

## BOOK REVIEWS

LIONS UNDER THE THRONE. By Charles P. Curtis, Jr. Houghton-Mifflin Co., Boston, 1947. Pp. 361. \$3.50.

THE NINE YOUNG MEN. By Wesley McCune. Harper & Bros., New York, 1947. Pp. 293. \$3.50.

These two books have by now been reviewed so often that a new reviewer is compelled either to review the reviews or to talk about something other than the books. Herewith is a little of each.

## 1.

The McCune book is a miscellany of accounts of recent Supreme Court decisions interspersed with biographical chapters on each member of the present Court. It also contains a chapter "covering" in 13 pages a few anecdotes and six recent Justices. It is, in the words of Professor Rostow, "a relatively harmless and gossipy piece of journalism, designed to give the lay public some idea of who the justices are, and what they are doing."<sup>1</sup> The best that can be said has been said by Professor Rodell: It "could well serve as a starting-point and a handy warehouse for anyone anxious to take on a more ambitious task."<sup>2</sup>

This reviewer, having made more than his own share of factual mistakes, must concede that error comes easy, particularly in historical writing. Such mistakes can easily result from momentary mental lapse and may not be at all serious—Mr. Curtis' insistence that the Minnesota Milk Cases involved an Illinois statute is an example of a sort of mental typographical error.<sup>3</sup> Enough such slips occur even when great care is used, and hence great care ought to be used. The McCune book is chock-full of trifling errors, regrettable particularly in a book whose main value is informational. As a layman's book it is, despite the slips, one of the better summaries.

The Curtis book is quite different, though it sketches many of the same events. It is informational, but it has ideas enough to compensate the professional reader who makes his way through a familiar summation of Old Deal decisions and the Court fight. This is no criticism of the book, which is written for the 99 per cent of us who can't recall offhand just what the *Carter Coal* case was about. The book does not stop with 1937, and its most stimulating passages deal with recent cases.

At times, Curtis, in his effort to write for laymen, may underestimate them. The Curtis style admits of fair difference of opinion. Professor Braden thinks "superb prose" what Professor Rostow considers "archness of style" and Professor Rodell terms "chopped-sentence chit-chat."<sup>4</sup> I found the Curtis mannerisms of the abbreviated sentence and rhetorical question a serious interruption to easy reading.

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1. Rostow, Book Review, 56 YALE L. J. 1469, 1473 (1947).

2. Rodell, Book Review, 56 YALE L. J. 1462, 1463 (1947).

3. CURTIS 277.

4. Book Reviews, 56 YALE L. J. 1467, 1470, 1463.

## 2.

Professor Rodell thinks that Curtis has made Justice Frankfurter the hero of his book, and draws some conclusions from that belief. This seems to me wrong. Grant that Curtis chooses to oversimplify a nine-man Court into three men and a ghost; for under his treatment the cast is almost entirely Black, Frankfurter and Jackson, with the shade of Holmes as the omnipresent off-stage noise.<sup>5</sup> Grant that he largely omits consideration of the economic aspects of the Court's work, that he talks about theories of sovereignty, that he thinks pretty well of Professor Thomas Reed Powell—in short, grant that he has a good many points of view in common with Mr. Justice Frankfurter. Nonetheless he divides laurels. If the book is a race for honors, Justice Frankfurter “wins” Chapter XVI on personal liberties, but Justice Black “wins” so much of Chapter XIV as deals with state taxation affecting commerce. One would suppose from the Curtis expressions at pages 215 and 224 that he would say of the Frankfurter opinion in *Freeman v. Hewitt*,<sup>6</sup> invalidating an application of the Indiana gross income tax last year, “By what authority?”

In short, Curtis is no carbon copy. He deserves to be answered on his own principles, and on some of those principles he seems to this writer exuberantly wrong.

## 3.

One problem deservedly puzzling to Mr. Curtis is the extent to which the intent of the founders, the meaning of the Constitution in 1789, should influence contemporary decision. His general point of view is expressed in his first chapter sub-heading: “The limited usefulness of history and the irrelevance of our forefathers’ intentions.”

