REVIEWS

The International Law and Diplomacy of the Russo-Japanese War. By Amos A. Hershey. New York. The MacMillan Co., 1906. Pages 394. $3.

The Russo-Japanese war had a unique interest to students of international law. It was the first and still remains the only war since the Hague Conference of 1899, in which both parties were adherents to the conventions framed by that Conference.

It was therefore fair to expect that it would be conducted with more regard both to humanity and to the principles of international justice, than has been apt to characterize such conflicts between nations in former days. Professor Hershey, who holds the chair of Political Science and International Law in Indiana University, has done a real service in recounting the general course of this war so far as it may illustrate the development of those branches of jurisprudence, and giving us the benefit of his own conclusions. These are expressed with moderation, and, if favorable on the whole to the Japanese contentions, are hardly more so than the judgment of at least Anglo-American public opinion.

Did Japan transgress any recognized rule of international obligation when she struck at Port Arthur before any formal declaration of war? Professor Hershey is of opinion (pp. 60, 61, 66) that the notice which she gave Russia on February 6 of her reserved right to take such action as it might deem best to protect her own interests was under the circumstances enough to justify her naval attacks on February 8. The telegraph in our times is a swift and certain messenger, and if Russia had not anticipated war as a probable result of its refusal of Japan's overtures toward a settlement, it was her own fault.

Professor Hershey considers the protest of Russia against Japan's forcing Korea to admit her troops, at the outset of the war, as theoretically sound but practically absurd (p. 72). Neutral territory, for the control of which a war is being fought, can hardly expect to be left in peace by either belligerent. Nor can it be forgotten that Korea had been for a considerable part of its more recent history practically under Japanese control, and was but fifty miles away from the island empire.

The author does not think our government failed in the duty of neutrality by doing nothing to check popular but private subscriptions in aid of the Japanese (pp. 84, 87). Here again the question is one of practice. Too much weight, he thinks, has been accorded to some observations which have fallen from the courts on this subject. The tendency of law students and perhaps of publicists is to search for particular judicial precedents, rather than for the general practice of nations, and that it encourages this tendency he deems "one of the gravest objec-

tions to the teaching of International Law mainly or exclusively by the use of the 'case system'" (p. 85).

The Russian assertion of a right to treat newspaper correspondents, making use of wireless telegraphy on the high seas, as spies, the author considers not only as contravening the Hague Convention of 1899 as to the rules of Land Warfare, but as wholly against sound reason (pp. 118, 121). The opinion of the Institute of International Law (p. 135) expressed at Ghent in September, 1906, is to the same effect. In respect to the general instructions to their commanders by both governments regarding the conduct of military operations, Professor Hershey justly emphasizes (p. 294) the fact that they are the expression of an advancing civilization, which is gradually stripping war of many of its horrors.

As to the vexed question of limiting the supply of coal furnished to belligerent men of war visiting a neutral port, he ranges himself with those who would confine it to no more than will take them to the nearest convenient port, at which they can safely call (pp. 89, 214).

The style of the treatise is clear, the arrangement simple and the index full. *S. E. B.*

The First Year of Roman Law. By Fernand Bernard. Translated by Charles P. Sherman, D. C. L., Oxford University Press.

The title of this volume reveals its true purpose. It is not intended to be a comprehensive work on Roman Law, but a first year book, setting forth many of the essential facts of the subject in a brief and interesting way, to be followed by the study of a second year book by the same author, not yet accessible in English translation. As Professor Bernard states in his preface, this book, in spite of its restricted dimensions, is not intended to be one of those lifeless skeletons of the subject so much employed abroad as brief digests for the cram of preliminary examinations in Roman law. It is a book by which one may well begin his acquaintance with the subject and, notwithstanding its modest size, the volume is peculiarly satisfactory in its content, in that it embodies modern doctrine and the results of recent scholarly research. It should be said that the author has followed very closely the teaching of the law faculty of Paris and that he has therefore laid under contribution only five contemporaneous writers, Cuq, Girard, Esmein, Gérardin, Jobbé-Duval. In clinging too exclusively to French authorities, however, there is always the danger of yielding too much to their brilliant speculations regarding those institutions which are to a greater or less extent being affected in the present day by the discovery of new sources. For the interpretation of the legal papyri, which have already shed much new light on many phases of legal history and the details of legal transactions, there is need of vast philological and legal knowledge, as well as most conservative judgment. In this field one cannot safely disregard the import-

ant and brilliant work of such investigators as Mitteis and Gradenwitz.

