

BOOK REVIEWS

CASES AND MATERIALS ON JUDICIAL ADMINISTRATION. By Maynard E. Pirsig. West Publishing Company, St. Paul, 1946. Pp. xxvii, 1017.

Every profession—the military, medicine, law—reaches assumptions as to its methods, which are accepted unquestioningly until there is a serious breakdown. In the military, it may come to be taken for granted that there should be a sharp division in command between the army and the navy; in medicine, that services should be rendered only through private practitioners dealing with individual patients. Each profession should constantly re-examine these underlying assumptions, so the profession could itself make the changes required to fit its methods to public needs.

In this book, Professor Pirsig offers a vehicle for the re-examination in law school of some of the assumptions made by the legal profession in its task, the administration of justice. "The fundamental principles, concepts and methods employed in the administration of justice," as he states, "are to be considered." And the method of study envisaged is the same "analytical and critical approach which the case-book system of instruction has taught students to adopt in their study of technical legal suggestions."

The eight chapters of the book fall, it would seem, into four parts. The first chapter, Justice as the Aim of the Legal Order, gives general direction to the critical inquiry which is to follow. It is justice according to law which is sought.

The next three chapters deal with major elements in the administration of justice. The most fundamental one is the adversary method, which is compared with the administrative method. Next comes the doctrine of precedent, basic as it is in the application and development of our law. The determination of the facts is also dealt with, both the character of the problem and the jury trial as the typical form of resolving it.

After these elements have been considered, there are chapters dealing with the courts, their organization, and the personnel of the judiciary. Then the book turns to the legal profession. After the criticisms of the profession, its organization, and the scope of its work have been considered, attention is turned to legal education and what it should do to equip for the tasks ahead.

Finally, there is a short chapter in agencies and methods of reform, as, judicial councils and rule making power of courts.

The book is unusually well done. The materials are varied in character, and are drawn from England and many of the states. The Selden Society as well as the American Judicature Society is represented. About half of the volume is made up of cases, statutes, and rules of court. The chapter on the doctrine of precedent uses several series of cases illustrating vividly the development of a particular principle in a single state. The rest of the volume consists of such materials as governmental and bar association reports, messages of the Presidents, treatises, and law review articles. The extracts are extensive enough to give the full flavor of the material used, and representative enough to show the views of all interests concerned in the administration of justice. The range and quality of the items selected, and the care which have gone into editing, reveal the results of Professor Pirsig's long and thoughtful experience with judicial councils and of the twelve years during which the course has been under de-

velopment in the University of Minnesota. Professor Pirsig expresses his great indebtedness in the work to Dean Fraser and Professor Cherry.

Is the course projected of a kind which a law school should introduce? It should more than pay its way if tested even narrowly. It would help give an understanding of the administration of justice as a whole which would be of advantage to any lawyer. But this test is surely not the only one to be applied by a law faculty. It has long been a commonplace that the bar has the major part in the public function of the administration of justice. More recently, it has come to be realized that the law schools have the task of preparing the students, not merely to represent effectively their clients, but to aid in the development of the profession itself. The public's principal criticisms of the profession have not been directed to the technical competence of its members, or to accuracy of their knowledge or analytical ability, with which law teachers have been so much concerned. The criticisms have been more fundamental. If we are to have a bar which will adjust its methods to the needs of our changing society, its on-coming leaders must be willing to think through its basic assumptions. In this essential task, Professor Pirsig's clear-sighted and hard-headed book would be of great aid.

Elliott E. Cheatham.†

THE ALIEN AND THE ASIATIC IN AMERICAN LAW. By Milton R. Konvitz. Cornell University Press, Ithaca, 1946. Pp. xiv, 299. \$3.00.

On May 6, 1882 Congress enacted the basic statute restricting Chinese Immigration. Three months later it adopted the first legislation establishing a general pattern for immigration regulation. These were the initial experiments by the Federal Government in the erection of immigration barriers. During the preceding century immigration had been completely unrestricted. But once these beginnings had been made the formulas of restriction directed against the immigrant and the Oriental were retained and expanded.

During the intervening period of 65 years we have developed a great body of law, through legislation and court decisions. The reaches of Congressional power were tested. Procedures were devised and perfected. National attitudes were crystallized into laws. Most of us will agree with President Roosevelt that the Chinese Exclusion Laws were a "historic mistake." But it cannot be denied that they made a profound impression upon our national policies, which to some extent has survived their repeal in 1943.

The story of our dealings with the alien, the immigrant, the foreign born, and the Oriental is an important one which involves the consideration of critical issues in constitutional, international, and administrative law. This is a field which needs a definitive exposition, since previous textual discussions generally are inadequate and out of date. But the reader who expects to find such a dissertation in this book is doomed to disappointment. For this work attempts merely to study some of the outstanding Supreme Court decisions dealing with immigration, naturalization, denaturalization, land ownership, employment and related topics. In connection with each of the selected cases it develops some background material, then follows with a rather full analysis of the published opinions, and concludes with a pronouncement of the author's judgments.