This view he would apply when dealing with punishment for contempt of court by the press. Thus *Bridges v. California*,<sup>7</sup> limiting the power of judges to punish for contempt those who criticize the judges’ acts, is scorned as “antiquarian.”<sup>8</sup> Just why is not wholly clear from the text.

Yet when Curtis desires to criticize such a view as this, or the minority view as to right to counsel in state criminal prosecutions, his scorn for history deserts him. Like most of us, he uses the historical argument when he finds it on his side. Of right to counsel he says that, in the 18th Century, states did not require counsel for the indigent; that English practice up to 1836 was so and so; that the Sixth Amendment was an innovation. “So”—and note that Curtis’ conjunction with history is a therefore—“So, when a case came up where a judge in Carroll County, Maryland, refused to assign counsel to a poor defendant . . . the Court refused to intervene,”<sup>9</sup> and refuses yet with the Curtis blessing. Similarly as to contempt, “Historically judges have always had this power . . .”<sup>10</sup>

Constitutional history should not thus catapult from argument’s glory to argument’s disgrace depending upon which page of the book one reads. This may be unfair to Curtis, because he is not primarily interested in the relation of American legal history to current problems, and if he were, he

5. Quite literally, CURTIS 200-201.

6. 329 U. S. 249 (1946).

7. 314 U. S. 252 (1941).

8. CURTIS 289.

9. *Id.* at 287-288.

10. *Id.* at 291.

would doubtless refine his analysis. But refinement it needs, for the function of yesterday's events in relation to today's lawsuits calls for highly selective judgment. A few off-hand classifications may be ventured:

(1) Some Constitutional phrases were so obviously written in the context of a world different from our own that the exact meaning of the Founding Fathers is merely a historical curio. Both Marshall and Hughes uttered the abstraction that Congress may regulate that which "affects commerce," but these utterances 113 years apart of course did not refer to the same things. Marshall probably would never have believed in 1824 that Congress had power to regulate wages in an office building. As conditions change meaning changes.

(2) There are also Constitutional clauses, as Chief Justice Hughes pointed out in the *Blaisdell* case,<sup>11</sup> in which meaning does not change no matter how much conditions change. For example New York now has roughly four times as many citizens as the 13 states of 1787 put together, but it still can have only two Senators.

(3) There are also deliberately ambiguous clauses—the buck passes of the Constitutional Convention. Some such clauses are well described by Curtis in his first chapter. They are the clauses in which the Founders were unable to agree and codified their uncertainty so as to get on to the next point. Curtis' example of Art. IV, sec. 3, concerning admission of new states, is a good one.

(4) Only a shade different are the clauses which are deliberate abstractions not because agreement was politically difficult, as in the preceding paragraph, but because the Fathers knew they could not entirely foresee future problems, and thus used broad terms for the purpose of leaving their full content open. "Cruel and unusual punishments," or "unreasonable searches and seizures" are examples. These phrases, by their generality, invite the addition of meaning. Assuming that the Eighth Amendment may be included within the Due Process clause of the Fourteenth, the Delaware and Maryland whipping posts should now be "cruel and unusual punishment" regardless of the status of corporal punishment in 1789.

(5) The broad goal phrases form another group. These are the terms which describe general objects of a sort in which our world is not so changed from that of 1789 as to have robbed the words of meaning. Most of the Bill of Rights is an example. Commerce in 1948 may be unrecognizably more complex than in 1788, but people still talk and pray in pretty much the same ways, and their words and prayers are still suppressed in pretty much the same ways. The Constitutional phrases thus set a minimum for decent conduct. Yet this is a minimum, not a maximum. It is a minimum because the phrases are sufficiently general to permit of allowance for change of conditions. One such change is the development of variant methods of suppression, as for example driving persons out of their jobs because of their political views. Another is the rising moral standard of the community, a standard implicit in Cardozo's reference to the concept of "ordered liberty."

