

## BOOK REVIEW

**AMERICAN BUSINESS CORPORATIONS UNTIL 1860.** By Edwin Merrick Dodd. Cambridge: Harvard University Press, 1954. Pp. xix, 524. \$7.50.

When Merrick Dodd died in a tragic accident on November 3, 1951, Harvard Law School lost one who wooed that "shy bird which is truth"<sup>1</sup> and who was a beloved and great professor; and the legal profession, an incisive scholar and counsel.<sup>2</sup> Dodd lived the active life of a twentieth century thinker-doer; much of it was almost in symbiosis with the throbbing, living modern corporation. But, just as Flaubert could never see a beautiful woman without thinking of her skeleton, Dodd could never contemplate modern corporate law without re-living its sparse American beginnings. The present volume is such a re-living.

*American Business Corporations Until 1860* is a gritty volume, an uneven memorial for Dodd, who if he were not a lawyer would have been a historian<sup>3</sup> and who attempted a synthesis of his ideals in his writing. Dodd's prospectus is in the Introduction. Having already traversed the Massachusetts statutory terrain,<sup>4</sup> Dodd proposed to deal with the statutory law of New York, the other important state so far as statutory corporate law in the period between the Revolution and the Civil War was concerned. The new work, "a collection of separate historical studies," was to include a national survey of case law.<sup>5</sup>

1. The phrase is Mr. Justice Frankfurter's. See his moving remembrances of his Cambridge colleagues: *Eugene Wambaugh*, 54 HARV. L. REV. 7 (1940); *Josef Redlich*, 50 HARV. L. REV. 389 (1937).

2. See instant volume at pp. xviii *et seq.* and 458 and Griswold, Chafee, Baker, Perry, Hardee, *Edwin Merrick Dodd*, 65 HARV. L. REV. 377 (1952), for illumination on other facets of Dodd's life. The bibliography of Dodd's extensive published writings is set out in Appendix B of the instant volume.

3. Page xiv.

4. Dodd, *The First Half Century of Massachusetts Business Corporation Laws: 1780-1830*, in that sprightly volume honoring Williston and Beale, HARVARD LEGAL ESSAYS 65 *et seq.* (1932). This essay with few revisions and additions has become the substantial Chapter III of the present volume (pp. 195-271). It is followed by *Massachusetts Business Corporation Laws: 1831-1860* (pp. 272-363), which is not complete in its present form, and by *The Evolution of Limited Liability in American Industry: Massachusetts* (pp. 364-90). The latter is the article which appeared in 61 HARV. L. REV. 1351 (1948) (*cf.* pp. 363, 373, 384, 386, 387) and which first saw the light as a paper read before the Massachusetts Historical Society in November, 1946.

5. Dodd's prospectus of the judge-made law emphasized state law, but he felt, especially in its constitutional aspects, federal law would have to be scrutinized.

Dodd's plan was cut short by death.<sup>6</sup> The section on New York statutory law was never written. Much of the material on judicial decisions of the sixty-year period reads like notes rather than like text, like a penultimate draft rather than a final redaction. At times his comments sound tentative, too often fragmentary. The case discussions frequently lack the necessary political, economic, social, and ideological setting which Dodd himself insisted upon in the writings of others<sup>7</sup> and which he incorporated into his earlier writings on Massachusetts statutes;<sup>8</sup> they appear too often as a concatenation of logically dissected, molecularly considered, lucidly presented case digests.

Reward is, however, present. While often lacking synthesis and pellucid connectives and somewhat marred by the temporal dichotomization, pre-and-post 1830,<sup>9</sup> the material is historically fascinating and gains by Dodd's perceptive presentation. Original sources are examined with a fresh, informed eye.

The legal history of American corporation (parochial, indigenous, petty) begins with the turn of the nineteenth century.<sup>10</sup> Despite conceptualisms which haunted the stuff of which cases are made, the United States Supreme Court in a series of discursive opinions molded the corporation into a dominant machine in the pre-Civil War days and made it a harbinger of the vehicle on which the moguls rode into the twentieth century.

