Notwithstanding these criticisms, Wright's bold and exploratory work is well worth reading. It will be a helpful reference on equity and the remedial constructive trust in the years ahead.

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Pioneering but Imperfect

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PROPRIETARY CLAIMS AND INSOLVENCY

By Gerard McCormack
(Sweet & Maxwell 1997 pp 253 £70.00)

PROBLEMS in insolvency administration can lead to lengthy and acrimonious disputes. One major problem facing the insolvency practitioner is to define what assets comprise the property available for distribution amongst the insolvent's creditors. In order to resolve this fundamental issue, it is often necessary to consider the principles which govern proprietary claims in equity, as well as the legislative regime set up to deal with insolvency. In modern times, proprietary claims have become increasingly complex and difficult to resolve.

McCormack's book is a helpful introduction to the growing complexity of proprietary claims and their impact on insolvency administration. The author suggests that the work is pioneering:

> The book stands very much at the intersection between three branches of law that are traditionally thought of as discrete: Trusts, Restitution and Insolvency. There is no other text directly in point (p v).

McCormack begins by stating that the book's focus 'is on the treatment of trust assets in insolvency' (p 1). In the first chapter, he describes the trust and sets the stage by reviewing insolvency procedures, administration orders, receiverships and the floating charge. In succeeding chapters, he considers such diverse topics

as the general rule of pari passu distribution, diminution of trust claims, mistaken payments, conditional payments, fiduciaries, tracing, the rule in *Barnes v Addy*,[1] and the remedial constructive trust.

This selection of topics indicates that proprietary claims traverse a wide variety of factual and legal contexts. McCormack presents each chapter topic as if it were one of a series of free-standing journal articles, the common link being that each topic deals with some aspect of proprietary claims and insolvency. The author's treatment of many of these topics is useful because he identifies matters of legal complexity and controversy within each discrete subject area. For example, in chapter 2, he engages in a stimulating discussion of the conflict between proprietary claims and the pari passu principle in insolvency administration. In chapter 7, he considers the unresolved practical and logical tension between fundamental mistake, which prevents passing of title, and other kinds of mistake (and certain ultra vires transactions) in which title does pass.

However, the book's deficiencies somewhat mar the attempt to examine the nature of proprietary claims in insolvency. First, some topics are superficially treated. For example, the discussion of equity and commercial relationships in chapter 1 demands better research and a fuller elaboration of the relationship between equity and commerce. Simply launching into a historical and legal introduction to the floating charge is not sufficient — the more so as the author's stated aim is to investigate the role of the trust in insolvency situations.

Secondly, whilst the discussion is often a useful summary of major issues and important academic comment, the author rarely offers his own suggestions as to how the courts should resolve difficult problems. For instance, a party who is owed a fiduciary duty may be able to obtain proprietary relief, whilst the victim of a tortious wrong is unable to do so. The contrasting treatment of parties owed fiduciary duties and victims of tort has significant practical ramifications in the insolvency area. The author points out that in *Lac Minerals Ltd v International Corona Resources Ltd*,[2] Wilson J challenged legal orthodoxy and 'eschewed any strict divide between fiduciary wrongs and other types of wrongdoing' (p 109). His Honour's attitude indicates that the different policy approaches in relation to parties owed fiduciary obligations and victims of tortious wrongs needs to be reviewed. McCormack, however, does not pursue this controversial point.

Thirdly, even though the author obviously considers that proprietary claims in insolvency situations are best treated by a discussion of discrete topics, he could perhaps have identified some common legal and policy problems which beset a wide variety of proprietary claims. This could have formed the basis of an

1. (1874) 9 Ch App 244.
2. (1989) 61 DLR (4th) 14, 17.

interesting concluding chapter. The pari passu principle, for example, does not merely impact upon the interpretation of clearing house arrangements (pp 17-19), construction contracts (pp 19-20), and direct payment clauses (pp 20-25); it is also a central issue in any consideration of whether to order a remedial constructive trust.

Finally, the points made above are linked to a more general criticism of the book. The author does not suggest any overarching, modern theoretical justification for proprietary claims in insolvency contexts. Yet, without such a justification, the prediction of future developments in this area is made difficult. It may well be that the author decided that it was impossible or inappropriate to proffer such a general theoretical overview; in the reviewer's opinion, however, an extensive clarification of his position would have assisted the reader.

McCormack's work is a helpful survey of the present law in relation to proprietary claims in insolvency cases. Although the book is primarily written in the light of English case law and legislation, it provides a useful introduction to the various situations in which proprietary claims can be made. Despite its shortcomings, the book is still well worth reading.

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The Lessons of History

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The Making of Modern Intellectual Property Law

By Brad Sherman and Lionel Bently
(Cambridge University Press 1999 pp 240 $79.00)

THE *Making of Modern Intellectual Property Law* is a detailed and scholarly account of the historical development of our current intellectual property regimes. The authors argue against the view that the law reflects some natural ordering: in their opinion the law of intellectual property has largely been shaped by 'a complex and changing set of circumstances, practices and habits' (p 6).

The authors limit themselves to two themes: (i) the problems faced by the law in granting property status to intangibles; and (ii) how it is that intellectual property law came to assume its now familiar form. In exploring these themes, Sherman and Bently confine themselves largely to British law from 1760–1911. They argue that by 1850, modern intellectual property law had emerged as a distinct area with its own grammar and logic. Accordingly, they divide intellectual property law into the pre-modern (ie, pre-1850) and the modern (post-1850) periods as a 'useful basis from which to explore and understand [the subject]' (p 3). They trace the development of the law from the pre-modern to the modern through the four parts of the book: 'Towards a Property in Intangibles' (chs 1-2); 'The Emergence of Modern Intellectual Property Law' (chs 3-4); 'Towards an Intellectual Property Law' (chs 5-7); and 'Transformations in Intellectual Property Law' (chs 8-9).

The authors make the point that the pre-modern intellectual property law was not divided into the now familiar categories (copyright, patent, designs and trade marks), but was subject-specific and reactive. Its particular concern was with the mental or creative effort embodied in the protected subject matter. The pre-modern law employed the language, concepts and questions of classical jurisprudence. Modern intellectual property law, on the other hand, tends to be more abstract and forward-looking. Its focus is not on the labour involved in the creation of the object, but on the object in its own right. Rather than employing the ideas of classical jurisprudence, it uses the resources of political economy and utilitarianism.