

## BOOK REVIEWS.

STORY'S EQUITY PLEADINGS. Tenth Edition. Revised, Corrected and Enlarged. By JOHN M. GOULD, Ph.D. Boston: Little, Brown & Co., 1892.

"Story on Equity Pleading" is to the profession so old and tried a friend that the reviewer of a new edition must confine himself to a notice of the work of the editor and of the publisher. Even as to the latter nothing but a single statement need be made, to wit: that the work is published by LITTLE, BROWN & CO. This is equivalent to saying that everything that the printer and the binder can do has been done to make the book attractive. The paper is good, the typography is excellent—every feature may justly be spoken of with praise.

Dr. GOULD has done his part well, and his notes, in many instances, go far toward remedying admitted defects in the author's work. For example, Mr. Justice STORY gives his readers but scant information upon the important question of whether or not a given answer is responsive to the plaintiff's bill. The omission of a thorough discussion of this topic is almost as grave a defect in STORY'S work as is the insufficiency of STEPHENS' treatment of the scope of the general issue in his classic treatise on "Pleading at Common Law." Recognizing this, Dr. GOULD, on pages 693-695, prints a valuable note, in which he presents many authorities on responsiveness, and classifies the cases relating to the effect of an answer as evidence for the defendant. We could wish that he had given the subject a still more thorough investigation, for difficult and disputable questions are constantly arising with respect to it, and many of the cases seem to be in serious conflict.

The note on page 40, *et seq.*, on the subject of the prayer for general relief, is a valuable one; and the notes to the chapter on Bills of Interpleader and Certiorari furnish a good illustration of the ability with which the editor has supplemented the discussion contained in the text and notes of previous editions.

On the whole, it may be said that the editor has been remarkably successful in his effort "to adapt this standard treatise to all the needs of modern practice, as well in the States which have a code procedure as in those having a distinct system of equity."

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THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. and EMERSON E. BALLARD. Crawfordsville, Ind.: Ballard & Ballard, 1892.

In this volume the editors have reported in full over one hundred cases decided during the year by State courts of last resort, and they have added to these several elaborate annotations and discussions, an index to decisions construing local statutes and an epitome of cases not important enough to be reported in full. The book represents the annual crop of real property cases yielded by the American courts, the wheat being separated from the chaff, and the whole ground into a form well adopted for the lawyer's "domestic use." With this book in hand one can keep abreast of the development of the law by reading the reported cases, for the editors report all cases in full (1) which overrule other cases on material points; (2) which construe important statutes not hitherto construed; or (3) which make some new application of legal principles. If one has the further object of investigating a particular point, he has at hand the admirable "Epitome of Cases" which, as a new volume, will be published each year, is justly characterized by the editors as "a growing and living 'brief' on all of the subjects about which the courts have anything to say."

The plan of the book is, in our judgment, an admirable one, and the execution of the plan seems to be in all respects satisfactory. But the true test of such a book lies in the constant use of it, and we shall be in a better position to pronounce a worthy judgment when the second "Annual" makes its appearance than we are at present.

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IL DIRITTO COMUNE. Per O. W. HOLMES, JR. Translated (into Italian) by FRANCESCO LAMBERTENGI. Sondrio: Tipografia A. Moro e. C., 1888.

This interesting volume has been sent to us but recently, although it was published, in limited edition, as

long ago as 1888. All admirers of Judge HOLMES' "Lectures on the Common Law" (that is to say, all *readers* of them), will be glad to learn that they have, by M. Lambertenghi's translation, been put within the reach of those who live in the very birthplace of the Civil Law. Not without the aid, we admit, of the more familiar Boston edition, we have examined a large part of the volume before us, particularly the fifth Lecture on "Bailment." The account of the celebrated Southcote's Case—*Caso di Southcote*—sounds strangely in the "soft Italian," and because of this we read with renewed interest of the later development of the doctrine of bailment and of Chief Justice PEMBERTON'S refusal "to follow the law of Lord COKE'S time to such extreme results"—"*di seguire fino a questo estremo il diritto del tempo di Lord Coke.*"

M. LAMBERTENGHI is to be commended for an undertaking that will materially assist Judge Holmes' work in attaining the world-wide reputation which it deserves.

