BOOK REVIEWS

Equity: Doctrines and Remedies, by R. P. Meagher, Q.C., B.A., LL.B., W. M. C. Gummow, B.A., LL.M., and J. R. F. Lehane, B.A., LL.B. with a foreword by Sir Frank Kitto. Sydney, Butterworths Pty. Ltd., 1975, lxiii + 722 pp. plus Index. $30.00 (clothbound), $25 (paperback).

Maitland, when lecturing in 1906, said that he did not think "that anyone has expounded or ever will expound equity as a single, consistent system, an articulate body of law". He described equity as "a collection of appendixes between which there is no very close connexion". He also said that he had no doubt that the right thing was done in the then new scheme for the Cambridge Law Tripos when candidates were required to study the English Law of Real and Personal Property and the English Law of Contract and Tort, with the equitable principles applicable to those subjects. To have mentioned equity as a separate subject would have implied acknowledgment of the existence of equity as a system distinct from law and that would have been "a belated, a reactionary measure".

The writers of the book under review would disagree with Maitland for it is apparent from their work that they fervently regard the body of equitable principle to be found in the law reports as a discrete subject worthy of exposition in its own right.

An Australian lawyer seeking expositions of equitable doctrines has had to supplement English text-books such as Snell, Ashburner, Hanbury and Pettit by investigation of Australian cases. If he possessed a copy of Sir Frederick Jordan's *Chapters on Equity in New South Wales* his burden of work was lighter, but that compilation did not purport to cover all the doctrines of equity. The publication in 1958 of Jacobs' *Law of Trusts in New South Wales* and the appearance in 1964 of *Fricke and Strauss on the Law of Trusts in Victoria* provided valuable local texts in a significant area but there remained many aspects of equity which were not covered by any Australian text. With the appearance of Dr. Spry's work on Equitable Remedies in 1971 Australian readers had the benefit of a most useful guide to the development of the main equitable remedies in Australian courts. Even then some fields of equitable doctrine still awaited treatment in an Australian commentary. That lack has now been met by Meagher, Gummow and Lehane.

Equity cannot be explained except by reference to history and it is fitting that at the outset the authors devote thirty-one pages to it. The opening chapter contains a particularly valuable treament of the development of equitable jurisdiction in each of the Australian colonies. Two further chapters, one on the judicature system and the other on the maxims, complete part one of the book covering the background to equity. The book proceeds in part two to explain the basic concepts of equity, namely, equitable estates and interests and the fiduciary relationship. The discussion of equitable estates and interests, though extensive, does not explore the implications of *McPhail* v. *Doulton*[1] on the position of beneficiaries under discretionary trusts. It is fair to observe that the book is not designed to cover trusts since they are adequately covered in earlier books but *McPhail* v. *Doulton* raises basic questions about equitable

[1] (1971) A.C. 424.

interests. Part three is concerned with assurances and assignments and contains chapters devoted to assignments in equity, requirements of writing, priorities, subrogation, contribution and marshalling. Part four, given over to unconscionable transactions, is made up of chapters on fraud in equity, innocent misrepresentation, mistake, undue influence, catching bargains, estoppel in equity and penalties and forfeiture. Part five on remedies includes chapters on declarations, specific performance, injunctions, specific restitution, damages in equity, rescission, account, rectification, delivery up and cancellation of documents and receivers. Part six covers equitable doctrines relevant to deceased estates and has chapters on the rule in *Strong* v. *Bird, donationes mortis causa,* satisfaction, ademption and performance. Part seven discusses the equitable defences based on the Statutes of Limitations, release, laches and acquiescence, and set-off and related doctrines. Part eight is devoted to miscellaneous doctrines, namely, conversion, election, merger and doctrines by which confidential information is protected from unauthorized disclosure.

In the treatment of these various topics the reader is furnished with an admirably full and clear exposition of doctrine which is supported at many points by close analysis of cases and critical references to periodical literature. The authors have some hard things to say about a number of doctrines. Their examination of the rule in *Strong* v. *Bird* leads them to the conclusion that the so-called rule "unlike most equitable technical doctrines, is not anchored in fundamental principle but is adrift and aimless". At the end of their treatment of the doctrine of election the authors find that it is now "a refined and technical doctrine with no fundamenal test for reconciliation of all cases decided in express reliance upon it". The doctrine of satisfaction of debts other than portion debts has been generally discredited and one gathers that the authors would not intercede to save it from abolition.

