS

Lawyers, if not the law itself, have long recognized the real economic differences between a "public" or "public issue" corporation and a "family" or "close" corporation. The Commission has characterized the latter as one in which "management and ownership are substantially identical."<sup>23</sup> For a number of years lawyers and writers in law reviews had been suggesting special statutory treatment for the "close" corporation, urging, among other grounds that various foreign jurisdictions give it separate treatment. In general, the dispute revolved around the necessity and desirability of giving statutory sanction to the widespread practice of participants in close corporations to contract among themselves as individuals as to what they would or would not do in their capacities as stockholders, directors, officers and employees, in clear derogation of the statutory scheme of representative corporate government. In varying degree, they would seek individual veto powers not only over the election of directors, but as to the hiring or firing of employees or other matters of day to day administration which in the statutory scheme are matters of directorial discretion. Our statute is typical,

"The business of a corporation shall be managed by its board of directors. . . . Unless otherwise provided, a majority of the board at a meeting duly assembled shall be necessary to constitute . . . a quorum . . . and the act of a majority of the directors present . . . shall be the act of the board."<sup>24</sup>

Two lines of authority developed in American courts. In Illinois, for example, the courts would freely enforce the shareholders' contracts regardless of consistency with statute if no public or creditors' interest would be harmed thereby.<sup>25</sup> New Jersey and Virginia at least were strict

<sup>22</sup> 305 N.Y. 395, 113 N.E.2d 533 (1953).

<sup>23</sup> Leg. Doc. No. 65 (K) at 6, Report of Law Rev. Com. 386 (1948).

<sup>24</sup> N.Y. Gen. Corp. Law § 27.

<sup>25</sup> See, e.g., *Kantzler v. Bensinger*, 214 Ill. 589, 73 N.E. 874 (1905); Note 15 U. Chi. L. Rev. 738 (1948).

constructionists.<sup>26</sup> New York seemed to be in between, drawing a distinction based on whether or not *all* stockholders had agreed to the questioned contract.<sup>27</sup>

*Benintendi v. Kenton Hotel Inc.*,<sup>28</sup> decided by the Court of Appeals in 1945 by four to three, lined up our state with the strict constructionists. The majority opinion in *Benintendi* left no room for doubt that contracts even among the holders of all outstanding shares in derogation of the statutory scheme were unenforceable. The corporate bar rose, almost as one man, demanding legislative remedy. Concern was so widespread that the Commission called a conference, inviting attendance by Bar Association committees, law teachers and individual lawyers from all over the state. The view most widely held was that *Benintendi* should be overruled by statute, while the question of possible separate legislative treatment for the close corporation could be deferred. Adopting this procedure, the Commission recommended and the Legislature enacted in 1948, section 9 of the Stock Corporation Law. It was somewhat revised after further Commission study, in 1951.<sup>29</sup>

There are many interesting facets to this picture. For one thing, the Commission studied the English "private company," the French "société à responsabilité limitée," the German and Swiss "Gesellschaft mit Beschränkter Haftung" and concluded that the analogies were not useful.<sup>30</sup> Yet the statute is in fact a "close corporation law" for our state, because what it does is to permit provision for unanimity or qualified majority only when it is adopted by a vote of the holders of at least the qualified majority of shareholders whose votes are necessary for the action sought to be restricted. Thus, if unanimity is to be required for any purpose, all shareholders must consent to the certificate provision which requires it. This is impractical in any public corporation set-up.

The one real difficulty presented is the increased possibility of deadlock through operation of section 9 certificate provisions. As originally

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<sup>26</sup> Jackson v. Hooper, 76 N.J. Eq. 592, 75 Atl. 568 (1910); Kaplan v. Block, 183 Va. 327, 31 S.E.2d 893 (1944).

<sup>27</sup> Cf., e.g. Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918) with McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934), and Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936), discussed in Leg. Doc. No. 65 (K), Report of Law Rev. Com. 381-427 (1948), Israels, "The Close Corporation and the Law," 33 Cornell L.Q. 488 (1948) and Delaney, "The Corporate Director: Can His Hands Be Tied in Advance," 50 Colum. L. Rev. 52 (1950).

<sup>28</sup> 294 N.Y. 112, 60 N.E.2d 829 (1945).

<sup>29</sup> Laws 1948, c. 862; Laws 1951, c. 717; Leg. Doc. No. 65 (K), Report of Law Rev. Com. 381-427 (1948); Leg. Doc. No. 65 (H), Report of Law Rev. Com. 251-318 (1951).

