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Book Reviews

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BOOK REVIEWS

CREDIT REPORTING AND PRIVACY: THE LAW IN CANADA AND THE U.S.A. By John M. Sharp, Toronto, Canada: Butterworth and Co., Ltd., 1970. Pp. 124. $6.95.

Credit!

One of the most important and necessary words in today's plastic card society. A panacea to some, a veritable chimera to others, and—to lawyers and the courts—the keystone in the evolving legal field of credit reporting and privacy.

Sharp, a Canadian barrister and law professor at the University of Manitoba, has come forward with a concise and very readable—to the lawyer and layman alike—book on this burgeoning field of privacy and credit reporting.

The chapter headings give an idea of the book's scope: What is a credit bureau?; The development, social utility and method of credit bureaus; The credit bureau and the law—defamation, privacy and confidentiality; Negligent mis-statements and statutory regulations; Some case histories; and Possible reforms.

His is one of a group of proliferating articles and books alerting the average citizen to the dossiers upon dossiers marking his life from infancy through adulthood, following him everywhere he goes, and threatening to undermine his next job application or credit rating.

The book covers both Canadian and United States law in the field, and offers several interesting and useful comparisons of the similarity and disparity of the law on this subject in the two countries.

If anyone thinks this is a small or insignificant field for legal development, forget it. There are literally millions of possible litigants. Dossiers are now kept on practically every American adult in the files of some 2,500 credit bureaus and local merchants' associations across the United States.

The field of credit reporting is immense and, thanks to computerization, all pervading. The consumer credit reporting industry in the United States processes from 125 to 150 million credit reports each year. One of the largest firms maintains 30 million files, enters

four million pieces of information on individuals monthly and services 14,000 subscribers.

The mind boggles at the opportunities for errors to creep into the credit reports. And, as pointed out by the Kafkaesque examples listed by Sharp and brought out earlier before the 1969 United States Senate Subcommittee on Financial Institutions, these errors crop up constantly and haunt persons for years, often costing them untold misery, humiliation, dollars and sometimes their very existence.

Sharp paints a clear picture of how the law surrounding the traditional torts, such as defamation and negligence, does not provide adequate remedies to meet the many wrongs likely to occur in credit reporting. There are also clear discussions of third parties who may suffer damage because of the erroneous report, but who have no privity with the credit bureau, and the abuses of the conditional privilege status often granted to credit reports.

The book is a strong and eloquent plea for reform in the credit reporting field. And, reform has come, perhaps just where it was most needed.

One of the biggest problems outlined by Sharp, and emphasized again and again in Senate hearings and by other writers, is the situation where a hapless job or credit seeker is turned down again and again for reasons he does not understand and never finds out. Most credit references or reports contain invidious secrecy clauses forbidding the users thereof to reveal the source of the information.

And not only was the source of this scourge which, thanks to computers, could follow a poor job seeker around the country, never revealed to him; even if he did find the source of the information he was often powerless to do anything about it. It was rarely defamatory, so no remedy lay in that direction. More often than not willful negligence could not be proven or shown, so no action lay in that direction. And, in many areas, the report was conditionally privileged.

When Sharp's book was published, reform was languishing in Congress. It has since passed, and in April the Fair Credit Reporting Act went into effect. With the coming of this Act came a breath of fresh air and a much needed helping hand to those who have been victimized and hounded by credit reports in the past.

Among other things, the new law will enable a person:

*To obtain upon his own request, from any reporting agency which issues a report on him, a disclosure of all the information in his credit file—including the sources of that information;

*To get the names of all who have received from any consumer reporting agency employment reports on him within the past two

years and the names of all others who have received credit reports about him within the past six months;

*To arrange for a reinvestigation of any item about him about which he has a question;

*To have that item deleted from his record if the reinvestigation finds it to be inaccurate or if the item can no longer be verified;

*To file a statement of about 100 words reporting his side of the story if the reinvestigation does not settle the matter—so his side will be included in any future reports containing the item;

*To see that if an item is deleted or a statement added to his file, the credit bureau informs those who have received employment reports about him within the past two years or regular credit reports about him in the past six months; and

*To obtain his record and a review without charge if in the past 30 days he was denied credit because of a credit report from a credit bureau or received a notice from a collection department affiliated with the credit bureau.

And, these are not the only key points of the new law. Other provisions forbid credit agencies from sending out adverse information more than seven years old and information on bankruptcies more than 14 years old and require that a person be informed of the scope and nature of investigative-type reports into his personal life.

Perhaps most importantly, it allows a person to bring civil actions against credit reporting agencies to collect actual damages plus attorney's fees if the agency is negligent in reporting inaccurate information.

