UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 40 | Number 2 Article 8

2-1-1962

Book Reviews

North Carolina Law Review

BOOK REVIEWS

Expulsion or Oppression of Business Associates, "Squeeze-Outs" in Small Enterprises. By F. Hodge O'Neal and Jordan Derwin. Durham: Duke University Press, 1961. Pp. vii, 263. $10.00.

This volume is a study prepared under the Small Business Administration Management Research Grant Program. It is a study of the causes of various types of squeeze plays in small businesses and remedies for them, and a textbook on existing law.

Chapter 1 deals with the scope of the study, the relation of business forms of squeeze-outs, the traditional corporate control pattern under the laws of the various jurisdictions, losses and injustices to particular persons, losses to the economy generally, and the objectives of the study.

Chapter 2 deals with the underlying causes of squeeze-outs. This chapter exhibits a comprehensive understanding of human nature and is not based only on a study of reported cases, statutes, textbooks and studies; rather the authors refer on more than one occasion to correspondence with active practitioners. Certainly one of the best methods of avoiding squeeze plays is for the interested individuals and their lawyers to know in advance what causes them and to recognize means of preventing them or lessening their harmful effects. Some squeeze-outs do not arise out of the vice of greed alone but from honest differences of opinion as to the relative earning power of services and capital in particular situations. There are nineteen sections in this chapter, and they deal with greed, inactive shareholders, a founder who dies or who hangs on after his value to the business has ceased altogether or has materially declined, autocratic control, shareholders' disregard of compliance with corporate forms and failure to keep good corporate records, the viewing of an incorporated enterprise as a partnership, the problem of unreasonable and unco-operative minority shareholders, acquisition of a competing business by minority shareholders, the difficulty of valuing the business interest, the failure to obtain preventive legal services, and the inability of many lawyers to supply adequate preventive services. There are others. The chapter is quite comprehensive and a necessary prelude to the principal study.

Chapters 3 through 6 deal with the various squeeze-out techniques in both corporations and partnerships. Chapter 3 treats the most common form of squeeze-out—the withholding of dividends and employment. Here, as in almost every area of business law, the income tax aggravates the problem. One of the most frequent situations for a squeeze-out exists when a corporation has been owned by two or more men who are actively engaged in the business. Usually their salaries have a close relationship to their investment in the business. As long as that situation lasts, all of the stockholder-officers draw salaries which are agreed upon; the salaries usually are not fixed in relationship to the value of their services but in respect to the combination of their services and invested capital, and there is no interest in having the corporation pay dividends. When one of them dies, the conflict usually begins. The beneficiaries of the estate of the dead officer-stockholder are not employed by the business, and they are interested in a return on the invested capital. This sets the stage for honest differences of opinion as to the dividend policy and the compensation of the officers who have survived and will continue to run the business. In most cases, there are other factors, including man's cupidity, which prevent agreement and lead to various forms of squeeze plays.

The squeeze-out techniques are numerous and will not be detailed here, but they involve fundamental corporate changes, contractual arrangements, appropriation of business opportunities, and other methods. Nearly all of the ordinary statutory procedures for corporate changes are used: charter amendments, mergers and consolidations, sale of the corporate business and assets, dissolution, recapitalizations involving changes in the voting rights and other rights of the stock, and preventing a fair appraisal of a dissenting shareholder's shares in a merger proceeding. In other cases the squeeze-out is accomplished by siphoning off earnings through favorable leases to or from officers or shareholders or their families, performance of services for the corporation, splitting off part of the business and transferring it to majority shareholders, appropriation of corporate assets for personal purposes, and usurping corporate opportunities.

Squeeze-outs in partnerships are discussed separately in Chapter 6. Although squeeze-outs are more difficult in partnerships, because of the power to dissolve them, than in corporations, the problem exists there and the techniques are similar.

Arrangements which avoid squeeze-outs are discussed in Chapter 7. This chapter with that part of Chapter 2 which deals with the causes of squeeze-outs should be useful to any practitioner whose clients are willing to consider the problems in advance and to provide means for resolving them. Among the arrangements suggested are buy-out arrangements, arrangements for settling disputes, shareholders' agreements, specific provisions requiring the declaration of dividends, long-term employment contracts which will prevent a majority of the stockholders from effecting the discharge of a minority stockholder from employment, charter or bylaw provisions requiring a higher vote than a majority for action by stockholders or directors and, in the case of partnerships, specific provisions in the partnership agreement which will preserve the rights of the partners to participate in the business, to receive a distribution of profits, to force a dissolution of the business and the disposition of the assets in such manner as to produce the fair value thereof, including good will. Arbitration provisions may be useful.

