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Book Reviews

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BOOK REVIEWS

EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. "SQUEEZE-OUTS" IN SMALL ENTERPRISES. By F. Hodge O'Neal and Jordan Derwin. Durham: The Duke University Press, 1961. Pp. xii, 263. \$10.00. This short, easily read book merits reading by all of those presently associated with small business enterprises, commonly termed "closed corporations" or those contemplating such associations, and their legal advisors. Actually, the material contained in this excellent study covers many problem areas of corporation, partnership and business association law with applications to all business whether big or small.

This book is actually a report on one of a series of investigations Duke University is making of the legal problems of small business sponsored by The Small Business Administration. The subject of this study is more graphically stated by its secondary title of "'Squeeze-Outs' in Small Enterprises."

By the term 'squeeze-out' is meant the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants. This study also covers what might be termed 'partial squeeze-outs,' that is, action which reduces the participation or powers of a group of participants in the enterprise, or their claims on earnings or assets, or otherwise deprives them of business income or advantages to which they are entitled. A squeeze-out normally does not contemplate payment to the squeezees of fair value for the interests, rights, or powers which they lose. The term 'freeze-out' is often used as a synonym for 'squeeze-out.'

Although the legal authorities, rules and remedies cited will be of use to those actually involved in internal small business litigation, the basic thesis of the study is that of "preventative law." It aims to inform the small businessmen and their legal advisors that "dissension and squeeze-outs are of rather common occurrence,"² perhaps especially because a family business is involved. Further, by enumerating the various squeeze techniques, the authors hope that minority investors and their lawyers will be able to recognize them early enough so that preventive steps in avoidance might be taken. More basic, enumeration of the major underlying causes of squeeze-outs and circumstances causing them will allow lawyers for the small investors to remove in advance some of the conflicts and causes of trouble as well as to take effective steps during organization, primarily through adequate written documents, to guard the interests of their clients. The attitudes of the courts in such situations is set forth as well as remedial steps and legislation that might be taken or enacted to protect minority interests.

It is interesting to note that the chief inadequacies of the study are laudably recognized by the authors themselves. This is another indication of the clear analytical thinking that went into the study. They recognize that it tries to do too much especially in view of the limited space available in such a report. It is written both for the lay businessman and for his legal specialist. Thus, the former might not fully understand the discussions of applicable cases but an attempt has been made in the main to use simple, understandable lay terms. On the other hand the lawyer may want an expanded discussion of legal authorities and possible remedies, especially if he is involved currently in litigation involving a squeeze-out. Also in such a limited report it is hard to cover the possible types of, causes, and remedies for the vast myriad of internal business manipulations oppressing or ousting minority interests in the fields of corporation and partnership law.

However, even with these problems the report seems to have adequately met its objective. Primarily it is useful as a detailed check list of possible problem areas, devices, and manipulations adverse to minority interests. Once the businessman and his lawyer have been warned, they can take appropriate preventive actions, perhaps by contract, to protect themselves in the future. In a given instance of

1 Text at 3.

2 *Id.* at 8.

present litigation, they can conduct more detailed research in texts and other authorities on corporate law. In addition they can cover many possible future injustices through the urging of remedial legislation. Fully three-quarters of the book outlines the various squeeze-out techniques employed. The diversity, type and magnitude of these techniques is amazing. Of terrible import is that these devices are all, as a rule, based on actual cases involving harm to former close friends or their widows, relatives, investors who have all of their funds in the small business involved, stockholders, faithful employees, and others who sometimes are ruined financially and otherwise for the balance of their lives by being excluded from a small business which was their life's work. This highlights the authors' point that squeeze-outs are more common than most people realize and that they do occur between close friends and relatives. These are the same close friends and relatives who believe that nothing can come between them in the optimism of forming a new business. Here indeed is the place for the objective legal advisor who can recognize problem areas and attempt to settle them in advance by appropriate written agreements on these points. It would even appear to be the duty of the lawyer at times to force consideration and agreement on future troublesome areas, and the small businessman should thank him for his concern.

One of the great values of this study and in the establishment of this check list or "red warning flags" of possible squeeze plays stems from the methods in which the materials incorporated in the report were obtained. It is not just a collection of cases and principles picked therefrom found in the reporter system, but instead is also based on extensive field work outside the law library accomplished through contacting lawyers, small businessmen and business advisors throughout the nation. They were asked to give information concerning actual squeeze-out or related cases of which they knew. They were also asked to list squeeze-out techniques and legislative measures or other legal changes which could protect minority interests if used. Thus, the knowledge, experience and help of many of the most astute lawyers and business people in the nation are available to the reader of this book. It is certainly not limited to the findings and research of a few investigators. In this, the study is invaluable.