Our author has divided the subject matter of his work into seven books, each with its appropriate subdivisions and titles. Following the usual pedagogical method of the Civilians, the first book is devoted to the external history of the Roman law and to an outline of Roman constitutional history. The traditional division into periods is followed. In a compendious treatment of the law of Rome, it is most difficult to determine upon a method which will embrace the changes in the law wrought by important developments in legal history and yet to give a consecutive and logical exposition of legal institutions. We think the author does well to begin with an outline of the Roman constitution and with an insight, though necessarily brief, into the legislative functions of the Roman government, but it does not seem to be worth the space required, to discuss the ethnic divisions of the early inhabitants of Rome. The atest historical research has amply shown the apochryphal character of much of the legendary history of Rome, and any space occupied by discussion of the three tribes, Ramnenses, Titienses and Luceres, a purely arbitrary division, having no legal significance whatever, might be reserved for more important matters. Granting that the whole question of the origin of clients and plebeians is still unsettled, we are somewhat startled to find it put dogmatically that the plebs did not appear until the second century of Rome (§16), a statement difficult of proof, whose value is somewhat impaired by a later remark that the origin of the plebs is quite problematical. In the discussion of the function of the praetor in the development of law such a statement as "the legislative activity of the praetor" (§49) might easily mislead the beginner. As Prof. James Bryce has well shown (Studies in Jurisprudence and History), the praetor did not "legislate," but assisted in the development of principles through his control of procedure. This prerogative of the praetor, growing out of his *ius edicendi*, was shared by him with all the higher magistrates of Rome. That "all these magistrates have the *ius honorum*" (§50) in explanation of the term *ius honorarium* is confusing. The *ius honorum* is the right of eligibility to office, without which one could not clothe a magistracy. From this *honor* (office), the system of legal principles which, by interpretation, grew up around the praetorian edict especially, was called *ius honorarium*.

In describing the duties of the jurisconsults it is somewhat questionable interpretation to ascribe to them the duty "to act in court for their clients" (*agere*). This has a modern sound, whereas the legal profession of Rome was so unlike that known to us, in more than one particular, that it requires careful explanation From the earliest times, "acting in court" in behalf of clients was performed by the *patronus*, as a duty, and in later times by professional advocates, who were not regarded as belonging to the profession of jurists. In fact, they were gener-

ally ignorant of questions of law. This is the point of the rebuke given the orator, Servius Sulpicius, by the jurist Mucius Scaevola, when consulted on a point of law, '*turpe esse patricio et nobili et causas oranti ius in quo versaretur ignorare*' (Pompon. Dig. 1, 2, 43).

The remaining six books of the volume are devoted respectively to Persons, Things, Actions, Ownership, Successions, Donations *inter vivos* and Mortis Causa. Inasmuch as the translated work is intended to be of service to the American student in guiding him in his first acquaintance with Roman law, it is to be regretted that there is no book devoted to Obligations. This omission is explained by the fact that this important subject is reserved by the French law faculty for the instruction of the second year. To us, however, no part of the Roman system is so illuminating and valuable as the refined and lucid treatment of the obligations growing out of contract, as discussed by the great jurists in the Digest.

It is in the clear, succinct and yet withal, interesting style that a large part of the volume's excellence lies. There is comparatively little in the subject matter to awaken adverse criticism. Some statements tend to raise a query, perhaps, because of their brevity. For example, the statement of the principle by which ownership is determined in cases of *specificatio*, *confusio* and *commixtio* is not entirely adequate. The rule "*accessio cedat principali*" scarcely assists in cases of *confusio*, as, for example, the mixing of two kinds of wine of equal quality. Which is the *res principalis?* In *specificatio* the general rule is that he who does the work which transforms the property of another into a new object usually acquires the right of ownership to the new product, while in case of the union of things inseparable, as wine and wine, joint ownership of the whole mass is commonly produced. On the other hand, in *commixtio* of things separable, no change of ownership occurs. The author's statement of these difficult principles is scarcely distinct enough for an elementary treatise.

