Review of *Equity and Commercial Relationships,* ed. P.D. Finn. Sydney: Law Book Co., 1987. pp. i-xxvii, 1-320. $54.00.

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This book originated as a series of papers and comments delivered at a symposium of judges, legal practitioners and academic lawyers held at the Australian National University in May, 1986. It is a companion volume to *Essays in Equity,* also under Professor Finn's editorship, which appeared in 1985. The present work deals comprehensively with that most striking and topical of case law developments which has occurred over about the past twenty-five years, namely, the application of equitable doctrines and remedies to commercial situations. The book consists of ten principal essays, six of which are followed by a substantial comment. In each case the essayist and commentator is a lawyer eminently well qualified for his allotted task.

Traditionally, it has been thought, equity has little place in commercial dealings. When business men are operating at arm's length, each for his own financial benefit, any suggestion that they stand in a fiduciary relationship towards each other, with all that that concept implies, would superficially appear to be irrelevant. In commerce, where title to goods, money and securities is often the subject of rapid (sometimes very rapid) turnover, certainty as to title is clearly of paramount importance to all the parties concerned. That certainty was said to be embodied in the common and statute law:

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equity was seen by many commercial lawyers as a thicket of recondite doctrines and of extraordinary remedies and, as such, inappropriate to the realities of the marketplace.

Equity itself appeared during much of the first half of the present century to be moribund, if not dead. Significant developments were few and far between. The private trust, fully developed (or so it seemed) during the course of the nineteenth century, appeared in this country to be confined largely to wills; categories of fiduciary relationships seemed almost to be fixed; equitable remedies were thought by many to consist only of injunctions and orders for specific performance, and the equitable account merely as a remedy against dishonest expressly-appointed trustees. Trustees were not often dishonest. It is significant that when Dr. Spry's landmark work on *Equitable Remedies* first appeared in 1971, a work itself confined to injunctions and orders for specific performance, it had been more than forty years since the last edition of Kerr on *Injunctions,* and more than fifty years since the last edition of Fry on *Specific Performance.* What we have seen during approximately the past twenty-five years has in fact been not only the rapid and extensive "penetration" of equitable doctrines and remedies into commercial relationships, but a renaissance of equity itself. The catalyst to many of these developments has been the ever-quickening pace of commercial litigation.

Against this background several more specific factors may be discerned as contributory causes of the growth of modern equity. First, the dramatic increase in the sheer volume and range of corporate activity since the Second World War has inevitably been accompanied by litigation brought to clarify the modern scope and content of that most classical of fiduciary relationships, namely, that of a director of a company towards his company. Related questions, such as those pertaining to the duties of a director in respect of business opportunities presented to him, and of his duty (such as it is) towards shareholders and others, have equally been the subject of modern litigation. These matters are dealt with in Chapter 5 of the present work by Mr. J.D. Heydon of the New South Wales Bar in his essay "Directors' Duties and the Company's Interest", in Chapter 6 by Professor R.P. Austin of Sydney University in his essay "Fiduciary Accountability for Business Opportunities", and in Chapter 7 by Mr. Justice J.B. Kearney of the Supreme Court

of New South Wales in his essay "Accounting for a Fiduciary's Gains in Commercial Contexts".

A second reason for these developments has clearly been the enormous impact of legislation, especially in relation to corporate activity and taxation, which has resulted in the use of trusts employed in order to circumvent legislative prescriptions and their consequences. These are trusts in which the corporate trustee acts as an entrepreneur, not merely as an investor in the traditional sense. They include both private "family" trading trusts and unit trusts, and also public unit trusts in which an expert manager (the company of the true entrepreneur) is employed to provide services such as cash management or real estate investment opportunities for the public at large. It has taken Australian courts some considerable time to clarify the exact nature of the relationships established by these various kinds of (in many cases) typically Australian trusts. Difficult questions have arisen in relation to the duties and liabilities of promoters, managers and trustees, and also as to the rights and liabilities of beneficiaries, especially in insolvency situations. These matters are the subject of a lengthy and detailed treatment in Chapter 3 by Emeritus Professor H.A.J. Ford of Melbourne University and Mr. I.J. Hardingham of the Victorian Bar. They conclude (at 82 - 83) that:

> "(t)rading trusts cause disquiet. Private trading trusts provoke concern because the position of creditors seems unsatisfactory. Public trading trusts raise questions as to whether the investing public are as adequately protected against unlimited liability as shareholders in limited companies ... Where a trading trust is administered by a limited company and the beneficiaries are not liable to indemnify the trustee, the result is a trading enterprise accompanied by limited liability for all concerned with it. That result is achieved without any express bargain with creditors and without full sanction from the state ..."

