

BOOK REVIEWS

A Treatise on International Law, with an introductory essay on the definition and nature of the laws of human conduct. By Roland F. Foulke. Philadelphia, The John C. Winston Co. 1920. 2 vols. Pp. 482, 518.

This is an unusual work. Instead of presenting the rules of positive law as developed in the practice of states, by custom, agreement, diplomacy, arbitration, etc., the learned author has apparently set himself the task of finding the underlying philosophy and legal force in the rules of conduct which characterize the intercourse of nations. His work therefore constitutes a critical analysis of the views of modern writers on the so-called rules of international law and an effort to deduce from conflicting opinion what seems to him the fundamental truth. This analysis is made from the point of view of the lawyer, the important conclusions of writers as to rules of law being measured by the test of legal accuracy. Where the practice of states differs, the author seeks to present the reasons, found in the external factors influencing state conduct, for departure from a norm, if there is one. The author evidences throughout a critical legal mind which takes nothing for granted; the book, therefore, cannot fail to be of interest to the student of international law.

The arrangement of the topics is also unique. It is divided into three parts: I. Preliminary; II. Substantive International Law; and III. Remedial International Law. Part I includes three chapters, entitled respectively, Definition and Nature of Law, Facts of International Life, and Definition and Nature of International Law. Part II includes six chapters, entitled respectively, Intercourse between Independent States; The Territory of an Independent State; The Open Sea and its Branches and the Maritime Belt; Treaties; Independent States and Aliens; and State Conflicts. Part III includes ten chapters, entitled respectively, Redress for Damage to a State Interest; War; Neutrality; Conduct of Hostilities; Property in War; Public Property in War; Private Property on Land and in Maritime Belt in War; Private Property on the High Sea in War; Private Individuals in War; Character of Individuals and Property. Each chapter ends with a useful summary, and a final chapter contains a summary of the conclusions of the entire work.

It will readily be admitted that this division is original; it cannot be said that clearness or logical order has been subserved by this particular arrangement. In fact, much of it seems fairly arbitrary, but an excellent index makes the contents accessible.

The author's method is to present in the text succinctly the conclusions he has reached and in the footnotes some of the instances in which the rule or practice discussed in the text has been applied, with citation of authorities.

The contribution of the author consists primarily in Part I, dealing with the fundamental conceptions of Law and International Law. He recognizes at once that much of the dispute as to the legal nature of International Law turns necessarily on the definition of Law, and as to this men differ. Failing to reach a common understanding of the nature of Law, certain polemics on the nature of International Law printed some twelve years ago failed to arrive at any satisfactory conclusion. The author points out that the Austinian conception of law, with a political sanction ever present, is not adhered to universally; hence it is not unnatural that a like difference of opinion as to the nature of international law should prevail. Logical adherence to the Austinian view has finally led to the inevitable conclusion that inasmuch as independent

states have no visible political superior, international treaties merely embody moral, and not legal obligations. Yet what international tribunal could so hold? The error in the conclusion, it is submitted, shows the error in the premise. Our author defines Law as the conception of human conduct as determined by external factors; and International Law as the conception of the conduct of independent states as determined by external factors other than the forces of nature and external political power, and excluding ethics. His inquiry is directed to the conduct of states as determined by these factors, which include self-interest, inherent prejudice, international public opinion, custom, or precedent, and pressure from one or more states. His distinctions evidence careful thought; his differentiation between municipal and international law will prove helpful. He correctly assails the ambiguous use of the term "right," but when he substitutes "interest," "power" or "privilege" he does not always enlighten. Although writing as an analytical lawyer, he is not apparently familiar with the contributions toward correct fundamental legal conceptions made by the late Professor Hohfeld [(1913) 23 YALE LAW JOURNAL, 16; (1917) 26 *id.* 710]. In his use of the concept "power" he occasionally confuses physical and legal power (e. g. sec. 802).

