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Book Reviews

the section seems to be clearly justified in view of the legislative history of the section. Without going into the entire legislative history of the section, it is sufficient to point out that the section as first enacted had expressly excluded money from the meaning of the word property. The deletion of this express exclusion by Congress was considered by the Circuit Court as ample evidence that Congress intended money to be comprehended by the word "property" as used in Section 112 (b) (6).

The significance of this deletion is more vividly demonstrated in view of the fact that Section 113 (a) (15) of the Internal Revenue Code was added to the law at the same tme. Section 113 (a) (15) provides that if property is received under Section 112 (b) (6) "then the basis shall be the same as it would be in the hands of the transferror." This means that, if a parent company receives unimproved real property from a subsidiary upon the complete liquidation of the latter, for which the subsidiary had paid $100,000, then the parent upon later disposing of such real property would use $100,000 as its "cost" in computing its profit or loss on the disposition, regardless of what the parent may have paid for the stock of the subsidiary. Consequently if the parent company in this example had paid only $10,000 for the stock and had later sold the real property for $110,000, its gain on such sale would be only $10,000. The effect of these sections of the Internal Revenue Code is that the profit of $90,000 which the parent made on the liquidation of its subsidiary by reason of its receiving real estate which had cost $100,000 in exchange for stock for which it had paid only $10,000 is not taxed. There should be no difference between such a case and one where the subsidiary prior to liquidation sold the real property for $100,000 and distributed that sum to the parent. If the subsidiary had sold the property for $110,000, the tax on the gain of $10,000 would have been imposed upon the subsidiary.

A Profit Retained

The type of tax saving effected in the principal case may not be infrequent. Consider the case where the subsidiary can afford, taxwise, to sell its plant and equipment because of a loss produced by the sale of the plant and equipment which may be carried back and substantially reduce the tax liability of the subsidiary for prior years. [Internal Revenue Code §§ 23(s) and 710(c).] Whether the court's interpretation of this segment of the Internal Revenue Code discloses an undesirable tax loophole or a benevolent attitude on the part of Congress, one can hardly quarrel with the court's interpretation. The court described its proper function when it said, "We are not, however, concerned with the wisdom of a tax law, but only with its meaning, express or implied."

BOOK REVIEWS

PHILADELPHIA LAWYER: An Autobiography. By George Wharton Pepper. Philadelphia and New York: J. B. Lippincott Company. 1944. Pp. 9, 407. $3.75.

This book contains the inspiring story of a versatile man who has lived an active life of constructive effort. Indeed, it seems as though he has scarcely wasted a moment in heeding the admonition of Carlyle to produce and of Grotius to waste no time. It is the story of a man who has risen to prominent position through his own extraordinary ability of mind, character, and personality.

George Wharton Pepper was born of sound and accomplished ancestry 78 years ago in Philadelphia. His father, who saw hard service in the Civil War and later became a physician, died when his son was five years old, and it appears that the

boy's mother and his uncle Dr. William Pepper were the most important personal influences in his early life. I used the adjective "personal" in order to distinguish another great influence in Mr. Pepper's life from early years, that is, the Church, but I am not at all sure that the distinction should be made in his case because I am inclined to believe that it was with him really a personal influence. He undoubtedly believes in a personal God to whom he is very close, and his activities in the Church have from early years brought him into contact with vital personal influences.

As a boy, the future Senator developed a temporary eye ailment which made it unwise for him to use his eyes in reading. As a result, he early learned to receive and retain knowledge through the auditory system and in that connection developed an extraordinary word memory. His mother was his only preceptor in almost all subjects prior to his entry into the University of Pennsylvania where he obtained his first formal instruction.

From the beginning of his academic life he worked hard at his studies and was extremely active in extracurricula competition, successfully engaging in football, crew, cricket, track, dramatics, and in campus publications. Graduating with high honors, he went into the University of Pennsylvania Law School where he took first honors.

