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DEMOKRATIE UND RECHTSSTAAT,
FESTGABE ZUM 60. Geburtstag von Zaccaria
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author's intention? In the last chapter he marks the fulfillment of his intention by noting that fewer voters participate in primaries in the South than in other sections of the country and that "these figures refute better than rhetoric the Southern apologists who maintain that the South is as democratic as other sections and that its democratic participation comes in the primaries rather than in the general election." (p. 103) If the extent to which a political system is democratic is determined by the number of people who bother to participate in elections, Professor Ewing could have fulfilled his intention on one page with one simple table and one line of text. In view of this, the thousands of statistics presented seem adventitious to the intention, or the intention is adventitiously imposed on the statistics. If it is important to know how many candidates enter Democratic primary contests for state auditor, or which office attracts the most candidates throughout the South, it would be more convenient to be informed by a handbook of election statistics, or an election almanac, and be spared a commentary which does nothing to illuminate the statistics.

On the last two pages Professor Ewing deals with questions of interest to anyone concerned with southern politics, and here, venturing opinions as to the future, he has been proved wrong by subsequent events. But this failure to predict correctly, it should be pointed out, in no way invalidates the conclusions reached by his study, since the prediction has nothing to do with the study.

Walter F. Berns, Jr.*

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Corresponding to the lifelong interest of Professor Giacometti, the accent of the *Festgabe* centers around the relation between the political process and the *Rechtsstaat* concept. A number of contributions are on specific problems of Swiss law and legal history by Maurice Batelli, André Grisel, Jakob Wackernagel and one by Hans Peters on German post-war constitutional developments. The other articles are more or less focused on the

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major theme. There are two contributions from the Vienna school: Hans Kelsen gives a concise and vigorous restatement of his well known position; Adolf Merkl shows what great variety of forms an individual state-organization may take and yet be counted among the *Rechtsstaat*-family; yet, at the same time he, nevertheless, endeavors to draw a precise enough boundary line between the countless variants and admixtures of the constitutional regime, which guarantees political freedom, and the totalitarian travesties of the concept. The articles of Hans Huber on "The Decline of the Law and the Crisis of the *Rechtsstaat*" and of Werner Kaegi on "*Rechtsstaat* and Democracy" develop a more fundamentally critical position in regard to present day institutions. Starting from a conservative criticism of positivist legality in present day mass society, Huber arrives at a straight antithesis between the conservative character of the law and the dynamics of changing mass needs, under the impact of which the law degrades to "voluntarism without a compass needle." In the same vein, Kaegi sees the main aberration of our time in what he calls "the decisionist-totalitarian concept of democracy." He tries to work out limits to popular and legislative action as necessitated by the maintenance of a more than merely formal *Rechtsstaat* concept.

Huber in his provocative contribution criticizes especially the diminishing sense of legality, the cleavage between administrative practice and legal and constitutional provisions and the general overburdening of the legal system. Yet, at the same time, frequent present day recourse to collective agreement finds equally little favor with him. Such attitude smacks a little of romanticism. In his justified strictures of the handling or mishandling of the law by the administrative bureaucracy, he overlooks that mass society's only chance of escaping increasing state regulation lies in the extension of group autonomy including self-determination of inter-group relations. If this involves some loss of individual freedom through withdrawal of the state from ordering relations between individual and group, it at the same time enhances the chance that the individual receives some form of effective participation in the formation of those decisions which are least remote from his daily concerns.

Similar reservations may be raised in regard to the equally provocative paper of Kaegi. The author's contention that democracy has a special calling for the *Rechtsstaat* and that there exist

particular possibilities for its realization seems open to some qualification. Historical experience has shown that realization of the goals of the *Rechtsstaat*, the maintenance of specific forms and procedures as guarantors of the fundamental rights and freedoms of the citizen, has been easier to achieve under the conditions of the older type of parliamentary and constitutional regime, with its restricted popular participation in the political process than under a mass democracy. The very attempt to extend the reign of the *Rechtsstaat* concept to the mass society has produced strains unknown to the halcyon days of the nineteenth century. Equally buffeted in by the popular sovereign, the executive and the private group, the non-affiliated individual's chance to see his claims vindicated have lessened considerably.

Yet, curiously enough, in Switzerland, in spite of its intermingling of parliamentary procedure and direct democracy, the main challenge to the *Rechtsstaat* has emanated less from attempts at popular or legislative usurpation of power than from the systematic enlargement of executive prerogatives. Therefore it is small wonder that the remaining three articles by Max Imboden on "Municipal Autonomy and the *Rechtsstaat*," Hans Nawiaskey on "Direct Democracy," and especially Hans Nef on the "Progress of Swiss Democracy" evince little fear of arrogation of vast and possibly unconstitutional powers by the sovereign people. Hans Nef goes even so far as to consider extension of direct democracy by way of introducing the device of a federal initiative for simple bills rather than—as under the present arrangement—only for constitutional amendments. For this reason Kaegi's temperamental discourse against the abuse of democratic omnipotence and the identification of majority rule and the dictates of justice might give the erroneous impression that the author has grievous misgivings against the working of direct democracy in Switzerland. This is not the case. He recognizes that under Swiss constitutional and political conditions the rule of the strictly general character of the law must undergo some exceptions in favor of allowing the sovereign people to make individual decisions in cases of far-reaching importance. He equally concedes, though only in a footnote, that the Achilles heel of the present day Swiss constitutional system rests in the over-extension of the powers of the executive to the detriment of both the legislature and the process of direct democracy.

Summing up, both Huber and Kaegi try to prove too much, at least insofar as their own bailiwick, the Swiss Confederation, is concerned. The tendencies which they describe and decry so vividly are less present under the conditions of Swiss society than under many other contemporary governments. Yet, foresight is better than hindsight. And we have all reason to be grateful to all those who familiarize us with their present thoughts and concerns on that elusive jewel, the *Rechtsstaat*.

Otto Kirchheimer*

THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF THE PROVINCE OF QUEBEC [McGill Legal Studies No. 2], by George S. Challies. Wilson and Lafleur, Limited, Montreal, 2d ed. 1952, pp. xii, 216.

This second edition brings up to date and in certain chapters considerably amplifies the original edition of 1940. Ordinarily a second edition merits a book note, but not a review, much less one appearing almost two years after its publication. This book, however, is the only detailed monograph in the English language on the development and substance of the action for unjustified enrichment in French and Quebec law;¹ as such it can be of tremendous influence to the good in Louisiana, where the basic law is so similar, but where this particular subject is all but unknown.

The principle of unjustified enrichment, that no one should be enriched at the expense of another without justification, is the foundation for much that is in any system of law, for it is a corollary of the virtue of justice. Precisely because it is a basic principle, it is applicable to phenomena far too numerous and too varied to permit its abstract statement to serve as a rule of law for all of them, and its articulation for the most part necessarily is in terms of specific rules of law for particular situations. Thus Justice Challies can list sixty-four articles of the Quebec Civil Code which he considers founded on the principle, though

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1. John P. Dawson's "Unjust Enrichment—A Comparative Analysis" (Little, Brown and Company, Boston, 1951), is a splendid book on the level of comparative legal science, designed to provoke thought on the problem in Anglo-American law. It contains an account of the action for unjust enrichment in France sufficient for the author's purpose, but it is not a treatise on the subject, as is Justice Challies' book.