

BOOK REVIEWS.

MODERN THEORIES OF CRIMINALITY. By C. Bernard De Quirós. Translated by Alfonso De Salvio, Ph. D., Assistant Professor in Romance Languages, Northwestern University. With an introduction by William W. Smithers, Esq., of the Philadelphia Bar. Boston: Little, Brown & Co. 1911. Pp. xxi, 249.

This work is the first volume of The Modern Criminal Science Series, which is to comprise nine volumes, consisting of translations of the leading foreign works on criminal science. The series will include such works as Criminal Psychology, by Gross; Crime, its Courses and Remedies, by Lombroso; The Individualization of Punishment, by Saleilles; Criminal Sociology, by Ferri; Penal Philosophy, by Tarde; Criminality and Economic Conditions, by Bouger; Criminology, by Garofalo; and Crime and its Repression, by Aschaffenburg.

The books comprising the series have been selected by and are edited under the supervision of the American Institute of Criminal Law and Criminology. The guiding principle in the selection has been "to choose works which best represent the various schools of thought in criminal science, the general results reached, the points of contact or of controversy and the contrasts of method—having always in view that class of works which have a more than local value and could best be serviceable to criminal science in our country." If the Institute had done nothing more than to make available to American readers through adequate translation, these works of foreign scholars, leaders in their particular lines, it would have amply justified its existence.

In this country, though we have done some good practical work in prison reform, we are not only woefully behind the civilized countries of Europe in the original study of criminology, but up to this time we have not even availed ourselves of the work of foreign students of the subject to any extent. Nothing could show our lack of interest in criminal science better than the very books before us. In this review of the works of schools and individuals in this field, one finds the names of illustrious men from every civilized country in the world but North America. The publication of this series cannot but stimulate an interest in the most important field of criminal science, which in time must profoundly affect our view of criminal law, both in its principles, and in its administration.

Perhaps there never was a time when the fundamentals of law were being so examined into as the present. As economic considerations shaped the law in the past, so humanitarian impulses working together with or separate from economic principles are making themselves felt in the law today. In some fields they are warring on individualism, ignoring what formerly were regarded as individual rights, as in the various forms of workman's compensation acts; sometimes focussing their attention on the individual's rights or welfare as in the care they are demanding of the study and treatment of the individual criminal.

The study of criminal science is beginning to take hold in this country. The sociologist, psychologist, the psychiatrist, all are attacking the problems from their respective points of view. The legal profession—judges and lawyer's—those who must in the last analysis give practical effect to the conclusions of criminal science, lag most behind. It is not meant that the legal profession is derelict in not being forward in accepting the theories of the psychologist, the sociologist and the alienist. These theories are too frequently based on a limited view of the whole problem or are rendered worthless by an ignorance of practical difficulties inherent in the administration of justice.

[In a recent convention the writer heard a most impassioned attack on what the speaker called the "technicality" of the hearsay rule in evidence. The reason for the rule had never penetrated the speaker's consciousness.]

But surely the legal profession is derelict in continuing to remain ignorant of the whole subject, or in maintaining an attitude of indifference, if not of hostility to it.

The book we have under review was first published in 1898. It met with immediate success, and in 1908 a second edition was demanded. It is from this second edition that the present translation has been made, the author having personally revised a copy for the translator.

The cries for reform in this country are taking in the main two forms, on their face contradictory. Speaking in the old terms of the opposition of the criminal and society—the one reform is aimed against the criminal and is protection of society, the other protection of the criminal at the expense of society. The follower of the new thought would say of both that their main object was to protect society.

The one seeks the abrogation of obstacles to the conviction of criminals, the other would ameliorate the condition of the criminal after conviction.

The work under review does not deal with the first problem—that problem seems to exist only for the United States.

The whole book is divided into three chapters: I. Criminology; II. Criminal Law—Penitentiary Science; III. Scientific Investigation of Crime.

