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Book Reviews

ESTATE PLANNING AND TAXATION. Two volumes. By William J. Bowe. Buffalo: Dennis & Co., Inc., 1957. Pp. lvi, 614. \$36.00.

This is a comprehensive and analytical book on the broad subject of estate planning, including those aspects having to do with the preparation of documents, the inter-relationship of factors taking effect at death and those taking effect before death, and the necessities, both of commission and omission or avoidance, resulting from the application of the tax laws to the subject.

The material was developed from preparations for lectures to practicing attorneys at the University of Colorado in 1956. Thus, the subject is approached from the standpoint of the practicing lawyer, his needs and problems. It has the virtue of being comprehensive and at the same time detailed and specific enough in the numerous areas and divisions of the field to provide a basic understanding of as well as to suggest answers to the practical problems encountered in the planning of a client's estate. It is not meant to replace the tax services and does not do so. They must be used to supply the ultimate answers to the unusual or the particularly complicated questions that may emerge in the process of advising the individual client regarding his estate and business problems. However, one asset of the book is that Professor Bowe's treatment of the subject matter clarifies the branches of the estate planning field, thereby assisting the non-expert in determining where it may be fruitful to check further, such as in the tax services, for additional information on a point of particular concern, for the case law, or for recent decisions or regulations.

Of keen interest to the reviewer was the author's method of organization of the text material and its presentation in the table of contents, which facilitates quick reference to the discussion of particular subjects. Volume I is divided into three parts, the headings of which indicate at a glance the principal large categories of the estate planner's problems, namely those related to (1) transfers at death, (2) transfers during life and (3) business purchase agreements. Following the general table of contents is a "Detailed Table of Contents" in which the subjects and areas of discussion are reduced to the smaller categories. For example, in part II, relating to transfers during life, Professor Bowe begins (in chapter VIII) with a basic discussion of the federal gift tax, the following sub-headings appearing: "Deductions and Exclusions"; "Tax Saving Through Gifts" (here two of the sub-paragraphs are "Relationship Between Estate and Gift Tax Rates" and "Advantages of Lifetime Gifts"); "Gifts of Future Interests"; "Gifts to Minors"; "Marital Privileges" (here the sub-paragraphs are "Gift-splitting" and "Gift-tax Marital Deduction"); "Valuation"; and "Selection of Gift Property."

The basic purpose of the book is to assist the practicing attorney in dealing with the practical problems of outlining an estate plan, plus the drawing of the proper papers to accomplish his and the client's desires with the maximum of tax savings. This purpose is carried out by rather frequent cross-references in the text to other portions of the book dealing with related matters and by numerous suggested forms which appear throughout the text and in comprehensive form at the end of volume II. In most instances, Professor Bowe has succeeded in talking through the book in a manner suggesting a question being answered or a personal explanation being given. This tends to promote clarification and simplification of meaning, a quality always desirable when dealing with such a complicated subject.

The various phases and factors of a particular subject are considered in general at the same point (with references to other parts where necessary) so that the requirements and avoidances are rather simultaneously called to the attention of the reader. It also provides a link of understanding between the effect of estate taxes, income taxes and business practices. One illustration of this may be found in volume I at page 540, where, in discussing buy and sell agreements between stockholders of corporations, it is pointed out that the stock of the deceased stockholder will receive a stepped-up basis (asset value) on the death of the stockholder, resulting in no income tax on sale under the agreement, and thus property of a deceased stockholder is taxed only once under the estate tax, rather than subjected to both estate and income taxes. Although every detail cannot, of course, be supplied, the inter-relationship of the various taxes are discussed in connection with insurance policies, large and small estates, farm estates, the family corporation and other areas of interest to the planner. This type of comprehensive treatment, together with the extensive forms, makes it not only a tool of the law but a whole steamshovel in the area of estate planning.

This book might have given a clear indication in part I as to the relationship between the will, and its provisions, and the discussion of the estate tax. While the idea undoubtedly is that one must know to what the estate tax applies before proper provisions of a will can be drafted, usefulness to those not experienced in the field might have been enhanced had this connection been emphasized.

Interesting additions to the book are an introductory section entitled "A Quick Survey of Basic Estate Tax Planning" giving various factors which must be considered in estate planning with references to the chapter or chapters of the book in which they are discussed, and a section containing a survey of forms which provides a quick reference to the complete form for a particular planning purpose.

This is a book that should be studied, and for the student or practitioner of practical estate planning, it is an extremely valuable and worthwhile work.

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CONFLICT OF LAWS, PART ONE. By Albert Ehrenzweig. St. Paul: West Publishing Co., 1959. Pp. 367. \$6.00.

Broad-gauge legal scholarship is an exacting challenge. Too often the challenge is not met but avoided: The writer either ignores the difficulties of his subject, turning out a compendium of case squibs with connecting commentary, narrows the scope of his activity so as to turn out erudite infinitesimalities, or, terrified by the enormous labor of doing a big job well, decides not to write at all, turning out nothing but book reviews. It is important, therefore, when a scholar is willing to undertake the labor and the risks of error involved in a major work.

Albert Ehrenzweig, Professor of Law at the University of California, Berkeley, has accepted the challenge of writing critically about a large field of law. His subject is conflict of laws. He brings to it a wide experience in public and private practice, both abroad and in this country, and of teaching and writing. In the main, he has met the challenge. In a few respects he has not. Ironically, the very excellence of his better discussion induces a discernment in the reader which then lays bare some of the author's weaker material. But whatever the precise balance between the stronger and the weaker portions of his treatment, we are obliged that the author has come into print.¹ His book is well worth reading and having, both for the lawyer and judge and for the student and teacher.