All of the chapters discussed contain illustrative cases, a most comprehensive citation of decided cases, statutes and other material. This reviewer knows of no publication or combination of publications from which a practitioner or any other person who is interested in the subject can find as much relevant material for both preventive and remedial purposes. Moreover, the index is excellent and the various section headings are also excellent.

Chapter 8 treats "Idea Guides for Changes in Legal Control" with particular reference to legislative proposals. Actually it is somewhat broader because it discusses existing statutes and some cases in which relief was granted or denied by the courts. The authors suggest relaxation of judicial strictness in upholding mere majority control and in refusing to review the exercise of "business judgment" by directors, statutory provisions compelling declaration of dividends, statutory modification of standards to be applied in determining whether to set aside fundamental corporate acts, broadening appraisal statutes to cover any corporate transactions which substantially affect shareholders, consideration of British devices for protecting minority stockholders including Section 210 of the English Companies Act, the desirability of broadening remedies available in minority shareholders suits, the need for legal protection for contractual arrangements designed to prevent squeeze-outs and

changes in the law of partnerships. There is a brief discussion of the North Carolina statute relating to dividends, G.S. § 55-50(i),[1] and some of the North Carolina cases. The appendix also contains a full case history of *Gaines v. Long Mfg. Co.*[2]

The authors regard the purchase of the shares of dissenting shareholders under fair appraisal statutes as one of the surest methods of preventing squeeze-outs. They would have such statutes apply not only to such procedures as charter amendments, mergers and consolidations, but also to any situation in which the shareholder finds his situation drastically changed with respect to earnings, liquidation and control. The North Carolina Business Corporation Act embodies a large measure of such relief.[3]

The North Carolina appraisal statutes expressly authorize the procedures of Chapter 40 of the General Statutes relating to condemnation; the standard of value is fair market value. Since the condemnation statutes in practice deal almost altogether with land and interests in land, it seems questionable that this criterion is desirable in all cases. Fair market value of shares in a corporation which is a party to a merger may be entirely different from the fair market value of shares in dissolution. Certainly a dissenting shareholder should have good will and similar intangibles included in valuation, and it could be most damaging to a dissenting shareholder if appraisers do not have the right to determine the actual fair market value of assets of the corporation as distinguished from book value. Actually, the courts can work these problems out on a case by case basis, but statutory guides would be helpful.

In connection with partnerships, the authors suggest that the fourteen jurisdictions which have not yet adopted the Uniform Partnership Act consider adopting it. They also suggest the adoption of two sections from the English Partnership Act, one of which provides that if a partner, without the consent of the other partner, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business, while the other prohibits a majority of the partners from expelling any partner unless a power to do so has been conferred by express agreement.

When the Uniform Partnership Act was adopted in North

[1] N.C. GEN. STAT. § 55-50(i) (1960).
[2] 234 N.C. 331, 67 S.E.2d 355, and 234 N.C. 340, 67 S.E.2d 350 (1951).
[3] N.C. GEN. STAT. §§ 55-101(b), -113(b), -119(b) (1960).

Carolina, the General Assembly failed to repeal some of the existing statutes relating to dissolution and liquidation of partnerships. Since these differ from the provisions of the Uniform Act, the reviewer suggests that the elimination of those sections of the General Statutes should be considered or, at least, that they should be consolidated with the Uniform Act in such manner as to remove conflicts or to provide alternative remedies. The value of good will and like intangibles should be expressly protected in a dissolution or other liquidation of a partnership.

This book should be in the library of every lawyer who has to deal with these subjects and should not be permitted to accumulate dust.

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Lizzie Borden: The Untold Story.* By Edward D. Radin. New York: Simon & Schuster. 1961. Pp. 269. $4.50.

> Lizzie Borden took an ax
> And gave her mother forty whacks;
> When she saw what she had done
> She gave her father forty-one.

