REVIEWS AND NOTICES

General Theory of Law and State. By HANS KELSEN. Cambridge: Harvard University Press. 1945. Pp. XXXIII, 516. ($6.00)

This is one of the most important books on legal science ever to be published in the English language. As Roscoe Pound has said, Kelsen is "unquestionably the leading jurist of the time"; but his work has not until now been easily available to English readers. For, while Kelsen is a prolific writer, most of his books are in German; and, while many of these have been translated into various languages, there was, until the publication of this book, no full statement of his system in English. Since coming to America, Kelsen has published three monographs in English; two short books in English on international law were published in the thirties; and there were a number of articles, including two important articles in volumes 50 and 51 of the *Law Quarterly Review*. English-speaking lawyers and students who wanted more than this were obliged to go to secondary sources, of which however, there were an increasing number.

Another reason for the importance of this book is that, as a result of his experiences in the United States, Kelsen has not only been able to reformulate the "pure theory of law" in terms that are more readily understandable by readers of the common-law tradition, but he has brought his thinking into closer relationship to the English analytical school. It is a strange circumstance that Kelsen apparently worked out his theory in ignorance of the work of Austin. Yet of all systems it is the Austinian that it most closely approaches.

The philosophical basis of Kelsen's theory is Neo-Kantian. Like Stammler, he uses the Kantian distinction between the "Is" and the "Ought". But Kelsen has little else in common with either Kant or Stammler. Stammler, like Kant, belonged to the natural-law tradition, although the formal "natural law with variable content" of the latter is radically different from the superior law of the modern Thomist. Kelsen, on the other hand, has abandoned the search for absolute justice. His theory is a theory of positive law. The legal order, says Kelsen, is a self-contained system which owes its validity to nothing outside itself. At the basis of the order is the fundamental norm which indicates the manner in which all subordinate norms are to be created but which cannot itself be referred to any other source. The validity of the fundamental norm cannot, therefore, be proved by juridical techniques. Long before Kelsen's work had become familiar to English-speaking jurists, Sir John Salmond had said that "there must be found in every legal system certain ultimate principles from which all others are derived, but which are themselves self-existent". For Kelsen, however, there is only one such fundamental norm which he finds in the international order of which the various national orders are merely delegations. Kelsen thus denies the possibility of basing the fundamental norm of positive law on any external order, e.g. the natural law, and at the same time asserts the supremacy of international law over national law.

Having rejected both natural law and national sovereignty, Kelsen proceeds to demolish the State which, he says, is simply a synonym for the national legal order. But the national unlike the international legal order is highly centralized: it possesses specialized organs for enacting, administering and enforcing the law. Hence the strength of the national as compared to the

international order from which the former nevertheless derives its validity. Nor are these the only concepts that fall before his trenchant reasoning. For many people this iconoclasm goes too far; and Kelsen has become the target for a good deal of superficial criticism. It is mainly because of the anti-ideological character of his system, however, that Kelsen has become a focus of controversy. In a world where ideologies are becoming stronger than science, and writers, both of the right and of the left, are erecting philosophical systems for the purpose of supporting this or that ideology, a jurist of Kelsen's objectivity is bound to be unpopular. But this does not affect his importance as a legal scientist; and lawyers and students who are seeking not support for some ideology but understanding of the law will find his system most helpful.

Not only does Kelsen reject the possibility of basing the positive law on any external order, his theory is also "pure" in that it divests legal science of all non-legal elements, whether ethical, economic, psychological or sociological. His criticism of so-called sociological jurisprudence is especially pertinent in view of the dominant position which that school has attained in the twentieth century. So-called sociological jurisprudence is sociology not legal science. "The statements by which normative jurisprudence describes law", he says, "are different from the statements by which a sociology of law describes its object. The former are ought-statements, the latter are is-statements of the same type as laws of nature." Kelsen does not deny the usefulness of a sociological study of the law; but he queries its achievements. "What goes under the name of sociological jurisprudence is hardly more than methodological postulates."