Professor Ehrenzweig has made a number of departures from the more conventional treaties on conflicts. In the first place, he has sought to avoid undue generalization about the conflicts rules themselves. Professor Joseph Beale, and the Restatement of which he was so much the author, attempted such a generalization of conflicts that it became a full-fledged subject unto itself. The generalizations which Beale formulated are not only of illusory certainty but frequently are totally divorced from the substantive law problems about which the conflict of laws occurred. Following the philosophy of Walter Wheeler Cook, Professor Ehrenzweig has attempted to recognize that conflicts is not so much a "subject" with subdivisions relating to various bodies of substantive law as it is a series of subdivisions of particular bodies of substantive law. This difference of view has manifold practical consequences in how we look at conflicts problems.²

In the second place, Professor Ehrenzweig has differentiated between conflicts arising between the law of this country and foreign countries on the one hand, and, on the other hand, those arising between sister states in this country.³ The impact of

1. Much of the material has appeared previously in the author's many law review articles. The book ties this material together, updates it and in a number of instances reshapes it.

2. For example, it cannot be said that a judgment is a judgment is a judgment. A "final" adjudication in domestic relations law is not the same thing as a "final" adjudication in a case involving title to real property.

3. Perhaps equally important, he has largely or entirely abandoned any reliance on intrastate venue cases as being illustrative of, let alone authority for, rules relating to conflict of laws. Beale in particular made wide use of cases involving venue and "jurisdiction" of local courts—particularly courts of limited jurisdiction. This is both annoying and inaccurate, and probably had adverse effects not only on the development of conflicts rules but also on the law of venue.

the full faith and credit clause on judgment recognition makes this differentiation useful, probably indispensable. Moreover, because of his European background, the author is able to give us a comparative treatment of the civil law and common law approaches both to conflicts law as such and to the substantive law's treatment of particular problems. In a shrinking world (St. Louis is now only 300 miles from an ocean port), these problems are becoming of increasing practical importance to the lawyer.

Finally, the author's approach is primarily an analysis and critique of the conflicts rules rather than a restatement of them. At times this takes the form of an explanation of what the courts are really doing, as distinct from what they say they are doing. At times it is a call for rejection both of what is being said and what is being done. At times it is a voice crying in the wilderness of entrenched doctrine. But throughout it is a demand for reconsideration, re-evaluation and reformulation. This demand must be met if the law is to keep abreast of the burdens which a mobile and urbanized society is placing on it. Conflicts concepts formulated 100 years ago, or even 50 years ago, are no longer adequate to the purposes they are supposed to serve today. In this book we are constantly met with this fact and called upon to do something about it.

So much, then, for the basic orientation of the book. What is its specific subject matter? The present volume is the first of two, later to be combined into one. It deals with what we ordinarily call jurisdiction and judgments—the power of a court to act and the consequences elsewhere of the fact that it has acted. (The second volume will cover choice of law.) Of especial interest are two large sections, one dealing with the litigating capacity of parties—such as nonresident guardians and unincorporated associations—and the other dealing with divorce and other domestic relations litigation. In addition, he deals with jurisdiction in personam and in rem, refusal to exercise jurisdiction, both for “want of jurisdiction” and on the ground of *forum non conveniens*, and the effect of judgments of various kinds rendered in various circumstances. Throughout the book we can feel the author's comparative law approach and the primacy he places on the substantive law.

When he is good, Professor Ehrenzweig is very good. Thus, he deals powerfully with the traditional rules governing the local capacity of foreign guardian,⁴ the supposed differences between jurisdiction in rem and jurisdiction in personam and the consequences thereof,⁵ *forum non conveniens* and its relation to in personam jurisdiction,⁶ and divorce jurisdiction and recognition.⁷ In the course of his discussion he gives us valuable insights into some troublesome problems of local law, such as the rules of res judicata and collateral estoppel. It is also interesting to see him

4. Pp. 45 et seq.

5. Pp. 80-88.

6. Pp. 119 et seq.

7. Pp. 231 et seq.

draw on the post-*Erie* cases involving the relation between state and federal law for light on the relation between the law of state and state.⁸

At times he is a little disappointing. Thus, his conviction that broad generalizations are dangerous and inaccurate leads him to minimize unduly the continuing impact of established generalizations. For example, the rules relating to personal jurisdiction probably ought to vary with the substantive law context,⁹ but I think it an overstatement to say that such is the law today.¹⁰ Moreover, in general I think he gives an inadequate picture of the divergencies of view found in the Supreme Court's decisions of the last two decades: While perhaps there are trends, the trends are more sinuous and halting, and the law more uncertain, than Professor Ehrenzweig implies.¹¹ Again, the conflicts problems of class suits seem to me to be inadequately penetrated, mostly because the civil procedure men have given him so little to work with. Finally, in the area of domestic relations, where he has so much that is valuable, I think he has taken a wrong turn on the problems of child custody decrees. He would emphasize, to the practical exclusion of other factors, the power of each court to "assume or decline jurisdiction over a foreign child, without regard to legalistic formulas, whenever the welfare of the child so requires."¹² I think this approach will postpone and perhaps complicate the problems without solving them.

