

REVIEWS

JUSTICE GEORGE SHIRAS, JR., OF PITTSBURGH: A CHRONICLE OF HIS FAMILY, LIFE, AND TIMES. By George Shiras, 3rd; edited and completed by Winfield Shiras. Pittsburgh: University of Pittsburgh Press, 1953. Pp. xx, 256. \$4.50.

It is well that this book was written. One should be grateful that it is as good as it is; the difficulties were considerable. Justice Shiras (1832-1924) was not a great judge, nor a colorful one; he would not support a really notable biography. He left little material on which a biographer could draw. And when in 1937 the son, George Shiras, 3rd (1859-1942), turned from the pre-occupation of a naturalist to write a book about the Justice, time had run: the son was then in his seventy-ninth year and in poor health;¹ the Justice had resigned from the Supreme Court in 1903 and had died long since. Prudently, George Shiras, 3rd, enlisted the cooperation of his nephew, Winfield Shiras, on whom, as it turned out, fell the task of completing the book. Here is the latter's statement of his uncle's plan:

"He wanted to depict George Shiras, Jr., against a background of the Shiras family, and to give some picture of the times in which the family and his father lived. This, of course, would require additional research he felt he might not live to see completed. He therefore empowered me to fill the gaps remaining after his death."²

So we have the saga of a notable and substantial family, whose roots in Pittsburgh dated back to 1794, when the first George Shiras (1774-1840) marched into Western Pennsylvania with the militia sent to suppress the Whiskey Rebellion.³ That was the Justice's grandfather. The family thrived in the brewery business, and supported works of public utility and culture. One reads of steamboating and of Conestoga wagons, of the founding of schools

1. I called on Mr. Shiras in Washington, D.C., on June 21, 1936, to inquire about material on his father. (This was incident to a rather systematic search for papers relating to the history of the Supreme Court. Justice Shiras had practiced in the circuit over which Justice Bradley had presided, and was his successor on the Supreme Court—which gave point to my inquiry.) My notes of our conversation record the outlines of the story of Justice Shiras' professional career, now set out at length. My memorandum concluded: "G.S. 3rd says there are a few of his father's papers—apparently at his house." But he had been busy with his book (doubtless *HUNTING WILD LIFE WITH CAMERA AND FLASH-LIGHT*) "& feeling too weak to do more. . . ." I have before me a page of his *Anecdotes of Justice Shiras*, reprinted from the Daily Mining Journal, August 1, 1934 (Marquette, Michigan). These were his best stories about his father, and they recur in the present biography.

2. P. xi.

3. P. 2.

and churches, of cookery, of homely pastimes, of Charles Dickens' American tour, and of the Shiras' interesting young neighbor, Stephen Foster. All this was painstakingly collected and is deftly woven into the story. It identifies Justice Shiras with the rise of the "Iron City."

In 1837, when the Justice's father (1805-1893) had accumulated a competence, he quit the brewery, bought a hundred acres on the banks of the Ohio 22 miles from Pittsburgh, and settled down to a long life of hunting and fishing. In 1849 he went to the wilderness of the Lake Superior region, a location which became a second home for his family. The love of nature, of the field and the rod, is a major theme throughout the book.

Yale is another theme. Shiras was of the Class of '53; he was elected to Phi Beta Kappa and was sufficiently outstanding among his fellows to make Scroll and Key. He remained an alumnus of the straightest sect. "Don't fly a *Harvard Flag*" was his warning at eighty-seven, when his grandson (Yale '23) looked ahead to the possibility of going on to Harvard Law School. Subscribe to every Yale publication, he urged, [mentioning that in which this review appears]: "have these papers lying on a table in your room, where they can be seen by your friends who call upon you."⁴ College life a century ago is effectively recreated. "Too much reciting by rote," was the judgment of Shiras' classmate, Andrew D. White.⁵ "Shiras [the authors recall] always believed that the most powerful intellectual stimulus at Yale in those early days was to be found, not in the classroom, but in the debating societies."⁶ He returned to Yale Law School, but withdrew before he had taken his degree, and read law in an office at Pittsburgh, where he was admitted to the bar in 1855. (His younger brother, Oliver P. Shiras, graduated from the Yale Law School in 1856, settled in Iowa, and served as United States District Judge from 1882 until he retired in 1903.)

Civic manhood, firm against the spoilsman, is another theme of the book: it was a marked quality of Shiras in his years at the bar—and of his son and biographer as well. This seems to have been the best justification for the appointment to the Supreme Court. Chapter VI, "Attorney at Law," recounts his civic and social activities, but certainly fails to set out professional accomplishments proving him worthy of the appointment.