6. Dodd did not live to complete his treatment of private law as to business corporations from 1831 to 1860 (p. 8 n.3), finished only four of six chapters planned on legislative law making (*id.* n.4), left undone paragraphs (*e.g.*, pp. 9, n.6, 123-24), did not perhaps polish footnotes and citations to their shiniest (*e.g.*, pp. 113 n.14, 178-79, 184 n.17, 194, 422). See also Appendix A, pp. 441-51. At times the editors of this volume breathed living matter into dead notes; at other times they had to be content with exhibiting the unformed residues.

7. Compare Dodd's reviews of Hunt, *The Development of the Business Corporation in England 1800-1867* in 50 HARV. L. REV. 1212 (1937); of Cadman, *The Corporation in New Jersey: Business and Politics, 1791-1875* in 63 HARV. L. REV. 1478 (1950). True, Dodd was not commenting on case and statute digests, but neither was he writing them in this volume.

8. See p. 200.

9. In his presentation of national case law Dodd followed an artificial time symmetry with the division he established for presenting Massachusetts Business Corporation Laws—the year 1830. That year did symbolize the end of the period of special charters and the time by which general statutes had crystallized for aqueduct, turnpike, insurance, banking and manufacturing companies (see pp. 200, 211 *et seq.*, 274). In the presentation of case digests the reader feels only a factitious impediment to the flow of doctrine by the separation of the material into two chapters. Reiteration and meandering ineluctably exist.

10. Dodd states at page 12 n.5 that the earliest case he has discovered in which a legal question of significance was involved is *Turner v. Bank of North-America*, 4 Dall. 8 (U.S. 1799), in which there is a dictum (*id.* at 11) that the president, directors, and company of the bank, a Pennsylvania corporation, were properly described in the declaration as Pennsylvania citizens. See also Williston, *History of the Law of Business Corporations before 1800*, 2 HARV. L. REV. 105 (1888); 1 DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* (5th ed. 1953) c. 1. The first edition of *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE*, by Joseph K. Angell and Samuel Ames, published in 1832, cites approximately 450 American cases.

Here we again review the phalanx of Marshall-Story cases: the *Dartmouth College* case,<sup>11</sup> making almost at the end of an era, charters without reservations inviolable contracts; <sup>12</sup> *McCulloch v. Maryland*,<sup>12</sup> deciding that Congress could charter a corporation as a "proper" means for carrying out its express powers, that the Bank of the United States<sup>14</sup> was such a means, and that, accordingly, a Maryland tax on the notes issued by the Maryland branch of the bank was an unconstitutional interference with a federal instrumentality; *Bank of the United States v. Deveaux*,<sup>15</sup> in which it was held that the judicial power of the United States extended to a case in which a declaration described the plaintiffs as "The President, Directors and Company," averred that they were "citizens" of Pennsylvania and that the defendants (individuals) were citizens of Georgia, under the diversity of citizenship clause, without binding the Court to treating a corporation as a citizen under the Privileges and Immunities Clause; <sup>16</sup> *Charles River Bridge v. Warren Bridge*,<sup>17</sup>

11. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819).