Some writers and critics have said there are weaknesses in the new law, particularly involving enforcement. This is probably true, but it's a common ailment of most legislation which pioneers in a new field. It's always difficult the first time around to draft and pass legislation that covers the entire field.

It's indisputable that this new law is a tremendous advance in the credit reporting field. It goes a long way toward meeting many of the criticisms voiced by Sharp, particularly those about never knowing that an adverse credit report about you was being circulated and the difficulty in bringing legal actions.

Computers may appear as villians in this whole scenario, but I do not believe this is really the case. Author Vance Packard once said "the Christian notion of redemption is incomprehensible to the computer."

He may be right on this particularly philosophical point, but the fact is that computers will make it possible to bring about many of the reforms sought by Sharp and enacted by the Fair Credit Law.

For example, when you expunge information from a computer tape, or a computer card, it is gone. Formerly, papers were shuffled from one file to another, but they were rarely destroyed. Past problems, indiscretions and general adverse information never died, but hung on for years.

Computers make it possible to get information from files without generating questions about who is after the information and why. Previously, the mere fact that a certain agency or party was seeking information would be enough to put a black mark behind a person's name in a credit file.

And, as Dr. Alan F. Westin, Columbia University law professor, points out, computers also make it possible to have direct, automatic notification to the subjects themselves that their records have been opened and queried. Previously, the credit industry has claimed this would be too expensive to implement.

Perhaps the best way to gain an appreciation for this book and field of law is to step into it yourself. Take advantage of the new credit reporting law. Next time you're downtown, stop in and ask to see your credit file at your local credit reporting agency.

You may be surprised what you find.

JACK MCDONALD*

WILLIS ON PARTNERSHIP TAXATION. By Arthur B. Willis. New York: McGraw-Hill Book Company, Shepard's Citations, Inc., 1971. Pp. 764. $25.00.

Next to sole proprietorship, the partnership is the most common method of combining to transact business, and most lawyers draw an occasional written partnership agreement. Probably many more partnerships are based upon oral understandings, but virtually all are created without an understanding of what may be crucial tax decisions.

For example, suppose Smith and Jones form a partnership to raise squash. Smith contributes new machinery which is worth $10,000, and Jones contributes farm machinery which has a fair market value of $10,000, but which has been owned by Jones for some time and has a basis, after subtracting his prior depreciation deductions, of only $6,000.

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We know that Congress has blessed a partnership with some of the attributes of a 'conduit' in as much as the share of income earned by each of the partners is reported by them on their own tax returns; while a partnership tax return is filed, it is the partners, not the partnership that pays tax. However, in other situations the partnership is treated as an entity and viewed as an artificial being like a corporation. In our example the partners' transfer of property does not produce gain or loss, and the partnership takes the same basis as the partners; this is the same result accorded corporations under § 351, IRC 1954. However, unless the partnership agreement provides otherwise, depreciation deductions on sale and gain on sale may result in one partner bearing an unfair burden of the tax. Thus if the machinery is sold, a gain will be realized of $4,000 ($10,000 - $6,000) which will be split equally between Smith and Jones unless the partnership agreement provides otherwise. Is this fair to Smith? The machinery he invested had no potential gain on sale, but Jones' contribution does. Would it not be just to require Jones to pay tax on the entire $4,000? Similarly, Jones will share equally in the depreciation deductions allowed on Smith's higher basis property. Would it not be fairer to allow Smith such deductions, in full, on his equipment and limit Jones to depreciation on his contribution? These worthy objectives are made possible of accomplishment by Section 704(c)(2); in fact, it could not be done in the only other vehicle of combination, the corporation.

It would be wonderful if we could have the benefit of hindsight and adjust our tax relationships with partners after we know where the chips have fallen. Congress has even allowed this, for section 761(c) allows the partners to modify their partnership agreement and adjust tax consequences after the year is over, but prior to the time the partners file their returns. Willis discusses how this can be done and gives the following example which should strike close to home for most of us.

> Suppose the law partnership of Abbot, Babbitt, and Cabot reports on a calendar year basis. Pursuant to a written partnership agreement the partners share profits equally. The profits of the partnership are unusually large for 1969, due to one exceptionally fine fee on a case originated and personally handled by Abbott. After December 31, 1969, (probably when the bookkeeper shows them the profit and loss statement for the year), but before April 15, 1970, the partners decide that Abbott should have a greater share of the partnership income for 1969. Accordingly, prior to April 15, 1970, they execute an amendment to the partnership agreement providing that for the calendar year 1969 Abbott shall have a 40 per cent interest in partnership profits and Babbitt and Cabot shall each have a 30 per cent interest. This amend-

ment to the partnership agreement should be recognized. It has economic reality in that Abbott really will receive his increased share of partnership income.