To one who got to know him in later years, it is easy to visualize the favorable impression which his intellect, character and personality made upon those with whom he came in contact. That such an impression was made is clear from the record, because from the beginning those qualities were recognized and he was therefore entrusted with work of increasing importance. In this book one will find a conscientious account of his prodigiously active life in teaching law, in practicing it, in the service of his Church, his country, state and city; and of the University from which he was graduated. It is interesting to note, and gives some guage of the man to realize, that approximately five-eighths of his working effort has been expended without charge and that even today he is dependent upon his daily earnings for his daily bread. He states that the income from his savings is scarcely sufficient to provide for his dependent friends and relatives. When I read the phrase "dependent friends" I stopped for a long time. One does not inherit that kind of an obligation. One creates and gives it.

Along with his law practice and teaching and his work within the Church, his life with his family and out-of-doors have meant most to him. His mother clearly was a woman of unusual character and intelligence, and he pays high tribute to his uncle Dr. William Pepper, who was Provost of and Professor of Medicine at the University of Pennsylvania and one of the most eminent physicians of his time. With his wife, who was a daughter of the distinguished Professor George Park Fisher of Yale University, and with his children he has been completely happy. His life out-of-doors has been lived on both land and water and has included strenuous activities in bracing air. He has considered it an exhilarating pleasure several times to climb Mt. Katahdin in the middle of Winter.

There are two other activities which must have given Mr. Pepper pleasure, his talents in drawing and writing of verse. He undoubtedly has a strong artistic side. Many of his drawings appear in and add charm to this volume, and he is now painting in oil. His father did beautiful work in drawing and that ability apparently was transmitted through the Senator to the latter's son who is today a well-known architect. His love for poetry is clearly established and his memory in that respect is extraordinary. Some of his own verses appear in the volume.

Many interesting and important men walk across these pages and frequently stop to visit. Mr. Pepper lists, as those few who impressed him most, "my uncle Provost Pepper for his charm, my father-in-law Doctor Fisher for his culture and urbanity, Bishop Brent for his simple godliness, John G. Johnson, one-time leader of the American bar, for his prodigiousness, President Arthur Hadley of Yale for his omniscience, Marshal Foch for his compelling personality, Professor F. W. Maitland of Cambridge for his scholarship and Herbert Hoover for his comprehensive grasp of public questions."[1] His word sketches of Presidents Harding, Coolidge and Hoover are intimate and at the same time objective.

Senator Pepper began to teach law as soon as he graduated from law school, but he also began to practice law as soon as he was admitted to the Bar. Of the two experiences it would seem that the teaching over a period of twenty-one years gave him the greater satisfaction. He adopted and was instrumental in spreading the mind-developing case system of teaching and probably can properly be called the father of the present courses on the Law of Business Associations, because he early consolidated his separate courses in Partnership and Corporations into one called the Law of Association.

However, Mr. Pepper has always been intensely interested in practice. Entirely delightful is his account of his early and unsuccessful attempt to invalidate the famous so-called charitable trusts established by the will of Benjamin Franklin on the ground that they violated the rule against perpetuities. After this there were many important and some famous cases: *The I'm Alone Case;*[2] *Bluefields Steamship Co. v. United Fruit Co.;*[3] *Federal Club v. National League;*[4] *Frick v. Pennsylvania;*[5] *Myers v. United States;*[6] *United States v. George Otis Smith;*[7] *United States v. Butler;*[8] *and Deputy v. duPont.*[9]

Of all his careful and brilliant presentations the finest that I know of was in *United States v. Butler,*[10] which he won by a vote of six to three. That case, together with *Carter v. Carter Coal Co.,*[11] may be said to mark in 1936 the end of an epoch in which plenary and general police power was denied to the Federal Government in accordance with the intentions of the drafters of the Constitution. Mr. Pepper clearly realized the significance of the *Butler* case at the time that it was heard. The concluding words of his oral argument were as follows:

"I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to this Court.