Like most reports, it is a combination of case and textbooks and does contain an appendix of similar case histories. The study after setting out its scope, purpose and method considers the underlying causes of squeeze-outs, techniques used, arrangements avoiding them and ideas for changes in judicial administration and legislation which would aid minority interests. The first section considers the most common type of squeeze-out techniques used in small corporations — the withholding of dividends and employment. Next, fourteen types of techniques involving fundamental corporation changes are considered, such as charter amendments, mergers, consolidations, destruction of preferred rights, sale of the entire business, dissolution, bankruptcy, establishment of a new business and reduction of capital stock. The next chapter on techniques lists another fourteen types of squeeze-outs concerning contractual arrangements, appropriation of business opportunities, and miscellaneous techniques such as split-offs, manipulations of meetings, directors, cumulative voting, and stock transfers. Partnership squeeze-outs, though not as easily accomplished because of the fundamental differences in legal entity, are also discussed. This also should be of interest to many lawyers.

The study concludes with two chapters on arrangements avoiding squeeze-outs such as can be provided for by contractual agreement at the time of the business organization and by ideas or changes in legal controls. In the latter chapter the rules used by courts in favor of majority interests are discussed. This study thinks the principle of majority rule in corporate management and the business judgment rule which often stifle minority protests against majority actions in court are only of limited validity with regard to small business corporations. Its thesis, which appears valid, is that the concept of majority rule, so important in politics, is not

such a firmly established attribute of corporate law, especially with regard to small closed corporations, as to be used to nullify the intent of the stockholders. To the same effect, the doctrine of infallibility of corporate directors (the business judgment rule) should not be inflexibly applied by courts with regard to small businesses where all expect to participate in management and there is an identity of owners and managers. Courts and advocates before them should be interested in the spirit of the law and not necessarily the form applying to more complex entities when dealing with small closed corporations. To the end of substantial justice for all business associates the report impliedly urges courts to strike out with new theories on traditional concepts of corporate law to effectuate justice and obtain legal protection for all stockholders and business associates whether they are in the majority or minority interest if smaller business associations are involved.

The study concludes with suggested remedial legislation to accomplish the protection desired. Examples from successful English law in this regard are given. Suggestions include establishment of statutory standards to guide courts in deciding whether equitable relief should be granted to minority shareholders, the broadening of appraisal statutes and of those giving relief to minority stockholders, and new statutes recognizing the validity of contractual agreements in corporations to prevent squeeze-outs which are now invalidated by judges having traditional concepts of corporate existence and establishment and who strike down anti-squeeze-out agreements among shareholders as contrary to the basic corporate conception. This complex problem of legal theory is worthy of a separate article in itself.

This work should prove of a real aid to the legal advisor of the small businessman and also to those generally involved in corporation law. The squeeze-out techniques and remedies outlined in this study in many cases are applicable to use by and against large entities as well as in the small closed corporate set-up. A distressing point is that this fine exposition and check list of ways of hurting your business associates can be used by those who desire to cause such harm as well as by those who will defend minority interests. The authors recognize this but hope that this publicity will hamper and not aid squeeze-outs. May that hope come true.

*Carl F. Eiberger**

IDEOLOGIES OF TAXATION. By Louis Eisenstein. Washington, D.C.: The Ronald Press, 1961. Pp. v, 263. \$——. Despite the foreboding title,¹ Mr. Eisenstein's book is a very readable revelation of a subject he correctly conceives to be substantially political. This ubiquitous subject affects the lives, directly or indirectly, of every American. The author feels that the technical nature of tax law would not prevent the voters from grasping the basic essentials of tax policy if the issues were adequately presented to them. He declares:

The real difficulty, I suspect, is that they might understand too well. If this . . . reason is tenable, then most Americans should not be concerned with the social problems of atomic energy, because nuclear physics is beyond their comprehension.²

The author seems to believe that political dispositions of tax issues should be made on the basis of many variants; i.e., the equitable, economic, social, and primarily practical implications of such dispositions. He feels that the basic considerations relevant to such a disposition are often deprived of social dissemination by the platitudes and banal verbiage of the tax ideologist.³

* Former editor of NOTRE DAME LAWYER, member of the Colorado Bar.

1 The general public regard tax law as complex and specialized; tax "ideology" is ostensibly esoteric.

2 Text at 227.

3 Platitudes result in ignorance of the basic political questions. And, "a state of ignorance may easily engender a lack of interest. [However] anything that involves human beings and money cannot be dull." *Id.* at 227.

The author perceives three primary ideologies: the ideology of ability, the ideology of barriers and deterrents, and the ideology of equity. The ideologist of ability would allocate taxes according to the ability to pay; they favor progressive income and death taxes. The exponents of barriers and deterrents object to this point as "progressive taxes dangerously diminish the desire to work; they fatally discourage the incentive to invest; and they irreparably impair sources of new capital."⁴ The ideology of equity champions "equality among equals." It demands that those similarly situated should receive similar treatment; those in diverse situations should receive diverse treatment.