Each chapter begins with a study of origins. The origins of modern criminology our author finds in the pseudo-sciences of physiognomy and phrenology: "Having seen your face and examined your head," says a Medici, "we do not send you to prison, but to the gallows." The same factor that changed astrology into astronomy, alchemy into chemistry, and demonology into psychiatry, has been at work to produce modern criminology from physiognomy and phrenology. Of these the principal are the development of psychiatry and the rise of statistical science.

In this chapter our author, under the title, "The Three Innovators," gives us a review of the work of Lombroso, the anthropologist; Ferri, the sociologist, and Garofolo, the juriconsult.

In the hands of these men all fields of science are made to contribute to the new science of criminality. "The travels and the discoveries made in wild countries; the first studies written by Camper, White and Blumembach on skull measurements and the human skeleton; the investigations of Darwin on the origin of species; those of Hæckel and of so many other naturalists in embryology, and Laplace's hypothesis of the nebular cell . . . found applications in criminology." We have traveled in a few years from the conception that "a law broken meant that there was a wilful transgressor, who deserved to suffer retribution," to a mathematical formula by which we can foretell the number of homicides not that *will* be, but *are* to be committed during the next month. $H = tx + hx^2$, t and h representing average temperature and humidity.

From the Innovators, De Quirós takes us on a rather too hurried journey through the development of the various theories of criminality. From Hæckel's and Lombroso's theory of atavism, which Flechsig said was well illustrated by the method of Lombroso himself, and which regards the criminal as a retrograde, through the epileptic theory of the Italian school, the neurasthenic theory of the Germans; the sociologic theories, according to which not the individual but the social environment is the real criminal, and crime is only and always due to agencies of such nature and of such power that, at times . . . the individual is overcome by them even against his own will; the anthro-sociologic, according to which, as expressed by Lacasagne, social environment is "the heat in which criminality breeds; the criminal is the microbe, an element of no importance until it meets the liquid that makes it ferment—communities possess the criminals whom they deserve."

The social theories come next, Vaccaro, with his application of the Darwinian theory of selection, and the survival of the fittest, finding crime in the lack of adaptation of the individuals to the social environment; crime appearing as an act which the winners in the social struggle, who constitute the ruling power, considers dangerous to their own interests; not the interests of the entire social body, but the interests of the favored people of whom public order is constituted.

Max Nordau comes next, to whom "crime means human parasitism"; the criminal, to him, is the man who treats other men as raw material from which they may satisfy their needs and appetites; then Alemán, to whom crime "follows a basal deficiency of the nutritive basis of subsistence." The socialistic theories, which emphasize the importance of the economical factor over other social factors are well reviewed. "When the iniquitous bourgeois society is overthrown," says Loali, "and the socialistic ideal is realized, then misery will end, and the motives for crime will be wanting."

In the second chapter our author gives us the origin, development and applications of the various theories of penology. Modern penology he finds to be the outcome of two currents—penal legislation and penitentiary reform, and in its present state to exhibit these tendencies; the traditional, which opposes crime by punishment only; the reformistic, which advocates traditional penal measures for certain delinquents only with a repressive aim, while for others preventive measures against relapse and imitation are reserved (these are in the majority everywhere); the radical, in which the penal reaction consists in a mere limitation of the freedom of movement and action of the delinquent who is a menace to society, with its still more radical offshoot of non-resistance to crime; and Tolstoi's paradox of considering "punishment as a crime and crime as a punishment."

The remainder of this chapter contains an interesting and valuable review and commentary on modern theories of responsibility, the treatment of delinquency, in minors and adults, probation and pardon, indeterminate sentence, capital punishment and reformatories, in which the Elmira Reformatory of New York, "the archetype of them all" comes in for extended description and for high praise. "It can be said to be the living expression of all that has been accomplished in regard to crime and punishment for many years, the most advanced institution in the world."

