description of the Alabama Hall in the City Hall of Geneva (vol. I, p. 13). This gives a flavour to any reading of the extracts from arbitrations that have been held there — *Alabama, Rann of Kutch, Beagle Channel.* By way of further example, how many people realize that arbitration is a British invisible export in the sum of £500 million per annum (vol. II, p. 250, fn. 12)? These illustrations add spice to a work of scholarship.

PATRICK J. O'KEEFE*

Constructive Trusts, by A. J. Oakley, London, Sweet & Maxwell's Modern Legal Studies, 1978, xiv + 142 pp. (including index) $5.90 (paperback only).

Ten years ago Sydney legal practitioners would have been unlikely to hear the words "constructive trusts" outside the lecture room. Now they are part of the suburban solicitor's verbal artillery, and have been accepted into the vocabulary of our accounting and commercial colleagues. One suspects, however, that the words are more often used than understood. Even within the legal profession, there seems occasionally to be an assumption that the law of constructive trusts is a unified doctrine, triggered by a single set of circumstances. It would be astounding, however, if the property transactions of fiduciaries, bankers, purchasers, and criminals could be governed by the same rule. In fact, though these situations have family resemblances, all that can be said about them in general is that the trust which is found to exist in each case is imposed by operation of law, independently of any expressed or presumed intention to create a trust. But the *rules* which give rise to a constructive trust in each situation are far from identical.

Mr. Oakley's book gives a sound account of the modern law, and the major controversies which surround it. He begins with trusts imposed as a result of fraudulent, unconscionable or inequitable conduct.[1] There are three fairly clear cases: where a person other than a *bona fide* purchaser acquires property as a result of undue influence; where a murderer acquires property in consequence of the death of his victim; and where a transferee seeks to set up the absolute character of a transfer in his favour in order to defeat a trust declared orally. More sweepingly, Lord Denning, M.R. has recently held that a "constructive trust of a new model" may be imposed whenever the result would

* B.A., LL.B. (Qld), M.A. (Business Law) (City of London Polytechnic), LL.M. (A.N.U.), Senior Lecturer in Law, University of Sydney.

otherwise be inequitable. He has applied this approach in cases involving the acquisition or improvement of property by A with the help of a financial or other contribution by B, and in order to make a contractual licence enforceable against a successor in title of the licensor. Mr. Oakley attacks Lord Denning's approach on the following grounds.[2] First, the imposition of a constructive trust necessarily places on the trustee duties of investment and the like, rendering him accountable to the beneficiary for the trust property, and any accretions to it, with interest. This may be unduly onerous in the case of some constructive trustees, such as the bank in *Selangor United Rubber Estates* v. *Cradock (No. 3)*.[3] Secondly, the imposition of a constructive trust gives the beneficiary an equitable proprietary interest. He will therefore have priority over the constructive trustee's unsecured creditors, and will be able to trace the property into the hands of a volunteer. These results are not always justifiable. For example, why (he asks) should the claim of the house owner's mistress, who (according to Lord Denning) may acquire an equitable interest under a constructive trust by helping him build the house, take priority in his bankruptcy over the claims of those who supplied building materials? Thirdly, Lord Denning's approach is not based on a clear and precise legal principle; his attitude makes it difficult for a lawyer to advise his client and challenges established principles of property law. Finally, Lord Denning's approach is inconsistent with the approach of the House of Lords in *Pettitt* v. *Pettitt*[4] and *Gissing* v. *Gissing*.[5]

Lord Denning's approach has its supporters in this country.[6] But in *Allen* v. *Snyder*[7] Glass and Samuels, JJ.A. decisively rejected the new constructive trust, on the main ground that it was inconsistent with High Court and House of Lords authority. Some comments after *Allen* v. *Snyder* have suggested that proprietary estoppel may provide a just solution in some cases, since relief in that form does not *entail* that the legal owner is under the duties of a trustee, or that the claimant has an equitable proprietary interest.[8] One hopes that the courts will develop this more promising prospect, though legislation may be needed to deal with the special problems raised by property disputes between man and mistress.

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[1] *Oakley*, Ch. 2.
[2] *Oakley*, 3-8, 19-28.
[3] [1968] 1 W.L.R. 1555.
[4] [1970] A.C. 777.
[5] [1971] A.C. 886.
[6] *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685 at 705 *per* Mahoney, J.A.; Mr. Justice M. M. Helsham, "*De Facto* Relationship and the Imputed Trust" (1979) 8 *Syd. L.R.* 571.
[7] [1977] 2 N.S.W.L.R. 685.
[8] J. D. Davies, "Informal Arrangements Affecting Land" (1979) 8 *Syd. L.R.* 578; see the reviewer's discussion of the point in *Recent Developments in Equity and the Law of Torts and Contract*, University of Sydney, Committee for Postgraduate Studies in the Department of Law, 1978, 34ff, and esp. the comments of Hutley, J.A. at 170-1. And note *Pascoe* v. *Turner* [1979] 1 W.L.R. 431.