(6) There are also Constitutional phrases of general clarity which are rendered ambiguous in particularly novel situations. This group cuts across the others. For example, the clause in Article I giving Con-

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11. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934).

gress power "to exercise exclusive legislation in all cases" over the District of Columbia is about as specific as words can be as to the general control of the District. In 1940, Congress sought to utilize this power to permit District residents to use the diversity jurisdiction of federal courts outside the District.<sup>12</sup> (This power is not given such citizens under Article III, say the decisions, because the District is not a "state.") The history of the District clause shows that the Founders never thought about this exact problem, although the discussion in the Virginia ratifying convention makes quite clear that they did not intend the District Clause to permit Congress to exercise any powers outside the District itself.<sup>13</sup> The statute illustrates that there are Constitutional clauses as specific as the Convention could make them, which still leave problems of interpretation in which historical research is indicative but not conclusive because a possible use of the clause never occurred in 1787.

This sort of analysis may itself be all wrong without affecting the underlying thesis that the relevance or irrelevance of constitutional history to current problems depends upon the particular clause, and indeed even upon the particular problem within a clause. Curtis to the apparent contrary on both points, our forefathers' intentions are not generally an "irrelevance;" and at the same time a man should not be tried without counsel in 1948 because state-appointed counsel may not have been "generally regarded as an inherent fundamental right" in 1789.<sup>14</sup> Whether the Sixth Amendment is treated as a broad goal phrase in the fifth category above, or whether the measure is as Mr. Curtis states it, "a common sense of justice,"<sup>15</sup> the fairness of a criminal trial should not depend upon whether the defendant is a man of means.

The most articulate, if not the most applied, portion of the Curtis theory of law and history is his conviction, expressed in his first two pages, that we are "getting older and wiser;" that our forefathers made plans but that "there is no reason why we should feel we have to carry out their plans for us;" indeed, "They may sit in at *our* councils. There is no reason why we should eavesdrop on theirs."

Though we may loosen our bonds with the past, we should not gambol quite so freely. For the storm is coming, and much that we prize may be swept away if we do not hold with relentless tenacity to some plans our forefathers made for us. Else we may have only that historian's consolation which Jefferson expressed when he observed on the momentary destruction of speech and press in the administration of Adams, "It is still certain that tho' written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people: they fix too for the people principles for their political creed."<sup>16</sup>

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12. 54 STAT. 143 (1940).

13. There was in 1788 a genuine fear that Congress might grant District residents special privileges outside the District, an argument which was countered with the assurance that "This exclusive power is limited to that place solely." Remarks of Pendleton in 3 ELLIOT, DEBATES IN THE STATE CONVENTIONS 440 (2d ed. 1901). Cf. comments of Mason, *id.* at 431, and discussion generally, *id.* at 430-440.

14. CURTIS 288.

15. *Ibid.*

16. Jefferson to Priestly, June 19, 1902, 5 Doc. HIST. CONST. 259-260 (1905). For a criticism of slavery to historical research, see Frank, *The United States Supreme Court 1946-47*, 15 U. OF CHI. L. REV. 49, 50 (1947).

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CASES AND MATERIALS ON THE LAW OF INSURANCE. By Edwin W. Patterson. Second Edition. The Foundation Press, Inc., Chicago, 1947. Pp. xxii, 832, \$7.50.

The second edition of Professor Patterson's casebook deserves, and will undoubtedly receive, wide recognition as the product of sound scholarship and ably applied classroom experience. The new edition presents no substantial departure from the pioneering first edition. The changes that have been made are for the most part the result of additional refinement and clarification, but the order, emphasis and substance remain much the same.

Crisp introductory notes are now found at the beginning of each major subdivision. These notes silhouette the practical commercial issues, stake out the scope of the legal problems to be presented, and serve as useful outlines for classroom lectures and discussions. Except for cases and materials on the "incontestable clause," and "change of beneficiaries," the catch-all fifth chapter of the first edition has been almost completely eliminated. The less extensive treatment accorded the portions retained is balanced by relating them to cognate materials. The omissions, which are not crucial, have probably been dictated by the author's expressed desire to prepare a casebook which "can be pretty thoroughly covered in a course of three hours a week for one semester." A number of new cases and references have been added to reflect significant changes in the field of insurance. More than half of the principal cases were not included in the previous edition. The appendix contains the current forms of standard New York and Massachusetts fire insurance policies, and an automobile policy which combines the trade-prescribed forms of liability and "comprehensive" policies.