12. The *Dartmouth College* case is actually more important as reflecting a Webster (see p. 128 n.29) cliché than as being a landmark in corporate law (compare contemporaneous effect: Dodd, at p. 32 n.67). There was some danger to public corporations, but even if Chief Justice Richardson's New Hampshire opinion had been upheld without change by the Supreme Court investors in private business enterprises would have "had little cause for alarm. . . . For if, as the Supreme Court held, an educational corporation were a private institution and its charter an inviolable contract, the same was equally, if not *a fortiori*, true of the charter of bank, insurance, canal, bridge, or turnpike corporations, all of which were classified as private corporations by Justice Story. . . ." (*id.* at p. 28). For inviolability of charters of private corporations (or the "strong tendency to equate charter rights with other kinds of property rights and to regard them as largely, though not wholly immune from legislative interference" (*id.* at 25)) prior to the *Dartmouth* case, see *Wales v. Stetson*, 2 Mass. 143 (1806); *Ellis v. Marshall*, 2 Mass. 269 (1807); and see *Terrett v. Taylor*, 9 Cranch 43, 51-52 (U.S. 1815), involving a church. What the *Dartmouth* case is usually noted for is Story's advertence to a legislature's avoidance of the effect of the decision by reserving in the charter itself the right to amend or repeal it (4 Wheat. 518, 712 (U.S. 1819)). Less than ten years later a New York court held such a reserved power of repeal valid. *McLaren v. Pennington*, 1 Paige 102 (N.Y. 1828). Dodd in his unfortunate division between Chapters I and II (see note 9 *supra*) separates his discussion of Story's suggestion from the effect on existing law (*e.g.*, *Commonwealth v. Bonsall*, 3 Whart. 559, 566-67 (Pa. 1838) refers to a Pennsylvania charter of 1784 containing such a reservation) and legislative attempts to do so (beginning with the New York Act of 1828: N.Y. REV. STAT. c. 18, tit. 3, § 8 (1827), 1 N.Y. REV. STAT. 600 (1829)) by more than a hundred pages (pp. 28, 141 ff.).

13. 4 Wheat. 316 (U.S. 1819). See further *Osborn v. Bank of the United States*, 9 Wheat. 738 (U.S. 1824) on the limitation on the power of the states to tax the only then existing federal corporation.

14. Congress chartered only two business corporations prior to the Civil War and, except for national banks, recent proposals to the contrary notwithstanding, has chartered very few up to the present time (pp. 2, 11, 32). The first national bank was the Bank of North America, chartered by the Continental Congress in 1781 and by several states, including Pennsylvania, "the only state in which it did any substantial amount of business." Page 32 n.69.

15. 5 Cranch 61 (U.S. 1809). Companion cases were *Hope Insurance Co. v. Boardman*, 5 Cranch 57 (U.S. 1809), and *Maryland Insurance Co. v. Wood*, 5 Cranch 78 (U.S. 1809).

16. Corporate conceptualism and constitutional logomachy played more important parts in early nineteenth century corporation law than we sometimes now acknowledge. Dodd adumbrated the struggle over the content of "citizen" in the two clauses

which held that a state which had granted a charter to a toll-bridge company might incorporate another bridge company in the immediate vicinity.

While the Supreme Court was entering its epochal opinions, lesser tribunals were speaking on cognate problems and divers aspects of the private law of corporations. In a formative period courts talking theory were laying down tough law. Decisions stemming from the separate entity theory of corporate personality came into conflict with "less sophisticated"<sup>18</sup> cases piercing the corporate veil, which in a century would be considered again the "new law."<sup>19</sup> This was an age when courts worried unduly about seals<sup>20</sup> and when every second opinion still worried about two sets of twin Latin words: *ultra vires*<sup>21</sup> and *quo warranto*.

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of the Constitution, but he missed making it the verbal and, if you will, philosophical drama that it was. State courts did not have the Supreme Court's special reason for becoming involved in this controversy (p. 50), but had occasion to wrangle with the concept in decisions involving foreign corporations and internal management, and back again.

17. 11 Pet. 420 (U.S. 1837). The history of this case, first argued in 1831, before a Marshall court and decided six years later by a Taney court, is a fascinating aspect of the whittling away of monopolistic privileges, express or implied, in corporate charters. In a rare instance of editorializing, Dodd concludes that the conflict of opinion between Taney (majority) and Story was "due less to divergent views as to the applicable legal precedents than to the deep cleavage between their political and economic philosophies." Page 126. This is as much as Dodd will talk about crass Jacksonianism. The *Charles River Bridge* case was followed by *Richmond F. & P.R.R. v. Louisa R.R.*, 13 How. 71 (U.S. 1851) and by *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416 (U.S. 1853). But monopoly (corporate and individual), in the language of the Thurman Arnold parody, was "not necessarily on the wane." See *Gibbons v. Ogden*, 9 Wheat. 1 (U.S. 1824); also *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35 (1834); *Boston & L.R.R. v. Salem & L.R.R.*, 2 Gray 1 (Mass. 1854); cases cited in *Enfield Toll Bridge Co. v. Hartford & N.H.R.R.*, 17 Conn. 454, 458 (1846). By mid-century Dodd analyzes a court compromise between Taney's view, as Attorney General under Jackson, that legislative power did not include power to grant monopolistic rights "even for the purpose of encouraging private capitalists to finance needed transportation enterprises and Story's view that a charter authorizing the construction of such a structure as a toll-bridge granted monopolistic rights by implication. No grant of monopolistic rights would be implied, but such rights, if expressly granted, could be extinguished or impaired, if, but only if, compensation were paid for so doing." Page 129.