† Professor of Law, Columbia University School of Law.

This work must be evaluated, therefore, in the light of its limited objectives. Professor Konvitz has sought to demonstrate that our treatment of aliens and Orientals has not conformed with the best American traditions of equal justice and fair play. Unfortunately there is much evidence to support such a thesis, and the author should be commended for collecting and documenting some of the evidence. His presentation is readable and generally quite interesting.

It must be reported, however, that the book suffers from a number of regrettable deficiencies. Konvitz is not content with an objective statement of the facts. He is a strong partisan and it is his assumption that all facts should be made to fit his thesis. The result of this approach is that the book contains many exaggerations and misstatements. Such overstatement inevitably is self-defeating, for it tends to create a defensive attitude even in those who, like this reviewer, generally are favorably disposed to the author's point of view.

A great many illustrations could be cited. Thus on pages 58-59 the author lists 17 indictments against the deportation process. Several of these relate only to proceedings under the Chinese Exclusion Laws, which were repealed in 1943; others are clearly inaccurate:—for example, the statements that the alien is not entitled to counsel or to the confrontation and cross-examination of witnesses who testify against him; still others are only partly true. And on page 47 the author makes the very extreme assertion that the three and one-half million alien residents in the United States all are subject to deportation. One might just as easily contend that every resident of the United States is subject to imprisonment. Our laws provide for the deportation of those aliens who entered unlawfully and those who have committed certain limited types of offenses after entry. The Supreme Court never has said that Congress could order the deportation of a lawfully resident alien who has been guilty of no misconduct. And Congress never has indicated that it would sanction such arbitrary legislation.

At another point the author briefly describes the action of Congress in repealing the Chinese Exclusion Laws. Then, to illustrate his estimation of the temper of Congress, he quotes from the remarks of a congressman who *opposed* this measure. There is no mention of the fine, enlightened speeches of Representatives Judd, Magnuson, and a host of others who persuaded Congress to repeal those archaic statutes. Nor is there any reference to the tremendous upsurge of popular sentiment in favor of the Chinese people, which helped to bring about the repeal legislation.

Another example of the same unfortunate trait is the discussion of the racial discriminations in the naturalization laws. The author dwells at some length upon the statutory provisions which, under the interpretations of the Supreme Court in the *Ozawa* and *Thind* cases, barred Orientals from the privilege of naturalization. At one point he criticizes the Supreme Court for not following earlier decisions of the lower courts, which is indeed a surprising basis for objection. At another point he castigates the Supreme Court for not adopting his concept of the legislative intent, which rests upon the doubtful assumption that Congress never intended to exclude Asiatics, other than the Chinese, from naturalization benefits. Many of us will agree that the racial discriminations in the naturalization laws were contrary to the best American traditions and that they conflicted with our essential interests as a great nation. But one finds it difficult to understand the author's failure to recognize, beyond a few obscure references, the splendid achievements of Congress in rescinding the racial re-

strictions against the Chinese, the Filipinos, and the East Indians and making them eligible for naturalization. Actually the author has presented a picture that is misleading in the light of current conditions. Some of the most important racial exclusions in the naturalization laws have been eliminated. And, despite the author's pessimism, it is believed the remainder soon will be discarded.

A similar one sided approach is revealed in the author's denunciation of Justice Cardozo's careless dictum in *Morrison v. California*, 291 U. S. 82 (1934), which suggested that persons of mixed race might be disqualified from naturalization, even if the ineligible strain was not preponderant. That dictum never has been followed, and it does not state the law. The author surprisingly omits any reference to the line of cases, the administrative construction, and the recent statutory amendment which united in declaring that a person of mixed blood is eligible to naturalization if the eligible strains in his blood are predominant. Sec. 303, Nationality Act of 1940, 8 U. S. C. 703, as amended by Act of July 2, 1946; 8 C. F. R. 350.2; *In re Young*, 198 Fed. 715 (Wash. 1912); *In re Knight*, 171 Fed. 299 (N. Y. 1909).

In his discussions of Supreme Court decisions the author sometimes assumes an air of superior wisdom that frequently is unpersuasive. An example of this attitude is the asseveration that in the 60 years before *Schneiderman v. United States*, 320 U. S. 118 (1943) the Supreme Court consistently had failed to protect the rights of aliens. *Truax v. Raich*, 239 U. S. 33 (1915) and *Ng Fung Ho v. White*, 259 U. S. 276 (1921) are two of many cases that could be cited to dispute such a contention. It is difficult to accede to the supposition that the Supreme Court was wrong and Professor Konvitz is right in virtually every important case dealing with the rights of aliens. Most lawyers undoubtedly would disagree with a few of the decisions in this highly controversial field. But such complete dogmatism hardly is convincing.

