REVIEWS

CASES ON JUDICIAL ADMINISTRATION. By Maynard E. Pirsig. St. Paul: West Publishing Co., 1946. Pp. 1017. $8.50.

THIS is a valuable book. In no other single published volume can one find collected as much important miscellaneous material bearing on the actual doings of American courts and lawyers. It should stimulate courses dealing with those vital subjects which have been largely neglected by many law schools.

The sections relating to the jury and to the fallibility of witnesses are excellent. Also particularly good are the data as to "the organization of courts," the selection of judges, and certain aspects of "reform." The matter concerning "the doctrine of precedents" is superior to that available in many case books, although, surprisingly, it omits the searching comments of such brilliant legal thinkers as Wigmore, Gray, Cook, Llewellyn, Felix Cohen, Green, and Yntema.[1]

Nevertheless, I laid the book down with a keen sense of disappointment. Pirsig tells us that it is the fruit of experience gained from twelve years of classroom use. Surely, in those twelve years, the gaps in this volume should have become obvious. Its grave deficiencies sharply appear when one compares it with the publisher's prospectus which says that it "deals with *our entire judicial system*" including "*its methods of operation*"; that its purpose is to "impart to the law student a better understanding of the institutions . . . before which he will practice . . . ," and that "this type of training can be acquired *only* in such a course" as this book offers; and that the book "contains a *direct approach*" to the legal profession.[2] The book falls far short of fulfilling those promises. I shall indicate a few of the points I have in mind.[3]

1. In the section on the administrative method, Pirsig sets forth a considerable part of an article by Roscoe Pound, published in 1941. Pound,

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1. See Wigmore, *The Judicial Function*, in the Preface to THE SCIENCE OF LEGAL METHOD (1917) at xxxvi-xxxix; GRAY, THE NATURE AND SOURCES OF THE LAW (1921) 225; LLEWELLYN, THE BRAMBLE BUSH (1930) c. IV; GREEN, JUDGE AND JURY (1930); Yntema, *The Hornbook Method and the Conflict of Laws* (1927) 37 YALE L. J. 468, 480.

Lacking in Pirsig's book is any adequate consideration of the consequences of regarding the doctrine of precedent as founded upon a sort of "estoppel." See, *e.g.*, Aero Spark Plug v. B. G. Corp., 130 F. (2d) 290, 298 (C. C. A. 2d, 1942); dissenting opinion in Helvering v. Proctor, 140 F. (2d) 87, 88, 91 (C. C. A. 2d, 1944); dissenting opinion in Commissioner v. Hall's Estate, 153 F. (2d) 172, 174-5 (C. C. A. 2d, 1946).

2. Italics added.

3. Perhaps the book's defects strike me the more forcibly because I am at present engaged in teaching a course at Yale Law School entitled *Fact Finding*, in connection with which, before I saw Pirsig's volume, I had prepared a mimeographed course-book which presents and discusses some of the same material.

contrasting administrative agencies with courts and describing "checks upon courts," said that, in public judicial records, ". . . one may find exactly . . . what disputed questions of fact and law were before the tribunal, and how the questions of fact were determined—if by a jury, very likely by questions put by the court and specifically answered; if by a judge, in the form of special findings of fact. Likewise anyone can find from those records what conclusions the court came to as to the applicable law, either in the form of instructions to the jury or of findings by the court. Moreover, the judgment of the court must respond to the pleadings, findings of fact and conclusions of law, and any lack of consistency in these respects will be apparent on the record. . . . Thus the materials for criticism of, and accurate judgment with respect to, judicial decisions are always available and readily accessible. . . . Recently there has been widespread assertion of a doctrine that findings of fact and finding and application of law cannot be separated. For the most part, this is a phase of the recrudescence of absolutism, conspicuous in all parts of the world in the last decades. . . . In this country it is urged chiefly by advocates of administrative absolutism. . . . Undifferentiated findings of facts and finding and application of the law thereto is the method of personal justice and mechanical modes of trial which characterize the beginnings of legal order." [4]

The student is thus informed by Pound that "the materials for criticism" of court decisions are "always available," because almost every court decision is accompanied by "special findings of fact." That this statement is patently wrong as to most jury cases—that Pound errs in saying that in such cases "very likely" the jury has "specifically answered" questions put by the court—the student will learn when he reads Pirsig's Chapter 4, *The Determination of Facts.*