To suggest that Kelsen's *General Theory of Law and State* is wholly devoted to a defence of the "pure theory of law" would be to give an entirely erroneous idea of its contents. For, while the book naturally exposes the theory at length, Kelsen also discusses particular institutions. In the first part, where he discusses the nature of law in both its static and dynamic aspects, he deals with such special topics as sanctions, delicts, persons, legal responsibility and the enactment of law. In part two, he develops his theories of the State and of International law. There is, finally, a long appendix on the "never-ending conflict" between positivism and natural law theories.

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Law and Practice of Divorce and Matrimonial Causes. By D. TOLSTOY. London: Sweet and Maxwell, Limited (Toronto: The Carswell Company Limited). 1946. Pp. xxxv, 386. ($9.00)

Authoritative works of recent publication cannot be over-looked by members of the legal profession particularly when they deal with subjects that in these days take up a large portion of the time of many practitioners. It has been estimated that, in one of the provinces at least, more than half the matters that come to trial are divorce cases; this volume will therefore undoubtedly receive a welcome reception from those who wish to be well informed in a branch of the law where precision and certainty are of the utmost importance.

Mr. Tolstoy writes, of course, of England, and points out that the law as stated is that existing on August 1st, 1945. The Matrimonial Causes (War Marriages) Act, 1944, and the rules made thereunder are included; statutes dealing with matrimonial matters and the Matrimonial Cause Rules, 1944, are set out in the Appendix, and reference to them, as well as to the Directions and Practice Notes in force, is made throughout the text.

In Part I the author, in a concise and logical manner, covers the law relating to divorce, judicial separation, restitution of conjugal rights and nullity of marriage, as well as jactitation of marriage, legitimacy declarations, financial provisions of spouses and children during and after marriage, custody of children, intervention, and costs and damages. Parts II and III treat respectively of practice and procedure in the divorce court and in courts of summary jurisdiction in England. The Canadian lawyer will find many useful suggestions in these chapters, under such headings as forms of pleadings, procedure at trial and questions relating to income tax in the allotment of maintenance, to mention only a few.

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Labor Policy of the Federal Government. By HAROLD W. METZ. Washington: The Brookings Institution. 1945. Pp. ix, 284.

One expects the publications of the Brookings Institution on the social sciences to be accurate, systematic and exhaustive. Mr. Metz's book is no exception.

Here is a factual study of the general labour policy of the federal government in the United States and of the methods adopted to implement it. The author is not, he emphasizes, concerned with the desirability of the policy's objects, with the political and economic forces that have shaped the policy, or with whether any given policy has been successful in attaining its objectives.

In spite of its limited approach, perhaps even because of it, the book will be a useful reference work for the Canadian lawyer who is interested in industrial relations. Our society and economics and those of the United States are so closely inter-related that no one can understand labour problems in Canada without knowing something of the solutions attempted across the border. While the study is not written primarily for lawyers and is in no sense a treatise on administrative law, the governing legislation is fully explained in its practical operation and frequent reference is made to judicial decisions.

The author deals with almost all the activities of the American government in the broad field of labour except unemployment insurance. After surveying the development of labour legislation in his first chapter, he moves on to discuss the government's attitude toward the concerted efforts of workers to increase their bargaining power by such means as unions, strikes, picketing and boycotts. In succeeding chapters he describes the policy towards collective bargaining; union organization; the labour market; preferential treatment to union members through the closed shop, the union shop, maintenance of membership, the check-off, and so on; wages; hours, child labour and safety; and the settlement of labour disputes.

During the past ten years the labour policy of the American government has been primarily to improve the conditions of workers; Mr. Metz does not quarrel with it on this ground and certainly most of his readers will not. While the author denies any intention of evaluating the results of the policy, he does permit himself the conclusion, "it is evident that the federal government does not have a labor policy that can be regarded as a coherent and integrated system". Reading the book, this reviewer seemed to detect a current of dissatisfaction with its policy on other grounds as well.

