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## A REVIEW OF ANNUAL SURVEY OF AMERICAN LAW: 1947

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A REVIEW OF  
ANNUAL SURVEY OF AMERICAN LAW: 1947\*

*Edson R. Sunderland*†

THIS is the sixth annual volume in which the faculty of the New York University School of Law has published its summary of the important developments in American law. The magnitude of the task required to produce these volumes would be considered beyond the capacity of the teaching staff of any single law school if the actual publication, year by year, of these monumental surveys did not prove that it could be accomplished.

The comprehensive plan of the *Survey* covers the whole field of the law, and in that field it includes not only judicial decisions, but statutes, rules and orders, as well as current legal literature in the form of books, law review articles and notes. Thus it contains a reference to, and a characterizing description of, practically everything of general significance to the legal profession which has been turned out during the year by the courts, by the various legislatures, and by legal scholars. The project is unique, and constitutes the one comprehensive source of information available to lawyers, judges and law teachers regarding the progress of the law.

The detailed choice of material to be included and commented upon is necessarily a matter of judgment with the writers of the several chapters. Each will naturally select those items which he himself finds most significant. Nevertheless, one is impressed throughout the book by its objectivity and by the good judgment with which the selection has been made.

The most striking feature of the *Survey* is the relatively large amount of space devoted to Public Law. Activity in this field represents the wide-spread social and economic changes which are being brought about by expanding governmental regulation and control. The treatment of Public Law occupies 590 pages, that of Private Law 430 pages. As Dean Pound suggested in his review of the 1944 volume of the *Survey*, which showed a similar distribution of material, "public law is swallowing up private law."<sup>1</sup>

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<sup>1</sup> 33 A.B.A.J. 1094 (1947).

In its manner of treatment the *Survey* is much more than a digest. Not only does the mere inclusion of a decision, statute, rule or legal treatise constitute an appraisal of its importance, but there are many useful comments and much background material and supplemental data to aid the reader in drawing his own conclusions.

One of the difficulties inherent in a survey of this character lies in the classification of the material. Many items might be appropriately dealt with under one or more of a number of different heads, and the distribution in such cases would depend on the judgment of the authors of the several chapters. In general, this task has been well carried out. So far as the same items have been discussed in different places from different points of view, such overlapping treatment can be readily traced by means of the very complete topical index, table of cases and table of statutes and rules, which make it easy for the reader to locate each item in which he is interested no matter where it may be found among the various classified divisions of the field.

For the purpose of the *Survey* the field has been divided into five parts, as follows: Part I, on "Public Law: In General," in 13 chapters; Part II, on "Public Law: Social, Business and Labor Regulation," in 10 chapters; Part III, on "Private Law," in 24 chapters; Part IV, on "Adjective Law," in 4 chapters; and Part V, on "Legal Philosophy, History and Reform," in 4 chapters.

While it is impossible in the space allowed for this review to give specific consideration to all the material included in the 1947 *Survey*, the manner of treatment employed and the character and scope of its subject matter can be fairly indicated by a summary of the first of its main divisions, typical of the entire work.

Part I includes the following subjects:

*International Law and the United Nations.* Developments treated under these heads largely relate to the activities of the United Nations through its various organs. Special attention is given to the Committee on Development and Codification of International Law, the International Law Commission, and the Commission on Human Rights. There is a resumé of the work of the Assembly and of the Security Council. Very little business came before the International Court of Justice. Two interesting federal cases are cited, holding that circumstances (such as those at Pearl Harbor) and not the declaration by Congress, determine the commencement of war,<sup>2</sup> and that treaty provisions not incompatible with a state of war are not suspended or

<sup>2</sup> *New York Life Ins. Co. v. Bennion*, (C.C.A. 10th, 1946) 158 F. (2d) 260.

terminated thereby.<sup>3</sup> Other cases noted deal with privileges and immunities of United Nations officers and employees, the effect to be given to foreign laws by American courts, treaties as a part of the internal law of the United States, nationality, and state and federal claims to tidelands. The literature of international law was augmented by an unusually large number of important publications during the year.