If the question were to be asked, what is the pre-eminent crime in the history of the United States, there could be only one answer. The assassination of Abraham Lincoln dwarfs all possible rivals. But second choice is not so easy. Surely not Garfield or McKinley, who were shot down in simple attacks by mentally disturbed cranks, devoid of all skill, finesse, or mystery. Devotees of De Quincey who go in for murder as one of the fine arts would no doubt suggest the kidnapping and murder of the Lindbergh child by Bruno Richard Hauptmann, or the Hall-Mills case under the apple tree in the New Jersey lane. But high on any list, at least, is the case of Lizzie Borden. This is due only in part to the jingle, of unknown parentage, which was chanted by children in the streets to the tune of "Ta-ra-ra-Boom-de-Ay," was repeated all over the country until

* [*Note by Editor*] Reprint of a book review published in the California Law Review, Vol. 49, No. 4, pp. 786-91 (October 1961). Reprinted with permission of the author and the copyright holders.

it passed into the folklore of the nation, and is familiar even now to a great many people who know nothing about the case itself. But the case is worth reading about; it is a fascinating one, which always has presented a good many problems for those interested in speculating upon evidence. The late Edmund Pearson did a great deal to popularize the story, with his book about the trial, and the series of articles with which he kept returning to it in later years. Now comes Mr. Radin to re-examine it, and contribute much fresh material which never has seen print.

August 4, 1892, was a day of sweltering heat in the city of Fall River, Mass., with the temperature mounting into the hundreds. In a house at 92 Second Street two elderly people sat down to breakfast. One of them was Andrew Borden, who may be described as a typical old-style skinflint New England banker; the other was his fat second wife. The breakfast which they ate consisted of hot mutton soup, roast mutton, johnnycake, cookies, bananas, and coffee. Those inclined to gastronomical jurisprudence have since speculated darkly that whatever reasons may have led to murder, that meal had something to do with it.

In that house, on that morning, between the hours of 9:00 and 11:15, both Mr. and Mrs. Borden were methodically hacked to death with an ax. Mrs. Borden was killed first, in an upstairs bedroom; Mr. Borden later, when he returned from a trip downtown and went to sleep on a sofa in the sitting room. The medical evidence left no doubt that about an hour and a half elapsed between the two murders. This always has been supposed—and surely quite correctly—to eliminate all possibility of a "fiend" from outside, who would have had to enter unobserved, conceal himself on the premises, in some stifling hot closet, to await the uncertain hour of Mr. Borden's return, and depart unobserved, carrying a blood-stained ax. In all human probability both murders were committed by someone in the house.

In and about the house that morning were two women. One was an apparently innocuous servant girl, Bridget Sullivan, who spent a considerable part of the time outside washing windows. The other was Mr. Borden's younger daughter by his first wife, Lizzie, of the immortal jingle. She was a rather homely, rather dumpy, rather dull, and quite uninteresting spinster of thirty-two, active in church work and charity, and in the Fall River Fruit and Flower Mission, and a member in good standing of the Women's Christian

Temperance Union. Nothing in her blameless and entirely respectable life had ever in any way remotely suggested that she was at all qualified for the responsible position of an ax-murderess.

In default of anyone else, Lizzie was tried for murder. Mr. Radin gives a very good picture of the way in which circumstantial evidence accumulated against her, and of the pressure which built up in Fall River, stimulated by the quite unscrupulous local newspaper, and encouraged by the latent hostility of the mixed population of the town toward the old first families. Lizzie was acquitted by the jury, and promptly convicted by the community. Refusing to leave town, she dragged out a lonely and pointless existence in a new home in an exclusive residential section until her death in 1927. Subsequent writers, and in particular Edmund Pearson have had no doubt of her guilt, and have concerned themselves only with how and why. Any answers thus far given to both questions have left a great deal unexplained.

Mr. Radin thinks Lizzie was innocent, and wields a whitewash brush. Up to a point, he does it very effectively. In the process he pretty completely discredits Edmund Pearson as a biased and unfair narrator, who consistently overstated the evidence against Lizzie, and ignored all of the telling points in her favor. At the very least Mr. Radin has suceeded in vindicating the jury which acquitted, and upon which scorn has been poured for nearly seventy years. Unquestionably Lizzie was not proved guilty beyond a reasonable doubt. The case against her was not only entirely circumstantial, but very thin; the witnesses for the state made out a poor case, letting the prosecution down with unexpected and damaging answers; all of the really important evidence for conviction was explained away. The fact that Lizzie did not take the stand in her own defense becomes not only reasonable but clear common sense. Her attorney would have been an utter fool to subject her to cross-examination when he had the case in his hand; and he was not a fool. Mr. Radin has even dug up a letter from the prosecuting attorney to the Attorney General, recognizing that he had a weak and unsatisfactory case, and saying that nevertheless he thought the jury entitled to decide.

