BOOK REVIEWS

REVIEW OF A REVIEW

To the Editor of the MICHIGAN LAW REVIEW:

In an interesting review of WALSH ON EQUITY, in 29 MICH. L. REV. 1122 (June 1931), Professor Clarence D. Laylin appears to ascribe to me parenthood for some pleading concepts set forth in that excellent treatise (of which I heartily approve; compare my review in 8 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 521, March, 1931). Although these ideas have been supported by able writers and courts for some time, I should not object to the honor but for the fact that Professor Laylin also seems to assume premises which in my opinion are most inimical to code reform. Perhaps the following paragraph of his review best states his general point of view:*

> "The author subscribes to the opinion, elsewhere held,[6] that the code substitution of the single 'civil action' for the forms of action at law and in equity of itself authorized equitable defenses to legal causes of action, and that the section common to most of the codes, expressly providing therefor, is superfluous. From this he argues that the plaintiff should, without express statutory authority, be permitted to meet the bar of a release or acquittance by a reply setting up fraud in the inducement.[7] As to equitable defenses, the view is expressed that they are not really made legal by becoming available for the overthrow of legal causes of action, because among other reasons, the issues of fact which they tender are not triable by jury; and the distinction between such defenses and equitable counterclaims is minimized. These views are accepted as prevailing on the faith of secondary authorities; but it is felt that the cases, if examined, would at least throw doubt upon their correctness, and lend support to the New York rules, which the author regards as 'unfortunate.'[8] So, certain decisions to the effect that, where the plaintiff seeking specific relief fails on the evidence to make out a case for such relief, the cause can not be retained and damages given,[9] are roundly criticized as judicial legislation to 'repeal' the Code.[10] But the defendant's statutory right of trial by jury in actions for money, preserved by the same code, does not seem to be taken into account."

Professor Laylin, as a student of the subject, has undoubtedly developed his supporting arguments for those positions, and I feel it would be most instructive if he could be induced to state them at some length for the benefit of those of us who are not in immediate agreement with him on these points.

I can perhaps explain better what I have in mind by taking up the above paragraph from Professor Laylin's review sentence by sentence, together with his footnote citations, adding comments of my own in brackets.

* 29 MICH. L. REV. 1122 at 1123-24. The footnote numbers are those which occur in this passage of Professor Laylin's review, and the notes are set out in full in the course of Dean Clark's discussion.—*Ed.*

1. "The author [Walsh] subscribes to the opinion, elsewhere held[6] [Note 6 reads: 'See Clark, Code Pleading, p. 61'], that the code substitution of the single 'civil action' for the forms of action at law and in equity of itself authorized equitable defenses to legal causes of action, and that the section common to most of the codes, expressly providing therefor, is superfluous." [The abbreviated reference to the statute which Professor Laylin makes unfortunately quite misstates it. While I am sure this is inadvertent upon Professor Laylin's part, it does seem to me to reveal a bias in his attitude toward the code reform. The statute, now N. Y. Civil Practice Act, sec. 262, reads: "A defendant may set forth in his answer as many defenses or counterclaims, or both, as he has, whether they are such as *were formerly denominated* legal or equitable." (Italics mine.) This varies little in form from the original statute passed in New York in 1852 (N. Y. Laws, 1852, c. 392—"whether they be such as have been heretofore denominated legal or equitable") and adopted in many but not all of the states. "Equitable defenses" were allowed in New York without the aid of the statute, *Haire v. Baker*, 5 N. Y. 367 (1851), and now also in other states where it does not exist, as in Connecticut.]

2. "From this he [Walsh] argues that the plaintiff should, without express statutory authority, be permitted to meet the bar of a release or acquittance by a reply setting up fraud in the inducement.[7]" [Note 7 reads: "P. 101 criticizing Hancock v. Blackwell, 139 Mo. 440; Perry v. O'Neill & Co., 78 Ohio St. 200."] [I agree with Professor Walsh's view, and would suggest that the citation of only the two cases does not give a fair picture of the state of the case law.]