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DIGEST OF INSURANCE CASES FOR THE YEAR ENDING OCTOBER 31, 1891. By JOHN A. FINCH. Indianapolis: The Rough Notes Company, 1892.

Mr. FINCH, of the Indianapolis Bar, prepares annually for the publisher of the insurance journal, entitled *Rough Notes*, a digest of the insurance cases reported during the year in any of the long list of law journals published in the English language. The volume before us represents his latest effort, and it will be welcomed by the profession as a most useful work—what the editor, in his preface, is pleased to call "an indispensable necessity." An examination reveals the usual number of tiresome and dreary decisions, which the editor must, of course, digest, together with the really useful and interesting cases. The Kentucky Superior Court (p. 72) has discovered that where the assured makes truthful answers, and the company's agent writes down false answers, the company cannot defend upon the ground of their falsity. The Supreme Court of Canada is to be congratulated on this decision: "Two marks ("), similar to those used for the word "ditto," placed under the word "no" in a column of answers, in an application for life in-

surance, make an answer which is evasive, if not false, and will vitiate the policy, when the word "yes" should have been written, instead of such mark, to make a true answer" (p. 112). While one possessed of all his faculties might have reached these conclusions unaided, it is well to have judicial sanction for the following proposition : that when a shot in the back of the insured produced total paralysis of the lower part of the body, he was entitled to recover under a policy payable upon "*the loss of two entire feet*" (p. 1).

Mr. FINCH has done his work well. The cases are carefully digested, the classification is good, and the index is remarkably complete.

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THE PURITAN IN HOLLAND, ENGLAND AND AMERICA: AN INTRODUCTION TO AMERICAN HISTORY. By DOUGLAS CAMPBELL, A.M., LL.B., Member of the American Historical Association. Two Vols. New York: Harper & Brothers, 1892.

This interesting work belongs, of course, to the domain of political rather than legal history. But the author finds it necessary, in the development of his subject, to deal with the problem of the sources and growth of American institutions and American law, and to discuss the relations which they bear to the institutions and the Common Law of England. It is this portion of the work which will have an especial interest for the professional readers of THE AMERICAN LAW REGISTER AND REVIEW, and it is this portion, and this portion only, which it is proposed to discuss in this notice.

The author, in the opening paragraphs of his introduction, makes short work of the popular assumption "that the people of the United States are an English race, and that their institutions, when not original, are derived from England." He proceeds to show that the institutions of America are very old, being partly Roman and partly Germanic, and that they have come down to us *via* the Netherlands, where were preserved for many ages the Roman institutions and the Germanic ideas of freedom. Our legal

system, he contends, is derived from the Civil and not from the Common Law, and he suggests that the admirers of the latter regard it as the perfection of human reasoning, "upon the theory that knowing it to be ugly they think it must be great." Of more recent legal developments in this country he speaks in a similar vein; and his position upon the whole subject is best expressed in his own words: "Looking at our legal system to-day, it can almost be said that everything in it consistent with natural justice comes from Rome, and that everything incongruous, absurd and unjust is a survival of old English customs and English legislation." "Such statements," he adds naively, "as to the influence of the Civil Law upon the jurisprudence of England and America may seem novel to some readers; but the whole subject of the influence of Rome upon modern society is comparatively new." He enumerates some of "the more salient legal reforms" in which America has led England, instancing the Constitutional guaranty to the accused of the right to be represented by counsel, the liberty extended to the prisoner to testify in his own behalf, the simplification of procedure in the courts, "the virtual amalgamation of law and equity," and the emancipation of married women. He predicts that other reforms will come in time, such as the prohibition upon the disinheriting of children without just cause, and concludes: "but for no such reforms, either past or present, need we look to English precedents."

It is important for the author's purpose to minimize the debt which we owe to England, although, in somewhat sarcastic language, he disclaims any intention to do so. It is a debt, he declares, which "will never be ignored or outlawed." But the theory which he is endeavoring to support involves the conception of a glorified Puritanism emanating from the Netherlands and triumphant in America, its intermediate history being the record of a struggle for existence against adverse conditions in England. Hence we are not surprised when, in describing the state of England in the sixteenth century, he denounces in unsparing