Passing on to the translator's share in the work, the introductory note informs the reader, in a somewhat labored sentence, that "the object of this labor of love is to place in the hands of students, and of others who desire an acquaintance, readily obtained, with the Roman law, an English version of a French work, designed for use in the law schools of France, which is remarkable for several excellencies that adapt it to become perhaps the best elementary treatise for commencing the study of Roman law." In view of this statement, we are justified in expecting the translator's work to present a high degree of excellence, preserving the lucidity and something of the charm of style of the original. To translate or publish any work on Roman law for English readers is certainly a labor of love, and for that reason may merit most courteous treatment. The difficulty of rendering into the English language the technical expressions of a legal system so different from our own is so great

as to convince some authors that the Latin terms must be retained without attempted translation. In this matter, Dr. Sherman has shown discretion and has not allowed himself to be tempted too far by the example of the original French, since a French writer on Roman law finds it easy and natural to adopt the Roman terminology by reason of the Latin characteristics of his own language and the Roman origin of the bulk of his legal system. In attempting to preserve the terse and almost telegraphic style of the French original, the translator has in many places strained the idioms of our tongue beyond the point of endurance, retaining French order and vocabulary to such an extent as to obscure the meaning, without recourse to the original French. Except for a temporary loss of Sprachgefühl for his native English while working under the spell of Dr. Bernard's brilliant diction, such expressions as the following could scarcely be accounted for in any English work: "the name so familiar of Quirites is applied therefore to the patricii alone" (*le nom si connu de quirites s'applique*, §5); "according to the historians, at this time commissioners charged with studying Hellenic laws should have been sent into Greece" (on aurait envoyé, §35), meaning that according to the traditional account commissioners *were* sent, etc.; "so the senate, before the time of Tiberius, should legislate but rarely" (*aussi n'a-t-il dû legiférer que bien rarement*, §43), meaning that the senate *did* legislate but rarely, since the statement has just preceded, that the senate did not have the right to make law; "the discovery of some pure sources has permitted the recovery of many of them" (*la découverte de quelques sources pures a permis d'en relever beaucoup*, §97), meaning that the discovery of original sources has made possible the correction of many erroneous interpolations in the Digest; "free marriage did not cease becoming general" (*le marriage libre ne cessa de se généraliser*, §248), meaning that free marriage became more and more usual; "*arrogatio* presented a special importance" (*présentait une gravité particulière*, §300), meaning arrogation was especially important; "*res mancipi* would have constituted" (*auraient constitué*, p. 135, n), meaning that *res mancipi* constituted the *familia;* "but a false idea, and above all scarcely Roman, would be given of obligations" (*seulement on se ferait une idée fausse et surtout peu romaine, des obligations*, §442); "it (*traditio*) will not transfer ownership only as often as the *tradens* shall have had the intention to transfer ownership" (*elle ne sera translative de propriété qu'autant que*, §636), where the *not* should certainly be deleted and *only as often as* should then read *only when* the *tradens*, etc. Passing on to the testamentary substitution of heirs, this gallicized English statement would certainly puzzle a reader without recourse to the original text: "resulting from the unlimited importance which the Romans attached to not dying intestate, they became ingenious to avoid by every means that their succession, by predecease, repudiation, incapacity of the heir, should become vacant" (*étant donnée l'importance sans bornes que les Romains attachaient à ne pas mourir intes-*

tats, ils devaient s'ingénier à éviter par tous les moyens que leur hérédité . . ne demeurât vacante, §756). The value and purpose of an elementary text book are certainly impaired, if not altogether destroyed, by inaccurate statement or by a lack of clearness and directness of expression, and our purpose in citing several of the foregoing passages is to show the need of revision in a second edition of this volume. There are several slips of different kinds in the original, and although the translator has corrected some of them, he has retained a number of errors in his translation, *e. g.*, there is constant wavering, in the translation and in the original, in the name of Augustus' act directed against "race-suicide," the famous *lex Papia Poppaea*. Likewise in both books occur *perduellio damnatus* (*perduellionis*), *collo ve*, *spondes ne*, *tigni immitendi*, *proemia* (*praemia*). Such words as *conditionibus* and *tralatitium* are no longer found in critical Latin texts. If the author yields to the demands of simplified spelling in such words as edile, one may ask, why not pretorship in the same paragraph (45)? Or with Paulus Emilianus, why not Julius Cesar? All agree nowadays that the latter's praenomen should be written Gaius, not Caius (§214). The English reader unacquainted with French will be puzzled with the name, Boèce, commentator on Cicero's *Topica* (p. 46, n. 1) and Denys of Halic. (p. 84, n).