To an uninformed reader some parts of the book might appear dated. For example a "rogue reformer" clamouring for "relevance"—when he means "immediate relevance"—might begrudge the space afforded to discussion of satisfaction of portion debts since portion debts are seldom if ever incurred these days. But the doctrine is worthy of discussion. Dixon, J. (as he then was) demonstrated the doctrine's potential for regeneration in *Royal North Shore Hospital* v. *Crichton-Smith*.[2] He considered whether the debt in that case, though not a portion debt in the strict sense, was nevertheless akin to a portion debt in the sense that it was designed to make a provision which could equally well have formed part of the debtor's testamentary dispositions and, if so, it was the kind of debt in respect of which equity could with reason presume satisfaction if the debtor left a legacy to his creditor.

Some readers may be struck by the highly critical tone of the book in relation to judges who have drawn on equitable principles to assist the development of the whole body of law and equity. In an inversion of a familiar phrase a certain Master of the Rolls is said to have displayed poor logic and base technique in relation to one of his decisions.

In their discussion of the judicature system the authors are concerned to expose what they call the "fusion fallacy", namely, the belief that the judicature system created "a new body of law containing elements of law and equity but in character quite different from its components" (p. 43). They find "depressing evidence of the damage done to Equity in England since 1873". They cite examples where careless tribunals have allowed the two streams of jurisdiction to mingle their waters. In their eyes even the House of Lords is a culprit for in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[3] did not the Law Lords seek support for a cause of action of damages in

[2] (1938) 60 C.L.R. 798.
[3] (1964) A.C. 465.

negligence from, amongst other things, the equitable doctrine embodied in *Norton* v. *Lord Ashburton*?[4] In the authors' view Sir Owen Dixon did the wrong thing when in *Brunker* v. *Perpetual Trustee Co. Ltd.*,[5] he sanctioned the use of the principle of *Milroy* v. *Lord*[6] as a test to determine whether a volunteer transferee of an estate in land under the Real Property Act had acquired a statutory right to the registration of an instrument in his favour.

An impression that the authors are opposed to all change would be incorrect for they see scope for further development of equitable doctrine in some areas. For example, they point to the increasing reliance on equitable protection of confidential information which is being placed by commercial interests who are dissatisfied with the patents system. For further evidence of the vigour of equity the authors might have referred to the speech of Lord Wilberforce in *Re Westbourne Galleries*.[7] The authors are not entirely unyielding in their devotion to logic. For example, they are prepared (p. 160) to accept on grounds of convenience the illogical but beneficial proposition that the right of an assignee of future property where the consideration is executed is a right of a higher kind than a right in contract. Although the authors seem pleased that equity is not to be presumed to be past the age of child-bearing (p. 722) they endorse the view of Bagnall, J. in *Cowcher* v. *Cowcher*[8] that equity's "progeny must be legitimate—by precedent out of principle". It is reassuring to know that equity really is fertile and that there is no need to rely on the approach of Kenyon, M.R. in *Jee* v. *Audley*.[9]

Meagher, Gummow and Lehane is a very welcome accretion to Australian legal literature and is more likely to be a possession for all time than many other works.

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Baalman, The Torrens System in New South Wales (2 Ed.), by R. A. Woodman[1] and J. P. Grimes,[2] Sydney, Law Book Company Limited, 1974, xxxii + 503 pp. $25.50.

Reading an annotated version of a long-standing and important statute such as the New South Wales Real Property Act 1900 is rather like revisiting an art gallery. The highlights are familiar but it is surprising how much of significance is tucked away in the corners. The second edition of the late John Baalman's *Torrens System in New South Wales* is hardly intended to be read at one or two sittings. Yet the exercise is one that could usefully be attempted by both practising and academic lawyers not only to bring themselves up-to-date, but to refresh their understanding of how the Torrens system works. The 24 years since publication of the first edition of *Baalman*, which earned a reputation as something of a classic in the literature of the Torrens system, have seen many fundamental changes in law and practice, some of which have been effected by legislative amendments (most notably in New South Wales the Real Property (Amendment) Act 1970) and some by judicial legislation

[4] (1914) A.C. 932.
[5] (1937) 57 C.L.R. 555.
[6] (1862) 4 De G.F. & J. 264.
[7] (1973) A.C. 360.
[8] (1972) 1 W.L.R. 425 at 430.
[9] (1787) 1 Cox 324.

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