The excellence of this collection of teaching materials lies principally in the order and compactness of its composition, the skillful selection and editing of case and text extracts, the consistent interlacing of readable notes with cases, appended policies, and statutes—all of which are designed to provide a kind of insurance-mindedness, which is more than an understanding of a series of legal concepts. The author creates an awareness of the interplay of business practice, judicial decision and legislative enactment and of the effect of these forces on the "insurance-community" (the insureds and insurers). But the impact of the institution of insurance and of decisions and legislation in this field upon the community as a whole is not as adequately treated. Not enough light is thrown upon the attainment of community security through the medium of insurance and even less light is directed to the magnitude of the social and economic force of insurance as an institution and a business.

In the chapter on "State Supervision and Control," one would expect greater emphasis to be placed upon the facts of insurance life. A clearer understanding of state insurance controls could possibly be secured by considering: the specific abuses that led to the Armstrong and other New York State insurance investigations;<sup>1</sup> the manner in which the industry has set its house in order;<sup>2</sup> the early opposition of insurance men to state

1. For accounts of the Armstrong Investigation in 1905-6 and the Accident-and-Health Insurance Investigation of the New York Insurance Department in 1910-11, see MOWBRAY, *INSURANCE* 502 *et seq.* (3d ed. 1946). The following are cited therein as the more common types of abuses: "a. Use of improper policy forms. b. Failure to live up to contracts. c. Unfair discrimination. d. Failure to make adequate financial provision for meeting losses. e. Unwise and speculative investments, and graft." *Id.* at 511.

2. See KULP, *CASUALTY INSURANCE* 587 *et seq.* (rev'd ed. 1942), for an illustration of the self-regulation and self-imposed discipline of the casualty insurance business.

regulation;<sup>3</sup> the cooperation that exists generally between the industry and insurance commissioners;<sup>4</sup> the rapid growth and colossal size of the insurance business; the charges of concentration of economic power in the hands of those who direct insurance companies, and of self-dealing by "insiders";<sup>5</sup> anti-social practices which persist in "industrial" insurance;<sup>6</sup> lapses in state regulation which have made possible bribery,<sup>7</sup> mail order trickery,<sup>8</sup> and the arbitrary division of lines of business between fire-marine and casualty companies.<sup>9</sup> Among student exercises which might be suggested for use with this approach are: (1) an analysis of *T. N. E. C. Monograph 28*, as compared with the able reply by industry spokesman in *T. N. E. C. Monograph 28-A*, and (2) a comparison of the indictment of certain features of "industrial" insurance by Professor Patterson, with the expression of a somewhat different viewpoint by a representative of the National Convention of Insurance Commissioners.<sup>10</sup>

The momentous *Southeastern* case,<sup>11</sup> omitted from the text, is, the subject of oblique treatment. The effect of this decision upon the several phases of state regulation is reflected in the *Robertson*<sup>12</sup> and *Benjamin*<sup>13</sup> cases,—but Federal regulation could, perhaps, have been approached more broadly and directly through the *Southeastern* decision itself. The character of the indictment,<sup>14</sup> the reliance of the majority opinion upon the

3. See Berke, *A Legal-Economic Discussion of the "S. E. U. A" and "Polish Alliance" Cases*, INS. L. J. 39, 47 (July 1944); VANCE, *HANDBOOK OF THE LAW OF INSURANCE* 25 (2d ed. 1930).

4. In the statement filed as a reply to the report of the T. N. E. C. by 137 life insurance companies domiciled in the United States, the National Association of Insurance Commissioners was extolled as "the greatest single force in advancing uniform insurance law," and "the outstanding organization through which uniformity of statutory interpretations and uniformity of administrative rulings have made such appreciable progress," and the encomiums are multiplied. T. N. E. C. MONOGRAPH No. 28-A, *Statement on Life Insurance*, § III, p. 82 (1941).

