

## Book Review

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## Book Reviews

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THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. By Nelson B. Lasson. The Johns Hopkins Press, 1937. Pp. xiv, 154.

In his brief preface, Dr. Lasson states that "It has been his endeavour to examine carefully the history of the amendment<sup>1</sup> and to survey analytically the cases decided by the final authority on the interpretation of the guaranty, the Supreme Court of the United States." The author has confined his efforts to that aim with possibly a too narrow interpretation of the "survey analytically."

The monograph consists of four chapters.<sup>2</sup> Chapter I, after a brief consideration of some safeguards thrown around the privacy of the home in Jewish and Roman times, is a historical account of the limitations (or lack thereof) imposed upon official search and seizure in England prior to the American revolution. While the common law developed doctrines as to the illegality of general warrants, whether for the arrest of persons or the seizure of property, the limitations seem to have been only for action under judicial order. Arbitrary executive action or action under special statute was unrestrained. The resulting ruthless searches of private homes and indiscriminate arrests led to the creation of a public opinion in England which was to raise the protection against unreasonable searches and seizures to a principle of constitutional dignity, recognized by Parliamentary declaration in 1766.

Chapter II is presumably intended to continue this historical account for the American colonies, where the chief abuses resulted from the "writs of assistance" used by British officials to enforce the onerous trade regulations of the mother country. Unlimited as to time, these warrants to search *all* places suspected of storing smuggled goods and to break open suspected packages became the center of pro-

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<sup>1</sup> United States Constitution, Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>2</sup> Chapter I. Early Background (38 pages); Chapter II. Writs of Assistance in the Colonies (28 pages); Chapter III. The Fourth Amendment (27 pages); Chapter IV. Development of the Principle by the Supreme Court (38 pages).

longed legal debate in Massachusetts Bay and provoked resistance by force.<sup>3</sup> The author acutely points out that while the writs were being used against objecting colonists, opinions were handed down in the English courts (not published in the colonies) "which in effect held illegal every search and seizure ever made in the colonies under a writ of assistance."<sup>4</sup>

After reviewing the actual precedents for the fourth amendment set up in the Bill of Rights to the various original State constitutions, Chapter III deals with the drafting and passage of the Amendment (along with the other first nine amendments) in response to the call of public opinion when the constitution was submitted for ratification without any stated protection for those individual rights which the colonists considered so important. An interesting observation is that the wording of the amendment,<sup>5</sup> emphasizing a separate prohibition against unreasonable searches and seizures as well as the one against the issuance of general or unsworn warrants was the result of a change made by the committee on arrangement after the House of Representatives had approved the amendments. The Chairman of the Committee, Representative Benson of New York, had urged the same change unsuccessfully during the debate in the House and the amendment had come to the Committee worded so as to make the principle of freedom from unreasonable searches and seizures a mere premise to a positive inhibition against the issuance of general warrants.<sup>6</sup> The committee's change was quite important in securing clear pronouncement of the broader principle.

Chapter IV considers each of the leading Supreme Court cases and their interpretation of the Amendment. Here, as in the previous chapters, Dr. Lasson's collection of material seems to be complete and his presentation of it accurate. However, he does not summarize his conclusions from it or state any general criticism of the development by the courts. Although the arrangement of the cases tends to indicate a scheme of classification more than merely chronological, the author does not in any single place state what this is. The reader is left to make his own outline and to draw his own

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<sup>3</sup> They expired at the death of the sovereign during whose reign they were issued.

<sup>4</sup> P. 65.

<sup>5</sup> *Supra*, note 1.

<sup>6</sup> The wording originally accepted by the House of Representatives was: "The right of the people to be secure in their persons, houses, papers, and effects shall not be violated *by warrants issuing* without probable cause" etc. The part italicized was changed. Cf. footnote 1, *supra*.

conclusions. Some attempt at summary plus a definite expression of opinion by the author as to the extent to which the judicial application of the amendment has carried out its purpose as well as to its possible future course would have made the book more complete and more interesting. Also, it would have achieved a better balancing of materials. With ninety-three pages spent on the historical background and the passage of the Amendment, only thirty-eight are used in telling of the Amendment's development.<sup>7</sup>

Speaking of things which one might like to have seen included, it might be observed that leading lower federal court decisions as well as those of state appellate courts (assuming there were relevant ones) might have provided interesting material on the solution of problems not yet determined by the Supreme Court. A survey of the interpretations of similar provisions of State Constitutions might have supplied helpful bases for comparison and criticism.<sup>8</sup> Also, it would have been of interest to see the extent to which protections have been added by statute where the courts have refused them under the Amendment. For example, while the Supreme Court has held that the amendment does not preclude the use of evidence acquired by "wire-tapping",<sup>9</sup> a case was recently argued and has since been decided resting on the theory that this is proscribed by the Communications Act of 1934.<sup>10</sup> However, the failure to include matters that we should like to know more about should not take from Dr. Lasson's work the credit deserved for his doing a workman-like job on his task as set out in the Preface. The thorough collection and analysis of the Supreme Court cases decided under the Fourteenth Amendment along with a complete historical survey of the colonial and English background of the amendment is a valuable contribution to political and legal literature. That it is a limited contribution is perhaps characteristic (too characteristic) of the modern doctoral dissertation.