The prevention of crime through, and reparation of, the injury caused by the crime is also treated. The last chapter is devoted to the subject of the scientific investigation of crime, and contains a full description of the various methods for identifying criminals; the Bertillon system, Dactyloscopy, the Word Portrait, etc.

In closing our author says: "What will the future do with the delinquent, judging by present indications? Perhaps nothing. It may be that abstention will form a part of the penal system. . . . It is safe to say that all forms that cause human dignity to suffer, or submit it to shame and insult will be abolished. These having been eliminated, penal tutelage, through indefinite, indeterminate, or at any event, conditional sentence, will take charge of delinquents and give to each what he needs by means of the consequent indeterminate sentence. . . . Modern criminal law seems to be always dependent on the study of anthropological sciences, and the first reform to carry out is the diffusion of their teachings among all those who come in contact with and have to deal with delinquents. These are indeed the new horizons of criminal law, no matter how paradoxical a criminal law without penalties may appear to some. What it has gained is so superior that it seems to have reached the *non plus ultra*; since all its work consists in extricating itself from the mire in which it shamefully finds itself at present. It is the duty of every one to proclaim these new horizons, and to serve them to the best of his ability."

W. E. M.

CRIMINAL PSYCHOLOGY: A MANUAL FOR JUDGES, PRACTITIONERS AND STUDENTS. By Hans Gross, J. U. D., Professor of Criminal Law at the University of Graz, Austria. Translated by Horace M. Kallen, Ph. D. Introduction by Joseph Jastrow, Ph. D. Pp. XX + 514. Boston: Little, Brown & Company. 1911.

This erudite treatise by Professor Gross, now for the first time made available for exclusively English readers through the work of the American Institute of Criminal Law and Criminology, opens a comparatively new field of study for American criminologists, or "criminalists," to use the author's terminology. The whole book, as its sub-title indicates, is a plea for extra-

legal preparation for those who deal with the criminal. He says: "We have confined ourselves long enough to the mere study of our legal canons. We now set out upon an exact consideration of their material."

The individualization of punishment required by the modern science of criminology necessitates an improved and scientific procedure. An accurate and comprehensive knowledge of the law must be supplemented by an intensive knowledge of the biological, psychological and sociological factors of crime.

This volume is limited to a relatively narrow field. While entitled "Criminal Psychology," it is in reality devoted to one phase of procedure, viz.: The Psychology of Evidence.

It is divided into two parts. Part I, The Subjective Conditions of Evidence (The Mental Activities of the Judge); and Part II, Objective Conditions of Criminal Investigation (The Mental Activity of the Examinee).

Reliability of testimony depends more upon the character of the examiner than upon that of the examinee. The author says: "Any body experienced in their conduct comes to be absolutely convinced that witnesses do not know what they know. . . . Whoever is able to correct the witness's apparently false conceptions and to lead him to discover the error of his own accord, and then to speak the truth—whoever can do this and yet does not go too far, deducing from the facts nothing that does not actually follow from them—that man is a master among us."

Only those mental states of criminals are dealt with which pertain to their character and integrity as witnesses, and which the examiner should understand in order to arrive at the truth. Sense, perception, imagination, association of ideas, recollection and memory, will, and emotion, are carefully studied with a view to ascertain their effect on testimony. The psychological differences due to age and sex are elaborately treated. "One of the most difficult tasks of the criminalist who is engaged in psychological investigation is the judgment of women. Woman is not only somatically and psychically different from man; man never is able wholly and completely to put himself in her place. . . . Some of the greatest mistakes in criminal law were made where the conclusions would have been correct if the woman had been a man." The author regards children as exceptionally good witnesses provided child psychology is well understood by the examiner.

Another valuable portion of the book deals with the psychology of mistakes due to optical, auditory and olfactory illusions, illusions of touch and taste, hallucinations, misunderstandings and the pathofornic lie. A further study is made of errors due to dreams, intoxication and suggestion.