But nothing in this chapter of seventy-four pages, or elsewhere in the book, will instruct the student that Pound is strikingly mistaken in saying that judges sitting without juries invariably or usually make and publish "special findings of fact" which provide the "materials for criticism and accurate judgment with respect to judicial decisions. . . ." The truth is that many jurisdictions do not require trial judges to publish special findings and that, absent such a requirement, trial judges in most cases do not make or publish

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4. Pound, *For the "Minority Report"* (1941) 27 A. B. A. J. 664, reprinted in Pirsig's volume at 143, 147, 152–3. That Pound has not consistently maintained that position is indicated by his endorsement of Orfield, Criminal Appeals In America (1939); see Introduction by Pound, and Orfield's statement at p. 85. As to Pound's perplexing shifts of position, see FRANK, IF MEN WERE ANGELS (1942) 332.

As to the inter-action of legal rules and findings of fact, see, *e.g.*, Wurzel, *Methods of Juridical Thinking*, in the volume, THE SCIENCE OF LEGAL METHOD (1917) 366–9; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. (1944) 753; Aero Spark Plug Co. v. B. G. Corp., 130 F. (2d) 290, 298 n. 26 (C. C. A. 2d, 1942); Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 223 n. 60 (C. C. A. 2d, 1942).

See also dissenting opinion in Old Colony Bondholders v. N.Y.N.H. & H.R.R.—— F. (2d) —— (C. C. A. 2d, Jan. 13, 1947) as to the "gestalt" aspect of decisions.

them. Instead, the judges in such jurisdictions usually content themselves with rendering laconic judgments without any explanation of their views of the facts or the applicable legal rules. For the bar and the interested lay public the consequence is that the means of criticizing these decisions are even less available than in cases where juries return general verdicts. Yet a student using Pirsig's book has no way of knowing that Pound's article has seriously misinformed him.[5] Since such a student will be unaware of how frequently trial court decisions are unaccompanied by explanations, he will not perceive the fallacy in the following assertion, made by Pound in another article included in Pirsig's volume: "If rules and over-rigid standards sometimes hinder the judge and prevent the best solution of which he is capable, they secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice. Oriental judges, bound by little or no law, are notoriously corrupt.[6] A judge tied down on every side by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules cannot do much for a corrupter, if he would." [7]

2. Moreover, Pirsig's failure to bring out the fact that trial judges frequently enter unexplained (laconic) judgments, seriously mars his chapter on "the doctrine of precedents." Because of that failure, the chapter leaves unconsidered a central problem: How can anyone ascertain whether a trial judge, sitting without a jury, has or has not followed the precedents in deciding a case if the judge gives no explanation of his decision? Such a decision yields no clue as to what facts the judge found or what legal rules, if any, he applied.

When such a decision is appealed, the reviewing court must guess the trial judge's reasoning. Usually, where findings of facts are not required, the upper court will affirm such a decision (1) if there was conflicting oral testimony heard by the trial judge, and (2) if some acceptable legal rule sanctioned by the precedents, taken in combination with some factual inference which can reasonably be drawn from some of the testimony, will rationally justify the trial judge's decision. But neither the appellate court nor anyone else knows whether the trial judge reached or checked his decision in this manner. That is, no one knows whether the trial judge's view of the facts was that ascribed to him by the upper court, or whether, had he reported his view

5. If Pound were correct in asserting that, when courts make "undifferentiated findings of fact and finding and application of law thereto," we have manifestations of "absolutism" and "personal justice," then it would follow that today many judicial decisions, because they do not differentiate findings of fact and legal conclusions, reek with "absolutism" and smack of "personal justice."

6. But KOCOUREK and WIGMORE, FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT (1918) vii-ix, discussing Mohammedan methods of dispensing justice, say: "A sympathetic understanding of the oriental point of view is necessary to overcome the narrow prejudice and the hasty judgment which would give an entirely erroneous view. . . ."

7. Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696, found in Pirsig's book at 14, 24-5.

of the facts, his decision could have been sustained as one logically resulting from an application of a valid legal rule to the facts as he found them. If he had published his findings, and if they had been supportable by reasonable inferences from part of the conflicting testimony, it might then have appeared that he had applied an untenable legal rule. In that event, the reviewing court would have accepted his finding of facts (since he heard and saw the witnesses), but his decision would have been reversed because he had erroneously deviated from the precedents. But when he makes no disclosure of his belief about the facts, any such disregard by him of the precedents remains unknown.[8] In short, the lack of knowledge of the grounds for many trial court decisions pokes a deep hole in the "doctrine of precedents." [9] But students reading Pirsig's book will be ignorant of that hole.

3. Closely related to the foregoing defects of Pirsig's book is its omission of material adequately directing attention to the transcendent importance of the trial judge, an importance which derives from the circumstances that the overwhelming majority of cases are not appealed and that, in those that are appealed, the trial court's express or imputed fact-finding usually controls the appellate court's decisions. One misses quotations from Judge Curtis Bok's books and regrets the absence of any comprehensive material showing the effect of the "personality" of the trial judge on his findings of fact, *i.e.*, of his "un-get-at-able" idiosyncrasies which influence his reaction to the witnesses.[10]

4. Once trial court fact-finding is fully recognized for what it is—one of the major factors in court-house government [11]—it will become clear that trained skill in the process of finding facts is imperative if we are to have competence and fairness in the administration of justice. For, if the facts as "found" by the trial court do not approximate the "objective" facts of the case—the facts as they actually occurred—the court's decision will be wrong and unjust, no matter how impeccable are the legal rules applied by the court. The "right" rule applied to the wrong facts—to facts which do not match the actual facts—cannot produce a correct or just decision. Pirsig helps the student to see how an innocent man may be criminally convicted through errors in fact-finding by juries. But a mistake in fact-finding made by a judge sitting without a jury in a civil case may ruin a man financially or otherwise. Fact-finding, as it is a human process, will never be perfect, infallible. But it should approach perfection as nearly as is humanly possible.

8. See dissenting opinion in LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F. (2d) 115, 119 at 123–4 (C. C. A. 2d, 1946); Frank, *What Courts Do In Fact*, 26 ILL. L. REV. at 658–72, 782–4 (1932).

9. *Cf.* Ricketts v. Pennsylvania R. R., 153 F. (2d) 759, 769 n. 46, second paragraph (C. C. A. 2d, 1946); Frank, *Sketch of an Influence*, in the volume INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES (1947) 189, 235–6; Frank, Book Review (1946) 59 HARV. L. REV. 1004, 1010–12.

10. See, *e.g.*, *In re* J. P. Linahan, Inc., 138 F. (2d) 650, 651 (C. C. A. 2d, 1944).

11. U. S. v. Forness, 125 F. (2d) 928, 942 (C. C. A. 2d, 1942); Green, *The Duty Problem in Negligence Cases* (1928) 28 COL. L. REV. 1014, 1037.

From this it would seem necessarily to follow that high on Pirsig's list of suggested reforms should be these: (1) Future trial judges should be carefully educated for the performance of their peculiar tasks. (2) Prospective jurors should not merely receive "pep talks" from judges and "hand-books" briefly describing their duties, but should be required to take a course in school in which they will learn something of the difficult art of fact-finding. One looks in vain for consideration of those suggestions in Pirsig's chapter on "reform."

5. Although in this book there are a few items briefly discussing the tactics and strategems of trial lawyers, they are scant. A "direct approach" to the legal profession surely calls for extensive excerpts from such refreshingly honest treatises as Goldstein's *Trial Technique* (1936) [12] and Longenecker's *Hints on The Trial of a Law Suit* (1927).

6. Ten pages of Wigmore's *Science of Judicial Proof* are quoted. But why not the highly significant passages in which Wigmore in effect admits that he has proved a negative, *i.e.*, that there is not, and almost surely never will be, such a science because of what I would call the ineradicable "subjectivity" inhering in judicial fact-finding when the testimony is in conflict? Surely Wigmore's negative conclusion is vital news for the future lawyer, since it underscores the uncertainties of litigation and therefore of legal rights and duties.