"But I do not want your Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am

1. P. 390.
2. U. S. State Dep't Arbitration Ser. 2; Pepper, pp. 226-229.
3. 243 Fed. 1 (C. C. A. 3d, 1917); Pepper, pp. 354-356.
4. 259 U. S. 200 (1922) *aff'g* 269 Fed. 681 (App. D. C. 1921); Pepper, pp. 356-360.
5. 268 U. S. 473 (1925); Pepper, p. 360.
6. 272 U. S. 52 (1926); Pepper, p. 361.
7. 286 U. S. 6 (1932); Pepper, p. 364.
8. 297 U. S. 1 (1936); Pepper, pp. 243, 384.
9. 308 U. S. 488 (1940); Pepper, p. 373.
10. *Supra* note 8.
11. 298 U. S. 238 (1936).

standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may 'the land of the regimented' be accepted as a worthy substitute for the land of the free.' "[12]

This case is still law but, in my opinion, only because the Federal Government has obtained all of the general police power which it desires by an extension of the meaning and scope of the commerce clause, and therefore has not had to attempt to establish such an authority under the taxing power. If the question should be presented again, I have no doubt that *United States v. Butler* would fall in the present Court, in view of the fact that Justices Stone, Brandeis and Cardozo dissented and the further fact that physical power seems today to be the sole test of the jurisdiction to tax and the scope of its effect.

Please do not conclude, because he has published his autobiography, that Mr. Pepper has retired from the practice of law and other activities. He has much too much unfinished work to permit him to think of retirement and I know of no lawyer against whom I should prepare with more care and apprehension for argument in an appellate court. I think that anyone who reads this book is certain to be convinced that Senator Pepper is nowhere near the unreasonable conservative whom his political opponents have from time to time described. You may consider that he has too much or too little conservatism to suit you, but he himself believes that he occupies a moderate position and takes a middle course. I think that is a just estimate, although it seems possible that his loyalty to the Republican Party has sometimes made him appear to espouse causes of which he did not personally approve. Be that as it may, the book is delightfully stimulating in a dozen or more fields, and is an eloquently told story of a life generously given.

HAMILTON VREELAND, JR.†

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835. By Charles Grove Haines. California: University of California Press. 1944. Pp. xiii, 679. $6.00.

On the title page of Professor Haines' book appears the well-known and oft quoted remark of Chief Justice Charles Evans Hughes: "We are under a Constitution, but the Constitution is what the judges say it is." The prominence given to this remark of Chief Justice Hughes by the author reflects the general thesis developed by him. Professor Haines holds strongly to the view that we have in the past been unduly emphasizing constitutional *law* and correspondingly ignoring constitutional *politics*. Moreover, he contends, that we have been laboring under the naive assumption that the Supreme Court is a "legal tribunal" when in fact it is "one of the foremost political agencies."[1]

Another way of expressing the issues between the old and the new interpretations of constitutional law and the realistic part played by the Supreme Court is to recall, as Professor Haines frequently does, the clashing political philosophy of Alexander Hamilton and Thomas Jefferson. Hamilton, the aristocrat, was distrustful of the people and desired to curtail the powers of Congress because it was responsive to the

12. 297 U. S. 1, 44 (1936).

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1. P. 48.

public will. Hamilton also favored the expanding powers of the Supreme Court making it a sort of super-legislature equipped to review, correct and annul acts of Congress under the guise of constitutional interpretation, if these legislative measures seemed to the superior minds of the justices to be unwise, inexpedient or impractical. Jefferson, on the other hand, was an ardent believer in democratic government, favored popular and unrestricted legislation without hindrance from any Court; he frowned upon the usurpation and extension of judicial powers by the Supreme Court by means of judicial review of legislation. Hamilton wanted a strong federal government with the states subservient to the national body. Jefferson was fearful of a mighty centralized nation and argued for the retention and reservation of political powers in the states as a bulwark against the expansion of federal powers. Lest it be thought that he is far away from the field of constitutional law, Professor Haines recalls that the viewpoint of Hamilton was subsequently accepted and utilized by Chief Justice Marshall in his policy-making decisions while Madison joined with Jefferson in expressing the contrary viewpoint.