The book is a most valuable addition to American criminological literature, and is of the highest authority in its special field. It should be read by every "criminalist" in the United States.

J. P. L.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By Jarius Wade Perry. Sixth edition. Edited by Edwin A. Howes, Jr., of the Boston Bar. Two volumes. Pp. 1642. Boston: Little, Brown & Company. 1911.

The lapse of more than a decade since the appearance of the fifth edition of this standard American text-book on the law of trusts, has created a proper field for the editor of the sixth edition. That period of time has been marked by many important decisions, hardening into greater certainty of statement the principles of "trusts" in the several States and courts. The editor has, it would seem, adequately covered his field, in a painstaking and workmanlike manner. The result of his labor has, indeed, considerably enhanced the value of Mr. Perry's work, in particular to the student, though perhaps equally well to the practitioner, who is, after all, but a more advanced scholar.

Since Mr. Howes has retained verbatim the text of the original work, and has confined his labor to the collection of additional or counterbalancing authorities, and the preparation of explanatory footnotes, the scope of a review of the volumes must necessarily be confined to these additions. It

therefore is sufficient to restate the plan as it originally appeared. Volume I is concerned with the history of "trusts"; their kinds as they arise by acts of parties, express or implied, or by implication of law from the intentions or conduct of parties; the establishment of a trust completed by the appointment, acceptance, etc., of the trustee, with a discussion of the general properties of his office; and the conduct of the trust once established. Volume II deals, briefly summarized, with particular kinds of trust duties and powers according to the scope of the settlement or trust deed. Trusts for infants, married women, charitable uses, bondholders, for creditors and the payment of debts, are all fully discussed. The volume concludes with chapters on actions, costs, compensation, and logically last, the determination of the trust.

The editor of the present edition seems to be possessed of a particularly fortunate and clear insight into the problems which prove so difficult in the study of the subject. Whenever the original text offered opportunity for a new, and perhaps a clearer, statement of the principles involved, based upon more recent decisions, he has added copious footnotes, summarizing by rule and by jurisdictions, and citing the cases to date. It is to be regretted, however, that in following Judge Perry's text and plan, Mr. Howes has not taken upon himself to vary it sufficiently to introduce, in the chapters on Express and Implied Trusts, a discussion of what may be called the informal trusts. The student is apt at recognizing a trust when there is a trust deed, or a trust devise, or words not expressly creating a trust, but from which it may be implied. He may also grasp without so great difficulty, the problems of resulting and constructive trusts. But the greatest task for the student, and it appears all too frequently, for the member of the bar, is to understand that the everyday business transactions of men may, and often do, create between them the relation of trustee and *cestui*. Dean Ames has dealt admirably with these problems in his case book, but the text-books on trusts do not seem to have approached the subject on this line. While this may be too far afield for a practicable text-book, yet the value of an intelligent and thorough text, discussing the problems outlined in Dean Ames' collection of cases, cannot be denied. Mr. Howes has, in his footnotes, made frequent citations of notes from the case book referred to, and perhaps adopted the lines of discussion there indicated, but the informally created trusts have not been treated.

Among the many points which have been exhaustively handled, special attention should be called to several. In Vol. I, Section 82, the question of the title to money deposited by one in trust for another, is thoroughly annotated. On page 177 there is added a note on the relation of a general depositor with the bank of deposit, but unfortunately the editor has not included in his discussion the comparative effects of the different forms of indorsement of the commercial paper which forms a large part of all bank deposits. In view of two comparatively recent cases, *Barton v. United States*, 196 U. S. 283 (1904), and *Noble v. Doughten*, 72 Kans. 336 (1905), and the vast amount of litigation under the name of *Armstrong*, Receiver, which marked the close of the last century, dealing with the related subject of the relation between depositors and collection agencies, such a note would have been most appropriate. In the same volume, at page 149, the editor has added the cases to date on precatory trusts, which together with Judge Perry's original notes, afford a complete reference to perhaps all important English and American authorities. The present collection has this advantage over the original notes and text—a classification has been made as the cases have divided themselves, and the line of demarcation is concisely drawn. It is well to note that the ambiguity in the original text at page 105 is corrected in a new note with citations at a different place in the same volume, page 113. Mr. Perry, in his discussion of the statute of wills, has expressed a doubt whether an existing paper referred to in a validly executed will, can be incorporated therein and probated when the incorporated paper is not attested by witnesses. The note mentioned above, though not connected with this part of the text, nor referring to it, would seem to clear away the difficulty. And reference may be made to the leading case of *Allen v. Maddock*, 11 Moore P. C. 201, cited in another part of the same volume.

