Washington Law Review

Volume 3 | Number 1

3-1-1928

Law of the Air, by Carl Zollman (1927)

Eugene C. Luccock
University of Washington School of Law

state without re-examination of the question and a full examination of the authorities bearing on it. Considering the state of the authorities that have squarely passed on the question, the dictum does not appear to be a safe one for peace officers to follow. A. J. S.

SEARCHES AND SEIZURES—INTOXICATING LIQUORS—EVIDENCE—INVALIDITY OF SEVERAL SEARCHES UNDER SAME WARRANT.—Armed with a search warrant authorizing the search of defendant's houseboat for intoxicating liquors, officers made a search but found no liquor and made no return. Two days later the officers returned and made another search under the same warrant and found intoxicating liquor which was used, over defendant's objection, to convict him of a liquor charge. *Held*. that the second search under the same warrant was "unreasonable," and that the evidence found on the search was erroneously admitted. *State v. Moran*, 138 S.E. 366 (W Va. 1927).

This recent decision, which appears to be one of first impression, is of considerable interest in this state because of the dictum of our own court in *State v. Ditmar*, 132 Wash. 501, 513, 238 Pac. 321 (1925) as follows: "One search did not exhaust his powers under it. He could return and continue the search as often as he deemed it necessary until the time limit fixed by the statute for the return of the warrant expired." This language was dictum, inasmuch as the officer did not return to "continue the search," but rather to get some samples of mash which the previous day's search under the warrant had revealed but which had not been taken along at that time. Even on this state of facts there is contrary authority. Cornelius on Search and Seizure, p. 363. The West Virginia court in the reported case quite clearly indicates its view that one search warrant may be used as authority for one search only, since repeated searches under the same warrant savor too much of writs of assistance and general warrants, so abhorrent to the traditions of American liberty. See also 12 MINNESOTA LAW REVIEW 181. It may be suggested, moreover, as another reason, that since a search warrant can be procured only upon a showing of probable cause, if a search is then made disclosing nothing of a contraband character, the probability of the cause for the issuance of the warrant has been sufficiently negatived to make any further searches under the same warrant unreasonable and, hence, that no new search ought to be authorized except upon a new showing of probable cause and the issuance of a new warrant. It would seem that the broad dictum of our own court in *State v. Ditmar, supra*, in view of the facts there before the court, cannot safely be made the basis of advice to peace officers in this state to make successive searches under the same warrant, but that the issuance of a new warrant for a second search is the safest practice. A. J. S.

BOOK REVIEWS

LAW OF THE AIR. By Carl Zollman. Milwaukee: Bruce Publishing Co., 1927, pp. 286.

A book can serve two purposes: It may be a repository of authoritative statement; and it may, by discussion, clarify the framework of the subject matter. One which only serves to clarify, even negatively, where the subject is new and its very novelty apt to create an atmosphere of complexity, has value.

So with this book; for Mr. Zollman has made it clear: (1) That government, through a coordination of the legislative and administrative in the new mode, has occupied the field of air-right, if we may use that term; (2) That a just analysis of the ancient maxim, *Cujus est solum ejus est usque ad Coelum*, furnishes a sound foundation for such appropriation inasmuch as the projection of right thereby suggested is rationally limited to the protection of the enjoyment of a particular species of

property· and, (3) That governments, in the modern view, are peculiarly adapted to oversee the use of all kinds of property and to regulate their enjoyment in the interest of that social harmony which we call progress.

The uninstructed attitude toward air-right is, no doubt, the same as that which has always prevailed toward the unappropriated; the non-existence of recognizable ownership tends to make it free, and convenience gradually creates necessity. If there is a tendency in law, as in morals, to get away from the hard and fast categories of strict right and to place law upon a basis of real injury, this subject offers an excellent field for its development.

Men have discovered a new use for atmosphere; new methods for subjecting it to old social needs are being developed. Government regulation postulates lawfulness and merely keeps pace with the accelerating impetus of growing populations. As one may gather from Mr. Zollman's text, there ought not to be anything new in the juridic situations which will arise; only the difference in setting will require the restatement of principle, and the logic of experience will blend the essentials of old law with the new circumstances.

It is a temptation to say that Mr. Zollman should have been content with a monograph and so enriched the literature of the law without adding to its encyclopedias. However, the lawyer's propensity for authority suggests that the author has chosen the form of his book wisely from the law-writer's point of view· and, being early in the field, he can justly anticipate that the future will clothe his efforts with the honor of frequent citation. EUGENE C. LUCCOCK.

OUTLINE OF SURETYSHIP AND GUARANTY. By Earl C. Arnold. Chicago: Callaghan and Company 1927, pp. 620.

The avowed purpose in this work is to present an outline of Suretyship and Guaranty in such form as to be an aid to students and practitioners and the author has succeeded admirably therein.

Perhaps any attempt to cover a broad field in the compass of a single volume raises the question as to choice of material and apportionment of space. The author has seen fit to select leading English and American cases as the basis for his discussion, and in the body of his text has made generous use of quoted material from opinions in the cases on the particular point of law under consideration. These are used not only to show the present state of the law but the development of it. The footnotes likewise contain statements from opinions in addition to citations of many cases bearing on the point in issue. Realizing the value of discussion in law journals, reference has been made to that source of information as well as to treatises in the field.

Naturally no attempt has been made to exhaust the authorities. Conflict in English and American decisions as well as controversial points have been discussed intelligently and concisely The result achieved in the manner of using the material is clarity of statement of the principles of the law of suretyship and guaranty.

The apportionment of the book is in some respects new The early part follows the usual procedure—the obligations in general—the requisites of the suretyship contract—Statute of Frauds—original and secondary promises—temporary and continuing guaranty—the defenses of the surety and rights and remedies of surety being discussed in order. Following this are two chapters which mark an interesting presentation of material—one on the Statute of Limitations and the other on the Effect of Bankruptcy upon Rights and Obligations of the Surety—a departure which seems to have merit.

Realizing the importance of the modern development of the compensated surety—the author has devoted the last part of his work to a separate discussion of this phase of the subject. In view of the widespread use of the compensated surety in the present day, the setting aside of a considerable portion of the book for this purpose is justifiable especially in view of the manner in which the subject is handled. The