Most of us know that the Internal Revenue Code is virtually impossible to read. Our author, a practitioner with lengthy experience in the field of partnership taxation spares us the indignity of admitting we cannot decipher it, for he approaches his subject in a simple, chatty fashion. His language is direct and unburdened with the vernacular of Revenue Service Regulation writers. Nor does he dwell on the history of partnership taxation, at least its history prior to the 1954 code, when Congress largely rewrote the partnership provision.

Rather, the author's method is to describe a problem in partnership taxation, discuss it in plain terms, suggest in plain terms how it might be solved and then include a clause to be inserted in the partnership agreement to accomplish the desired result. This book is practical, though not erudite, and one searching for a theoretical discussion of partnership taxation will not find it here.

Willis was a member of an advisory group formed to rewrite Subchapter K in 1957; Congress considered this report but failed to take action. From time to time throughout the book Willis refers almost nostalgically to these now long-forgotten proposals, and, I submit, detracts from his work and his purpose. However the reader can safely ignore those portions.

This is a second edition of this work and was apparently occasioned with the passage of the Tax Reform Act of 1969, which gave many scribes in the field opportunity to rewrite their old books.

Following 554 pages of textual material several appendices are attached. The first one consists of a partnership agreement for a commercial business operation, the second a limited partnership agreement; incidentally, the problems of limited partnerships, their flow-through tax attributes and the use of a corporation as a general partner are discussed elsewhere in the book and done rather well. Third, a partnership agreement for a professional firm appears as well as a partnership agreement for a professional firm with multiple classes of members. Fourth, a family partnership agreement is included and, finally, another general partnership agreement for a commercial business operation with cross purchase for the interest of a deceased partner appears.

GARRY A. PEARSON*

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ORGANIZING AND THE LAW, A HANDBOOK FOR UNION ORGANIZERS. By Stephen I. Schlossberg and Fredrick E. Sherman. Washington, D. C.: The Bureau of National Affairs, 1971. Pp. 304. $10.00.

The authors of this book, Stephen I. Schlossberg and Fredrick E. Sherman, are respectively, General Counsel of the United Automobile Workers Union and Assistant Professor of Labor Education at the University of Wisconsin. The book is described by the publisher as the Handbook for Union Organizers. It is lucid, concise and direct. It is a successful book.

However, probably few readers of this *Review* would be classified as union organizers, but for students and general practitioners, this book is a fine outline of threshold labor relations. Students may use it for review purposes in examinations, and every general practitioner can use it for a quick survey of threshold labor law and also as an index work taking the lawyer into the statutes and board decisions.

The first four chapters are devoted to what the authors describe as preliminary matters. Federal Labor Law is first generally discussed with references to the Taft-Hartley Act, the jurisdiction of the National Labor Relations Board and, finally, a brief analysis of selected portions of the Landrum-Griffin Labor-Management Reporting and Disclosure Act and the Welfare and Pension Plans Disclosure Act. Chapter II includes instructions for union organizers setting out the legal rights and duties of an organizer, but has several "selling" suggestions that are certainly useful for organizers. This leads logically to the next two chapters which deal respectively with Employer Unfair Labor Practices (chapter III) and Union Unfair Labor Practices (chapter IV). The remaining chapters of the book are devoted to securing union recognition in the appropriate bargaining unit together with a good discussion of representation case procedure before the National Labor Relations Board. Some of the best material deals with elections. Here again, the book was written to use. For example, in discussion of the Agreed-Upon Elections, Chapter VI, p. 113, it is said:

> There is often an informal conference dealing with observers, check of the payroll, and the mechanics of the election. This is the proper time to settle such questions as: the number and identity of union and company observers; the physical setup and location of the voting booths; the time of voting; the method of releasing employees from work for voting; and, if possible, problems as to possible challenged votes. Unions and companies that wait until balloting time to meet those problems often regret it.

All of Chapter IX, dealing with the Conduct of Elections, is of intense interest to a general practitioner in rural North Dakota communities. The matters covered are practical, useful and to the point. They are valuable irrespective of whether the lawyer represents a union or the employer.

There is a glossary of labor terms together with the text of the Labor Management Relations Act, a directory of NRLB Regional Offices and also selected NRLB forms. The book has an excellent index. Finally, it is written in a lively, readable style. It is, in other words, entertaining as well as instructive.

Buy this book—you'll get your $10.00 worth.

FRANK F. JESTRAB*

POWER & PUT-ON: THE LAW IN AMERICA. By Joseph S. Lobenthal, Jr. New York: Outerbridge & Dienstfrey, 1970. Pp. 187. $5.95.