All of these criticisms, however, should not detract from the value and importance of Professor Ehrenzweig's book. While his ideas are often novel, often difficult, and cast in a style and arrangement which sometimes makes it hard to follow him

8. Fortunately, he does not put too much stock in the Supreme Court's actual treatment of "substance" and "procedure" in the *Erie* field. As *Byrd v. Blue Ridge Rural Elec. Coop.*, 78 S. Ct. 893 (1958), demonstrates, the Court has a long way to travel, mostly by way of retreat, before it will have developed a workable solution to this problem.

9. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

10. See *Hansen v. Denckla*, 357 U.S. 235 (1958). In particular, compare the effect on non-divorce cases, such as *Hansen v. Denckla*, of flat statements in the divorce cases, e.g., *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1950), that personal jurisdiction is required to bind an absent spouse on matters other than dissolution of the marriage bond itself.

11. For example, he says "That administrative acts are entitled to full faith and credit . . . it now no longer in doubt," p. 171, citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943). In the light of *Carroll v. Lanza*, 349 U.S. 408 (1955), this is a pretty strong statement.

12. P. 276. He has support in a large number of recent cases. See, e.g., *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956). Elsewhere, he characterizes child custody proceedings as "extra-litigious," p. 202, in the sense that they are not merely adversary proceedings but involve active intervention by the state. But the intervention of the state in a particular custody battle is usually at the behest of one of the parents, and frequently a parent who, because he lives locally or for some other reason, believes he can get the court to "intervene" in his favor. The answer to the problem, it seems to me, will not be found in allowing every court with colorable claim to jurisdiction to "intervene" and redetermine the child's welfare, but in recognizing that a determination of the child's custody ought to have substantial invulnerability to attack elsewhere. To have the rendering court reconsider the needs of the child is something else again. See my thoughts on this in *Hazard, May v. Anderson*, etc., 45 Va. L. Rev. 379 (1959).

easily, effort spent on these pages will be well repaid.¹³ The author uses recent cases for all propositions except those requiring historical explanation, or for which the only available authority is old. He cites secondary materials liberally, thus providing a quick avenue into the detailed collections of cases and accompanying analysis which are to be found in the legal periodicals, while at the same time avoiding either prolix citation or barrenness of authority. Especially for the lawyer who has a case on the adverse side of a traditional doctrine, Professor Ehrenzweig has an armory of historical, logical and authoritative weapons for advocacy. How much effect his thinking will have on the judicial process remains to be seen. I suspect it will be a good deal. But this will largely depend on the willingness of courts to forego the "let George do it" reliance on legislative solution to legal problems and instead to push on with the unfolding process which is the common law's strength.

GEOFFREY C. HAZARD, JR.*

VOICES IN COURT. Edited by William H. Davenport, New York: Macmillan Co., 1958. Pp. xxxvi, 216. \$3.50.

This book, the editor of which is a professor of English who also on previous occasions was interested in building a bridge between law and literature, is a valuable anthology of treasures of the art of literary style. The miscellaneous subjects covered therein by various authors, lawyers as well as non-lawyers, have this in common that all of them are to a certain extent related to law and those professionally concerned with it. And most of the separate pieces thus assembled are human interest features. Lawyers as well as those who are not our brethren in the legal profession are thus offered an opportunity for inspiring and delightful reading. It does, of course, not detract from the value of the book that the reviewer does not completely agree with the selection that was instrumental in its composition, exclusion as well as inclusion. This is certainly a matter on which there may be reasonable disagreement and on which the editor's taste and the space made available to him by the publishers must be the final criterion. While one or the other reader may not be fully satisfied in this respect, no reader will fail to welcome the enrichment which the editor has given to the anthology by placing before each of its component items a concise, but interesting, introductory note, except in those few instances where this is substituted by a cross-reference to a preceding note.

The main title of the book, *Voices in Court*, is a misnomer if the reviewer is correct in believing that that phrase properly applies only to what is said in court,

13. The author's style is not only complex but very compact. Moreover, the text has innumerable cross-references, both explicit and implicit. Accordingly, following the author's analysis will be difficult for the student and for the lawyer who is rusty on his conflicts law. The best way to approach the book, therefore, is to look through it from cover to cover with some care before attempting to search out a particular point. For the latter purpose, the index seems quite good.

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may perhaps also be applied to what is said by the court, but is not apt to refer to something which is neither said in court nor by the court. Numerous items of the last mentioned kind are, however, included in the anthology. It would seem that a better omnibus label for its contents would have been "Law and Literary Style," since each of its component parts is an achievement in the manner of expression of thought by exquisite language.

In outlining the particular features forming this anthology, we shall not follow the order of their arrangement in the book. Instead, we shall start with what appears at its end. Certainly, that brilliant star in the firmament of American jurisprudence to whom, among numerous other valuable contributions, we owe the most profound exploration of the law of evidence, could not well have been omitted in the galaxy of great lawyers who appear among the authors of parts of the present book. Thus we find as the closing piece a reprint of Wigmore's essay entitled "A List of One Hundred Legal Novels," in which he defines a "legal" novel as one "in which a lawyer, most of all, ought to be interested, because the principles or the profession of the law form a main part of the author's theme." Attached, by him, is a list, on a selective basis, and omitting pure detective stories, of one hundred novels of this kind, American, English, French, and also of authors of other nationalities. Since in its revised form it appeared in 1922, it cannot be expected to be up to date, and the editor would have done well had he supplied a supplemental list indicating, on a similarly selective basis, the important legal novels that appeared subsequently, including, for instance, Robert Traver's *Anatomy of Murder*.¹ Moreover, even as of 1922, Wigmore's list has conspicuous omissions, for instance, by not including Dostoevsky's *Crime and Punishment*, the same author's *The Brothers Karamazov*, and Stendhal's *Scarlet and Black*.