*Conflict of Laws.* Jurisdiction for divorce has been the most actively litigated subject in the field of conflict of laws. Professor Dean, in this chapter of the *Survey*, says that "although the United States Supreme Court did not hand down any decisions in 1947 relating to jurisdiction for divorce, the remaining courts reported approximately as many cases on this single topic as there were over the year in the entire area of conflict of laws."<sup>4</sup> The complexities of the subject are well illustrated by references to the more significant of these cases. Two notable decisions of the United States Supreme Court, each by a five to four division,<sup>5</sup> have given an enlarged operative effect to the doctrine of *forum non conveniens*, which Justice Black, in a dissenting opinion, predicted would "inevitably produce a complex of close and indistinguishable decisions from which the accurate prediction of the proper forum will become difficult, if not impossible." Interesting cases are commented upon dealing with the scope of full faith and credit under the federal Constitution, problems as to the custody of children of divorced parents, contracts between spouses, the law governing devises of real property, the effect of borrowing statutes of limitations, and the status of federal law in the state courts and state law in federal courts. The author concludes with the thought that the common law technique of case law development has substantially failed in the field of conflicts, and only legislation seems capable of leading us out of the wilderness.

*Constitutional Law and Civil Rights.* In these chapters, comprising 157 pages, Professor Reppy deals with a huge mass of material, partly executive, partly legislative and mostly judicial, involving constitutional implications and limitations. In considering the vast amount of litigation over constitutional issues one is appalled by the price we are obliged to pay to maintain our intricate system of national and state constitutions.

The year 1947 brought up many new questions and threw new

<sup>3</sup> Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431 (1947).

<sup>4</sup> P. 45.

<sup>5</sup> Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518, 67 S.Ct. 828 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947).

light on old ones, including the duty of the states to enforce federal penal laws; the effect of the *Erie R. Co.* doctrine upon the concept of res judicata; conditions for the lawful delegation of legislative power to administrative agencies; applications of federal jurisdiction over interstate commerce, particularly as affected by other federal statutes and by state statutes relating to taxation, labor relations and rates; limitations of various kinds imposed by the due process clause of the Fourteenth Amendment upon public support of church schools, taxation of estates, public utility rates, zoning ordinances, license fees, criminal law administration; various kinds of legislative discrimination amounting to a denial of the equal protection of the law. As a whole, says Professor Reppy, the trend toward greater concentration of power in the federal government continues unabated.

In the field of civil rights the year was an eventful one in the continuing struggle for their preservation and enlargement. Cases arising out of racial discrimination were unusually numerous. The scope and nature of many other civil rights were discussed and defined, such as freedom of speech as related to peaceful picketing and to criticism of the courts; the privilege against self-incrimination in state and federal courts; freedom of religion as applied to public transportation of children to church schools and to the practice of polygamy; the right to engage in political activity under the Hatch Act; the right to have a lawfully constituted jury; the right of one accused of crime to have counsel; the right to be secure against unreasonable search and seizure. Here, again, the conclusion is drawn that the cause of civil liberty has suffered a loss by the decisions of the year.

*Administrative Law.* The most important cases during 1947 have been in the field of judicial review, where a continued narrowing of the scope of review has been somewhat offset by a re-assertion by the United States Supreme Court of the availability of review even in the absence of legislative authorization and by the broadening of the scope of review provided in the Labor-Management Relations Act of 1947. Many cases have discussed the rule that administrative remedies must be exhausted before resort is had to the courts. Judicial supervision of delegated powers, and of sub-delegation has received much attention as a safeguard against arbitrary grants. Applications of the substantial evidence rule in reviewing findings of fact and mixed questions of law and fact have been very numerous, with the general result in the federal courts, and to a somewhat less extent in the state courts, of severely limiting the scope of review in spite of much adverse professional opinion. The effect of the Administrative Procedure Act cannot be appraised from the few cases which have so far been decided.