language the immorality of clergy and people, the ignorance of the masses, the corruption of the judiciary, the absurdity of the Common Law, and when he laments, not without a trace of satisfaction, the decay of civil liberty. Then he tells of the ever-widening stream of immigration from the Netherlands, where "the Reformation began at the bottom," so that between the years 1560 and 1562 the number of refugees from Flanders had increased in England from ten to thirty thousand, and still the stream continued to flow. These refugees instructed the English in agriculture, manufacture and commerce; they aided in making England "Protestant and free;" they furnished the recruits for Cromwell's army, and it was from the places of their settlement that the hardy settlers of New England came. "Never," says Mr. CAMPBELL, "has the world beheld another missionary work on such a scale as this; nor one where the conditions were all so favorable. They came from a land filled with cities, which, until the days of Alva, had been the home of civil liberty, where trade was unshackled by monopolies or arbitrary impositions, where justice was impartially administered, imprisonment by royal warrant unknown, the pardon of criminals for money unheard of, where liberty of debate in their legislatures was unquestioned, and where taxes had been imposed only with the consent of the Government. They came to a land where almost every right was trampled under foot, where civil liberty, if it ever existed, was little more than a dim tradition. How their influence must have been exerted can be readily imagined."

We repeat, therefore, that it is important for the author's purpose to minimize the debt which we owe to England and, consequently, to find in the English Constitution and in the English law as it existed at the date of this immigration as few guarantees of civil liberty as possible, and as few effectual provisions for enforcing rights and redressing wrongs. Under these circumstances it would, perhaps, be unreasonable to expect a dispassionate and judicial examination of the claims of the Common Law

upon our admiration, and a perfectly impartial discussion of the relation subsisting between our written Constitution and the unwritten Constitution of England. But it is not unreasonable to expect that an author, especially when he is entering upon debateable ground, will avoid such extravagant and exaggerated language as that quoted above, to the effect that everything in our legal system consistent with natural justice comes from Rome ; and it is difficult to listen with respect to such assertions as that every right (in the sixteenth century) was trampled under foot and that civil liberty, if it ever existed, was little more than a dim tradition.

When we examine the proofs which Mr. CAMPBELL adduces in support of these assertions, we find them unsatisfactory. After dwelling upon the absence of a State Church in America, he endeavors to break the connection between American and English "institutions" in five particulars—first, by contrasting the somewhat bombastic averment in the Declaration of Independence that "all men are created equal" with the English class system ; second, by pointing out that ours is a written, the English an unwritten, Constitution ; third, by comparing the single Executive in the United States with the king and cabinet in England ; fourth, by noting the points of difference between the two legislative houses under our Constitution and under the English ; and fifth, by commenting upon the supremacy of our Judiciary as represented by the Supreme Court of the United States. He further contrasts the laws in the two countries relating to the ownership of land, popular education and local self-government. It is obvious that in discussing whence we derived the provisions of our Constitution little is gained by remarking that the English Constitution is unwritten. It is also clear that the differences noted with respect to the conception of the citizen and the executive are incidental to the abandonment of monarchy ; although it must not be forgotten that personal rule, the rule of a single Executive, did not cease in England until the death of William IV. We must be careful

not to read present conditions in this respect back into the past. With regard to the equal representation of the States in the Senate, if it be conceded that this feature, as well as the element of permanence, was copied after a Dutch model, it is to be remarked that many features which might with equal justice be referred to the same source were inserted in the Articles of Confederation and were found wanting in the hour of trial. On the other hand, we do not understand it to be seriously denied that the English House of Commons was present in the minds of the framers of our Constitution when they made provision for the lower house. The admirable distribution of power which gives supremacy to our Federal Judiciary is indeed a creation of our own, and one of which Mr. Campbell is justly proud. The land laws will be adverted to directly in connection with American jurisprudence, and local government and the common school system do not fall within the scope of this notice. It may be remarked, however, that the former is a thoroughly English conception; and as to the latter, it is well known that the school system set on foot by the Plymouth colonists fresh from Holland languished and failed to thrive, while the system established by the Massachusetts settlers, who were English to the backbone, may in fairness be called the parent of the modern New England system.