18. Page 121.

19. See notes 21, 36, 37 *infra*.

20. Pages 93 *et seq.*

21. In one of his aberrant letters to his friend Pollock (1 HOLMES-POLLOCK LETTERS 174 (Howe ed. 1941)) after he had distributed to his associate justices "an opinion in one of our damn great cases" (the editor of the letters says it was probably *Virginia v. West Virginia*, 220 U.S. 1 (1911)), Holmes, having received the Sonderabdruck: "Has the Common Law Received the Fiction *Theory of Corporations* in Festschrift OTTO GIERKE 105 (1911), reprinted in 27 L.Q. REV. 219 (1911), said he never realized the corporation entity question was a "very burning one." He then claims to have been the first to make *ultra vires* a special topic (5 AM. L. REV. 272 (1871)). In Holmes' mind the topic of *ultra vires* leads around and into the unitary personality theory. In *Remington & Sons v. Samana Bay Co.*, 140 Mass. 494, 501 (1886), Holmes said the existence of a corporation was a fiction, but, as he points out to Pollock, only as a preface to the statement that "the very meaning of that fiction is that the liabilities of the members shall be determined as if the fiction were true." All this comes after Dodd's study. Dodd alludes to the jurisprudentialist struggle in attempting in a footnote paragraph not to disparage the view expressed in Gierke's *Genossenschaft theorie* that the corporation is a real, not a fictitious, group person. Page 43 n.119. On Marshall's early views, see *Head v. Providence Insurance Co.*, 2 Cranch 127, 167 (U.S. 1804).

For one *Dartmouth College* case there were innumerable state cases.<sup>22</sup> But such inhibition against the states did not seriously affect their right and power to tax.<sup>23</sup> In the period closer to the Civil War the vexing tax problems resolved around the proper allocation of state and local taxes as between a corporation and its shareholders—early shades of “double taxation.”<sup>24</sup>

While all chartered companies may have been equal, in the language of George Orwell some were more equal than others. These became the public service corporations. Ineluctably Dodd comes to the subject of eminent domain.<sup>25</sup> The turnpikes of a century and a century and a half ago are lineal ancestors of our through-ways. As one reads Dodd’s analyses and comments one thinks how he can apply them, *mutatis mutandis*, to the billions of dollars of concrete bleaching our maps.

From such detouring, the reader rushes back to the more homely problems of the early 1800’s. Again we are on the spoor of a wild corporate idea about to be domesticated. We hunt in the ruts of corporate contracts, property, torts,<sup>26</sup> the transfer of shares, stock subscriptions and shareholders’ liability; but then we again become entranced by some “big” topic.

During this period, developed law with respect to the foreign business corporation. Even before Justice Story published his *CONFLICT OF LAWS* in 1834, there was recognition of one state’s or nation’s giving effect to foreign law on principles of comity.<sup>27</sup> It is a fascinating story how this

22. Pages 19 *et seq.*, 124 *et seq.* Apparently the earliest American case considering the scope of legislative power over corporations is *Trustees of the University v. Foy*, 5 N.C. (1 Murph.) 58 (1805).