Mr. Eisenstein examines the ideologies in order, explaining the basic tenets of each. The "ability ideologist" argues that those with greater earnings have the ability to pay higher taxes. A fixed percentage of a larger income, resulting in a larger tax liability, does not go far enough. The higher income recipients must also pay a higher rate and therefore surrender a larger percentage of his income. This reasoning is carried one step further. It is earnestly contended that the progressive tax is also an impartial, equal tax. Mr. Eisenstein seems to feel that this position distorts the basic policy question determining the merits or demerits of progressive taxation. He declares:

Yet the very essence of progressive tax rates is that taxpayers are not treated equally or neutrally.⁵

He adds:

A *rara avis* like Professor Simons would impatiently deny that graduated rates are impartial rates, and would candidly praise progression as a deliberate means of mitigating economic inequalities. But his was a voice crying in the wilderness.⁶

Illustrations that follow show that in many particular cases the basic theories do not dominate the contentions of even their more tenacious adherents. For example, Stanley Surrey is one of the leading exponents of the ability ideology. The author relates that Mr. Surrey is unhappy with the liberalized deductions for medical care granted those over 65 because many people in this category have great "ability" to pay these expenses. The author continues:

Yet at the same time Surrey indicates that the problem of personal deductions cannot be resolved by a rigid adherence to ability to pay. Even he concedes that such allowances may be tolerable if they serve some worthy purpose. For example, he approves the deduction for charitable contributions until a better "way is found of encouraging private philanthropy."⁷

The author makes similar revelations concerning the ideology of barriers and deterrents, and the ideology of equity. The obfuscations caused by the ideologies prevent frank recognition of the fact that taxes are disliked and resisted by almost everyone called upon to contribute. Candor would require rational allocation of discomfort according to all relevant criteria. Instead, Mr. Eisenstein's concluding remarks on "the wondrous ways of equity" indicate what often happens:

Since equity is the fair distribution of dispensations, Congress is busily emulating the Dodo. Like Congress, the Dodo tried hard to be fair and impartial. After watching a curious race he dispassionately declared, "Everybody has won and all must have prizes."⁸

The closing chapter suggests that politicians inform the public on basic tax issues. An illustration drawn from the Nixon-Kennedy debate indicates the author's objection. The question related to percentage depletion. The author tells us:

On analysis the Senator simply stated that he was ill-disposed toward loopholes. Burdens should be "fair and equitable," and everyone should pay the taxes that "he ought to pay." The Vice-President was more precise. . . . What is good for the oil industry is good for the country. Percentage

4 *Id.* at 13.

5 *Id.* at 23.

6 *Id.* at 55.

7 *Id.* at 42.

8 *Id.* at 177.

depletion is almost synonymous with our survival as a great nation. But at no point did either speaker explain to his vast audience what percentage depletion is and how it operates.⁹

Percentage depletion was not distinguished or compared with depreciation. Neither Mr. Nixon nor Senator Kennedy attempted to relate the specific facts of oil depletion to the ideological theory they expounded. This failure typifies the legitimate concern of Mr. Eisenstein's book.

The author concludes by observing that in order to avoid having tax laws reflecting Congressional yield to pressure for dispensations, we must elect Congressmen with the desired resistance. Most taxpayers are unaware of our system of dispensations. A rhetorical question asks, "How, then, are the required members of Congress to be obtained?" Mr. Eisenstein modestly declines an answer. One starting point would be wide circulation of the kind of information found in *Ideologies of Taxation*.

Richard C. Wilbur

⁹ *Id.* at 228, 29.

BOOKS RECEIVED

CANON LAW

CANON LAW FOR HOSPITALS. By Francis N. Korth, S.J.
St. Louis: The Catholic Hospital Association of the United States and
Canada, 1961. Pp. 40. \$1.50.

CIVIL LIBERTIES

CIVIL LIBERTIES AND THE CONSTITUTION. By Paul G. Kauper.
Ann Arbor: The University of Michigan Press, 1961. Pp. xii, 237. \$6.00.

VERSIONS OF CENSORSHIP. Edited by John McCormick and Mairi MacInnes.
New York: Doubleday & Co., 1962. Pp. xx, 374. \$1.45.

CORPORATIONS

*EXPULSIONS OR OPPRESSION OF BUSINESS ASSOCIATES: "SQUEEZE-OUTS"
IN SMALL ENTERPRISES. By F. Hodge O'Neal and Jordan Derwin.
Durham: The Duke University Press, 1961. Pp. xii, 263. \$10.00.

WHEN CORPORATIONS GO PUBLIC. Edited by Carlos L. Israels and George M.
Duff, Jr.
New York: Practising Law Institute, 1962. Pp. xv, 391. \$20.00.

CRIMINAL LAW

CRIMINAL PSYCHOLOGY. By Richard W. Nice.
New York: Philosophical Library, 1962. Pp. 284. \$10.00.

PROCEDURE

ESSAYS ON PROCEDURE AND EVIDENCE. Edited by Thomas G. Roady, Jr. and
Robert N. Covington.
Nashville: Vanderbilt University Press, 1961. Pp. xxix, 288. \$7.50.

SCHOOL LAW

SCHOOL LAW (2d. ed.) By Madeline Kinter Remmlein.
Danville, Illinois: The Interstate Printers and Publishers, 1962. Pp. xxx,
346. \$5.25.

YEARBOOK OF SCHOOL LAW. By Dr. Lee O. Garber.
Danville, Illinois: The Interstate Printers and Publishers, 1962. Pp. 234.
\$4.50 (cloth), \$3.50 (paper).

* Reviewed in this issue.



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