Thirdly, modern corporate financing devices such as the inclusion of retention of title ("Romalpa") clauses in financing agreements, and purpose trust ("Quistclose") clauses requiring that funds lent will only be used, say, to pay off a particular debt or class of creditors, have in their turn given rise to equitable considerations, and again particularly so in corporate insolvency situations. These matters are canvassed in Chapter 8 by Mr. Justice L.J. Priestly of the New South Wales Court of Appeal.

Not least among contemporary business structures is that of the joint venture, in which companies typically contribute assets and,

perhaps, expertise by contract in the exploitation of a particular resource or in the fabrication of a particular product. In this context the question may well arise, and especially upon the insolvency of one of the parties, whether the joint venture is in fact a partnership attracting the equitable doctrines of partnership law, or whether, on the contrary, the entire relationship between the parties is governed simply by their contract. This topic is dealt with by Mr. Justice B.H. McPherson of the Supreme Court of Queensland who argues that a joint venture may very well attract the equitable partnership doctrine, even where, as is often the case, the joint venture contract expressly provides that the parties are not partners in any sense. The essay is followed by a lively dissenting comment by Mr. R.A. Ladbury, a solicitor expert in the field.

A consideration of the foregoing suggests a fourth contributing factor towards the renaissance of modern equity and that is the ever-present phenomenon of insolvency. It has in practice frequently been in relation to creditors' rights that much of the law under discussion in this book has developed, a fact which prompts the reflection that in a consumer-oriented society founded upon usury business failures are not only to be expected but are likely to continue.

In Chapter 4 of this book Mr. L.S. Sealy of Cambridge discusses the enforcement of partnership agreements, articles of association, and shareholder agreements. As to the latter, he concludes that company law is moving into a new era in which directors will be required to take into account interests of persons other than shareholders such as creditors and the company's employees. In Chapter 9 Mr. W.J. Gough, a solicitor, deals comprehensively with the important law relating to the floating charge – one of the most successful of all creatures of equity. He argues to dispose of several misconceptions: that a floating charge creates an equitable interest prior to crystallization; that such a charge creates an equitable interest which is liable to be defeated; and that relating to a chargor's right to dispose of assets other than in the ordinary course of business. In Chapter 10, Dr. W.A. Lee of the University of Queensland discusses the modern portfolio theory and the investment of pension funds. He considers the question whether superannuation funds should be invested only in certain authorised securities, the question of management costs, and the content of

the Monaghan Report of the Inquiry into the Superannuation Fund Investment Trust published in 1984. Last, but by no means least, Mr. Justice G.A. Kennedy of the Supreme Court of Western Australia has contributed, in Chapter 1, a general overview of equity in the commercial context which, with considerable scholarship, traces the history, scope and rationale of modern doctrines and remedies in the areas considered in more detail throughout the book.

Two final reflections occur to this reviewer. First, by its entry into commerce equity has not only gained a new lease of life but seems assured of a long and healthy existence in our legal system. This is not only by reason of the relevance of equitable doctrine, but also, and especially, because of the availability of the equitable proprietary remedy of tracing and the significance of equitable securities in insolvency situations. Secondly, the development and application of equitable doctrine in the areas canvassed in this book has for the most part been "by principle out of precedent" – not merely as the application of perceived judicial notions of "justice" or "fairness". Decisions to the contrary by appellate courts (of which the *Amadio Case*[1] is perhaps the most conspicuous example) have been few. The fear of common lawyers that equity could stifle commerce by its supposed uncertainty has generally not been realised, as these essays amply demonstrate.

This, then, is a thoroughly admirable book, and in this reviewer's opinion is indispensable to any student of equity, and to every practitioner in the field of commercial litigation.

[1](1983), 151 C.L.R. 447.