5. See T. N. E. C. MONOGRAPH No. 28, *A STUDY OF LEGAL RESERVE LIFE INSURANCE COMPANIES*, §§ II, III, IV, VI and VII. The techniques of self-perpetuation and interlocking of directorates with the resulting power concentration are described in §§ III and IV.

6. Professor Patterson has cited the inordinately high expense and lapse ratios in industrial insurance, concluding that the "portion of the lower income group which can be persuaded to take a pitifully inadequate amount of insurance only at an excessive cost of persuading them to take it should be denied this luxury." Patterson, *The Distribution of Wage-Earner's Life Insurance*, 2 LAW AND CONTEMP. PROB. 3, 9 (1935). Cf. Fuller, *The Special Nature of the Wage-Earner's Life Insurance Problem*, *id.* at 10. For a further description of the abuses to which industrial insurance is peculiarly susceptible, see T. N. E. C. MONOGRAPH No. 28, pp. 271-305.

7. See *State v. American Ins. Co.*, 200 S. W. 2d 1 (Mo. 1946).

8. See testimony of Hon. Sam Hobbs, Rep., Ala., author of H. R. 687, in *Hearings Before Committee on Post Office and Post Roads on H. R. 687*, 78th Cong., 1st Sess. (1943); Patterson, *The Future of State Supervision of Insurance*, 23 TEX. L. REV. 18 (1944).

9. See Blanchard, *The Lawyer and Insurance*, in *PROCEEDINGS OF THE SECTION OF INSURANCE LAW*, A. B. A. 130, 132 (1946). Cf. Professor Patterson's statement that "competition for business has produced pressures for the maintenance of the strict separation between the fire-marine and casualty lines; a counter pressure has been exerted by the demand for coverages . . . which cut across these two lines." Casebook under review at 54.

10. See Hobbs, *The Role of the Insurance Commissioner in Industrial Life Insurance*, 2 LAW AND CONTEMP. PROB. 49, 56 (1935), and note 7 *supra*.

11. *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).

12. *Robertson v. People of State of California*, 328 U. S. 440 (1946).

13. *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946).

14. The indictment to which the defendants demurred charged that "the member companies of S. E. U. A. controlled 90 per cent of the fire insurance and 'allied lines' sold by stock fire insurance companies in the six states where the conspiracies were consummated; . . . the conspirators not only fixed premium rates and agents' com-

economics of insurance, and the court's social-policy approach<sup>15</sup> are live, teachable elements. The use of these materials would leave little doubt that, as Professor Patterson has said, "The steady encroachment of Federal power . . . has not resulted from the machinations of a perpetual set of personal devils."<sup>16</sup> Judged by its immediate impact upon the underlying scheme of state taxation and regulation of insurance companies, the *Southeastern* case may be of arguable significance, but the lives and fortunes of untold millions will be affected by the self-examination of insurance companies, insurance commissioners and state legislative bodies induced by this decision.<sup>17</sup>

The importance of "social insurance" is neither emphasized nor explored. The social security laws are cited as just another example of the forms of insurance provided by governmental agencies along with hail insurance, workmens' compensation funds, federal banks deposit insurance, Torrens title insurance funds and war-risk insurance. The nation's social security program characterized by Professor Blanchard as "the most significant . . . legislation in recent years,"<sup>18</sup> is disposed of in a single paragraph.<sup>19</sup> The number of persons covered by Federal Unemployment and Old-Age and Survivors' insurance compares favorably with the number covered by all the life insurance policies of all the insurance companies of the country, with Federal Survivors' insurance protection already equivalent to 50 billion dollars of term insurance. But the economic and social force of these realities is excluded by the wall with which the author's definition surrounds the concept of "insurance."<sup>20</sup> It was this definition which led Professor Patterson to the conclusion that

missions, but employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage." 322 U. S. 533 at 535.

15. "In marking out these activities the primary test applied by the court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether in each case the competing demands of the state and national interests involved can be accommodated." 322 U. S. 533 at 548. The court relied upon such sources as T. N. E. C. MONOGRAPH No. 28 and various statistical compilations.