Much space is given in this anthology to write ups that, broadly classified, belong in the field of legal biography. Thus, under the title "Holmes Prepares for the Bar," an excerpt from Catherine Drinker Bowen's *Yankee from Olympus* is presented. An interesting portion of the same author's *The Lion and the Throne*, a story of the life of Sir Edward Coke, is included under the title "Trial of Sir Walter Raleigh (Part I)." The tragic celebrity of "Jeffreys, The Hanging Judge," is recognized by a piece so entitled, taken from Thomas Babington Macaulay's *History of England*. Two famous eighteenth century judges of Scotland are, under the heading "Lord Monbaddo and Lord Braxfield," portrayed in an extract from W. Forbes Gray's *Old Scots Judges*. Biographical, but at the same time a story of the historical background of one of our most important constitutional cases, is the item entitled "Marbury Versus Madison," a selection from Albert J. Beveridge's *Life of John Marshall*. Biographical

1. The author covered by the pseudonym "Robert Traver" is Justice John Voelker of the Supreme Court of Michigan who, before that best seller, *Anatomy of Murder*, had under the same pseudonym and under the title *Small Town D.A.*, published a volume wherein he recollects in a most amusing way his human interest experiences as public prosecutor. In this connection, another fascinating book written by a contemporary judge may be mentioned: Bernard Botein's *The Prosecu-*
tor.

also is a piece entitled "The New Supreme Court," taken from Carl Swisher's *Robert B. Taney*, and dealing with John Marshall's successor in the office of Chief Justice of the United States Supreme Court, a great judge too, who, however, became a tragic celebrity because of his opinion in the Dred Scott case. Incidentally biographical is an excerpt from Alpheus Thomas Mason's *Brandeis: A Free Man's Life*, entitled "Holmes and Brandeis Dissenting." And a short, but highly artful, feature on an outstanding American trial lawyer, who at a relatively young age passed away not so long ago, a profile of Lloyd Paul Stryker entitled "Knight with the Rueful Countenance," published in Stryker's lifetime in *The New Yorker* and authored by Alexander Woolcott, is also included. Describing chief justices of the United States Supreme Court of which he is a member most ambitious to write his opinions in a high class language, is Justice Felix Frankfurter in his "Chief Justices I Have Known," a sample of his *Of Law and Men*. Particularly dealing with one of these former chief justices, is the feature entitled "Fuller's Increasing Influence on the Court," an extract from Willar L. King's *Melville Weston Fuller*. Most touching experiences of a British lawyer with people who were about to die are revealed in Reginald L. Hine's "The Solicitor and the Will," taken from his *Confessions of an Un-Common Attorney*. Chief Justice Marshall, whom we have mentioned before, is also represented in this book by his "Letter to Joseph Story," addressed to a great legal scholar and judge in his own right, which letter is reproduced from *An Autobiographical Sketch by John Marshall*, edited by John Stokes Adams. Last, but not least, tribute is paid in this legal-biographical collection to the memory of that American lawyer who from most humble circumstances arose to become one of the greatest presidents this country ever had, Abraham Lincoln. Unfortunately, "Lincoln the Lawyer," part of Carl Sandburg's *Abraham Lincoln: The Prairie Years*, is a rather insignificant part of the great biographical work of the leading Lincoln historian. Nothing is included in the book on the most adventurous life of one who was probably the most colorful, most romantic, and at the same time most questionable character that ever sat on the Bench in this country, the one time Chief Justice of the Supreme Court of California, David S. Terry, who, in a duel, killed a United States senator, and was himself killed by a United States deputy marshal, acting in protection of the life of Justice Field of the United States Supreme Court, then on circuit in California.² And, of course, nothing could be included from Eugene C. Gerhart's *America's Advocate: Robert H. Jackson*, since this excellent biography of the American chief prosecutor at the historical Nuremberg trial appeared at about the same time as the anthology here reviewed.

Only on judicial opinion is printed in this book, the one wherein Judge Woolsey of the United States District Court, Southern District of New York, stated the reasons for his famous decision dismissing the libel of confiscation brought by the United States against James Joyce's *Ulysses*, a leading case on what may legally be con-

2. A judicial aftermath of Terry's involuntary death was the criminal prosecution of the federal deputy marshal, Neagle, who killed him. See *In re Neagle*, 135 U.S. 1 (1890).

sidered as "obscene." The editor would have done well had he given at least one specimen of those decisions whereby American judges sometimes show that the seriousness of the law and the dignity of the judicial office do not preclude an ingenious display of a sense of humor by a witty judge. And most regrettable is that he did not include at least one of those masterpieces of literary style as well as legal acumen whereby Holmes became "The Great Dissenter," for instance his dissenting opinion in the naturalization case of Mrs. Schwimmer.³