3. "As to equitable defenses, the view is expressed that they are not really made legal by becoming available for the overthrow of legal causes of action, because among other reasons, the issues of fact which they tender are not triable by jury; and the distinction between such defenses and equitable counterclaims is minimized." [I think the view really is that not only do equitable defenses so-called not become legal, but that it is really improper and misleading to use the term "legal" for the combined form of action. We see here, too, that the generally asserted fear of violating the constitutional right of trial by jury is unfounded. Probably the view does minimize the distinction between such defenses and counterclaims, but just what is that distinction? I have been able to discover no clear statement of it.]

4. "These views are accepted as prevailing on the faith of secondary authorities; but it is felt that the cases, if examined, would at least throw doubt upon their correctness, and lend support to the New York rules, which the author regards as 'unfortunate'.[8]" [Note 8 reads: "Pp. 117, 118, citing CLARK, CODE PLEADING, 61, 62, note 70; the reviewer feels that several of the cases cited by Clark do not sustain his text, notably those from the reviewer's own jurisdiction (Ohio). The unprofitableness of trying to determine the 'weight of authority' as to a question of code pleading, depending upon the provisions of a local statute, is obvious."] [As at present advised I see no necessity for modifying any citations I employed in the reference given. As to the New York rules I have also wondered what they were, for I have been unable to see any consistent rules on the subject in that jurisdiction. Professor Laylin has apparently examined my book at the place cited by Professor Walsh and hence,

although he does not mention the fact, he must have noticed the form of my reference to Ohio. Thus, prior to my citation of an Ohio case in note 71 I said: "This result, which is so easily reached under provisions such as the Connecticut statute, quoted above, is often confused by calling the pleading, in whatever form stated, an equitable counterclaim, or by speaking of the action as now one in equity." See similar references to Ohio in my book at page 430, and in my article in 11 CORNELL LAW QUARTERLY 482, 488, 490. It seems to me that I made my position clear, namely, that while in Ohio a result in accordance with the position asserted is finally reached, yet the issue is concealed and colored by the use of misleading language. Presumably Professor Laylin does not agree with this conclusion, but it is a case of difference in interpretation, not of miscitation.]

5. "So, certain decisions to the effect that, where the plaintiff seeking specific relief fails on the evidence to make out a case for such relief, the cause can not be retained and damages given,[9] [Note 9 reads: "Jackson v. Strong, 222 N. Y. 149; Potts v. Church, 207 App. Div. 219, 201 N.Y.S. 776"] are roundly criticised as judicial legislation to 'repeal' the code.[10]" [Note 10 reads: "P. 111"] [I, too, have criticized the two cases cited, but still more I wonder just what *Jackson v. Strong* decided. Did it hold that the cause cannot be retained for further proceedings or did it only order a new trial?]

6. "But the defendant's statutory right of trial by jury in actions for money, preserved by the same code, does not seem to be taken into account." [But, as Professor Laylin himself points out in 3, above, the jury trial right is carefully preserved. Reliance upon this part of the Constitution is usually the fundamental premise of judges who reason along the line which Professor Laylin seems to have taken. The premise is false. Is Professor Laylin, too, relying upon it, though he himself points out its falsity?]

Very truly yours,

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A BOOK OF LITTLE VALUE

THE LAW OF NEGOTIABLE INSTRUMENTS, with Forms of Pleadings, Trial Evidence, and Trial Procedure. Third edition. By *James Matlock Ogden*—Lecturer in Indiana Law School on Negotiable Instruments; Attorney General of Indiana. Chicago. Callaghan and Company. 1931. National Textbook Series. Pp. xix, 689. $5.00.

The former edition of this textbook appeared in 1922, before the Negotiable Instruments Law had been adopted by all of the states. The changes in the present edition are numerous. Part III of the two former editions has ben eliminated by placing the citations to the Negotiable Instruments Law in the footnotes. Many new sections have been added. The chapter on Guaranty and Suretyship has been eliminated. The introductory chapter is essentially new, and a chapter on Amount of Recovery has been added. The chapter on Conflict of Laws has been rewritten. The author has incorporated the proposed amendments to the Negotiable Instruments Law as approved by