16. Patterson, *The Future of State Supervision of Insurance*, in REPORT OF PROCEEDINGS OF THE SECTION OF INSURANCE LAW, A. B. A. 188 at 31 (1944).

17. See Blanchard, note 10 *supra*, at 135. See also Symposium, *S. E. U. A.—and After*, INS. L. J. 387-394 (July 1944); Ely, *State Rating and Related Laws 1947*, INS. L. J. 867 (Oct. 1947); COVER, DEVELOPMENTS IN STATE LIFE INSURANCE LEGISLATION RESULTING FROM PUBLIC LAW 15 (Pamphlet of the Lincoln Nat'l Life Ins. Co., 1946).

18. Foreword to WYATT AND WANDEL, SOCIAL SECURITY ACT IN OPERATION, p. vii (1937). See casebook under review at p. x, for acknowledgment of assistance in preparation by Professor Blanchard.

19. "'Social Security' laws, Federal and state, make provision for unemployment insurance benefits, and for death benefits as a supplement to the old age benefits. As these plans are not clearly self-sustaining, it is not clear that they are to be classified as insurance." Casebook, p. 116, n. 5.

20. Patterson, *The Distribution of Wage-Earner's Life Insurance*, 2 LAW AND CONTEMP. PROB. 3, 4 (1935). "Historically, insurance means a scheme of risk distribution whereby persons exposed to similar risks receive payments, in case of loss, from a fund derived solely from contributions made by the persons so exposed. In other words, insurance is here taken to mean a completely self-sustaining, unsubsidized plan of risk distribution. . . . Insistence upon this definition will serve to indicate clearly when proposals for government insurance cease to be insurance and cross the line from individualism to paternalism, philanthropy or charity."

"wage-earners' life insurance, as above defined, is socially necessary but economically impossible."

The reviewer could find no reference in this work to the Brandeis-inspired savings-bank insurance plan. The plan, which is now permitted in Massachusetts, Connecticut and New York, is expanding,<sup>21</sup> and has been recognized as a possible antidote to the social poison compounded of inadequate wage-earner insurance, exorbitant costs and high lapse rates. A down-to-earth lesson in the legislative process could possibly be found in the resistance of various state legislatures to the introduction of the savings-bank plan.<sup>22</sup> In connection with this study it might be desirable also for students to wrestle with Mowbray's appraisal of this plan of insurance,<sup>23</sup> and to ponder why support for such a plan is limited to those of the "advanced liberal persuasion." It might even be in order at this point to suggest the existence of well-organized legislative lobbies.<sup>24</sup>

In the chapter, "What is Insurance?" Professor Patterson has introduced the "group-health" insurance problem, *i. e.*, whether cooperative, non-profit medical plans constitute "insurance" within the meaning of state regulatory statutes. The introduction is by way of the muddy *Community Health* case.<sup>25</sup> The notes which follow this case do not generate a consideration of whether the fumbling of the court is due to the struggle between social pressure and legal formula. Nor is appropriate weight accorded to the possible threat to national health and economy, if in the absence of appropriate legislation, the courts were to conclude that they were bound by patterns of thought, evolved in another era, and applicable to burial schemes and plate-glass replacement plans. It might also be of value at this point to raise such questions as: To what extent are non-profit pre-payment medical organizations the answer to the problem of "health insurance?" What is the place of the private insurance carrier in this type of coverage? Are these two agencies ineffective to a degree that would warrant consideration of such state compulsory health insurance plans as have been adopted in Rhode Island and California, or a Federal health plan such as the Wagner-Murray-Dingell bill proposed?

The author has missed an inspirational note that has pedagogical value as well as social force—a note dramatically expressed by Professor Vance:<sup>26</sup>

"Here the stage is set for observing the mighty attempt now being made by modern society to equalize the uncertainties and distribute the risks incident to human life and all its activities. Imaginative people enjoy calling it the quest for social security."

