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BOOK REVIEWS

Judging Equity: The Fusion of Unclean Hands in US Law. By T. Leigh Anenson. [Cambridge University Press, 2019. 222 pp. Hardback £80. ISBN 978-11-07160-47-7.]

The treatment of the maxims of equity in the classic American *Treatise on Equity Jurisprudence, as Administered in the United States of America* (1st ed. 1881–83) by John Norton Pomeroy has been influential elsewhere. A recent example in Australia is the judgment of Allsop P. in *Kation Pty Ltd. v Lamru Pty Ltd.* [2009] NSWCA 145, (2009) 257 A.L.R. 336, at [2]. With respect to the unclean hands maxim, his Honour set out the statement in *Pomeroy* at §399 that the maxim "is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation".

Several points should be made respecting this statement of principle. First, the author of the book under review, who is Professor of Business Law at the University of Maryland, advocates a much broader application of the maxim. Second, she attributes this as a consequence of the "merger" of law and equity procedure in the federal courts and in many states. Third, the passage quoted above is from the 5th (and final) edition of Pomeroy's *Treatise on Equity Jurisprudence*. This was published in 1941, before "merger" fully took hold.

There were to be no further editions of *Pomeroy*, nor, after its second edition published in 1948, of Professor Henry L. McClintock's *Handbook of the Principles of Equity*.

Professor Anenson confronts the subsequent decline of equity as a distinct discipline in the US and the lack for many years of systematic study of equitable defences. She writes (at p. 30) that following "merger": "law schools transitioned from teaching a course in equity to a course in remedies comprising both law and equity. As a result, a considerable amount of equitable principles were lost in the transition."

Generations of practising lawyers had never had the benefit of a comprehensive course in equity. Scholars also stopped specialising in the subject of equity.

However, trusts retained their importance, exemplified in the treatise by Professor A. W. Scott, now as *Scott and Ascher on Trusts* in its fifth edition. With respect to the broader field of equity change is in the air. The current work of Professor Henry E. Smith of Harvard and Professor Samuel L. Bray of the University of Notre Dame commands attention beyond the US. In his lecture on appointment in 2011, available on video, entitled "Equity Revisited", Professor Smith examined through the lens of economic analysis equity as a control upon the opportunism of those who exploit "bright line" law. Professor Bray challenges the prevalent view that the distinction between legal and equitable remedies is outmoded since "merger" and serves no purpose: "The System of Equitable Remedies" (2016) 63 U.C.L.A. L. Rev. 530. The *Restatement of Restitution and Unjust Enrichment (Third)* and the *Restatement of Agency (Third)*, under the respective Reporters Professors Kull and DeMott, emphasise the importance of the subject of equity.

Those scholars approach equity with an understanding that Pomeroy could have understood. Professor Anenson moves from a radically different viewpoint. She begins (p.105) with the position adopted by Professor Douglas Laycock in his 1993 paper "The Triumph of Equity" (Summer 1993) Law & Contemp. Probs. 53, that "the

war" between law and equity was over and equity was now absorbed in all areas of the law.

Professor Anenson seeks to advance that thesis by fixing upon what she identifies as a battle still waging in various courts in the US respecting the unclean hands maxim; despite "the merger of law and equity, a majority of courts deny the application of unclean hands in actions at law" (p. 106). She advances, for acceptance by the courts, what is identified as a "process-based" theory of unclean hands (Ch. 6). It is apparent that in doing so the author gives the maxim significantly broader scope than it has had in equity. There, the misconduct, however gross, had to be sufficiently connected with the matter in litigation – a point emphasised by Pomeroy. Thus, the new theory of unclean hands not only catches up actions at law for legal remedies, but expands the scope of the doctrine as hitherto understood in equity.

This "process-based" theory has four "phases". Phase 1 (pp. 196–98) concerns misconduct in the present litigation that potentially interferes with due process. Examples given include destruction of evidence, witness tampering and the tainting of the potential jury pool. Phase 2 (pp. 198–200) deals with "non-litigation misconduct" that has the potential to affect the court's ability to control the process or ensure a fair outcome. An example is the falsification of documents relevant to later litigation although not created for the purpose of interfering with that litigation. Phase 3 (pp. 200–03) concerns misconduct and fraud in earlier litigation even though it does not interfere with the ability of the court to hear and decide the present case. Phase 4 (pp. 203–06) usually involves illegal or unethical business practices prior to the instant commercial dispute. An example is the development of unclean hands into the defence of "copyright misuse" (further discussed at pp. 84–85).

The author notes (p. 212) possible overlapping with principles of *in pari delicto*, estoppel and fraud on the court, but views unclean hands as "more expansive in application". In considering a work such as this, distinctive features of the legal system in the US are to be borne in mind. There is the absence of a national court of final appeal in all matters, federal and state, and the consequent absence of universally accepted, for example, doctrines and principles of equity. This gives an important role for scholarship in seeking to draw private law subjects into a coherent national whole. This book is an example of scholarship which is devoted not to stating the present state of the law but rather, this being unsettled across the nation, to advocate how the law should be developed by the courts.

The author has collected an impressive amount of case law and academic writing from the US and beyond. It is to be regretted that the publisher has not included at least a table of cases.

The interest of the book for readers outside the US is principally in the contrast it presents both in the approach to equitable doctrines and remedies and in the advocacy of equitable remedies as an instrument of due process in a broad sense.

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Control of Supreme Courts in Early Modern Europe. Edited by I. Czeghun, J. Antonio López Mevot and A. Sánchez Aranda. [Berlin: Duncker & Humblot, 2018. 323 pp. Softback €89.90. ISBN 978-34-28148-08-0.]

The extent to which the actions of superior courts were controlled in the early-modern period, and the ways in which any control was exercised, are central to