<sup>30</sup> Leg. Doc. No. 65 (K) at 6-36, Report of Law Rev. Com. 386-416 (1948).

enacted in 1948<sup>31</sup> these provisions were limited to ten years' duration. In 1951 the limitation was removed.<sup>32</sup> Therefore, the experienced practitioner now usually combines his Section 9 certificate provision, with an agreement that under given circumstances, e.g., deadlock on the board or among the stockholders, all of the latter will vote their shares for voluntary dissolution of the corporation. The writer believes that such an agreement is specifically enforceable in New York.<sup>33</sup> However, there may be danger lurking here. New York has had for many years a "deadlock statute"—Section 103 of our General Corporation Law. It was revised, at Commission instance in 1944.<sup>34</sup> Unfortunately, even as amended, the statute appears consonant with the all too generally accepted view that dissolution of a corporation is something drastic, a remedy to be applied even in a clear deadlock case with extreme caution. On this subject the writer has said elsewhere that "deadlock . . . or stalemate in a close corporation is as completely socially undesirable as in a partnership or in a marriage and . . . the corporate contract is not a holy sacrament."<sup>35</sup>

The Commission in its Recommendation of the 1944 amendment to our deadlock statute said: "A final order dissolving the corporation does not and will not under the amendment inexorably follow. . . . It must appear to the Court that dissolution will be beneficial to the stockholders or members and not injurious to the public (Gen. Corp. Law § 117). . . ."<sup>36</sup> Unfortunately, our New York courts have used the language quoted by the Commission from section 117 of the General Corporation Law to accomplish something which certainly the Commission never anticipated, i.e., to impose a sort of "clean hands" doctrine upon the plaintiff in a dissolution case no matter how clearly insoluble the deadlock.<sup>37</sup>

Here we cite the third and most recent four to three decision of our Court of Appeals, *Matter of Radom & Neidorff, Inc.*,<sup>38</sup> which in the writer's view, unfortunately again looks backward. The deadlock between the stockholders was as clear as crystal. However, the corporation—up to the time of the decision—had been prosperous because one of the

<sup>31</sup> Laws 1948, c. 862.

<sup>32</sup> Laws 1951, c. 717.

<sup>33</sup> *In re Block's Will*, 186 Misc. 945, 60 N.Y.S.2d 639 (Surr. Ct. Bronx County 1946); *Accord, Leventhal v. Atlantic Finance Co.*, 316 Mass. 194, 55 N.E.2d 20 (1944). Cf. *Flanagan v. Flanagan*, 273 App. Div. 918, 79 N.Y.S.2d 862 (2d Dep't 1948), *aff'd*, 298 N.Y. 787, 83 N.E.2d 473 (1948).

<sup>34</sup> Laws 1944, c. 186, Leg. Doc. No. 65 (K), Report of Law Rev. Com. 349-377 (1944).

<sup>35</sup> *Israels*, "The Sacred Cow of Corporate Existence, Problems of Deadlock and Dissolution," 19 U. Chi. L. Rev. 778, 789 (1952).

<sup>36</sup> Leg. Doc. No. 65 (K) at 6, Report of Law Rev. Com. 354 (1944).

<sup>37</sup> See, e.g. *Matter of Catelmo*, 275 App. Div. 231, 88 N.Y.S.2d 604 (1st Dep't 1949).

<sup>38</sup> 307 N.Y. 1, 119 N.E.2d 563 (1954).

stockholders was continuing to run its business without salary, which he could not collect because the other stockholder would not join in signing a salary check. Judge Fuld's dissent is down to earth:

Although respondent relies on the fact that the corporation is now solvent and operating at a profit, it is manifest that, if petitioner carries out his plan to resign as president and quits the business, there may be irreparable loss, not alone to him and respondent as owners of the corporation, but also to the corporation's creditors. . . . Whether the petition should or should not be entertained surely cannot be made to turn on proof that the corporation is on the verge of ruin or insolvency.

It is well known that a general revision of our corporation laws is long overdue. Indeed, it is a perennial proposal and in the writer's view it should, in the not too far future, be assigned to the Commission with an appropriation ample to accomplish it. Short of that desirable goal, the deadlock section and one other—Stock Corporation Law section 58, dealing with dividends—seem to the writer most in need of further study and revision. Several times in its reports the Commission has noted as "work in progress" studies of section 58, but no publication has followed. The task would not be easy. It should call for further progress in the slowly evolving integration of legal and accounting theory and techniques. The high standard set by the Commission over twenty years in this and other fields gives confidence the challenge would be met.