Turning to Mr. CAMPBELL'S discussion of our legal system, the lawyer's attention is at once arrested by this remarkable fact, that the denial to our jurisprudence of an English origin is based upon the indebtedness of the Common Law to Norman and Roman sources. It is somewhat surprising that Mr. CAMPBELL should fail to realize the incorporation of principles of Civil Law into the Common Law by such English jurists as Lord MANSFIELD is not an act of plagiarism, but a step in the development of English jurisprudence which made it not a whit less English. The author's contention is as if some one were to assert that "Paradise Lost" could not be included among English poems because Milton drew inspiration

and material from classical sources. "Most of our law," he says, "is a transplanted growth; very little, except the decayed or stunted shoots, having sprung from English soil. It is to Rome that we are indebted for almost all of our system of equity and admiralty; our laws relating to the administration of estates and the care of minors, the right of married women, bailments and, to a large extent, our whole system of commercial law. Following back the institutions which are England's boast, such as parliament, trial by jury and her judicial system, we find them derived, not from the Anglo-Saxon, but from the Normans, who were French by domicile and cosmopolitan by education." Surely there is need for definition here. If by the term "Common Law," Mr. CAMPBELL means the laws of England as William the Conqueror found them, his observations do not require consideration. If by that term he designates the system of jurisprudence, both law and equity, as it existed in England when MANSFIELD died, then it is proper to inquire once more by what right he denies to it the name English? What of those great jurists who have from age to age developed the jurisprudence of the High Court of Chancery and settled the law as it is administered in our courts to-day? If we are to be referred to bailments, what of Lord HOLT and the judgment in *Coggs v. Bernard*? Not English, we are told, because these great English men had studied the civil law! Then this "vigorous language" which we speak—for which Mr. CAMPBELL gratefully acknowledges his indebtedness to England—is not English after all. It has drawn upon Rome, both directly and through the Norman, the French and the other Romance languages. It has drawn upon the Greek and is still drawing. If it is not English now, when, it becomes pertinent to inquire, shall we be able to call any of our "institutions" or our legal system "American"—or, indeed, when shall we be able to call any of these things "ours?" It is this strange failure to conceive of the Common Law as an organism, growing and developing in harmony with the life of the English people, assimilating what was good in

other systems, undergoing constant changes and modifications, it is this strange failure, we venture to think, that vitiates much of Mr. CAMPBELL'S reasoning.

In view of these considerations it is obviously proper to apply, as we have already ventured to apply, the terms "exaggerated" and "extravagant" to Mr. CAMPBELL'S characterization of the doctrines of the Common Law. Even if we are referred by him to Elizabeth's reign—when he is pleased to consider that the liberty of the subject reached its lowest ebb—we discern the stern figure of Lord COKE to whose integrity MACAULAY paid an unwilling tribute; and we are instantly reminded that it was in Lord COKE'S time that the great Monopolies Case was decided and that the first signal triumph of equitable principles was recorded. We recognize that it was during that very period that many of the fundamental principles of our jurisprudence were formulated and many of our most venerated precedents were established. As to the state of the criminal law and the barbarous penalties inflicted under judicial sanction Mr. CAMPBELL'S language is perhaps not too severe. No reader of Mr. CARSON'S able articles in the June and July numbers of *THE AMERICAN LAW REGISTER AND REVIEW* will care to dissent from such condemnation.

Mr. CAMPBELL has much to say about the English land laws, the evils of primogeniture and the disadvantages which spring from a failure to adopt our recording system—a system, by the way, for which, it seems, we are indebted to the ancient Egyptians. He falls into a common error in attributing to the laws governing the transfer of real estate an undue importance; or, rather, he underestimates the importance of private laws—averring that, in comparison with the laws concerning religion, education and property, "the rules by which States or individuals transact their ordinary business are but minor matters." This is a strange assertion for a modern lawyer to make; it would have been approximately true a century ago.

With regard to the "reforms" to which reference has already been made but little need be said. The alleged

simplification of procedure is by no means an unmixed blessing ; and it should seem that the present English system of pleading, in which the scope of the general issue is restricted instead of being enlarged, is far preferable to our code pleading. The married woman's property Acts are fraught with sociological dangers, and the most sweeping of them are so recent that it is unsafe to boast much of the wisdom of such legislation.

On the whole, it is impossible for us to acquiesce in the view that no good thing has come to us from the Common Law ; and we venture to protest against what appears to us to be an attempt to manipulate our legal history to fit a preconceived theory. Interesting as Mr. CAMPBELL'S work unquestionable is, and plausible as are his arguments, the American student of English law will detect the presence of many a lurking fallacy ; and while he will recognize the value of a work which compels him to assume the defensive, he will nevertheless be able to justify the confidence which he feels in the correctness of his position.