Four chapters are devoted to the ten and a half years on the Court. (In one aspect, at least, Shiras was unusual: he is one of very few Justices who have promptly taken the benefit of the statute of 1869 for quitting the bench with salary. He had determined early in his judicial career to resign while mind and body were unimpaired.) "The Justices and their Humors" is a series of thumb-

4. P. 203.

5. P. 48.

6. P. 51. Justice Brewer and Brown, who graduated from Yale three years later, and Bradley (Rutgers '36) and Field (Williams '37) would have agreed as to the value of college debating societies. Fairman, *The Education of a Justice: Justice Bradley and Some of His Colleagues*, 1 STAN. L. REV. 217 (1949).

nail sketches of Shiras' associates. This draws on familiar materials, and also upon the clippings preserved in a series of scrapbooks that in times past were maintained in the Clerk's office. "The Court and Constitution" traces major developments, and relates Shiras to them. In the end, "Shiras' personal social philosophy," the authors justly observe, "emerges dimly"; "he expressed himself like a lawyer who did not wear his major premises on his sleeve." "Shiras was a moderate man." Wisely, the authors make no immoderate pretensions. The chapter on "A Judge's Business" takes up some of the Justice's opinions and makes as much as it can of them. One notes the dissent in *Brown v. Walker*,⁷ where Shiras (Gray and White, JJ., concurring with him) contended that Congress, consistently with the Fifth Amendment, could not compel the giving of testimony, otherwise incriminating, by coupling with the requirement a grant of immunity from prosecution. As the authors observe, this is "a position which may seem extreme today."⁸

The most interesting chapter, to close students of the history of the Court, will be that on "The Income Tax Case." Did Shiras shift his vote at the second hearing, thereby defeating the tax?⁹ Here is the authors' conclusion:

"Because of the importance of the Income Tax decision in Shiras' life, an attempt has been made to set down here every possible hypothesis and every shred of evidence which have been found in published works or suggested by kindly advisers. Shiras may have voted consistently against the tax on all issues; he may have changed his vote on personal property in order to be consistent with his overall view that the tax was invalid; he may have deferred making up his mind at the first hearing on the reserved issues; or he may have refused at that time to pass on personal property because he had

7. 161 U.S. 591, 610 (1896).

8. P. 190. We may in the future hear more of Shiras' dissenting opinion. This is suggested by Mr. John W. Davis in his reply to Senator Kilgore on the subject of S. 16 (a bill to amend the immunity provision relating to testimony given before either House of Congress or their committees) and by Mr. Philip B. Perlman's memorandum on that bill. 99 CONG. REC. 8649, 8652 (July 9, 1953).

9. The Court (Harlan and White, JJ., dissenting) held the income tax statute invalid as to income from real estate and from state bonds; as to whether or not those holdings required the invalidation of the entire scheme, and whether or not the taxation of income from personal property could be sustained, the Justices were equally divided. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895). How individual Justices stood was not disclosed. Jackson, J., did not sit. On a rehearing with all of the Justices present, 158 U.S. 601 (1895), it was held that a tax on the income from personal property was invalid, and accordingly that the income tax law fell. Justices Harlan, Brown, Jackson, and White dissented. If the Court without Jackson stood four to four, and on the rehearing he was one of four dissenters, which of the Justices had changed his mind? On quite inadequate authority, so far as appears, Shiras was said to have been the one. Mr. Hughes, in the interim between his two periods on the Court, intimated broadly that this suspicion was unjust. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 54 (1928). Other commentators have pursued the puzzle without being able conclusively to solve it. CORWIN, *COURT OVER CONSTITUTION* 194-201 (1938); RATNER, *AMERICAN TAXATION* 208-10 (1942); KING, *MELVILLE WESTON FULLER* 218-20 (1950).

already voted the tax invalid on the ground of separability. In none of these eventualities would he have defeated the tax by changing his mind. Very possibly there was no such person as a so-called vacillating Justice in the case. But if there was, it is hoped that this discussion will help to strengthen the growing belief on the part of historians and other writers that Shiras was not that Justice."¹⁰

Wisely, the editor obtained competent professional assistance—as is evident throughout the discussion of the Court. This could not, however, avail to relieve the narrative of its hearsay character, so far as the chapters on the Court are concerned.

Because Shiras was a Justice he will be remembered; but he will not be remembered for anything he did or said as a Justice. Even his witticisms—like those of Mr. Marquand's General Melville Goodwin—draw their only interest from the office of the speaker. (As when, at the argument of *Dooley v. United States*, Shiras inquired: Who represents Mr. Hennessy?¹¹) To his intimates, Shiras was an engaging, whimsical, unpretentious companion; he was an able practitioner and a conscientious judge. We are the wiser for this biography, which treats him respectfully and affectionately, but without any excessive claim.

Special mention goes to the University of Pittsburgh press, which has produced a really handsome book.

CHARLES FAIRMAN†

CASES AND MATERIALS ON PLEADING AND PROCEDURE. By Claude H. Brown, Allan D. Vestal, and Mason Ladd. Buffalo: Dennis & Co., 1953. Pp. xvi, 752. \$8.00.

THIS volume reflects the growing trend in teachers who favor the Federal Rules, to devote casebooks to them and their state prototypes. This is the second such volume in little more than a year to come to the reviewer's attention, the first being Clark's *Cases on Modern Pleading*. While one can find no inherent fault with casebooks of this sort, it does not seem quite cricket to entitle them anything but "Federal Pleading" or equivalents. In the preface to his book, Judge Clark first states that he has tried "to make the book justify its title,"¹ and then proceeds to limit its contents almost exclusively to federal and federal rule state cases. Such is also true of the work under review, except that Messrs. Brown, Vestal, and Ladd clearly indicate that they are concerned primarily with the problems raised in federal rule jurisdictions.

10. P. 183.

11. P. 127.

†Nagel Professor of Constitutional Law and Political Science, Law School, Washington University.

1. CLARK, *CASES ON MODERN PLEADING* viii (1952).