

## BOOK REVIEWS.

PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH. By Richard T. Ely. Two volumes. Pp. xviii and 995. New York. The Macmillan Company, 1914.

In this treatise Professor Ely considers the legal rules applying to the making of contracts and the acquisition and protection of property, and comments upon their desirability or undesirability. He makes clear that these rules are conventional in the sense that they are made by human beings with power to choose between alternatives. He recognizes the conflicts of economic interests and of social theory which underlie these choices, and in his own judgments he steers a safe and innocuous middle course. It is of prime importance, he concludes, for the government to uphold the sanctity of contracts, but it should also prevent the making of contracts which may become an instrument of oppression. The institution of private property is socially useful and it should be protected. But that it may continue to promote the general welfare it must be increasingly socialized. This socialization takes place through the police power, the power of eminent domain, and power of taxation.

The chief merits of Professor Ely's work are his insistence on the test of social utility, his recognition of the freedom of choice exercised by the judiciary in making and developing legal rules, and his freedom from absolutistic conceptions and dogmatic assertions. The chief defects of the work are the natural accompaniment of its merits. The point of view preserves such an even balance that it remains vague and indefinite. While social utility is made the test of the merit of protection of property and of freedom of contract, the social utility of established rules is not shown by disclosure of the results which they have produced. Doubtless such a task would require the labors of many scholars for many years; labors that might in the end be of little value. We cannot know what would have been the result of other legal rules than those which have been applied. Other factors than statutes and judicial decisions have contributed to the distribution of wealth. We must be grateful to Professor Ely for having laid stress upon the importance of the legal factors and for presenting the ideals which should guide those who have a part in making the legal rules. To those who profess to take a mechanistic view of the law, Professor Ely's observations on the training and selection of judges are especially commended: "As the judges have such social and economic power as no other body of men have, should they not be selected with reference to their social and economic philosophy? Why should they not be openly questioned with reference to this? As a matter of fact, they are not appointed without reference to this philosophy. Although little is said about it openly, if powerful interests fear the philosophy of candidates, opposition arises to nomination or confirmation of these candidates. Why not make the inquiry open and above-board? Is it not absurd for the American people to elect a President

and Congress to carry out a certain policy and then to perpetuate arrangements whereby other men are appointed in supreme control whose social philosophy is such that they will necessarily overthrow all that the first have done? The frank recognition of the facts would put upon the judge positive constructive work and not merely the easier negative work (pp. 689-691). We need an adequate modern legal education conceived not from the point of view of private practice, but from the point of view of public interests. We want schools of jurisprudence in the broadest sense. And then as judges, all disclaimers to the contrary notwithstanding, do have real and very great legislative powers, only those should be selected as judges who have an enlightened twentieth century social philosophy (p. 213)."

*Columbia University.*

*Thomas Reed Powell.*

---

THE LAW OF THE CANADIAN CONSTITUTION. By the Hon. W. H. O. Clement. Third Edition. Pp. xxix and 1099. Toronto: The Carswell Co., Ltd. London: Sweet & Maxwell, Ltd., 1916.

Mr. Justice Riddell, of the High Court of Ontario, has noted the relatively large amount of discussion given to constitutional questions in the United States. He has pointed out the fact that Canada has in substance the same constitution as the United Empire, that is to say, no constitution at all, in the sense in which we use the term, and that therefore so-called constitutional questions receive but little attention in the courts of that province. The legislatures are omnipotent within the division of legislative subject matter between the Dominion and the provinces.

Notwithstanding the non-existence of a written constitution, Judge Clement has found it possible to write a book of upwards of a thousand pages on the subject of Law of the Constitution of Canada. His book purports to exhibit this law in reference to the position of Canada as a colony of the Empire, and to its self-government under the scheme of the British North America Act of 1867. Chapter twenty-eight, on the administration of justice, is one that will especially interest lawyers, in that it sets forth the constitution, maintenance and organization of the courts, their jurisdiction and their procedure. Two valuable appendices contain constitutional statutes, orders in council, important imperial statutes relating to Canada, and a table of British statutes as to the operation of which in Canada question has been raised by the courts.