7. This volume bears the title, *Cases on Judicial Administration.* That is a misnomer since the book wisely consists principally of excerpts from books, articles and reports. However, one aspect of the "case book" concept still has Pirsig in its grip. In an effort to avoid the characteristics of a "text book," he seldom comments on the material, virtually never expressly states his own positions on controversial questions.[13] As a result, he creates the impression that he agrees with the publisher that his book, or some similar book, affords "the only" means of "understanding" the "methods of operation" of our "judicial system" and "a direct approach" to the legal profession. The reader—this reader, at any rate—is eager to know whether Pirsig believes it necessary to tell his students that first-hand, "direct," observation of courts and lawyers at work constitutes an essential ingredient of such understanding. If he does so believe I think he should say so, and not merely orally in the class-room. In other words, his "case book" should, I think, include more of what is contained in a first-rate text book like Paul's *Gift and Estate Taxation,* which not only painstakingly records what the courts have decided but also forthrightly and in detail states the author's views and why he entertains them. Of course, as Pirsig remarks in his preface, "divergent views may legitimately be held" concerning "topics which

12. See Morgan, Book Review (1936) 49 HARV. L. REV. 1387.

13. Perhaps he sometimes does so obliquely by his selections. Thus he devotes twelve pages to a quotation from Pound's article, *For the "Minority Report,"* which severely castigates administrative agencies; but Pirsig merely cites, without quotation, the works of critics of that article.

are controversial." But a pseudo-Jovian aloofness does not, as he suggests, convincingly preserve an "analytical and critical approach." It is more wholesome for the teacher honestly to avow at least a tentative attitude, at the same time inviting the students freely to criticize it. A teacher should not purport completely to suspend his judgment until Judgment Day, nor even for twelve years.

8. Pirsig includes Millar's admirable piece, *The Formative Principles of Primitive Procedure*,[14] which compares "the principle of judicial investigation" with "the principle of party presentation." The latter principle largely governs in our American legal system, more so than in England's today. When Pirsig in his last chapter presents "methods of reform," he offers nothing concerning the advisability of our moving considerably further in the direction of something like "judicial investigation." [15] In a previous chapter, Pirsig inserts a statement by a layman, Callison, criticizing the legal profession because, among other things, it does not sufficiently supply competent legal services at moderate prices to people with small incomes.[16] The bar has begun to meet that criticism through "legal aid" and "neighborhood law offices." But what of the inability of the "under-privileged" to meet the expenses of conducting investigations to obtain evidence without which meritorious cases will often be lost? Material suggesting the possibility of utilizing some sort of governmental investigation in such circumstances—thus supplying "white-collar justice"—is not even mentioned by Pirsig. Thus his section on the "administrative method" contains no reference to the important innovation under the Chandler Act of 1938 by which the S. E. C., an administrative agency, instead of entering orders subject to judicial review, supplies invaluable evidence concerning corporate reorganizations directly to the judge and the parties.[17] The extension of the idea embodied in that new practice to other areas of judicial activities deserves study.[18] For until we devise some way by which persons of modest means, in litigation with those possessed of ample means, are able to obtain essential evidence, we will continue to have a legal system of which a layman, like Callison, can legitimately say that it "makes justice a thing of purchase, of barter and sale." [19]

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14. (1923) 18 ILL. L. REV. 1. See also Millar's Introduction to ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE (1927).

15. "Gulson says that, in litigation, 'one party or the other is always supremely interested in misrepresenting, exaggerating or suppressing the truth,' and he speaks 'of the characteristic dangers of deception and fraud to which judicial tribunals are exposed. . . .' It would seem, then, that the courts should take all the precautions possible against being misled." FRANK, IF MEN WERE ANGELS (1942) 126.

16. P. 824.

17. See FRANK, IF MEN WERE ANGELS (1942) 45-7.

18. See *id.* at 122-8. That Chief Justice Taft's thinking moved in that direction, see WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION (1929) 33, 59, 206 n. 7.

19. See Frank, *White Collar Justice*, Sat. Eve. Post, July 17, 1943, p. 22. That article suggests why "discovery" procedure will not do the trick, *i.e.*, important evidence, needed to win a suit, may not be in the hands of the opposing party. See also dissenting opinion in U. S. v. St. Pierre, 132 F. (2d) 837, 840, 849 n. 40 (C. C. A. 2d, 1943).

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