In that the author teaches at the New School for Social Research, in New York City, in addition to being a practicing attorney, this book should be interesting reading for psychology and sociology students, as well as for lawyers and law students. Throughout the book the author is concerned with trying to describe why the law is the way it is, why the legal professionals act as they do, and what the consequences are to the lay individual.

The author has divided his book into two parts. The first, entitled, "The Guides and the Maze", deals with the individual and his relationship with lawyers, judges, and policemen. The relationship between the lawyer and his client is especially interesting.

The client obviously wants the lawyer to achieve some specific goal for him, be it a money judgment or a "matter of principle." The lawyer also, according to Lobenthal, wants to achieve something from the client. This may be compensation in the form of money, publicity, political advantages, or any other form of compensation the lawyer feels is worth his time and effort. The indication here being, that what the lawyer can get out of the case is more important than what the client may eventually achieve. The lawyer just spends the amount of time and exerts the amount

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of energy he feels the case justifies and then closes it up. In illustrating this phenomenon, Lobenthal uses the example of a negligence case settlement. He shows the conversation likely to take place between the lawyer and (in this case) the insurance adjuster, and then the conversation between the lawyer and his client. The illustration shows how the lawyer may many times get the client to say "well done" never knowing that, possibly with a little more time and effort, it could have been done much better.

In this part of the book, the author also talks of a "balance of illegality."[1] In a sense this may be characterized as, members of society—including professionals, stretching the bounds of legality. At one point, Lobenthal describes this as a sort of modern day "Robin Hood morality."[2] This idea includes the willingness to color the truth, the nonenforcement or the selective enforcement of certain laws, etc. Such stretching and coloring are so much a part of society, that one must be aware of it and anticipate its occurrence. Lobenthal feels this awareness is a major element in a lawyer's usefulness to his client. It is for this reason that the lawyer cannot seek to act as an idealist, he must be "realistic" and adapt to these very same social norms.

The second part of the book, "In the Maze," deals with the law's bureaucracies such as the parole agencies and treatment centers. Lobenthal makes his position clear immediately—the individual serves the needs of the organization. The treatment he will receive from the organization depends upon the attitude he displays towards the organization and his co-operation in playing by their rules. As a prerequisite, the individual must "understand and accept the fact that idealogical goals are window-dressing."[3]

The author feels that the bureaucracies exist for themselves and to provide jobs for their employees, who may be idealistic enough to think their own goals are being furthered by their own actions and by those of their employer.

The parole system, according to Lobenthal, typifies this kind of organization. The parolee has to agree to a list of rules and conditions before he is actually paroled. Because these rules and conditions are vague and even contradictory, the parole officer has the opportunity of interpreting the parolee's actions. The parole officer, it is pointed out, does not want to have his parolees (or at least not too many of them) labeled as "violators" because this would be a bad reflection on him personally and upon the parole system as a whole. The parolee, of course, does not want to be considered a violator either, although he knows that it will be

1. J. LOBENTHAL, POWER & PUT-ON: THE LAW IN AMERICA 75 (1970).
2. *Id.* at 80.
3. *Id.* at 106.

impossible for him, or anyone, to follow rules and conditions to the letter.

The enlightened parolee will realize that this list of rules and conditions is actually a list of things his parole officer (as a symbol of the parole system) would like to hear. What counts then, is not so much what the parolee does, but how faithfully he meets with his parole officer and what he says when he gets there. In this way the parolee causes the system few, if any, problems and by keeping this up long enough, will eventually be labeled "rehabilitated" by the system.

Those parolees who do not know how to play the game and, therefore, do not let the system label them as "rehabilitated" are, in a sense, black eyes on the system and returned to jail.

The author is also concerned with how the middle-class is affected by crime and how it responds to it. Lobenthal says that few activities are called criminal if they are not widespread throughout the middle-class. He illustrates this idea with the example of drug use, saying when drugs were largely confined to the ghettos, users were jailed without taking into consideration age, whether the defendant was a user or a pusher, or the type of drug involved. Lobenthal says it was not until drug use became a "national problem"—widespread in the middle-class, that terminology began to change, and solutions and treatments began to appear.

Only a few of the interesting thoughts the author displays in his writing have been discussed. In reading this book, one sees the author as a man greatly concerned with society and what it is or might be doing to its members. The reader may become outraged at the author's description of how things are and his reason for why they are that way, or he may even become angry with the author.

It is apparent, for example that the actions and motivations Lobenthal says characterize lawyers are not peculiar to them, but are found in all other professions and occupations and are, in fact, basic characteristics of all human beings.

Regardless of whether the reader agrees or disagrees with the author, there is no doubt but that he will give much thought to actions and ideas he has long taken for granted.

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BENCH

and

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