*War Powers and Their Administration.* This chapter is devoted largely to a brief summary of the more or less conflicting activities of the President and Congress in regard to the termination of wartime controls, and the results accomplished by such legislation as the Sugar Control Extension Act, the First and Second Decontrol Acts, the Housing and Rent Act, and by the numerous executive orders issued by the President. There is also a review of the rather extensive litigation over veterans' re-employment rights.

*Civil Service.* During the year the right of the Civil Service Commission to dismiss federal employees on suspicion of subversive activities was sustained, and the Hatch Act prohibiting political activities of federal employees was held constitutional. Much legislation, both state and federal, was enacted dealing with the right of public employees to strike and to organize unions, veterans' preferences in public employment, and the powers of personnel agencies.

*Federal Taxation.* While the never ending flood of litigation in this field could not possibly be dealt with exhaustively in such a publication as the *Survey*, Professor Wallace has, in 21 pages, given an interesting and readable discussion of most of the more important questions which have come before the courts during the year.

*State and Local Taxation.* This chapter contains an unusually valuable collection of widely scattered material consisting largely of statutes designed to meet the insatiable demand for public revenue while at the same time attempting to avoid shipwreck upon constitutional restrictions. The questions arising out of the administration of these statutes cover a wide range, including taxation of foreign corporations doing an interstate business; the line of demarkation between rendition of services and making of sales; the inclusion of other taxes and government subsidies in the base of the tax; deductible obligations in estimating death taxes; taxation of property in which the United States has an interest; exempt organizations. Viewing the results of the judicial decisions the writer confesses to the disheartening impression that "the philosophy, approaches and techniques employed in construing statutes is woefully deficient."

*Local Government.* Much of the activity in this field centered in the problems of state aid to local governments and the granting of new taxing powers to localities. Carelessness in the methods by which local legislative power is exercised has been high-lighted in a number of decisions. The allocation of public funds for the support of leagues of municipalities, which have proved to be exceedingly useful agencies, was sustained as an appropriation for a public purpose. The numerous questions affecting local municipal government which came before the

courts, include the reasonableness of the manner of exercising police power, the need for legislative standards for the exercise of delegated licensing power, restrictions on the authority of municipalities to impose penal sanctions for violations of ordinances; collective bargaining rights of municipal employees, methods of fiscal management, the validity of bond issues, liability for tort, and zoning and planning. In general the courts recognized the necessity for allowing public law to keep abreast of actual public affairs.

*Crime and Delinquency.* This chapter refers to a large number of surveys and studies, in various states, in the field of delinquency, made as a preliminary to the preparation of new legislation; to a number of statutes enacted during the year; to a few important decisions; and to several books of more than passing significance, constituting a useful bibliography.

*Criminal Law.* This chapter, the last in Part I, summarizes the results of several hundred decisions, but, as the author states, "does not reflect any new trends or startling developments."

Subsequent Parts of the *Survey* follow a similar pattern.

It is interesting to compare this "Annual Survey of American Law" with the somewhat similar "Annual Survey of English Law," which was prepared and published by the University of London Department of Law, from 1928 until 1940, when war conditions compelled its discontinuance. Like the American *Survey* it included legislation, case law and literature, and covered the whole field of English law.

Correlating the 1947 volume of the American Survey, now under review, with the 1940 volume of the English Survey, which was the last volume published, we find that the American volume contains 1227 pages compared with 295 pages in the English volume; the American volume includes a consideration of 679 statutes, compared with 49 in the English volume, and the American volume discusses 3640 cases compared with 324 in the English volume. These figures would seem, in a general way, to measure the comparative need for such surveys of the law in England and in the United States, and to show how indispensable such a survey would be to anyone who wished to keep abreast of current trends in American law.