21. MOWBRAY, *INSURANCE* 310 (3d ed. 1946); see STEWART, *BUYING YOUR OWN LIFE INSURANCE* (Public Affairs Pamphlet No. 134, 1947), at 4 *et seq.*

22. MOWBRAY, *op. cit. supra* note 21, at 311.

23. "The extension of the system has been strongly advocated as a public service by those of the 'advanced' liberal persuasions. . . . So long as the system is surrounded by proper safeguards as in Massachusetts, New York, and Connecticut laws, there appears to be nothing unsound about it." MOWBRAY, *op. cit. supra* note 21, at 311. See the endorsement of the plan by Patterson, cited *supra* note 20, at 8.

24. MOWBRAY, *op. cit. supra* note 21, at 484.

25. *Commissioner of Banking and Insurance v. Community Health Service*, 129 N. J. L. 427, 30 A. 2d 44 (1943). *Cf.* *Jordan v. Group Health Ass'n*, 107 F. 2d 239 (App. D. C. 1939), cited as the leading case in the note to the *Community Health* case on p. 33 of the casebook. See *MEDICAL CARE INSURANCE, A SOCIAL INSURANCE PROGRAM FOR PERSONAL HEALTH SERVICES, REPORT FROM THE BUREAU OF RESEARCH AND STATISTICS SOCIAL SECURITY BOARD TO THE COMMITTEE ON EDUCATION AND LABOR UNITED STATES SENATE*, Senate Committee Print No. 5, 79th Cong., 2d Sess. (1945).

26. VANCE, *CASES ON INSURANCE* 1 (headnote) (3d ed. 1940).

Professor Patterson's casebook is a masterfully constructed, precisely engineered instrument for teaching, which I have used with pleasure. One could wish that the guide-lights supplied with this teaching equipment were less limited in their scope, but a law-teacher sharing this view should have the imagination and ability to adjust them.

Julian E. Goldberg.†

LEHRBUCH DES VÖLKERRECHTS. (PART I). By Paul Guggenheim. Verlag für Recht und Gesellschaft, Basle, Switzerland, 1947. Pp. xviii, 159.

The volume under review is the first installment of a treatise on international law, (in German) the final section of which, according to the publisher's prospectus, will appear in 1948 and bring the total number of pages to 800. Under the circumstances a review in the present instance can hardly be more than a preliminary statement.

Professor Guggenheim is on the staff of the Graduate Institute of International Studies in Geneva; he is well represented in the more recent literature on international law. His present study is focused on international, and particularly Swiss, jurisprudence and is thus a further addition to a small but seemingly growing collection of studies of international law from respective "national" points of view.

The volume under consideration consists of three chapters, entitled respectively Bases of International Law, International Law as a Supra-National System, and The Formation of International Law. Guggenheim begins with the usual definition, discusses briefly the weaknesses and retarded development of international law, and considers the question of its ultimate foundation, which he somewhat vaguely defines as the principle underlying universal customary law (he rejects the *pacta sunt servanda* principle as being itself a part of customary law, not, however, its basis). Natural law concepts are emphatically rejected: "the theory of international law must treat positive international law as it is observed in experience."

The relationship of the international and national legal systems is considered, and Guggenheim concludes that the more acceptable theory recognizes the primacy of the former, on the ground that it circumscribes the temporal, geographical, and substantive scope of the latter. He affirms that positive international law does not acknowledge any exclusive substantive competence for municipal law, and in fact the scope of such competence is constantly subject to change through international legislation. There is an interesting and useful discussion of the execution of international law under municipal law, with particular reference again to Swiss practice.

The final and longest chapter, dealing with the formation of international law, is somewhat less theoretical. There is a brief section on customary law, followed by an extensive discussion of the law of treaties. This covers the usual ground: the treaty collections, nature and content of treaties, ability to conclude treaties, procedure, bilateral and multi-lateral treaties, reservations, registration with the League of Nations and UN, preconditions for the conclusion of treaties, rights and obligations of third parties, the "most favored nation" principle, duration, termination,

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and interpretation of treaties, and the problem of conflicts. Consideration is given to the "general principles of law recognized by civilized states" which the Statute of the International Court of Justice accepts as a source of law, and to equity, which is often accepted as a basis for arbitral decisions. A final section deals briefly with the codification of international law.