Several actual and fictitious trials are referred to in the book. Among the actual ones is the famous defamation action wherein Oscar Wilde appeared as plaintiff against the Marquis of Queensberry, as the tragic aftermath of which the great poet was criminally prosecuted for and convicted of homosexuality. The extract included is from H. Montgomery Hyde's *The Trials of Oscar Wilde*, and, in the editor's words, "is from the cross-examination on the afternoon of the second day when Wilde who up to that point had toyed with the great cross-examiner Sir Edward Carson, made his fatal slip." The masterful performance of two celebrities among one-time British trial lawyers, Sir Rufus Isaacs, then Attorney General, and Sir Edward Marshall Hall, in the celebrated case against the poisoner Seddon, Isaacs acting as prosecutor, and Hall as defense counsel, is presented in the item entitled "The Seddon Case," taken from Edward Majoriban's *For the Defense: The Life of Sir Edward Marshal*. Another defamation case which resulted in a catastrophe for the plaintiff, though in a different way from the Oscar Wilde case, and in which another luminary of the one-time British Bar, Sir Charles Russell, conducted the cross-examination that became ruinous to the plaintiff, is recalled in *The Baccarat Case*, a loan piece from Edward Wilfrid Fordham's *Notable Cross-Examinations*. The case was at the time most sensational since it concerned a scandal in which the then Prince of Wales, later King Edward VII, was involved. Finally a murder case involving not an historical figure, but a "small fry" defendant, an American Negro, but most noteworthy by the highly idealistic and successful performance of his voluntarily uncompensated counsel, Mr. Clinton Gidding Brown of San Antonio, Texas, is in an extremely heart-warming manner described by the latter in "The Jim Wheat Murder Case," taken from his book *You May Take the Witness*.

Turning to the fictitious trial stories included in this anthology we must first mention Stephen Vincent Benét's *The Devil and Daniel Webster*, describing "with local color and Faustian overtones," to use the editor's words, the trial of Jabez Stone before Justice Hathorne, with the Devil and Daniel Webster as opposing counsel. The author has made numerous other notable contributions to the American literature, including *John Brown's Body* for which he received the Pulitzer Prize for Poetry in 1929. But, in the reviewer's eyes he has reached the peak of his creation in that wonderful account of the forensic battle between Webster and the Devil. Among similarly outstanding pieces of trial fiction which, however, are not included in the

3. *United States v. Schwimmer*, 279 U.S. 644 (1929). Within a year, the *Schwimmer* case was overruled in *Girouard v. United States*, 328 U.S. 61 (1946). As in other instances, what Holmes had said as a "crier in the desert" became subsequently "the law."

anthology is the reviewer's favorite, Anatole France's, the French Nobel Prize winner's, *Crainquebille*. Space therefore could have been gained by not including another masterpiece which is too well known to have needed inclusion, "Bardell v. Pickwick," from Charles Dickens' *The Pickwick Papers*. Most welcome is, however, the inclusion of the observations of an outstanding legal historian on Dickens' *Bleak House*, the item entitled "Bleak House and the Procedure of the Court of Chancery," taken from William S. Holdsworth's *Charles Dickens as Legal Historian*. One of the shortest, but also of the most delicious items of the collection, is "Madame Luneau's Case" by Guy De Maupassant. It tells about a kind of Salomonic judgment in a trial wherein the plaintiff sought to recover a stipulated compensation for the making of a child. The reviewer does not agree with the editor's comment that "it is written with a total cynicism that is astonishing even today," rather believes that the story is satirical, but not cynical. Turning to another item, that great novelist, Anthony Trollope, is represented by an extract from his *Phineas Redux*, entitled "Phineas Finn Awaits Trial or Chaffanbrass on the Law." The full story is that of a trial for murder in which the innocent defendant is acquitted; there is little of this in the particular extract which contains, however, interesting professional observations of the fictional Mr. Chaffanbrass, supposed to be old barrister with great experience as defense counsel. Not represented in the anthology are the American lynch trial fictions, of which the reviewer believes Erskine Caldwell's *Trouble in July* to be the best one. But included is that most ingenious piece of writing of a Harvard Law School professor, Lon L. Fuller's *The Case of the Speluncean Explorers*, which is a most felicitous merger of the fictional story of a murder trial, to take place in "4300," with a serious discussion of legal problems. Before concluding these references to the fictional part of the book, one of the items omitted therein will be singled out, the German Heinrich von Kleist's classic short *Michael Kohlhaas*. It most suspendingly deals with the psychological commutation of an honest man who out of a fanatic embitterment about a miscarriage of justice of which he became a victim continues his theretofore dignified life as a criminal, and thus ends on the gallows although by his inborn character he was not predestined therefor.

Apart from those parts, which are particularly attractive from a human interest standpoint, the anthology contains also numerous outstanding write-ups that are bound to be of greater interest to those professionally connected with the law than to lay readers. While regrettably nothing is taken from Rousseau or Montesquieu, there is included an essay "On the Law" by the French sixteenth century writer and philosopher Michel de Montaigne. From Henry David Thoreau's *On the Duty of Civil Disobedience*, "based on an incident involving his refusal to pay polltax to a government which allowed slavery," as the editor relates, we get his essay entitled "Unjust Law." It is well known that Gandhi, in his tactics of passive resistance which finally resulted in the sovereign independence of India, was inspired by Thoreau's book. That great judge, Learned Hand, is represented by his essay on "The Future of Wisdom in America." The late Arthur T. Vanderbilt, equally eminent as judge and as scholar, tells us about "The Growth of Substantive Law," in an extract from his *Men and Measures in the Law*. A distinguished federal judge, John C. Knox, looks back to the prohibition era in "Trouble with the Volstead Act," a