So far, so good. But we are not the jury, and cannot demand proof beyond a reasonable doubt, but only the balance of probabilities. It is here that Mr. Radin does not do quite so well, and that he seems to have yielded to an opposite bias from that which he has

demonstrated on the part of Pearson. He has undoubtedly destroyed the better part of the traditional case against Lizzie Borden. The "silk dress" which she was wearing to do ironing that morning turns out to have been bengaline silk, a cheap cotton fabric with a few silk threads, and, at least if it was an old dress, quite appropriate for the occasion. The other dress which she burned in the stove three days after the murder is pretty conclusively shown to have had no bloodstains on it, but only paint, and not to have been worn on the fatal day. The ax with the handle broken off which was found in the cellar was proved by competent and conclusive chemical tests to be free from all traces of blood, where blood could not possibly have been washed away if it had been the weapon. And the excluded evidence, which so much exercised Dean Wigmore, identifying Lizzie with the woman with the fur who tried to buy prussic acid, turns out to be utterly flimsy, with the best witness relying only upon a "tremulous" voice, and two others upon general appearance at a distance. One may readily agree that it is unthinkable that Lizzie Borden, wearing a fur through the streets of Fall River on a hot August day, would not have been recognized by someone who could offer better than that.

All this is quite convincing. But the question remains, who, then, murdered the Bordens, if not Lizzie? With all those outside of the house eliminated, as they must be, the only remaining possibility is the immigrant servant girl, Bridget Sullivan. Recognizing this, Mr. Radin sets out to construct a case against Bridget. It does not, I think, quite come off. There is in it far too much in the way of resolving all conceivable doubts in favor of Lizzie, and against Bridget; and of rejecting the simple, logical, and most likely explanation in favor of the barely possible but highly improbable. Bridget Sullivan was questioned at length, and early exonerated, by the police, for the sufficiently obvious reason that there was nothing about her, and no evidence at all against her, to suggest that she would have massacred her employers. Bad as the police sometimes are, they are not usually prone without good reason to ignore possible suspects present on the the scene of ax murders; and with all of the pressure upon them from the more respectable elements of the community to clear Lizzie, it is not at all likely that they overlooked the possibility of Bridget's guilt. Surely it is reasonable to say that they are entitled to the benefit of whatever there may be in the way

of reasonable doubts as to Bridget's appearance, conduct, credibility, and consistency under questioning.

Mr. Radin treads lightly over the question of motive. Granted that motive is not indispensable to crime, still when you have it, it is not to be ignored in pointing the finger of guilt. Lizzie inherited at least a half a million dollars from a stingy father who for years had kept her on an annual allowance of $200. Church and charity, Fruit and Flower Mission, and all the rest, still half a million dollars is half a million dollars—a good round sum, and in 1892 a great deal more than it is even now. And the one thing that never was said about any of the Bordens was that they did not know the value of a dollar. Mr. Radin minimizes the tension and bad blood between Lizzie and her stepmother; conceding that something of the sort had existed, he regards it as all over, and in any case no sufficient incentive for murder. Yet he is quite willing to believe that Bridget perpetrated the grisly slaughter of an old woman and then, after waiting for an hour and a half, during which time she made no attempt to include Lizzie, gave Mr. Borden forty-one, all for no better reason than resentment at being ordered to wash the windows on a hot day. And this with nothing whatever in the record to indicate that Bridget had even displayed a bad temper, and no suspicion of her at all on the part of Lizzie. Of course such brainstorms are possible, and not unknown in the annals of murder; but the best that can be said for this one is that it is a highly unlikely theory.

Mr. Radin is unwilling to accept Bridget's statement that she spent fifteen minutes losing her share of that Olympian breakfast in the back yard. Is it so unlikely that she would have wanted to sit down, or lie down in the shade, for a while? He does not believe her story that it took her an hour to wash the outside of the windows, but only a quarter as long for the inside. Is this really so incredible? Are windows not usually dirtier on the outside, and does one not have to use a long-handled mop, and carry water back and forth? And would not a thoroughly nauseated girl work more slowly at the start when no one was watching her, than later when she was somewhat recovered and under the eye of Lizzie?