*David Werner Amram.*

---

THE LAW OF SALES OF STOCKS AND BONDS. By Milford J. Thompson. Pp. xxv and 208. Chicago: Barnard & Miller, 1915.

It seems axiomatic that sales of stocks and bonds should conform to the same principles of law as sales of any other kind of personal property. It is the purpose of this book to point out that in several particulars sales of stocks and bonds do not follow the principles of the law of sales as laid down in cases as to sales of other kinds of personal property, and to show

how, by slight changes, sales of stocks and bonds might be made to conform to those principles.

The chief manner in which sales of stocks and bonds do not comply with the law of sales is this: Stocks and bonds stand for two rights—first, a right of action against the corporation for dividends or interest, and second, a right of possession to an undivided part of the property which the corporation owns which forms the basis of the security of the purchaser of the stock or bond. When stocks or bonds are sold in this second sense, that is as rights in property, the sales are sales by description, the property being described to the purchaser by means of a prospectus. But in all sales by description there is an implied condition precedent that the thing sold shall comply with the description and that the purchaser shall have the opportunity to inspect the thing to see if it complies with the description. No such opportunity to inspect is given in the case of sales of stocks or bonds, and for this reason the author of this book claims that all sales of this sort are illegal. He suggests that the sale should be made from the seller to the buyer through a trustee who should represent both parties until the buyer has inspected to see whether the property described complies with the description.

The book is interesting and the author's suggestion, if carried out, would undoubtedly go a long distance toward preventing fraudulent stock transactions. It is of regret, however, that the forms of expression used through the book are not more clear and concise; one feels after reading the book that the diction could be decidedly improved.

*Edward W. Madeira.*

---

NOTES ON THE REMEDIES OF VENDORS AND PURCHASERS OF REAL ESTATE. By C. C. McCaul. Second Edition. Pp. xxiii and 222. Toronto: The Carswell Company, Ltd. London: Sweet & Maxwell, Ltd., 1915.

Mr. McCaul, in this second edition, brings his work down to date by the review of the more recent authorities and a revision of his subject-matter in view thereof. The "essay," as the author prefers to term it, is a clear, concise, but complete, discussion of the different remedies available to vendor and purchaser of real estate on breach of contract by the opposite party. It is, however, more than a mere statement of rules and their application; it contains an elucidation of those rules by a thorough analysis of underlying principles. The style and arrangement of the material are likewise to be commended. The author treats first of the remedies of the vendor and then of the remedies of the vendee, each as based upon the affirmation and disaffirmation of the contract and upon special stipulations; but, in this division of the subject-matter, substance is not sacrificed for form and in the treatment of the remedies of the one, there is a discussion of the correlative rights of the other. Relief against forfeiture is most thoroughly discussed, and the essay concludes with a chapter on Notice, Waiver, Delay, and Election of Remedies.

Of special interest is the original thought put forward of a difference between the "rescission" and the "determination" of a contract; the former signifies that the contract is called off and necessitates a *restitutio in integrum*, in the latter the party terminates the contract but retains his rights arising out of the breach. There is, no doubt, a real distinction between the two remedies; but it is in reality only a question of terminology. The use of the two terms, however, is conducive to a more thorough understanding of the remedies in question. The same distinction has sometimes been denoted by the use of the term "rescission" and "rescission *sub modo*."

The law expounded in this treatise is the law as laid down by the courts of England and the Canadian provinces; there is practically no citation of authority from the courts of the United States. The English and Canadian cases, while based on the common law, are nevertheless influenced to some extent by local statutory law. This, together with the differences arising in the course of judicial decision, tends to give local color to the book and makes it of interest to the lawyer of the United States largely for the purpose of comparative study only. To the lawyer of Canada and England it should be, however, a most serviceable tool of trade.

Y. L. S.