portion of his *A Judge Comes of Age*. A fiction entitled "Old Judge and Young Lawyer," the ending of James Gould Cozzen's *The Just and the Unjust* is also included. This novel is, according to the editor of the anthology, strongly recommended by the Harvard reading list for law students. The reviewer believes, however, that another best seller of the same author, Cozzen's *By Love Possessed*, although most interesting from a legal point of view,⁴ might be dangerous reading⁵ for such beginners in the legal profession who have not yet a firm understanding of its ethical principles. Close to the reality of professional ethics is Charles P. Curtis' ingenious essay "The Advocate," reprinted from that author's *It's Your Law*. The analysis, therein, of the ethical position of the defense counsel of a guilty client is one of the best discussions the reviewer has read of that perennial problem which seems to create more difficulty for laymen than for lawyers and has been frequently treated in fictional works, for instance in Galsworthy's notable play *Loyalties*. The reviewer wholeheartedly subscribes to the following statement of Mr. Curtis: "In a way the practice of law is like free speech. It defends what we hate as well as what we most love." Turning from the advocate to the judge, we find the statement that "a great judge must be also a great man" in an essay on "The Judicial Temperament" which is taken from *Homilies and Recreations* by John Buchan, one-time Governor-General of Canada. He also says that "in the perfect judicial style there must be both wit and humour on occasion. . . ." Included in the present book are two famous talks of Oliver Wendell Holmes, "The Profession of the Law" and "The Path of the Law." And in the item entitled "The Criminal Law" we find a criticism of our penal system by that sharp-tongued, but ingenious critic, H. L. Mencken, reprinted from *A Mencken Chrestomathy*. Francis L. Wellman's outstanding writings on the art of handling testimonial evidence are represented by three items, one entitled "Art in Direct Examination," which is reprinted from his *Day in Court*, another entitled "The Manner of Cross-Examination," from his *The Art of Cross-Examination*, and the third one, entitled "The Cross-Examination of Mrs. Reginal Vanderbilt," from the same book. A British prosecutor's brilliant cross-examination, conducted by the now Right Honorable Justice Birkett, is discussed in "The Reputation of the Dead," an extract from Joseph Dean's *Hatred, Ridicule, or Contempt*. We must finally mention three items that brilliantly deal with the relation between law and language and law and literature, namely: Lord Macmillian's "Law and Language," reprinted from his *Law and Other Things*, an extract from Benjamin N. Cardozo's *Law and Literature*, this extract bearing the same title, and an address on *Language, Legal and Literary* by John Mason Brown, delivered, in the editor's words, by "an American, not a lawyer by profession, but a distinguished literary figure."

The following passage from that speech may well serve as the conclusion of this review: "It is plain libel to assume, as some people do, that lawyers and jurists always employ English as if they were drawing up wills. Lawyers and jurists as writers do face certain dangers unknown to professional authors. They are excused

4. Gould, "By Love Possessed": A Review from the Legal Point of View, 44 A.B.A.J. 731 (1958).

5. Koessler, *By Love Possessed Article Was Misleading*, 44 A.B.A.J. 1037 (1958).

from the necessity of entertaining and interesting their readers, and all too often—let's face the evidence—they take a cruel advantage of this enviable exception. Nonetheless, some of the best writing that we have has come from the pens of lawyers and especially judges.”

MAXIMILIAN KOESSLER*

EHRlich's BLACKSTONE. By J. W. Ehrlich. San Carlos, Calif.: Nourse Publishing Co., 1959. Pp. 987. \$15.00.

There are those among the adepts of law who because of natural gifts or circumstances influencing their education and further development are apt to become great advocates. Such one seems to be our contemporary, Mr. J. W. Ehrlich, a San Francisco attorney whose reputation certifies to his extraordinary efficiency as trial counsel. The inside story of his working in the defense of people accused of crime is revealed in his autobiographical writeup entitled *Never Plead Guilty*. Other members of the legal profession are not of a timber to become easy preys of the “devil of advocacy.” Such one was Sir William Blackstone who at the time when he first attempted to become prominent at the Bar was a failure in this respect,¹ but whose fame as a scholar is still alive, although he wrote at a time when people believed in witchcraft² and in our present days the predominant fear is that of an atomic war. He owes the immortality of his name to the revolutionary way in which he taught English law at Oxford, prior to and after becoming the first Vinerian professor³ at that English university,⁴ where before only Roman and Canonic law had been taught in such a manner, and, even more, to the general recognition which was given, in England as well as in this country,⁵ to his *Commentaries on the Laws of England*. The first book of this monumental work which

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1. See Odgers, *Sir William Blackstone*, 27 YALE L.J. 599, 612 (1918). Generally, on Blackstone's life and work, see LOCKMILLER, *SIR WILLIAM BLACKSTONE* (1938).

2. Blackstone himself wrote in the *Commentaries*: “To deny the possibility, and, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth in which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested or by prohibitory laws, which at least suppose the possibility of commerce with evil spirits.” EHRlich's BLACKSTONE 772 (1959).

3. That chair was established after the death of Charles Viner who in his will had bequeathed for this purpose the copyright of his *Abridgment of Law and Equity* and other property totalling in value 12,000 English pounds. LOCKMILLER, *op. cit. supra* note 1, at 44.

4. The Vinerian professorship at Oxford served in this country as the inspiration for the creation, in 1779, of a similar chair at the William and Mary College in Williamsburg, Virginia, an act of Thomas Jefferson, then governor of Virginia. The first common law professor at that college was George Wythe, one of the pupils of whom was the later Chief Justice John Marshall. LOCKMILLER, *op. cit. supra* note 1, at 46.