It is to be regretted that so many misprints, especially in foreign words, escaped the proof-reader's eye: *ius civili* (p. 42, n. 1), *Mallius*, Catiline's confederate (§221), *lege egere* (§371), *Heraclium* (p. 128, n. 1), *dii superii*, *res sanctea* (§425), *Poetelea* (§436), porcedure (§464) *nihi* (§449), 254 B.C. (§234, p. 155, n. 4), *vocatio in iure* (§499), die Civilprocess (p. 161, n. 1), *hunc ago* (§604), des römisches (p. 207, n. 3), Czilarz (Czyhlarz), *aquaehaustus hauriendae* (§684, 2), *argum* (§723), *caduciariae* (§755), lex Voconia, 269 B. C. (§169).

With the removal of these *errata* and some of the blemishes in the matter of translation, this book may safely and with profit be put into the hands of beginners with a confidence that the presentation of a subject, vast and intricate, may be found attractive and intelligible in this manual.

Every aspirant to the study of Roman law may well start with the firm conviction that to pursue this subject first hand, he must have a sound knowledge of the Latin language and considerable acquaintance with Roman history and institutions. Without this equipment he may derive some knowledge of the elementary principles of Roman law from English manuals, such as the one under consideration, but in making use of such acquirement for comparison with the English system or the understanding of the law of our colonial dependencies, he must always remain on slippery ground unless he has recourse to original Roman sources. *James J. Robinson.*

Law of Nuisances. Joseph A. and Howard C. Joyce. Matthew Bender & Co., Albany, N. Y. Law Canvass, pp. 972.

The authors of this work have furnished to the profession a decidedly up-to-date exposition of the law of England and this country on this subject. Beginning with a compresensive list of definitions of the word "nuisance" the end is devoted to a chapter subdivided into Remedies, Parties, Defenses and Damages. About 3,500 cases are cited and a noticeable feature of the work is the care used in not only stating propositions concisely, but also in citing cases directly in point as authority for the principle laid down. There can be nothing more aggravating to the busy lawyer than to jot down a lot of citations only to find a large percentage of them inapplicable. A very complete and well arranged index shows the endeavor to make it possible to turn to any topic of the work at once. Such important questions as smoke nuisances, water rights, sewage cases and municipal powers and liabilities are dwelt on at length and, in some instances, as in the Chicago drainage canal case, much of the decisive part of the court's opinion is stated. That so much meaty matter has been condensed in a comparatively small book is the best proof of the large amount of well applied and successful work which the compilation of this volume must have involved.

F. P. M.

The American Lawyer. By John R. Dos Passos of the New York Bar. Banks Law Publishing Co. About 190 pages, Buckram. $1.75.

When a man of the recognized standing and ability of John R. Dos Passos gives his views on the American lawyer "As he was, as he is, and as he can be," one is assured of a forceful statement of original ideas. Already the author of a number of valuable works on the law, his latest contribution is very timely and ought to be welcomed and read by all whether lawyer, student of the law or those members of the general public who appreciate first-hand information on a subject as to which there is much misconception. In the opening chapters some rather startling comparisons are made between the lawyer of to-day and his predecessors of ante-bellum days. The average modern lawyer's unfamiliarity with basic constitutional principles and his consequent inefficiency as a legislator are dwelt on at length and to this the author ascribes the major part of the unconstitutional legislation which encumbers our statute books. In New York State alone 109 such cases are cited—and these only by way of illustration.

Under "Duties" of a lawyer the ethical side of the profession is touched on and Lord Brougham's reverberating statement in the Queen Caroline trial is referred to as "wholly, unmitigatedly and disastrously bad." Under "Causes and Remedies," eleven suggestions are made for the improvement of the profession. Most of these would undoubtedly express the wishes of the aver-

age member of the Bar while others will be received, perhaps, rather coolly as, for instance, his 10th suggestion that the English idea of a division into two classes, Attorneys or Solicitors and Counselors and Barristers be adopted in the United States. That this system has many undesirable and perhaps evil features will be readily admitted. Code procedure and Codification in general are now and have been more less deprecated by leading members of the Bar, but it remained for this author to assert that (p. 170) "the difference between a common law lawyer and the practitioner under the code is the difference between a surgeon and a butcher." It seems also a little broad to say (p. 171) that "instead of seeking the truth, the Courts and the Bar are engaged in the pursuit of technicality and form."

A careful reading of the book, which is made a pleasure by the use of large, clear type and excellent paper, indicates an earnest attempt by Mr. Dos Passos to ward off the acceptance by lawyers of certain pernicious principles of conduct which the changing conditions of society and business would almost seem to warrant. *F. P. M.*