REVIEWS

Outlines of Criminal Law. By Courtney Stanhope Kenney, LL.D., Reader in English Law, University of Cambridge. Revised and Adapted for American Scholars by James H. Webb, Instructor in Criminal Law and Procedure in the Law Department of Yale University. N. Y. The MacMillan Co., 1907.

Until the publication of this volume, there has been no short work on Criminal Law especially adapted to the use of American law students. Dr. Kenney's book, published in 1902, was based upon lectures given by him for more than twenty years at Cambridge. It stated, in a fresh and interesting way, so much of English criminal law as an English university student or an English country magistrate needs to know, in order to acquaint himself with its fundamental principles and rules, not forgetting to emphasize such as are of universal application. Like all English law books, it was saturated with statute law. Mr. Webb has weeded out a good deal of this, introduced not a little from purely American sources, and recast the work into a homogeneous whole, not showing upon its face how much is from his pen and how much from that of Dr. Kenney. The latter observes of Stephen's edition of Blackstone (p. 4) that it was one in which the Commentaries were reconstructed rather than edited. A not dissimilar service has been performed, and well performed for him by Mr. Webb.

The English common law of crime was the parent of ours, but we have somewhat expanded it in applying it to the conditions of a new country, provided in the beginning with but meager statute-books. Thus Dr. Kenney's remark (pp. 6, 23) that until made such by Act of Parliament, it was no crime in England to kill a horse or cow, represents a stage of social development which Americans passed very early in their judicial history.

The peculiar value of the original work was its clear setting forth of the subject is a scholarly and philosophic way. This feature has been fully preserved in Mr. Webb's recension. It is an intelligible book to the general reader, who has had no professional education in law.

Dr. Kenney is no sentimentalist in his theory of punishments. He vindicates them mainly as deterrent, although showing some sympathy (p. 30) with Cousin's epigram that punishment is not just because it deters, but deters because it is felt to be just.

One gets occasionally an illuminating glimpse of the greater directness and stronger movement of the English criminal trial, as compared with ours. The Judge takes a hand in the case, from the start to the finish, in a way that our Constitutions or usages render rare. Thus a trial cited as occurring in 1901, when Mr. Justice Bigham "advised" the jury to acquit a women of murder, who had deliberately drowned two of her children, though she had never showed any other symptom of a disordered

mind, and had declared that she thought "it was the best thing she could do for them." (p. 51).

The chapters on evidence are of particular merit. Our very artificial rules and the reasons for them are both clearly explained.

Dr. Kenney accepts as a maxim *Omnia presumuntur rite et solenniter esse acta*, without the customary prefix of *Ex diuturnitate temporis* (p. 319). It may be doubted if in this abbreviated form it can be considered as established in American courts.

It has evidently been the aim of Mr. Webb to make no changes in the text not necessary to prevent misconceptions by an American reader. This rule was, no doubt, the right one, but occasionally may have been pushed too far. Thus, he has retained without qualification (p. 360) the statement (supported by ample English authority) that a witness, who is not a party, cannot be compelled to produce his title-deeds for inspection. There are, to say the least, strong reasons for the position that this immunity is bound up with the peculiar English system of real estate conveyancing, and would not be respected in a country where all land titles are normally matters of public record.

The proof reading has been in general well done, though we notice (pp. xvii, 306) the leading case of United States v. Arjona given as United States v. Arizona. *S. E. B.*

Aperçu de l'Evolution Juridique du Mariage. II. Espagne. By Émile Stocquart. Brussels, Oscar Lamberty, 1907. pp. 283. 3½ francs.

The first part of this work was reviewed in the Yale Law Journal in 1905 (Vol. XIV, 357). The author now takes up the course of the law of marriage in Spain. Its original Roman foundation is first set out, with considerable detail;—monogamy but side by side with it, concubinage, both equally legitimate forms of union. The father of the concubine, or he who had the *patria potestas* over her, must give his consent to the latter contract, and by the same right could terminate it at will (pp. 39, 65). Christianity, under Constantine, withdrew the sanction of the law for concubinage (p. 73).

The invasion of the Goths made, Dr. Stocquart maintains, less of economic and social changes than has often been thought, because the lands which they seized belonged to but a few proprietors. Spain was than held by a handful of grandees, each with a little army of slaves. One of them fed four thousand persons through the Winter on the products of his estate. The Barbarians took from most of these land holders two-thirds of their possessions; but this still left them rich (p. 99). In the fifth century the term *nobles* meant the rich rather than the well-born, and they were found largely in the cities, where the principles of civil liberty were for long better enforced than in the rest of Europe.

German institutions had little influence in Spain. The name *German* is the Latin rendering of *Herman*, that is war-man (p. 108), and it was only in that character that the Roman people

knew the German people. In the seventh century, the Roman and Barbarian laws were merged into one system by the Visigoths and the territoriality of law made the rule (p. 217). Restrictions on marriage now became greater. Theodosius had made it a capital crime for first cousins to marry. Now the marriage of the children of first cousins was forbidden (p. 222).

A new influence soon came in with the Arabs. The Koran ranged itself with the old Roman law in allowing divorce at the will of the husband (p. 264). But the Moor in Spain was ready to acknowledge woman's share in the world's work, outside of the household. Many were government clerks. In one quarter of Cordova there were seventy girls employed as copyists (p. 265). After the final expulsion or subjugation of the Moors, those who remained were governed by their own personal law, as regards marriage (p. 278).