Guggenheim's treatment of the subject in general is highly commendable. His emphasis is entirely on modern practice and concepts—he includes in his study the latest post-war developments in the field—and he has drawn on a wide variety of contemporary literature. In view of the fact that international law is still today regarded by most laymen and even lawyers as a rather mysterious subject that has little if any relevance to the facts of life, one may welcome Guggenheim's forthright showing in this volume of the significant place of international law and of its relationship to the larger political and social problems. It should also be acknowledged that Guggenheim has rather successfully cut through a number of troublesome issues of theory among writers in the field by pointing to concepts which should prove conducive to progress. This treatise should also be of value to the practicing lawyer in view of the numerous new problems coming before the Swiss courts as a result of the war and post-war international settlements. It is to be hoped that succeeding installments will maintain the high standard of the present issue, and that a comprehensive bibliography, list of cases, and explanation of abbreviations will be supplied.

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THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES. (Second Edition.) By Israel Packel. Matthew Bender & Co., Albany, 1947, pp. xix, 333.

I began the review of the first edition of this book by saying: "As Bacon took all knowledge to be his province, so the author has taken all fields of cooperation for his kingdom." This statement is even more true of the second edition than it was of the first.

It is believed that this is the only book which coordinates the various types of cooperative activities. The author has not attempted to present an encyclopedia with respect to the law of cooperation. On the other hand he has attempted, and quite successfully, to point out situations and problems with appropriate citations that may arise in the organization and operation of nearly any type of cooperative. Many of the subjects and topics to which he directs attention would require chapters, or possibly books, for an exhaustive discussion. The author, however, by calling attention to various problems and questions makes it possible for the lawyer or those peculiarly concerned with the organization or operation of a cooperative to be aware that a particular problem may be inherent in a given type of situation. In other words, the general purpose of the book has been to alert persons concerned with cooperation to questions and dangers that they might otherwise not realize existed.

The author has made a commendable effort to dissipate the current fallacy that cooperation has any relation to communism. He points out that a cooperative association is an economic unit that is formed for

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economic gain through effecting savings or through increasing financial returns, or through obtaining goods and services of better quality than would otherwise be available. In other words, the profit motive in some form is the basis for the formation of cooperative associations. In this regard the author calls attention to the decision by the Supreme Court of the United States involving the Associated Press, in which that Court pointed out that the Associated Press was a cooperative association, and the author leaves the inference that no one would think of identifying the Associated Press with any form of communism.

One of the outstanding features of the book is the discussion of provisions concerning exclusive dealings. Also the discussion of the taxation of cooperative associations constitutes a real contribution to the literature on the subject. As the author points out in the foreword, this is one portion of the book that has been considerably revised.

In the discussion of the retention of surplus as a means by which a cooperative association may increase its capital, it is suggested that capital may be increased by refraining "from declaring patronage refunds." While this statement is entirely correct, it is believed the author would agree that the same practical result might be achieved by declaring patronage refunds but requiring that they be allocated on the books of the association with the provision that they will be paid out in cash in a subsequent year on the basis of first in, first out. In fact, statements in subsequent paragraphs make it clear that the author has this type of operation in mind. Perhaps in a later edition the author will discuss at greater length the status of allocated patronage refunds that are made by an association in pursuance of a mandatory obligation in its organization papers or in a contract to make them. In such case the board of directors would have *no discretion* relative to the *payment* of patronage refunds, and thus the refunds would appear clearly to be deductible or excludable by the association in computing its income taxes. It is believed that such obligatory refunds could be paid in cash, certificates of some kind, or allocated on the books under terms that give the patrons a bona fide interest in them.

The reader should keep in mind the purpose of the author in writing the book, which was to cover the entire field or spectrum of cooperation without exhaustively dealing with any particular subject. The author has displayed considerable artistry in saying much with a few words. The book invites the reader to read on. Many interesting and constructive suggestions not only of a legal but of a practical and business nature are given throughout the book. These comments will be found most helpful. The extensive bibliography should be found particularly useful. Hundreds of cases are cited that will enable an attorney to find original authorities on nearly every question of cooperative law. It will be a liberal education in the law of cooperation for anyone to read this book.

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