The author approves the dissenting opinion of Justice Rutledge in *Knauer v. United States*, 66 S. Ct. 1304 (1946), which took the extreme position that once naturalization has been granted it cannot be revoked, even for flagrant fraud in its procurement. This theory probably will gain few adherents. Most of us recognize the dangers inherent in denaturalization proceedings and the need for protecting the integrity of American citizenship. But such solicitude cannot be extended to preserving the fruits of deception. Few lawyers or students would agree that the Government is powerless to revoke benefits obtained through fraud. Such a holding would weaken the defenses against imposition and would place a premium upon fraud.

Equally questionable is the author's position with respect to the curfew and exclusion orders issued early in 1942 by the military authorities on the West Coast against persons of Japanese ancestry. Most observers will agree now that grave mistakes were made by the military authorities and that there was inadequate provision to protect the rights of many loyal persons, citizens and aliens, who suffered only because they happened to be of Japanese origin or descent. But the Supreme Court seems to have been on solid ground in concluding that the nation's survival is paramount. I cannot agree that the courts may pass judgment upon the orders of the military commanders, issued during a time of actual hostilities to effectuate precautions reasonably related, in their estimation, to the military necessities. It is one thing to say, upon mature consideration, that the orders should not have been issued in that form; it is another thing for a court to assert that the military was powerless to issue them.

Many of the faults in the author's presentation stem from his apparent assumption that it is the function of the courts to pass upon the social desirability of all legislation. The principal objection to many of the cases he disputes is not that the measures attacked were illegal but that they were undesirable. It is wrong, I believe, to assume that the Supreme Court is empowered to correct what it conceives to be mistakes in legislative policy. Such a supposition would repose in the Supreme Court veto power over all legislation, state and federal. The delegation of such power to a body that is not chosen by popular suffrage would be undemocratic and unwise. The sound, democratic way to remove legislative errors, other than those which infringe Constitutional guarantees, is to educate public opinion and thus induce corrective action by the legislature.

It would be unfair to conclude this review without emphasizing some of the many good features of the book. Professor Konvitz has done a good job of research, particularly in the legal publications. And there is a satisfactory analysis of many leading Supreme Court decisions. Perhaps the most complete exposition is that of the background and the opinions in the *Hirabayashi*, *Korematsu*, and *Endo* cases, which dealt with the military orders against the West Coast Japanese. Particularly helpful also is the discussion of the *Bridges* case.

The reader will find in this book an abundance of new ideas. He may not agree with all of those ideas, but if he reads the book with a critical eye he will find here many things of value. The author's challenging approach is bound to stimulate the reader's thinking and should enable him to examine in fresh perspective some of the concepts he has heretofore accepted without serious question.*

Charles Gordon.†

THERE IS NO MYSTERY ABOUT PATENTS. By William R. Ballard. J. M. Barrett Corporation, New York, 1946. Pp. 120.

This is a small book which can be read comfortably in less than an hour. It is not a law book in the ordinary sense. It has no table of cases and cites very few cases and does not contain long dreary quotations for Judges. Almost all of the words of the book are by the author himself. It omits the uninteresting details of patent practice and procedure. The author says his purpose is "to present in a condensed form and in simple terms the philosophy and the fundamentals of the American patent system, and to indicate how that system works to accomplish its intended purpose, and why * * *". The excuse for so rudimentary a statement on the subject at this late day is that an entirely new and untrue theory of the patent system is now being advanced, and is being made the basis of a concerted effort to alter our patent laws so radically that they would be inadequate to accomplish their purpose."

He proceeds to set out his story in chapters on Things to Remember (what patents are); Why We Have Patents At All; Are We Paying the Right Price?; Is the Patent System Obsolete?; What Use of Patents Is Lawful?; Suppressed Patents; Control of Patent Groups; Public Safety, Public Health and Patents; and Whence the Sound and Fury? There follows a Postscript setting out some small reforms which may be desirable

* The opinions expressed are the author's, and do not necessarily represent the views of the Department of Justice.

† Attorney in office of General Counsel of Immigration and Naturalization Service, and member of the New York Bar.

and then extracts from testimony by small business men before Congress indicating that compulsory licensing under patents would be greatly to the disadvantage of the inventor and small business.

A patent should be distinguished from an invention or a physical embodiment of the invention. A patent is a property right, not to practice the invention, but merely to exclude others from practicing the invention for the limited period of seventeen years from the date of the grant.