Yet Mr. Radin accepts without question Lizzie's story that she was ironing handkerchiefs in the dining room and never heard a sound, while on the floor above her, with all passages wide open in the heat, a two-hundred pound woman was felled with an ax, and struck eighteen more blows in the head while she lay on the floor.

The more one ponders this the more utterly incredible it becomes. The thing must have made about as much noise as someone slaughtering a steer, and following it up by chopping half a cord of wood; and it may very well have shaken the whole house.

He accepts also Lizzie's story that during the murder of her father she was spending twenty minutes in the loft of the barn behind the house, looking for some lead to make sinkers for fishlines to be used on a trip the following week—during which time she dawdled around, looked out of the window, and ate a pear. He dismisses the question of why she chose that sizzling morning for such a quest instead of waiting until it cooled off, by saying that it was hot everywhere. One may suspect that Mr. Radin never has been in a hayloft on a good hot day. Conceding that there was evidence, not credited by the police, of a passer-by who saw a woman in a blue dress in the yard coming from the direction of the barn, it might account for three or four minutes; but twenty, for a search in stewing heat that could easily have been made in two?

Accounting, as she must, for her mother's absence from the scene, Lizzie told a story of a note from some sick person unknown, asking Mrs. Borden to come and see her. The note was not found, and repeated newspaper appeals for the writer to come forward producing nothing. Mr. Radin believes the tale, and thinks that the reason the writer did not appear was that she was one of the foreign immigrants who filled the town. If so, she was a foreigner who could write a note in English, who knew Mrs. Borden, and who failed to appear to clear her daughter of murder; and if there was any one in Fall River who was not talking about the Borden case, whether in English, Portuguese, or Italian, that person was deaf, dumb, and blind. Surely it is not unreasonable to suggest that there is a much more likely explanation: there never was any such note, and Lizzie Borden lied.

Then there is the fascinating, macabre, Hollywood touch of the laugh uttered by Lizzie on the stairway at the time her father came home. It was testified to only by Bridget; but it does not appear that Lizzie ever denied it. Mr. Radin makes it quite clear that the body of Mrs. Borden, lying in her gore, could not be seen from the stair except by one who knew the precise point to stop and look through under the bed; but does not the laugh indicate that Lizzie knew where to look? And if not, why did she laugh? Who but the murderer would find anything at which to laugh in that house on

that morning? Mr. Radin suggests that she was laughing at Bridget's efforts, laden with mops, to open the door for Mr. Borden. Would that really be so funny? And where is the greater likelihood?

Taking the medical evidence that Mrs. Borden died at 9:30, with a margin of half an hour either way, Mr. Radin advances her death to 9:00 in order to make it possible for Bridget to have committed the murder while she was still in the house. He ignores the equal likelihood of 10:00, when Lizzie would have been the only possible wielder of the ax. He explains, and probably correctly, the inconsistent statements reported to have been made by Lizzie to the neighbors and the police, as due to excitement or the usual variations in recollection; but he finds it damning that, after a lapse of ten months during which she was thoroughly worked over by the police, Bridget changed her story in several minor particulars, all of them unfavorable to Lizzie. Would it not have been a more suspicious matter if she had changed nothing, and had adhered to all the details of a story as if by rote?

Mr. Radin properly makes much of the fact that a complete search of the premises on the day of the murders uncovered no dress of Lizzie's spattered with blood; but he does not attach any importance to the fact that the search included Bridget's room, and no such garment of hers was found. When the police arrived Lizzie was calm, collected, and composed; Mr. Radin regards this as an indication of innocence. Bridget was badly upset, terrified, and trembling; he considers this evidence of guilt. The converse interpretations appear at least as likely. The death-bed summons which Mr. Radin has unearthed, sent by Bridget to an old friend in 1942, for what turned out to be a reassertion that she had told the truth at the trial, appears quite as likely to have been really for that purpose as for any confession. As a case against any one, all this simply will not wash.

