

Louisiana Law Review

Volume 6 | Number 3

December 1945

GENERAL THEORY OF LAW AND STATE, by Hans Kelsen, translated by Anders Wedberg (20th Century Legal Philosophy Series: Volume I), Harvard University Press, Cambridge, 1945. Pp. xxxiii, 516. \$6.00.; THE PURE THEORY OF LAW, by William Ebenstein. University of Wisconsin Press, Madison, 1945. Pp. xii, 211.

Eric H. Voegelin

Repository Citation

Eric H. Voegelin, *GENERAL THEORY OF LAW AND STATE*, by Hans Kelsen, translated by Anders Wedberg (20th Century Legal Philosophy Series: Volume I), Harvard University Press, Cambridge, 1945. Pp. xxxiii, 516. \$6.00.; *THE PURE THEORY OF LAW*, by William Ebenstein. University of Wisconsin Press, Madison, 1945. Pp. xii, 211., 6 La. L. Rev. (1945)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol6/iss3/17>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

themselves but preventing competent scholars from gleaning from them knowledge of our past history? Dr. Dickey's biography is definitive. It is a significant contribution to the field of southern political, legal and oratorical history and a distinct compliment to Louisiana State University's Southern Biography Series.

EDWIN ADAMS DAVIS*

GENERAL THEORY OF LAW AND STATE, by Hans Kelsen, translated by Anders Wedberg (20th Century Legal Philosophy Series: Volume I), Harvard University Press, Cambridge, 1945. Pp. xxxiii, 516. \$6.00.

THE PURE THEORY OF LAW, by William Ebenstein. University of Wisconsin Press, Madison, 1945. Pp. xii, 211.

As a sequel to the Modern Legal Philosophy Series, the Association of American Law Schools has prepared the publication of a *20th Century Legal Philosophy Series*. Most appropriately the editorial committee has chosen Hans Kelsen's *General Theory of Law and State* as the opening volume. Kelsen's "Pure Theory of Law" is, no doubt, the outstanding achievement of our time in legal theory. The great trend of analytical jurisprudence, going back to Bentham and Austin, has reached in Kelsen's work a climax of elaboration that will hardly be surpassed in the near future. The achievement is paralleled by a prodigious success, attested by the bibliography that is attached to the volume: it shows translations of Kelsen's works into fourteen languages, and the select bibliography of the more important monographs on the Pure Theory of Law runs into eight pages.

The present volume contains a restatement of ideas expressed in earlier works. It has absorbed the substance of the *Allgemeine Staatslehre* (1925), of the *Théorie Générale du Droit International Public* (1928) and of the *Reine Rechtslehre* (1934). It is, however, not simply a translation of parts of the earlier volumes but a systematic reorganization of the whole body of doctrine with a view to the interest of the reader who is brought up in the tradition of the Common Law. This fact alone lends importance to the new volume, for the shifts of emphasis, as well as the omissions and additions, throw a revealing light on the differences of outlook between the Civil Law and the Common Law. The stu-

*Head Archivist, Louisiana State University.

dent who is interested in a comparison of the two legal civilizations will derive great profit from checking the chapters of the *General Theory* against the chapters of the *Allgemeine Staatslehre* of 1925. Moreover the materials are arranged in a new systematic order. The *Allgemeine Staatslehre* had suffered from the attempt to cast the new legal theory approximately into the German form of the *Staatslehre* in the tradition of Laband and Jellinek. The earlier treatise is organized into three parts on "The Nature of the State," "The Validity of the Order of the State," and "The Creation of the Order of the State." This arrangement has now been dropped and we find the *General Theory* organized into the two parts on "The Law" and on "The State" which stand to each other in the clear relationship of a general theory and its application. The first part presents under the title of "Nomostatics," the fundamental legal concepts and, under the title of "Nomodynamics," the problems of a hierarchically unfolding legal order. The second part employs the legal categories in the analysis of the problems of constitutional and administrative law. This part closes with an extended analysis of the relations between national and international law. The new systematic form is a decisive improvement.