Professor Haines covers completely the early years of the Supreme Court, takes us into the conference room of the justices and shows us just what the Supreme Court was *doing* and why they were doing it rather than what they were *saying*. He scorns the facial language of the opinions as an accurate expression of the real reasons for their decisions. He argues that the Court may talk in terms of law but they act pragmatically and politically expressing frequently a partisan viewpoint divorced entirely from legal principles as motivating causes for their decisions.

His book passes the every day and inconsequential cases in the Supreme Court during the stated span of 1789-1835. He limits his questions to the relatively few decisions of "political significance."[2] For example, *Marbury v. Madison*,[3] *Fletcher v. Peck*,[4] *Martin v. Hunter's Lessee*,[5] *Dartmouth College* Case[6] and *Gibbons v. Ogden*.[7]

Retracing our review to the focal point of Professor Haines' book—that constitutional "law" is a misnomer and that it is really constitutional "politics", that the Supreme Court decides politically and not legally, and that the Justices veneer political decisions with legal terms—it is clear that Professor Haines has collected considerable proof for his thesis, if limited to the trunkline cases of constitutional law.

Professor Haines introduces his main analysis of constitutional law by a detour into certain modern jurisprudential theories developed by the legal realists in America and by the European cult advocating "free legal decisions." Both of these schools of juristic thought subordinate the doctrine of *stare decisis* and elevate correspondingly the individual emotions and feelings of the justice divorced from precedents.

It is unfortunate that Professor Haines felt obliged to use these modern legal philosophies as a basis upon which to erect his views regarding constitutional law. There is a wide chasm that separates private law from public law; his temporary joinder of these two separate parts of the legal order is not convincing. It is feared that he has oversold legal realism, at least in the field of Anglo-American common

2. P. 5.
3. 1 Cranch 137 (U. S. 1803); Haines, pp. 245-258.
4. 6 Cranch 87 (U. S. 1810); Haines, pp. 309-323.
5. 1 Wheat. 304 (U. S. 1816); Haines, pp. 315-316, 340-350.
6. Dartmouth College v. Woodward, 4 Wheat. 518 (U. S. 1819); Haines, pp. 379-423.
7. Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824); Haines, pp. 487-495.

law. Emotion, the hunch process and even the gastronomical approach are admittedly factors of the judicial process, for justices after all are human beings with all the frailties of human kind. But judges generally rise above the level of insight, feelings and abdominal reactions. The art of judging calls for thinking as well as hunching, research as well as subconscious motivation, detached judgment as well as the impact of external stimuli. The crystal ball and the ouija-board are unlikely to supplant the American Digest system in the equipment of our libraries.

However, it should be noted that Professor Haines devotes the major part of his book to the broader cases of constitutional law which involve primarily matters of governmental policy. It is doubtless true that in the early days of the Supreme Court it was necessary for the justices to shape and fill in the general clauses of the constitution and the Court very frankly stated that this interpretative work was a part of the judicial process. It will be recalled that Chief Justice Marshall in *McCulloch v. Maryland*[8] warned that "we must never forget that it is a constitution we are expounding."[9] Similar expressions dot the pages of the reports of the Supreme Court even down to our own day. Flexibility therefore is one of the necessary ingredients which gives a reasonable amount of elasticity to the clauses of the constitution.

Professor Haines pointedly suggests that the Supreme Court by its policy of nationalism and opposition to state's rights, seems to have set the stage for the Civil War. But he then says: "It is, of course, difficult to refute the contention that Federalism saved the union and that the views in opposition, had they been adopted, would have destroyed the union."[10]

There are some obstacles in the way of a complete acceptance of his theory that the Supreme Court is a politically motivated body. How does his theory fit into the fact that the Supreme Court has avoided "political questions"[11] and turned aside all attempts by government agencies to obtain "advisory opinions."[12] This tender withdrawal from political power is not wholly consistent with his concept of a government agency generated by politics and not by law. Even in the fringe-area of "pure" constitutional law, the Supreme Court has built up many obstacles to the easy entrance of litigants into the Court. Only those questions are justiciable which meet the exact conditions of real cases, real parties, live controversies, and pending problems of constitutional law. Stated in summary fashion, this Court, which Professor Haines pictures as one devoted in its formative era to "the supremacy of the Judges over all other public officials as interpreters of the Constitution," has strangely turned back many available opportunities to increase its power over the "interpretation" of the Constitution.