—G. KENNETH REIBLICH.\*

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<sup>7</sup> *Supra*, note 2.

<sup>8</sup> The contents of similar provisions of State Constitutions preceding our National Constitution are included in Chapter III as indicated earlier in this review.

<sup>9</sup> *Olmstead v. United States*, 277 U. S. 438, 72 L. Ed. 944, 48 Sup. Ct. 564 (1928).

<sup>10</sup> *Nardone, et al., Petitioners, v. U. S.*, 5 U. S. Law Week 404. The decision was handed down on December 20, 1937, after this number of the *Review* had been set in type. The Court held that the Act made such evidence inadmissible.

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PRINCIPLES OF CONFLICT OF LAWS. By George Wilfred Stumberg. Chicago. The Foundation Press 1937. Pp. xl, 441.

Ten years ago there was a dearth of American material on Conflict of Laws. Story's classic treatise was ancient. Minor's short text-book was even then a quarter of a century old and the latest edition of Wharton was almost as far back. There were the two standard law school casebooks by Beale and Lorenzen. Across the water there were the English text-books by Westlake and Dicey.

The intervening decade has been a fruitful one for American material in the field. First came the Goodrich horn-book. New editions of the older casebooks have appeared and there are three new ones, one by Carnahan, another by Cheatham, Dowling, and Goodrich, and the third by Harper and Taintor. The Restatement of the subject by the American Law Institute has been completed. It has been followed by local annotations, by Professor Beale's three volume treatise explaining it, and by a host of law review articles reviewing, damning, counter-damning, and, occasionally, praising it. The latest publication in text-book form is this one, prepared by Professor Stumberg of the University of Texas Law School.

This book, while published in a series designed for university students, possesses, nevertheless, considerable utility for the lawyer and judge who must deal with problems impinging on two or more states and thus creating difficulties usually denoted "Conflict of Laws" problems. As the author admits, the size of the book precluded exhaustive citation of cases; yet an examination of the useful and convenient table of cases and a survey of typical footnotes discloses that he managed to cite more cases than one would expect in a book of such size. He has, furthermore, given access to still more of such basic material by referring the reader to the contents of legal periodicals and to collections of cases in leading case series annotations.

The author performs a double service with respect to his reflection of the doctrinal quibblings about the underlying theory of the Conflict of Laws. He recognizes the existence of a clash between divergent schools of thought in this regard without adhering to the doctrines of any one group. In his introductory chapter he states the various positions of the scholars in the field and thus seeks to convey to the average reader what "the shouting is all about" in the more

learned circles. He enables the interested reader to seek complete enlightenment from the periodicals referred to. At the same time he refrains from over-emphasizing the doctrines of any one school of thought (whether Restatement or anti-Restatement, comity or vested rights, expediency, local law, or what) and thus makes his presentation of materials more useful to the average reader who wants some feel of how courts have been deciding cases in the past and might decide them in the future. To have adhered to the doctrines of any one school in the matter might have made his book more interesting in the field of scholarly polemics, but it would have detracted from its usefulness as a practical tool for student or lawyer.

The book preserves the traditional chapter on domicile, putting it immediately after the introduction, as was customary before the recent "realist" movement called for its abolition as a separate concept and its distribution among the other subjects in which domicile might be relevant. His treatment of the capacity of a married woman to acquire a separate domicile, for instance, presents interestingly the trend in American law toward permitting it more freely.

The subjects usually collected under "Jurisdiction and Procedure" are divided into four chapters next following as: Legislative Jurisdiction, Jurisdiction of Courts, Judgments (including Sister State Judgments), and Procedure. Extensive treatment is made of the growing concept of personal jurisdiction based on acts done and business transacted within the state, such as by non-resident motorists and foreign corporations.

The next two chapters on Torts (including Workmen's Compensation) and Contracts cover the usual material found under such headings in the Conflicts field. Following these are two chapters covering the difficult questions arising in the Domestic Relations field. The book ends with a series of chapters on Business Organizations, Property, Testate and Intestate Succession, and Administration of Estates.

The topical index is rather brief and, therefore, less helpful than otherwise. A lengthy list of leading articles in the legal periodicals aids the frequent citation of them in the footnotes in making this material, more valuable in this field than in others, available to the readers.

Mr. Stumberg's style is very readable and he makes his presentation more attractive to the average reader by incor-

porating into his discussion the facts of well known cases. That he did this, instead of trying to dabble in high flown doctrinal disquisitions, makes the book of practical value to the average student and practicing lawyer. Conflicting views are presented; the Restatement is discussed without being followed blindly; sound knowledge of the periodical literature and doctrinal differences is reflected; and yet there results a workaday book. More books of this type should be published.