As to the substance of the theory, the position of Kelsen has not changed noticeably. The great merits of the Pure Theory of Law come again into their own. The concept of positive law is carefully defined and guarded against all admixtures which have a habit of entering the theory of law from the spheres of sociology, psychology, ethics, politics and the speculation on natural law. This work of purification is of importance not only for the establishment of an objective, scientific theory of law; but the unscrambling of a traditional mass of problems which go under the name of jurisprudence, and the clear distinctions between legal problems proper and those which belong into other contexts, will be of help even to those who do not share Kelsen's opinions concerning a general theory of politics. The value of the method becomes particularly obvious in the clarification of the legal complexes which are most deeply corroded by political preconceptions. The reader should be referred specifically to the section (which has become a classic of legal theory) on "Centralization and Decentralization," containing the masterful analysis of the Federal State and the Confederacy. The section on International Law, furthermore, will be of assistance to everybody who is sin-

cerely interested in clear distinctions between politics and the state of the law in this delicate field.

Unfortunately, there have been retained in the present volume also the drawbacks of Kelsen's positivistic metaphysics. The reader who is faced by the division of reality into nature and norms, into the Is and the Ought, may be worried by the question what has become of the realms of meaning in politics and history. He may also doubt whether the problems of natural law (treated specifically in the appended study on *Natural Law Doctrine and Legal Positivism*), are, indeed, exhausted by Kelsen's analysis. And he may wonder whether the problems of politics can all be squeezed under the titles of "interest" and "ideology." These questions, however, concern the fringes of Kelsen's theory; they have a bearing on the claim of the Pure Theory of Law to be the exhaustive theory of the state; but they neither affect the value of the systematic core, nor the validity of the detailed analysis of legal problems. The work as a whole is a magnificent contribution to the science of law, and the institutions which have assisted in making it available to the English reader are greatly to be thanked for their service.

The monograph on *The Pure Theory of Law* by William Ebenstein is the revised edition of the English translation of the author's *Rechtsphilosophische Schule der Reinen Rechtslehre* (1938). Ebenstein's study will be of great help to the English reader who wishes to penetrate more deeply into the backgrounds and implications of the Pure Theory of Law; particularly so, since it is the author's purpose to show that the theory is not only of value in the analysis of Continental Law, but is of general validity also for the Common Law. As far as the rendering of the theory itself is concerned, the reader will probably now prefer to have recourse to Kelsen's new treatise. Still, the study of Ebenstein retains its usefulness because here the reader finds information on the neo-Kantian theory of knowledge and its influence on Kelsen's theory of law, as well as on the general European situation in legal philosophy out of which the theory of Kelsen has grown. Moreover, the study gives a fairly adequate impression of the school of legal theory that has evolved under the influence of Kelsen,—or rather of the schools for not all of Kelsen's disciples have remained within the pail. The broad advancement of legal theory in general, and the penetration of special fields of law, through the work of Verdross and Merkl, Weyr and Sander, Felix Kaufmann and Schreier, has to be understood if ones wishes to

appreciate the fertility of Kelsen's enterprise. A slight flaw may be found in the study insofar as the author is perhaps too much inclined to see only the merits of the Pure Theory of Law and does not give a sufficient impression of the very serious criticism which it has experienced. And a regrettable gap is the complete omission of an inquiry into the background of Austrian legal tradition and theory which is a highly important component in Kelsen's work. Still, the study remains the best approach to the subject available in English.

ERIC H. VOEGELIN*

AIRPORTS AND THE COURTS, by Charles S. Rhyne, National Institute of Municipal Law Officers, Washington, D. C., 1944. Pp. viii, 222. \$5.00.

This volume is a concise review of principles of law stated or affirmed in some four hundred federal and state court decisions involving acquisition, operation, maintenance, and zoning of public airports, and air-space rights of operators, aviators, and landowners. The author also used information gathered from the files of the National Institute of Municipal Law Officers and the Civil Aeronautics Administration, and from numerous books and articles, to make the volume a rather complete outline of airport law as it now stands.

The main phases of airport law development have been described clearly. The idea of public acquisition and operation of airports has met with little opposition from judges who had become accustomed generally to regard public operation of analogous enterprises such as harbors, docks, and wharves as proper "public purpose" functions. In cases involving tort liability of municipalities, however, a majority of the courts have held that airports are "proprietary" functions, and that a city is liable in damages "for failure of its agents to use ordinary care" in operating its airport.¹

Five theories of air-space rights have emerged from the numerous court decisions on this question. The author feels that the "so-called 'nuisance' theory" is the most reasonable basis for deciding cases of this kind because, unlike trespass, for example, it "gives the aviator one more chance to become acquainted with

* Associate Professor of Government, Louisiana State University.
1. P. 74.