One might dismiss Mr. Radin's solution of the case as an interesting but quite unconvincing tour de force, if it were not for one telling bit which he has uncovered. The great mystery of the Borden case is what became of the ax. It never was found. Some one, at some time, in some manner unexplained, removed it from the premises. Lizzie never had any opportunity to do so; and it always has been one of the strong points in her favor. Bridget Sullivan, says Mr. Radin, was known by newspaper reporters to have left the house the first evening after the murders, in defiance of police orders, to stay the night with a cousin; and she was carrying an un-

examined bundle. Of much less consequence is the dubious story, for what it may be worth, that during the morning she was seen crossing the street to the house of a neighbor, and walking in a peculiar manner. It is hard to see how any such visit would have afforded any opportunity to dispose of the ax. But the foray in the nighttime is quite another matter. It gives one pause.

A natural caution about accepting newly discovered hearsay seventy years after a murder leads one to inquire: why was this not blazoned forth in all of the newspaper headlines, when there was no wild and ridiculous rumor which escaped? Why was it not reported to the police; or if it was, why, with all of the pressure on them to exonerate Lizzie, did they not rush to take Bridget, and the cousin, and the bundle, all apart? Why was Bridget not cross-examined about it at the trial? Could any counsel, fighting for the life of his client, forego such an opportunity?

Without the possibility of checking Mr. Radin's sources, one can only accept his discovery as at least possibly true, although not free from some shadow of reasonable doubt. But assuming that it is true, does it clear Lizzie Borden, and shoulder the murders onto Bridget, unaided and alone? Scarcely so. One is then led to surmise that Bridget may have been, after all, Lizzie's accomplice; and that the stories told by the two women as to everything that went on in that house of death on that morning were a pack of carefully concocted lies. This is a tempting theory; it would account for nearly everything. It is borne out by Bridget's reported statement to her old friend, unearthed by Mr. Radin, that afterward Lizzie gave her enough money to go to Ireland, buy a farm for her parents, and stock it with horses, cows, pigs, chickens, and sheep. This must have been quite a sum of money; and money runs all through the case like a spectral music in the background. Such generosity may have been a characteristic of this particular Borden, as her prior and subsequent charities may indicate. But there is again another, and one would think a more likely, explanation.

And so, I think, the problem remains unsolved; and Mr. Radin has succeeded only in making it all the more a mystery. At least this is a book which the connoisseur of murder will not want to miss.

WILLIAM L. PROSSER

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The Common Law Tradition: Deciding Appeals. By Karl N. Llewellyn. Boston: Little, Brown and Company, 1960. Pp. xii, 565. $8.50.

Professor Llewellyn believes that the bar faces a crisis—a crisis caused by the diminishing confidence of the bar in our appellate courts because of wide-spread doubts that there is any "reckonability" or predictability of result in appellate court decisions. This book is devoted to the task of reviving that confidence. As the author puts it: "My task has been to wrestle with an unjustified crisis of lawyers' confidence in appellate courts, and with worries among the courts themselves which slow and hamper their work."

The effort is directed toward convincing the critics that there exists a degree of reckonability in each individual case sufficient to satisfy the demands of the bar and of the public and toward proving that appellate court decisions are more reckonable than the bar has any right to expect from any human group charged with the duty of making difficult and responsible decisions.

By way of background, attention is first directed to certain factors presented in all appellate courts that give stability to their work and results. Most of these would be obvious to the lawyers who would take time to consider them. For instance, the bar is assured of some degree of stability in its appellate courts because all appellate judges are trained and, in many cases, experienced lawyers, or because decision is made only after argument by trained counsel, or because decisions are reached under the compulsion or pressure of having to justify them in a published opinion. In all, fourteen factors are described and discussed.

It is argued that reckonability or predictability of outcome is at its best in those appellate courts which have recaptured the Grand Style of the common law that prevailed in appellate courts of this country in the early nineteenth century. This Grand Style is much more than a style of writing; it is a way of thought and work that produces the best results. The author calls it "the best device ever invented by man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice." Exploration is conducted into everyday decisions of appellate courts, and it is found that this style is again at work in many of our appellate courts producing a body of decided authority consistent, in a large degree, with both law and justice.

Some of the lack of confidence with which the book is concerned is charged to misunderstanding about our system of precedent. Sixty-four standard methods of dealing with precedent are set forth, all of which are in common use and all of which are acceptable. The numerous choices available are referred to as "Leeways of Precedent." In spite of this wide range of choice, it is shown that most appellate courts use the technique of following single decisions or groups of decisions more often than any other technique. Nevertheless, it is also demonstrated that appellate courts are using the other techniques at their command to arrive at a just result on the facts and that they do not hesitate to use any of these other techniques when the ends of justice require.