23. In *Providence Bank v. Billings*, 4 Pet. 514 (U.S. 1830), the Supreme Court rejected the argument that a state which has chartered a business corporation and has not reserved any specific taxing power is not to be permitted to impose a tax on its capital. This, even in view of the argument (that still, Marshall or no, has a flavor-some appeal to the neoanarchist in each of us) that the power to tax is potentially the power to destroy. See counsel’s attempt to induce the Court to treat the *McCulloch* case as “an applicable analogy.” *Providence Bank v. Billings*, *supra* at 535 *et seq.*

24. Pages 164 *et seq.* Said a Pennsylvania court *apropos* of holding certain property owned by banks as exempt from taxation that since the shareholders were taxed on their shares to tax the bank “would be literally taxing them for the same property twice, which would seem to be the very height of injustice”: *School Directors v. Carlisle Bank*, 8 Watts 289, 292 (Pa. 1839); see *Pennsylvania Saving Fund Soc’y v. Yard*, 9 Pa. 359, 361 (1848). Dodd calls attention (p. 165 n.13) to a common sense counter-quote from Justice Porter, in which that eminence stated: “The power of the legislature to tax twice is as ample as to tax once.” *West Chester Gas Co. v. Chester*, 30 Pa. 232, 233 (1858). To jump a century, compare recent Congressional debate on exclusion from income and credit against tax for dividends. *E.g.*, H.R. REP. No. 1337, 83d Cong., 2d Sess. 5 *et seq.*, 7 *et seq.* (1954); SEN. REP. No. 1622, 83d Cong., 2d Sess. 5 *et seq.* (1954).

25. Pages 44, 128 *et seq.*, 149, 158 *et seq.*, 237-40, 243 *et seq.*, 403.

26. The whole subject of corporate liability in tort was thoroughly explored in the famous opinion of Chief Justice Tilghman in *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 S. & R. 6 (Pa. 1818).

27. But, as Dodd points out, comity usually meant that a court of one state would apply the law of another state to acts done in the latter. It is stretching comity to what one contemporary author (p. 47 n.7) claimed was beyond its proper limits for

could be stretched to accommodate essentially national corporations, and Dodd tells it, step by step, often through labored opinion and pregnant dictum.<sup>28</sup> By treating a corporation as an association of natural persons as it did in the *Bank of the United States v. Deveaux* and in companion cases,<sup>29</sup> the Supreme Court evaded the intellectual puzzle of how an artificial entity created by one state and deriving all of its powers from the laws of that state could be recognized by a tribunal situated in another jurisdiction. By 1830 there was substantial authority for the proposition, however, that a foreign corporation could be a party plaintiff.<sup>30</sup> On the other hand, procedural difficulties had still prevented the development of any method of treating it as a party defendant.<sup>31</sup> It was assumed rather than articulately decided that a foreign corporation could engage in business and become an owner of property.

In the thirty years following, a number of developments occurred. The right of a corporation to sue in a federal court sitting in a state which was not the corporation's domicile was broadened in scope by *Marshall v. Baltimore & Ohio Railroad*,<sup>32</sup> which, in effect, treated the corporation as a citizen for purposes of federal jurisdiction. By judicial accretions, the view developed that the validity of suits against foreign corporations would be limited to cases in which there was a state statute which could be construed as making liability to suit in the local courts a condition of the corporation's right to do business in the state and in which the corporation had in fact engaged in such business. The theory of implied consent raised many difficulties which could not be smoothed away by language.<sup>33</sup>

In the most minute way the geographical theory had repercussions in the field of corporate law. Thus, was formed the doctrinal basis for

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one state to say that, if another state's law would attach legal consequences to an act done not in such other state but rather in the adjudicating state, the latter would attach the same legal consequences to that act.

28. Pages 46-57, 170-81.

29. See note 15 *supra*.

30. See, *e.g.*, p. 50 n.15.

31. A Pennsylvania case has continued to make the historical lists. A foreign attachment proceeding instituted against the property of a foreign corporation which was in the hands of a third person was successful in *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. 173 (Pa. 1827). The court treated the foreign attachment statute as applicable to corporations, despite what appear to be cogent contra-constructional arguments. Judge Rogers in a dictum in favor of capacity to sue observed that process might be served on a foreign corporation if it "locates the president, or other officer within the state, for the express purpose of making contracts here." *Id.* at 176. Dodd astutely remarks that in an age when few if any corporations would have located any of their principal officers outside the state of incorporation the dictum could have little seminal force unless service on some minor official would have been sufficient. Page 51. Cf. *Libbey v. Hodgdon*, 9 N.H. 394 (1838), where service on the agent regularly in charge of its local business was held sufficient in a suit against a foreign stage coach company.