Certainly the federal government in the United States appears to have clothed the administrative bodies charged with the implementation of its policy (sometimes the administrative bodies have clothed themselves) with much greater powers than have been given similar bodies in Canada. Thus the National Labor Relations Act imposes upon American employers the obligation to bargain collectively with representatives of their employees, which involves the obligation to bargain in good faith, and forbids employers to engage in unfair labour practices. The National Labor Relations Board established under this act has power to determine whether an employer has been guilty of an unfair labour practice. In Canada a similar obligation to bargain collectively is imposed by a variety of legislative enactments, but, except in Saskatchewan, no administrative board has power to decide that an employer has engaged in an unfair labour practice.

It will sound strange to some Canadian ears to hear that the National Labor Relations Board has held on a number of occasions that the refusal of an employer to grant a closed shop was evidence of his bad faith. The Board has held also that an employer is guilty of an unfair labour practice if he demands that a union put up a bond to guarantee its performance of the terms of a collective agreement. Again, it has ruled that an employer cannot urge his striking employees to return to work; to do so constitutes an interference with the workers' right to organize.

Mr. Metz makes the same criticism of the laws governing labour matters in the States as he does of federal policy itself; if the policy is not coherent and unified, neither are the laws giving expression to the policy. One suspects from reading his book that American labour laws are even more piecemeal, to borrow his phrase, than Canadian legislation. Partly this is due in both countries to the federal system of government. For similar historical reasons neither the American constitution nor the British North America Act referred to labour matters. The resulting division of powers between the federal government, on the one hand, and the provinces or states, on the other, and the uncertainty as to what powers rest with whom, have made it difficult to tackle labour problems courageously. It may be hoped, if not too sanguinely, that the present Dominion-Provincial Conference will bring about some improvement in this regard in Canada.

Readers of Mr. A. C. Thompson's article on Collective Labour Agreements in the March issue of this Review[1] will be interested in Mr. Metz's chapter on collective bargaining and the collective agreement. The growing importance of collective labour agreements for the lawyer among others is illustrated by the fact that in the United States the number of employees covered by such agreements increased from 1,000,000 to 14,000,000 in the short period from 1935 to 1945. Mr. Metz says that collective agreements are recognized as binding legal contracts in most of the American states,

[1](1946), 24 Can. Bar Rev. 167.

though he does not always make it clear what he means by a binding contract; Mr. Thompson argues that in Canada they are something less than contracts. Whether they should be treated as contracts or not is another matter. Speaking only of his own country, Mr. Metz thinks that in the interests both of employers and employees they should be.

G.V.V.N.

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Recent Trends in English Precedent: With a Comparative Introduction on the Civil Law. By JULIUS STONE. Sydney: Associated General Publications. 1945. Pps. vi, 76. ($2.25)

The material of this book was the basis of a course of lectures delivered by Professor Stone in May, 1945, upon the invitation of the Law Committee of New South Wales, to members of the profession returning from war service. Some hint of its content is afforded by saying that it is a part of Professor Stone's coming treatise, *The Province and Function of Law: Law as Logic, Justice and Social Control*, and a most scholarly and informing analysis of the processes of thought that guide, dictate and condition judicial decisions. Complete with tables, lists of abbreviations, cases and authorities, and an index, the book is a satisfying unit in its special field.

The student of comparative law will welcome the study of the fallacies of the logical form in the interpretation of the Code of Napoleon, set over against fallacies of the logical form in modern English precedents.

