Equity and Commercial Relationships edited by P. D. Finn, Sydney, The Law Book Company Limited, 1987, xxvii + 320 pp. $54.00.

This is a volume of essays by various hands arising out of a Seminar which Professor Finn organised at the Australian National University in May 1986. Once again all lawyers with any interest in Equity have reason to be grateful to Professor Finn for his efforts.

The first essay is one by Mr. Justice Kennedy called "Equity in a Commercial Context" which defines the problems associated with any dogmatic statement of when equity will or will not intervene in the ordinary fields of commerce.

The second essay is an essay on Joint Ventures by Mr. Justice McPherson. Joint ventures, of course, are a common feature of Australian mineral and exploration experience. His Honour expresses the view that a joint venture is either a partnership or something analogous thereto which is "subject to the rules of partnership law." In an interesting comment on the paper Mr. R. A. Ladbury makes a powerful case that joint ventures in Australian law (as distinguished from joint ventures in United States law) are very different from partnerships and, in particular, that whereas partnerships are primarily designed for the sharing of profits, joint ventures in the Australian context are more concerned with the sharing of assets.

In a third paper Professor Ford and Mr. Ian Hardingham deal with the perennial problems of trading trusts, and in particular the rights and liabilities of beneficiaries under such trusts and the position of creditors. Their article is exceedingly thorough, learned and balanced, as one would expect from authors of such eminence. They generally come to the conclusion, with some regret, that it is not within the ability of modern equity to grant full protection to creditors of trading trusts. This in the reviewer's opinion is undoubtedly correct; but I am unable to share entirely their regret at this conclusion. Cannot a case be made that it is up to the creditors of such trusts when they enter into transactions with the trustees that they should look after their own interests?

There is also an essay by L. S. Sealy on the problems associated with the enforcement of partnership agreements, articles of association and shareholders agreements. As Mr. F. H. Callaway remarks in a provocative commentary on this paper, the courts, with a little legislative help, have been providing satisfactory answers to all problems raised on a case by case basis. In particular he points out that it would be destructive of legal coherence in this branch of the law to legislate that directors owe duties to outsiders.

There follows an essay by Mr. J. D. Heydon on "Directors' Duties and the Company's Interests". He discusses the fundamental questions whether the directors' duty to act for the benefit of the company as a whole means simply that directors owe the same general duties as a fiduciary or that directors must act *bona fide* for the benefit of the company or that they must act *bona fide* for the benefit of shareholders or that they must act *bona fide* for the benefit of all persons who have any interest

in the company. In many cases the differences between these formulations of directors' duties involve mere semantics, but in some cases they involve more than that. The general conclusion the author comes to is that directors owe their duties to the company even though in fulfilling that duty they may have to take other persons' interests into account. They certainly do not simply have to advance the interests of existing shareholders. The author also refuses to embrace the extraordinary notion, although it is obtaining some muddled adherence in recent judicial utterances, that directors owe any duty, fiduciary or otherwise, to a company's creditors.

In an interesting article entitled "Fiduciary Accountability for Business Opportunities", Professor R. P. Austin surveys the relevant authorities in that area and particularly examines the United States doctrine of "corporate opportunity". The main conclusion at which he arrives is that it behoves equity judges to abandon broad formulations of principle and enunciate specific "rules or theories". It also advocates the recognition of some "business opportunity" doctrine such as is recognised in the United States. One may wonder whether this latter conclusion is really justified.

Mr. Justice Kearney deals with "Accounting for a Fiduciary's Gains in a Commercial Context". His Honour stresses, and very correctly, that the main difficulty in this branch of the law consists of identifying and measuring the gain to which one is referring. Once that problem has been overcome there is generally no difficulty in defining what are the appropriate remedies.

Mr. Justice Priestley deals with the two problems which have most concerned equity lawyers in the commercial field recently, the *Romalpa clause* and the *Quistclose Trust.* Most of the problems and difficulties to which these two institutions have given rise are appropriately commentated on.

Dr. W. J. Gough gives a thorough and competent account of the problems of a floating charge, a subject on which he is a recognised authority. He repudiates the notion that a floating charge confers an equitable interest prior to crystallisation. However, as Mr. Justice McLelland points out in a commentary on Mr. Gough's paper, it is not easy to reconcile this view with a number of important decisions, including two unanimous decisions of the English Court of Appeal.

Finally, Mr. W. A. Lee of the University of Queensland contributes a paper called "Modern Portfolio Theory and the Investment of Pension Funds". This is a somewhat curious essay, which has little to do with the law as such and may or may not have something to do with modern commerce. The theory which Mr. Lee seeks to propound seems to be that a trustee who invests in shares should not bother himself to inquire about the suitability of each investment but should indiscriminately invest in all shares (or, at least, all listed shares) then available. This theory seems to have some odd characteristics. The first is that it lacks any conceivable legal or logical basis. The second is that it can hardly be of any practical importance so far as most trusts are concerned, which simply cannot afford

the luxury of compying with such curious notions. The third is that it disregards the well-established rule that a trustee may not set off a profit in one investment against a loss in another.

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