32. 16 How. 314 (U.S. 1853).

33. Page 178.

rulings to the effect that a corporation cannot hold shareholders meetings and perhaps not even directors meetings except in the state of incorporation. This, however, was not a hardship in an era when the state of incorporation, except in rare instances, was in fact the principal seat of the corporation's activities.<sup>34</sup>

An interesting aside was the increasing number of instances in which a single business enterprise was chartered by two or more states.<sup>35</sup> This occurred with the expansion of American railroads. The story on this has only begun when the period prescribed by Dodd ends.

Thus, in every facet of the law, the beginnings are analyzed through the eyes of a judicial tribunal and every facet of the law can be at least analyzed by evolution to beginnings in this period. Had Dodd lived and despite his prospectus, I feel here in this book or in a subsequent one he would have traced what was so dear to him, the whole area of the fiduciary principle as it manifests itself at the present time.<sup>36</sup> This involves in the beginning such things as what we know as disregarding the corporate or separate entity.<sup>37</sup> In discussing the *Deveaux* case, Dodd has an illuminating reference to the deep rock situation in which he states that many, if not most, of the cases in which the courts professed to disregard the separate entity of the corporation could have been decided in the same way without doing violence to that doctrine. Early cases often arose with respect to the rights of minority versus majority stockholders, with respect to change in the character of the business.<sup>38</sup> In the first part of Dodd's discussion from 1800 to 1830, he finds no cases in which the principles of federal law were applied as such to the directors or officers of business corporations. Dicta and inferences in opinions show that the judges and the chancellors were not blind to the problem and the need for establishing a doctrine of interest sole to the corporation and its stockholders. The second chapter was the last which he worked on before his death, and

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34. See note 31 *supra*.

35. Page 181.

36. The twentieth century Supreme Court has enshrined the fiduciary relationship as it manifests itself in a number of simple to extremely complicated cases into a doctrine of the highest stewardship and trust. *E.g.*, *Pepper v. Litton*, 308 U.S. 295 (1939); *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307 (1939) (the so-called "Deep Rock" case); *cf.* *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1942), 332 U.S. 194 (1947). (On the first *Chenery* case, see Dodd, Note, 56 HARV. L. REV. 1002 (1943)). In their modern *CASES AND MATERIALS ON CORPORATIONS* (2d ed. 1951), Dodd and Baker devote a substantial, yet, as this practitioner can vouch, by no means, inordinate, amount of space to problems which may be subsumed to the rubric "fiduciary relationships" (see *id.*, pp. 399-693, without limitation). CAVEAT: the reference to the Supreme Court does not imply deprecation of the many state courts (from Cardozo's New York Court of Appeals in all directions) or the lower federal courts.

37. While on the whole Dodd persistently treats the 1800-1860 legal system as an operating one at the time "not as an egg out of which law of today has hatched" (p. 9 n.6), he cannot refrain from projecting the pigeonhole label of "disregarding the corporate fiction" backward to his selected period (*cf.* pp. 38, 43).

38. Page 133.

apparently he did not have time in tracing the "gradually evolving American ideas"<sup>39</sup> about corporate legal history to discuss the most interesting of the topics which he raised in the 1800 to 1830 period.

Thus, a discussion of this book must end on an inchoate conclusion. It is not complete. It is not complete, despite some brilliant and devoted editing at the Harvard Law School.<sup>40</sup> For what it does, the book is a worthwhile study of many cases, statutes, and the judicial and legislative milieu surrounding corporations in the first sixty years of the nineteenth century.

*Morris L. Forer* \*

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39. Page 1.

40. Professor Chafee acted as general editor. He was assisted by his colleagues teaching Corporation Law and by research students at the Harvard Law School. The short introductory statement to Chapter II was written by Robert A. Kagan.

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