5. “Blackstone's influence has been far greater in the United States than in England.” LOCKMILLER, *op. cit. supra* note 1, at 181.

has become a classic and which, incidentally was also a great financial success,⁶ appeared in 1765; the fourth and final one in 1769. There have since been numerous republications of various kinds, including quite a few good American ones. The prevailing trend of the modern editions has been to bring good old Blackstone up to date by more or less elaborate footnotes indicating what has ceased to be living law, rather has become dead law, and what new legal developments, unforeseeable by the author of the *Commentaries*, have meanwhile taken place.

The present book takes a different approach as announced by Mr. Ehrlich in the following words of his short preface:

. . . each edition of Blackstone has been overwhelmed with a larger avalanche of footnotes and commentaries on the commentaries. I have taken Blackstone's original editions, excised the unnecessary and confusing passages and digressions which are not of interest to the law today, translated any necessary Latin, and deleted all footnotes.

The result is a handy and neat volume, containing a strongly abridged and slightly revised version of that text of which Mr. Ehrlich in the same preface says:

By virtue both of his knowledge of law and of his literary genius Blackstone produced the one treatise on the common law which for all time must remain a part of English literature.

Much of Blackstone's presentation and discussion of law that has become obsolete, as for instance the details of the then feudal system, has been retained also in this edition, and rightly so. The *Commentaries* are nowadays mostly of interest for the student of legal history. And even where Blackstone writes about law that has long ago ceased to be in effect, his clear expression of his ideas, his elegant thought, in accordance with the fashion of the epoch, sometimes stilted style,⁷ his ingenious attempt to rationalize the common law as a body of logically consistent and ethically and socially sound principles,⁸ will continue to be delightful reading to lawyers as well as educated laymen.

While Mr. Ehrlich is technically wrong when in the preface he states that Blackstone's *Commentaries*, more than any other single book, are "the codification" of English and American law, his enthusiasm thus expressed is well understandable. And although there will be those who will not like the absence of footnotes establishing a bridge between Blackstone's and our modern law, there will be others who will agree with Mr. Ehrlich's belief that the footnotes are a nuisance and who will therefore welcome their having been thrown overboard in this new edition.

MAXIMILIAN KOESSLER*

6. "It is said that Blackstone realized no less than £16,000 by his *Commentaries*—a remuneration which, I believe, no writer ever received for a single law-book before or after." Odgers, *supra* note 1, at 612.

7. Criticized by John Austin.

8. A sharp antagonist of Blackstone's views was Jeremy Bentham who, in his first book, *A Fragment on Government*, "was cavalierly critical of Blackstone's smug belief that the common law was the embodiment of reason and had flowered to perfection." MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 261 (1959).

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THE GREAT LEGAL PHILOSOPHERS: Selected Readings in Jurisprudence. By Clarence Morris. Philadelphia: University of Pennsylvania Press, 1959. Pp. 571. \$10.00.

What is the ideological essence of that conception, referred to as law, which is inherent in and gives a glamour of moral authority to those rules and institutions that, varying according to time and place, constitute the so-called positive law? Is this ubiquitous social phenomenon a creation of that species of animal which conceitedly calls itself "homo sapiens," or is it inherent in its very nature? What is the difference between law and justice, and what is the difference between law and ethical precepts? What is the relation between law and logic, between law and history, and between law and power? Is the process of adjudication a process of creation or one of merely application of law, or is it both? What is the relation between customary law and a mere custom? Is what has been called "living law" law or a sociological fact? Does law cease to be law when it has become obsolete because the conditions in the light of which it was created do not exist any more? Is international law properly denominated law, or is it something different from law? Those and other questions of a similarly general nature have inspired penetrating thoughts of eminent authors throughout the ages of recorded history. The following defeatist statement is contained in a popularly, but ingeniously written book: "We dream of 'a government of laws, not men.' But at the very outset of any approach to the law we discover a rather astounding and embarrassing fact: It is said to be impossible to say exactly what law is. The question what law is is the dark cat in the bag of jurisprudence. A lawyer could not answer the question—even for a fee."¹ Yet those intellectual luminaries who by various propositions have attempted to solve that allegedly insolvable problem are most numerous, although only twenty-two of them are covered in the present anthology.

It includes extracts from the writings of two important figures of the pre-Christian era, the great Greek philosopher Aristotle (384-322 B.C.), and the famous Roman orator, advocate, and politician, Marcus Tullius Cicero (106-43 B.C.). The scholastic approach of the Middle Ages to the nature of law, particularly concerned with the relation between natural, human, and divine law, is represented by the reproduction of a part of the *Summa Theologica* of Thomas Aquinas (1225-1274). Turning to the post-medieval period of history, the editor introduces the Dutchman, Hugo Grotius (1583-1645), who is reputed to be the founding father of systematic treatment of international law, and whose famous book, *The Law of War and Peace*, is represented by excerpts from its jurisprudential part. Next in the galaxy of great legal philosophers covered in this book are two Englishmen whose names are too well known to each intellectual in this country to need further comment: Thomas Hobbes (1588-1679)² and John Locke (1632-1704).³ There follows the Frenchman Baron de Montesquieu who is represented by extracts from his most influential book *The Spirit of Laws*, and who Justice Oliver Wendell Holmes seems