Greatly simplified, the problem of the "fallacies" is this. The Civil Code of France or of Quebec is a statement of precise rules of law which are intended to be clear; are these rules, made textually rigid long ago, to be applied literally, with all the implications of logical form? If so, how can the law grow? Or has the judge the right, where the law is or seems silent, obscure or insufficient in respect of the case before him, to examine the sources of the article of the Code, the doctrine that has grown up around it, the social and other changes that have taken place, and in the result to render a creative judgment which amounts to legislation, so different is it from what may have been contemplated by the codifiers? Our own Mignault strongly contended that we should examine the remarks and explanations of the codifiers of the Quebec Code to ascertain the reason for a given rule. As for the English system which relies on the force of precedent or *stare decisis*, have we not all the rigidity of a Code—and if so, how can the law grow to meet new needs and conditions if a judge may not within certain limits take a creative view of the law to meet the case, where the law is silent, obscure or insufficient?

Fundamentally, the learned author, with a wealth of illustration, rests upon the essential basis of logic in interpretation, but very easily convinces one that logic has many methods, depending upon varying premises; so that in fact the judge has a wide choice in his effort to do justice under law. His premise in judgment is his *point d'appui*. How far he can go in ignoring a literal deduction, by the premise that, for example, the legislator could not have willed a rule obviously inequitable, or contrary to the necessities of actual life in the present, may be a question. Yet—"I have often wondered says Lord Wright, "how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*"; and he seems to answer his question when he says that "a good judge is one who is the master, and not the slave of the cases". Or, as Mr. Justice Holmes in his famous dictum puts it: "The life of the law has not been logic; it has been experience".

Actually, the process of accommodation of law, even of precedent, to the facts of existence, is the life of the common law, and has gone on for centuries.

Ehrlich in his *Juristic Science in England*, 1913, speaks of the "free-finding of law by English judges" as the fecund source of accumulating rules based on behaviours and customs.

"It is the case", says Professor Stone, "whatever the form behind which it has been concealed, that the work of English courts from the mediaeval period onwards represents a great achievement in legislation by reference to the changing facts of social life as seen in the actual behaviour of associations of men for the time being. And it is also the case that this was achieved and continues to be achieved not because of, but rather in spite of, the apparent reliance on legal conceptions and propositions and on pure deductions from them."

In France, jurisprudence has not the authority accorded it in England. As Mignault pointed out in an article in this Review,[1] when the growth of industry made necessary a new conception of responsibility to shift the burden of proof in favour of the workman, in England the change came, and apparently could only come, by legislation. In France, on the other hand, the jurisprudence was able, without the intervention of the legislator, to create and sustain the theory of responsibility for damage caused by things under the employer's control (*la theorie du fait des choses*). In Quebec, the authority of jurisprudence is comparatively slight. Mignault has pointed out also[2] that we admit that decisions of the Privy Council and the Supreme Court of Canada are authoritative here, provided they flow from Quebec cases—a statement perhaps not quite ample, since we have adopted *Lemesurier* v. *Lemesurier* as to jurisdiction in divorce, and judgments on subjects such as for example Bills and Notes or Merchant Shipping, though deriving from cases in other provinces, are authority for us. Judgments of our Court of Appeal, he says, "have generally been followed in our lower courts"—more for reasons of convenience and out of consideration for litigants; but "in Quebec we have never blindly bowed to precedent—*our supreme authority in civil matters, as Lord Haldane recognized, is the Code*".

The "supreme authority is the Code". It is known that the "advice" of the Privy Council may savour of high policy while stating the law. A judgment of a single judge is reversed by a majority in appeal, and this majority reversed with variations by the Supreme Court whose judgment is reversed by the Privy Council which restores the judgment of the trial judge with variations. By a convention, the Privy Council judgment is accepted as now stating the rule of the Code—at least until the judgment can be "distinguished" or the facts present themselves in some different sequence or aspect, or until, as has happened, a trial judge has refused to bow to the judgment of the Privy Council.

What emerges is that by means of many imponderables of reference to principles, doctrine, jurisprudence and good sense, the law of the Code is and has been susceptible of growth, to meet changing conditions and wider horizons; for here, too, by article 11 of the Code, "A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law".

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[1] (1927), 5 Can. Bar Rev. 1-17.
[2] (1925), 3 Can. Bar Rev. 1-24.