But Professor Haines has written a treatise on the early years of the Supreme Court which deserves a place alongside of Beveridge's *Life of John Marshall* and Warren's *The Supreme Court in United States History*. His research is wide, his arrangement of material excellent, and his treatment highly interesting. It is hoped that he may be able to continue his realistic study of the Supreme Court down to our own time, especially so because he forecasts the opinion that the same jural politics exists today as in the days of John Marshall.[13]

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8. 4 Wheat. 316 (U. S. 1819).
9. *Id.* at 406.
10. P. 657.
11. Pp. 12-13.
12. Pp. 143-148.
13. P. 41.

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CARTELS; CHALLENGE TO A FREE WORLD. By Wendell Berge. Washington, D. C.: American Council on Public Affairs. 1944. Pp. vi, 266. $3.25.

The author, Mr. Wendell Berge, is presently the Assistant Attorney General in charge of the Antitrust Division, with which he has had many years of experience. He is well acquainted with the problems of monopoly and of unreasonable restraints of trade. In this work he draws on his reservoir of experience. As might be expected the Antitrust Division plays a most prominent part in the book. Most of the examples of improper restraints of trade and of the operations of cartels are taken from actual cases which have been the subject of litigation or are pending trial.

The thesis of the book is that the restoration of free enterprise and the competitive system in both international and domestic markets is essential if we are to preserve our political freedom and to avoid totalitarian controls. The author identifies cartels with Germany and Germany with cartels. To him "Totalitarianism represents simply the ultimate consummation of cartelism—the final, full expression of the reactionary forces stemming from special privilege."[1] Throughout he stresses the participation of German industry in various cartels and in particular in those which German industry dominated.

Neither the particular instances cited by the author, however, nor the numerous cartels, such as the shipping conferences, which he does not mention, warrant the conclusion that there is any necessary affinity between cartelization or monopoly on the one hand and the totalitarian form of government on the other. It is, of course, true that in a wholly totalitarian country all business is a state monopoly. On the other hand, cartels have had a fruitful growth among the industrial concerns of countries which are complete strangers to the totalitarian form of government.

An objective study of the development of cartels would disclose that German business men have been no more prone to enter into them than have been the business men of Great Britain, France, Belgium, Italy, Holland, Denmark, Sweden and other countries. Such an objective study would further disclose that cartels are not always secret agreements among private industries. Sometimes they are participated in by governments as well. Various of the Latin American countries, for example, have established legal monopolies in different products, particularly minerals, and these legal governmental monopolies deal in cartel fashion with either the private or the governmental producers of the same minerals in other countries.

Cartels are a form of ordered or planned economy. Their aim is to adjust their quantity of production to the point where the individual unit produced will secure the highest price in the market. They do not aim at large scale production for sale at low unit prices. Production of limited quantities for sale at high prices means less labor used in production with less purchasing power in the buying public to enable it to pay the high prices exacted by the producers. Hence, any such restricted economy necessarily finds itself in a vicious circle. The producers in any particular industry should not be damned, however, for failing to produce large quantities for sale at low prices unless all other products are produced in a similar fashion. If other industries continue to operate on a restrictive basis there will not be sufficient purchasing power available to buy the products of the freely producing industry and these products will become a drug on the market.

Cartels are designed to prevent such economic evils as dumping and cut-throat competition, while at the same time bringing about a world wide distribution of the products subject to their operations. Unless one is persuaded of the soundness of the

1. P. 3.

now generally rejected theories of the Manchester School the abolition of cartels and the substitution therefore of unbridled competition are likely to bring about as bad, if not worse, a situation as would a wholly cartelized economy.

Because of the light it sheds on the policy of the Antitrust Division, disclosing that that policy is the same now as it was during the administration of Justice Arnold, and because of its informative descriptions of the operations of the different cartels and trust combinations which it details, the book has a definite value. It will likely be read with great interest by all who are engaged in foreign trade or who hope to engage therein.

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