1. SEAGLE, *THE HISTORY OF LAW* 8 (1946).

2. Covered by extracts from *LEVIATHAN*.

3. Included are excerpts from his two *TREATISES ON GOVERNMENT*.

to have considered as the exponent of what is nowadays called sociological jurisprudence.⁴ Turning to a famous Scotchman, David Hume (1711-1776), the editor presents parts of that book which was probably Hume's most important publication, although it originally "attracted little notice and sold poorly,"⁵ *A Treatise of Human Nature*, interspersed with observations belonging to the realm of legal philosophy. There follow excerpts from *The Social Contract* of Jean Jacques Rousseau (1712-1778), again a name that speaks for itself. While Rousseau owed his great success not only to the brilliance of his ideas, but also to the most pleasant way in which he presented them to his readers, the latter cannot be said of the writings of that German philosopher who is represented in this anthology by a piece taken from his *Philosophy of Law*, the great native of Koenigsberg, East Prussia, Immanuel Kant (1724-1804). Most attractive is, however, the style of the Englishman who is next in the array of great legal philosophers introduced by Professor Morris, Jeremy Bentham (1748-1832), the "Great Utilitarian," who is represented by excerpts from his *Introduction to the Principles of Morals and Legislation*, as originally published, and from a posthumously, and only in 1945 published part thereof, entitled *The Limits of Jurisprudence*.

The following inclusion, that of the German, Friedrich Carl von Savigny (1779-1861),⁶ is questionable since that great scholar who has made outstanding contributions to the history of Roman Law can hardly be classified as a "great legal philosopher," although he is generally considered the forerunner of the so-called historical school of jurisprudence. More important from the point of view of philosophy of law were the theories developed by the jurisprudential trend of which Savigny was the prominent scholarly antagonist, the so-called natural law school, which had brilliant exponents,⁷ none of whom is, however, covered or mentioned in Professor Morris' anthology.

The next one presented in the present book is again a German, Georg Wilhelm Friedrich Hegel (1770-1831),⁸ a great philosopher whose ideas have influenced numerous other important writers, including Karl Marx, but whose style is so discouragingly dry and whose ideas are so extremely abstract, that he would seem to belong to those of whom it is said that everybody admires, but few read. He is followed, in this international procession of famous authors, by an Englishman, John Austin (1790-1859),⁹ whose name is well known to every American law student as that of the founder of the so-called analytical school of jurisprudence, the most important representative of which, Hans Kelsen, is, however, not covered or even

4. Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582 (1916) (first sentence).

5. MORRIS, *THE GREAT LEGAL PHILOSOPHERS* 185 (1959).

6. Included is part of the famous pamphlet "Of the Vocation of Our Age for Legislation and Jurisprudence," wherein Savigny raised objections to the idea of codifying the German law similarly as the French law had been codified under the auspices of Napoleon.

7. Including, as the most famous one, Otto von Gierke.

8. Represented by an extract from his *PHILOSOPHY OF RIGHT*.

9. Included are excerpts from *THE PROVINCE OF JURISPRUDENCE DETERMINED*.

mentioned in Professor Morris' anthology, although it can hardly be denied that Kelsen is a giant in the field of jurisprudence and far more outstanding in that respect than some of those included in the anthology. We are thereupon made to meet another famous Englishman, John Stuart Mill (1806-1873), whose style is most delightful, as appears from the two included excerpts, one taken from the essay "On Liberty," the other from "Utilitarianism," only the latter having some relation to the field of legal philosophy, but the other one included because of the great political influence which that essay "On Liberty" had. "Its style and respect for intellectual freedom make it required reading," the editor observes in explanation of the inclusion.¹⁰ The book then turns to one of the most ingenious and influential jurisprudential writers, Rudolph von Ihering (1818-1892), a German who during part of his life was teaching law at the University of Vienna and received his nobility title from the then Emperor of Austria. He was famous for his charming personality which is reflected in his most pleasant way of writing on matters that sometimes are covered in a dull manner. Included is a selection from his most important jurisprudential book, *Law as a Means to an End*. The book thereupon presents that brilliant star in the firmament of American jurisprudence, Justice Oliver Wendell Holmes (1841-1935), reproducing a talk he gave to Boston University Law School students, "The Path of the Law," and a note he wrote for the *Harvard Law Review*, "Natural Law." There follows an Austrian scholar, who was greatly admired by Holmes as well as Cardozo, Eugen Ehrlich (1862-1922). He was very fertile in the field of sociological jurisprudence, but his writings on what he called "living Law" did not draw a clear line between law and custom. Excerpts from his *Fundamental Principles of the Sociology of Law* are included. We thereupon meet a less original and less important jurisprudential writer who is teaching at a Belgian University, Jean Dabin. The book includes a reprint of part of his *General Theory of Law*. Finally, it presents three American celebrities, John Dewey (1859-1952),¹¹ Benjamin Nathan Cardozo (1870-1938),¹² and Roscoe Pound.¹³

In conclusion it is submitted that Professor Morris has not only assembled very interesting specimens of the pick of the crop of jurisprudential thought, but has added to this selection of masterpieces the following attractive feature. He introduces each reprint part with a short human interest essay, written by himself and very well written, dealing with life, career, and scholarly curriculum of the respective author. This newcomer in the field of jurisprudential literature is therefore well apt to serve not only study and reference, but also recreational reading purposes.

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10. MORRIS, *op. cit. supra* note 5, at 365.

11. Included are excerpts from HUMAN NATURE AND CONDUCT and from MY PHILOSOPHY OF LAW.

12. Represented by excerpts from THE NATURE OF THE JUDICIAL PROCESS

13. Included is part of MY PHILOSOPHY OF LAW.

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