All Spanish institutions of government and society, down to their bull-fights, and including their spirit of architecture, bore and still bear a closer resemblance to what belonged to Rome, than those of the rest of modern Europe. There was, however, a strong local color in the various provinces, and a diverse customary law (the *Fueros*), the treatment of which Dr. Stocquart reserves for another volume, in which he will also trace the Spanish history of marriage to the present time, with its growing conflict between Church and State.

Like its predecessor, this volume is the work of a ready writer of wide reading, who has the art of stating plainly and in good order what others of perhaps greater scholarship but inferior literary ability have left in a certain degree of obscurity or confusion. *S. E. B.*

Federal Rate Bill, Immunity Act and Negligence Law of 1906. Annotated by F. N. Judson. T. H. Flood & Co., Chicago. *Conference of Counsel for Railroad Companies in Louisville. Ky., Sept., 1906.* Report of Committee on Employers' Liability Act.

By passing the Rate Bill, the Immunity Act and the Negligence Law in the Fifty-ninth Congress, the Federal Government greatly extended the scope of its control over corporations engaged in interstate commerce and abrogated some of the fundamental principles of the common law. Whether or not these acts will stand the test to which they will undoubtedly be put by the corporations which are affected by these statutes is a matter of great interest and of some doubt.

At the present time the Employers' Liability Act, or "Federal Negligence Law" as it is sometimes called, seems to create more excitement in the camp of the railroad corporations than either the Rate Bill or the Immunity Act. The Immunity Act simply declares in statutory form the principle enunciated by the court in U. S. v. Armour, 142 Fed. 808, to the effect that immunity from prosecution granted in cases in which self incriminating evidence is produced before the Interstate Commerce Commission

extends "only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence documentary or otherwise, under oath." In other words, the Act does not include in its scope the corporation or artificial person. The salutory effect of this provision is obvious. The Commission is enabled to secure evidence, otherwise unobtainable, and at the same time the guilty party does not escape all punishment. The immunity is extended to the agents and officers of the corporation, but not to the artificial entity itself. One would not expect this matter to create the same amount of interest which the more radical Negligence Law has aroused.

Bitter and harsh have been the assaults on this piece of legislation. Some foresee the destruction of our dual system of government, while others see an opportunity to give a crushing blow to the overzealous supporters of increased federal control of interstate commerce. What the outcome will be is doubtful. Already two federal courts have declared that the act is unconstitutional. Judge Evans of the District Court of Kentucky and Judge McCall of the District Court of Tennessee have decided that Congress in undertaking to legislate in this manner, has transgressed the limits of its powers.

Judge McCall declared in substance that "Congress has no power to define the liability of interstate carriers for torts resulting in injury to their employees unless it has, in the first instance, prescribed rules governing the conduct of such carriers towards their employees, and it is only for a breach of those rules that it may fix civil liability."

"As the Employers' Liability Act does not prescribe rules governing the conduct of common carriers towards their employees, but merely attempts to define their liability for negligence, it is not a regulation of commerce among the states, and therefore, is unconstitutional."

"If the Act regulates commerce at all, it regulates intrastate commerce, and as Congress has no power to regulate intrastate commerce the entire Act must be declared void, it being impossible to separate that part of the act which relates to intrastate commerce from that part which relates to interstate commerce."

Practically the same grounds are taken by Judge Evans in the earlier case and they are the grounds upon which the opponents of the act rely in their attacks. Just what view the United States Supreme Court will take of the matter is, of course, unknown. The decision will probably be handed down sometime in April.

Some of the interesting features of the Negligence Law are as follows:

The strict common law doctrine of contributory negligence is abrogated, and the rule adopted is substantially the same as that which exists in admiralty. The statute provides that "contributory negligence shall not bar a recovery where his (employee's) contributory negligence was slight, and that of the employer was gross in comparison." This rule does not entirely

relieve the injured party who contributes to the cause of his injury from all liability. Yet the strict and rigid rule which bars a recovery at common law where the injured party is guilty of contributory negligence is no longer in force in this class of cases in the Federal Courts.

The above brings us to a consideration of another and no less interesting feature of the act, that the doctrine of comparitive negligence is adopted. The statute provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." This doctrine is not a part of the common law and is generally considered a dangerous one. While the principle of equitable adjustment which the rule contains is unquestionably praiseworthy, it is most pernicious in practice. The act provides that "all questions of negligence shall be for the jury." To turn a jury loose on questions involving such nicety and precision invites havoc and seriously impairs the usefulness of the jury system.

It is one thing to determine whether or not a party has departed from the legal standard of care required of him and quite another and most difficult thing to find the degree of departure by each party, to determine whether the defendant is guilty of gross negligence and the plaintiff of slight negligence. The mere difficulty of administering a rule is, perhaps, never a sufficient excuse for not adopting it, if it is a just one; but where that difficulty renders the rule impracticable, any other excuse is uncalled for. The Supreme Court of Illinois clearly stated this view when it said that "the definition of gross negligence itself proves that it is not intended to be the subject of comparsion. It is 'the wont of slight diligence.' Slight negligence is 'the wont of great diligence.'"

The fellow servant rule is also abrogated. The corporations coming within the purview of the act are liable to any of their employees for all damages resulting from the negligence of any officer, agent or employee. This is not the place to discuss the merits of the fellow servant doctrine. It is sufficient to note the effect of the provision.

The texts of these acts annotated by F. N. Judson and the report of the committee appointed at the Conference of Counsel for Railroad Companies on the questions arising under the Employers' Liability Act are of great value to the student of these new laws. The latter work is very exhaustive and presents in the strongest light the position which the railroads have assumed in combating the extension of federal control over interstate commerce.