The function of rules of law is defined and explained to show how and why appellate courts decide as they do. Situations are described in which a rule of law should be used and those in which it should not; those in which it should be extended and those in which it should be redirected and reshaped. The author believes that appellate decisions should make sense and that they should be compatible both with justice and law. He urges that courts should use, and insists that most of them are using, the rules at their command to achieve this result.

Throughout the book, emphasis is placed on the importance in any case of the facts of the situation taken as a type, as distinguished from the facts of the individual case. The duty of an appellate court to justice (as distinguished from its duty to law) works through the facts and, in many instances, the author believes that the court, in considering how it shall decide the case before it, first examines the type of fact situation involved and then seeks a sound rule to govern and control the fact situation; thereafter, the court may direct its attention to sense in the particular case. At times, this "situation-type" can be seen by the way in which the opinion works at shaping the rule and the decision.

One of the book's longest chapters suggests to appellate courts methods and means of sharpening their "craft procedures." An intriguing suggestion is made that appellate courts should consult outside experts in cases involving technical matters unfamiliar to the court. Another suggestion is that appellate courts should give advance notice in their opinions of important changes in doctrine. These are only a few; there are others too numerous or intricate to describe here in detail.

Many thoughts, theories, opinions, conclusions, conceptions and misconceptions about appellate courts are discussed in general and in detail. These cover a wide range and only a few have been outlined above.

This book is based on many years of research. Professor Llewellyn has thoroughly investigated and discovered what appellate courts have been doing and are doing. He tests the correctness of his conclusions by showing them at work in decided cases appearing in consecutive order in various volumes of state appellate court reports. These cases are ordinary cases, neither highly important nor specially selected for their subject matter. Tests of the same court were made, in several instances, some years apart to determine if the conclusions still held true. It is of interest to find that the opinions of the North Carolina Supreme Court are used in this testing process. The first test involved several decisions rendered in 1940 and then a later check was made of the cases appearing in a 1959 advance sheet. The latter cases are discussed in detail in an appendix and the author finds the net result of this North Carolina sampling to be gratifying. Reason, it is said, sits as the eighth member of the North Carolina Supreme Court.

Four sets of lectures by the author between 1940 and 1953 furnished the basic material for this book that was thirty years in the making. Continuity is at times obscure and simplicity of expression does not seem to have been a particular objective. However, the points which are made have substance and merit and show a keen insight into the subject matter. The author has, without doubt, a greater knowledge about how and why appellate courts decide as they do than a vast majority of the appellate judges who render the decisions and write the opinions.

Although this book is a valuable contribution to the world of legal knowledge, it seems safe to predict that it will not be widely read by the lawyers of North Carolina. It is not the kind of book that can be read leisurely; it must be studied carefully to achieve an understanding of what is being said. However, those lawyers who will take the time and effort to read and study it will gain a new insight into the work of appellate courts that should prove of value in their practice.

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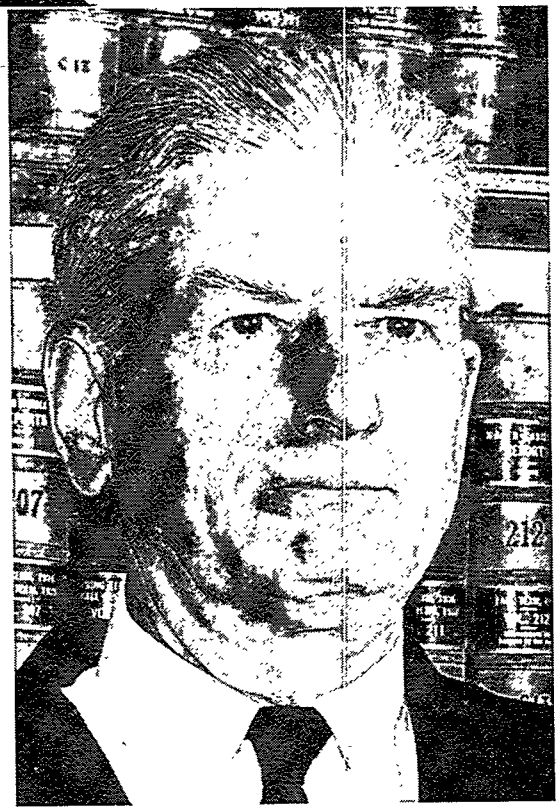

Millard
Sheridan
Breckenridge