The principal defects of the book become apparent in the treatment of positive law. Here the author has relied upon other writers and while he has undoubtedly consulted with intelligence and discrimination much of the English literature on the subject, he has often missed some of the best monographic studies and has apparently avoided an examination of the continental literature. On many of the controversial points with which he deals, e. g. the rules as to aliens, mob violence, *postliminium*, etc., some of the best thought is published in foreign languages. Nor has he seen some of the studies in English that would have aided him; for example, he makes no mention of John Bassett Moore's study on *postliminium*, a doctrine which is not, as the author suggests, "inapplicable in international law and should accordingly be discarded as unnecessary and confusing" (sec. 810). Familiarity with Latin-American boundary disputes would have shown the invalidity of this conclusion. The same lack of published information where its absence may be deemed to have impaired the author's conclusions is evident in the treatment of such topics as the responsibility of states, the effect of war on treaties (in which the important Resolutions of the Institute, recently approved by Judge Cardozo in *Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185, are ignored), the status of gulfs and bays (where no mention is made of the important rule that an assertion of jurisdiction over wide bays and acquiescence therein has sustained a claim of sovereignty, as affirmed in the award of the Fisheries Arbitration, 1910), and several other topics. Inasmuch as the author takes the view that municipal statutes and decisions dealing with rules of international law cannot be regarded as international law proper, the almost complete absence of citation of judicial decisions may be excused. Yet the important awards of international tribunals might on the same reasoning have been included. Some of his statements are not supported by authority: e. g. the federal courts of the United States (vol. II, p. 29), *do* assume jurisdiction of suits between foreigners (*The Belgenland* (1884) 114 U. S. 355, 363, 5 Sup. Ct. 860, 863); the expulsion and exclusion of aliens is *not* frequently (sec. 429) but very rarely regulated by treaty. Rome was *not* friendly to aliens (sec. 426). On the other hand, some of his conclusions show keen judgment. For example, the principle he announces that expatriation without the consent of the national state is impossible, while contrary to the professed American theory, is nevertheless supported by actual practice, and even our federal statute of March 2, 1907, impliedly admits it by denying to American citizens the privilege of expatriation in time of war.

The author is a lawyer with a lawyer's demand for accuracy of reasoning and statement; and he is also a realist. He recognizes that a state's title to its territory rests upon its physical ability to maintain and vindicate it. His thesis that international law is merely a conception of the conduct of nations as determined by certain external factors makes him keenly alive to the nature and force of those factors; he therefore is eminently practical in his examination and solution of motives for international action. Yet at times his statements (secs. 805, 840) are marked by a want of judicial restraint inappropriate in a scientific treatise.

As a philosophic and analytical study the book is to be welcomed. Critical works ought to be encouraged. With the technical equipment in positive international law of a Westlake, Moore, or Renault, the author's power of critical legal analysis would have given us a splendid treatise. The absence of such equipment, and the unique, almost bizarre, arrangement of the topics, has made many of the sections quite inadequate and therefore often misleading. The physical make-up of the work is attractive. It deserves the serious consideration of the profession.

EDWIN M. BORCHARD

Yale University, School of Law

Federal Taxes. By George E. Holmes. Third Edition. Indianapolis, The Bobbs-Merrill Co. 1920. Pp. xiv, 1151.

The federal government's taxing arm is so long and is reaching so many subjects that books upon federal taxation are vitally necessary. These books are usually of two kinds, one a manual of suggestions for the business man who is his own lawyer, and the other a legal treatise for lawyers. While the present volume will be of undoubted help to laymen, it is distinctly a lawyer's book for lawyers. The authorities are collected and discussed in an extremely complete manner. Such subjects as the constitutionality of taxing capital gains as income, or the admission in evidence of documents not properly stamped, are adequately treated. One will not find here, it is true, direct suggestions as to the rate of depreciation he may allow himself, though he will find the legal rules governing such allowances. Obviously, however, this is a book of legal authorities and not of suggestions for lessening the amount of your tax. One may perhaps feel disappointed that the author's own prophecies of law from the authorities are not more definitely stated, but otherwise the author's purpose seems to have been admirably accomplished.

Mr. Holmes deals not only with income and excess profits taxes, but also with the capital stock tax, the stamp taxes and the tax upon the employment of child labor. A particular feature is an appendix containing schedules for depletion and information for computing such depletion in connection with the oil, gas, mining and lumber industries. The author's previous connection with the Corporation Trust Company, whose Income and War Tax Service he freely cites, stamps him as an authority upon the subjects of which he treats, and the volume must be consulted by all those who wish to keep in touch with the best authorities upon the legal problems involved in federal taxation.

CHARLES E. CLARK

Yale University, School of Law

Primitive Society. By Robert H. Lowie. New York, Boni and Liveright, 1920. Pp. viii, 463.

Dr. Lowie writes nothing that is not painstakingly and conscientiously accurate in detail. Each of his chapters is a careful little monograph. Seven