An excellent addition with the present edition is a note at page 289 on constructive trusts imposed on devisees or grantees who have secured a devise or grant absolute on its face, on an oral promise to hold in trust for certain uses. But one comment may be made on the use of the cases here. Even a careful reading discloses no distinction between a grant *inter vivos* and a devise on the question whether the intended beneficiary of the express trust, unprovable by the seventh section of the Statute of Frauds, may enforce a constructive trust against the grantee or devisee. In both cases he is treated as equally able to do so according to the particular facts and the jurisdiction. It may be thought such a distinction is necessary under the authorities.

Other valuable notes may be found with full collections of authorities, on the subjects of the liability of a trustee for the misappropriation of trust funds by the trustee's agent, though the discussion is not carried out to include the related and important point respecting the liability of a depository bank for the laches, defaults and insolvency of the collection agencies, bank or notarial, which it employs; the subject of equitable conversion as affecting trustees which is a distinct addition to Mr. Perry's original text; the extent of the liability of one trustee for breaches of trust by his co-trustee; legal trust investments in the various States; the American rule on the liability of a defaulting trustee for simple or compound interest. And in the second volume the main additions are exhaustive notes on charitable trusts, together with the original note by Mr. Perry; an especially careful note on the rules governing a mingling of trust funds with the funds of the trustee, and collecting the English and American authorities on the rule that withdrawals from the mingled funds by the trustee for his own purposes, are presumed to be from his own funds, and the qualifications thereof where the protection of the *cestui* demands it, to which might be added the recent case of *Newell v. Hadley*, 92 N. E. 507, 515 (Mass., 1910); and a discussion of the doctrine of *Dearle v. Hall*, 3 Russ 1, collecting to date, the American cases adopting or rejecting the rule.

The editor has largely contented himself with statements of settled law or of the trend of judicial opinion. He has not held a brief for either side on the disputed points. The merit, therefore, of the work done is the summary it presents. It is not going too far to say the result of his labor has made Judge Perry's work a present help in the study of trusts, and enhanced its value to the lawyer who practices in the subject. In doing either Mr. Howes has retained the standing of the book as the leading American authority on this difficult branch of the law.

R. J. B.

THE EARLY COURTS OF PENNSYLVANIA. By William H. Loyd. Boston: The Boston Book Company. 1910.

The present volume, a part of the University of Pennsylvania Law School Series, constitutes a commendable effort to contribute to the understanding of the historic development of American law. As the author states, colonial legal history has not received the attention it deserves. It is, indeed, a rich field in which nearly every phase of judicial and legislative law-making is illustrated. The history of the colony of Pennsylvania is especially interesting, as it takes its beginning with the political and legal ideas of Penn. The author has studied the development of the entire system of courts in Pennsylvania down to the beginning of the nineteenth century. The work is founded upon direct research in all the available sources. The value of this book is enhanced by the manner of treatment; the author does not confine himself to a study of the organization of courts, but in dealing with their jurisdiction and methods he presents an abundance of interesting material which throws light upon the general development of law in the colonial era and the early decades of the Commonwealth. The book is thus of permanent value, and constitutes a building stone in the slowly growing edifice of American legal history.

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