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AMERICAN RAILROAD AND CORPORATION REPORTS. Edited and Annotated by JOHN LEWIS. Vol. IV. Chicago: E. B. Myers & Co., 1892.

In this volume of upwards of eight hundred pages Mr. LEWIS gives to the profession in convenient form the most important corporation cases decided in Courts of last resort in the United States since January 1, 1891. The decisions here reported pertain to the law of railroads, municipal corporations, insurance, banking, carriers, telegraph and telephone companies, building and loan associations—in short, all the industrial enterprises which are carried forward through the instrumentality of the private corporation. Many of the decisions are followed by careful and elaborate annotations upon the point of law involved in the principal case. The work is provided with a digest-index, remarkably complete and accurate, containing references to both the reported cases and the notes.

The decisions which the editor has selected are, in

general, useful and important, and some of them will doubtless rank hereafter as "leading cases." *Shipman v. Bank of State of New York*, decided by the New York Court of Appeals, relates to the liability of a bank to its depositor for money paid out on a cheque drawn by the depositor, his clerk having stolen the cheque and forged the endorsement thereon. *Cincinnati Inclined Plane Ry. Co. v. City and Suburban Telegraph Ass'n*, from the Supreme Court of Ohio, investigates the relative rights of street railways and telegraph companies with respect to the use and occupation of public thoroughfares. The decision is to the effect that the prior grant of the use of a street to a telegraph company is subject to the right to establish and operate an electric railway thereon, inasmuch as the dominant purpose in the dedication and opening of streets is to facilitate public travel. Hence the telegraph company's claim to "ground circuit" is not superior, though prior. In *Briggs v. Spaulding*, the Chief Justice delivers the opinion of the Supreme Court of the United States. This was a bill framed upon the theory of a breach by the defendants, as directors, of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the National Banking Act. The opinion discusses the personal liability of bank directors, and the Court decides, under the circumstances of this case, that there is no such personal liability on the part of the defendants since they had not been guilty of negligence or breach of duty. Three of the directors, however, had a narrow escape, as Mr. Justice HARLAN, with whom concurred Mr. Justice GRAY, Mr. Justice BREWER and Mr. Justice BROWN, filed a dissenting opinion on the ground that, as to the three, the evidence showed that they had not used the requisite degree of care, and that, with respect to the wrong-doing of a fellow official, "their eyes were as completely closed to what he did from day to day in directing the affairs of the bank as if they had deliberately determined not to see and not to know how he controlled its business." The case of *Handley v. Stutz*, the already

well-known decision of the same august tribunal, is also reported by Mr. LEWIS. This case may be said to represent the "high-water mark" of the doctrine that the unpaid capital of a corporation is a trust fund for the benefit of creditors. The Court held (to quote from Mr. LEWIS'S syllabus) that "the stockholders of the corporation, who voted to increase the capital stock eight hundred shares, and then distributed among themselves three hundred of those shares, without any consideration, must, at the suit of creditors of the corporation, which has become insolvent, respond for the par value of the shares, though they never expressly agreed to pay for the same, and though the stock is expressly declared to be fully paid and free from all claims or demands on the part of the corporation." The severity of the decision on this point is somewhat tempered by the refusal of the Court to enforce the same rule with respect to those who had purchased the new stock together with the bonds of the corporation in the market as the highest bidders; it being conceded that, but for the stock bonus, the bonds could not have been negotiated. But in any view the decision is an extreme one, and it is interesting to observe its relation to *Wood v. Dummer*—the case in which Mr. Justice STORY originally propounded the trust fund doctrine. The use of the term "trust fund" is rather an absurdity in this connection, for the distinctive attributes of the trust fund are absent; and, at the same time, the true equities of a case could be better worked out by treating the stockholders as those who have made representations on the faith of which others have acted, and who must, therefore, be compelled to make them good. This is not the only instance in which Mr. Justice STORY must be made responsible for much that is absurd in the law in consequence of his adoption of plausible but dangerous grounds on which to attain a sound conclusion which might have been reached on sound principle. Witness his "general commercial law" doctrine in *Swift v. Tyson* and the confusion which has resulted from the refusal of the Federal Courts to be ruled by the provisions of the Judiciary Act with respect to the laws