The Revolution was fought to abolish monopolies but nevertheless the Constitutional Convention thought it was for the public good to get information about new inventions and they were willing to give a monopoly of the invention for a limited time in compensation for the information and as a bait to prevent an inventor from keeping his new invention secret. This exclusive right is not a true monopoly since it takes nothing away which the public had but really merely postpones the public use of something new. "The reservoir of knowledge is both an aid and an inspiration to any one interested in practicing or developing a particular art. Anyone is free to practice the invention when the 17 year patent expires. Since it is impossible to fix even an approximately fair monetary reward for each invention, the exclusive right varying in value as it does in exact accordance with the value of the invention seems an altogether proper payment to the inventor." This has an almost poetic beauty in that it automatically proportions the reward to the value of the invention turned over to the public. If the invention is properly disclosed in the patent the inventor has given all he needs to. Congress has repeatedly refused to amend the law to require him to "work" his invention during his exclusive period or to require him to pay taxes or to grant compulsory licenses to interfere with his own business.

The mere complexity of business and of science and industry has made the application of patents more complicated but nothing has occurred to mar the effectiveness of the underlying principle of a short exclusiveness for the revelation of a new invention. The fact that the system is 150 years old does not mean it should be discarded, but fills us with admiration for those who could so well foresee the future in the beginning of our government. The patent system is the thing which induced the establishment of research laboratories and they should be given the patent benefits so that they will continue to produce and disclose new inventions on which new heights of achievement may be built. "The one purpose of the patent system is to get the inventions made and disclosed so that they may be available to the public." The assembling of many patents in one company is not bad as "The making and patenting of improvements on the patented product of a going company is as much open to others as it is to the company itself." Many companies make pocket lighters, for instance, each separately patented. "Nothing could better promote the progress of an art than to have two or more companies (or individuals) competing under the spur of self-interest to see who could produce and patent the most and the best improvements relating to it."

A patent (the right to exclude) is property and can be used as any other property. It can be sold or leased or traded with. A license can be given for cash or for a license under a patent of another. "Any kind of property or any transferable right can, of course, be used as the inducement or consideration in an illegal agreement—patent rights and business as readily as money or any other property" including land, buildings and machines. Patents are being attacked but no one proposes to abolish the ownership of land or money or machines and the proposal to abolish

or emasculate patents is just as illogical. Thus, a patentee may limit his license to a single state, or for five years, or for a limited number of installations, or for a specific type of device; but the anti-trust laws prohibit a license limited to using the patentee's unpatented material, or from forbidding competition with the patentee, or on condition the licensee does not attack the validity of other patents held by the patentee, or many other improper conditions. "If the restraint imposed on the licensee *after* the license is one the patent already imposed on him *before* the license, the restraint is justified and is lawful." It may be that the anti-trust laws are not properly and fully enforced, but if they were most of the "new deal" attack on the patent system would fall of its own weight.

There is a "persistent myth" that patents (i. e. the patented invention) are suppressed to the detriment of the public. First be it noted that suppression could only last the 17 years of the patent's life, but most important the author reviews the investigations and assertions made and clearly shows that no one has ever been able to surely prove a single such suppression. Thomas A. Edison said, "I myself do not know of a single case. . . . The spur of self interest can be counted upon to get into the market any new inventions which are good enough to pay their way."

Groups that exist as result of research or invention, or companies that have research laboratorie are good for national economics as producing more new things to help the public. Pools of patents, if they go beyond cross-licensing appropriate to patents, infringe anti-trust laws and need no changes in the patent laws to eliminate them. Pools with free cross-licensing seem to remove the impetus toward independent research since no inventor has any incentive to make new invention for every other member to use. The author quotes General Mitchell as saying the Manufacturer's Aircraft Association discouraged improvement to such an extent that it was a threat to national defense.

"Patent property, like other property, is subject to the sovereign right of eminent domain in the Government . . . if a patentee should refuse to provide or permit others to provide the patented invention necessary for the protection of the public, the Government could take over the patent and make or permit others to make the needed things." The Act of 1910 in effect permits the Government to make or use a patented invention, compensation for which may be recovered by the inventor by a suit in the Court of Claims, but the right of exclusion cannot be used against the Government. Information for making artificial rubber was available in patents before Pearl Harbor, and the Government, if it desired, could have been producing it in quantity. If we had had no patent system to disclose the inventions, we might not yet have the necessary information.

The author seems to have established that the underlying principle of our patent system is sound and must be kept inviolate if we are to continue to progress. The laws are now adequate to prevent abuse of patents if the laws are enforced. The text is clear and simple. Probably the patent system would be beyond danger if every Congressman and every Senator could be persuaded to give to this book the few minutes needed to read it. To learn the true foundation of the patent system and to be able to help preserve it for American progress, every lawyer should read this book and see that There Is No Mystery About Patents.

Karl Fenning†

† Professor of Patent Law, Georgetown University Law School.