Chapter 3 deals with constructive trusts imposed as a result of a breach of fiduciary duty. To a considerable extent Mr. Oakley's analysis is superseded by Dr. P. D. Finn's *Fiduciary Obligations*,[9] which is more comprehensive and more closely argued. Nevertheless, Mr. Oakley provides a useful, brief account of this difficult subject-matter, though his attempt to amalgamate the law of confidential information and the *Boardman* v. *Phipps* line of cases[10] appears to this reviewer to be unsuccessful. The distinctions between these two doctrines are fully explained by Dr. Finn.

The subject of Chapter 4 is the liability of a stranger who receives or deals with property which reaches his hands as a result of breach of fiduciary duty. Surprisingly, Mr. Oakley finds the law clear and consistent, for the most part.[11] In most modern discussions a distinction is drawn between cases in which a stranger receives and deals with trust property, and cases in which a stranger knowingly assists in the trustees' dishonest and fraudulent design.[12] A problem with this approach is that the latter category seems on its face to involve a constructive trust without trust property. One commentator has therefore suggested that the liability in the second category is merely a personal liability to account.[13] Mr. Oakley's analysis is different. There can be no constructive trust, he says, in the absence of some identifiable property upon which to impose it.[14] In Mr. Oakley's view the bank cases[15] (which were treated by the judges who decided them as cases of knowing assistance without receipt of trust property) depended on the bank receiving the company's money.[16] He would apparently take the view that, if there is knowing assistance without receipt of trust property, the law of constructive trusts has nothing to say. That is not the modern orthodoxy. Mr. Oakley's view tends to restrict the constructive trust doctrine, but it has the merit of avoiding the problem of absence of trust property.

Another contentious issue relates to the liability of an agent who assists with merely constructive notice of the trustee's dishonest and fraudulent design. Mr. Oakley's solution is that the agent is not liable as a constructive trustee so long as he acts honesty in the course of his agency.[17] The bank cases are wrong, in his opinion. But what

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[9] Law Book Company Limited, 1977; reviewed (1979) 8 *Syd. L.R.* 770.
[10] *Oakley*, 48ff.
[11] *Oakley*, 83.
[12] See J. D. Heydon, "Recent Developments in Constructive Trusts" (1977) 51 *A.L.J.* 635.
[13] *Hanbury and Maudsley's Modern Equity* (10th ed. by R. H. Maudsley, 1976) at 316-7.
[14] *Oakley*, 66.
[15] *Selangor United Rubber Estates* v. *Cradock (No. 3) supra* n. 3; *Karak Rubber Co. Ltd.* v. *Burden (No. 2)* [1972] 1 W.L.R. 602. However, in the former case Ungoed-Thomas, J. adopted a different conceptual framework.
[16] *Oakley*, 78.
[17] *Oakley*, 81.

is meant by "acting honestly"? In *Consul Development Pty. Ltd.* v. *D.P.C. Estates Pty Ltd.*[18] the High Court of Australia distinguished four relevant states of knowledge: actual knowledge of the dishonest design; shutting one's eyes to the evidence of the dishonest design; knowledge of facts which to a reasonable man would indicate a dishonest design; and knowledge of facts which would put a reasonable man on inquiry. Mr. Oakley would not allow knowledge of the fourth kind to give rise to liability, but what would he say about the other three categories? Though he mentions the *Consul Case,* he makes no reference to these refinements.

Chapter 5, on secret trusts and mutual wills, concentrates on theoretical problems. In Mr. Oakley's view, the theoretical justification of secret trusts is that they operate outside the will. The rules of probate govern the vesting of the legacy in the secret trustee, while the law of trusts governs any matter concerning the operation of the secret trust.[19] But to the reviewer this appears to be no justification at all, and produces unsatisfactory and rather arbitrary results, especially as regards disclaimer by the secret trustee.[20]

Oakley argues that both fully and half secret trusts are express trusts, because the testator intends to create a relationship of trustee and beneficiary.[21] However, if the secret trustee attempts to make a profit by relying on the absence of the writing required by the Statute of Frauds, he will be a constructive trustee on the principle in *Bannister* v. *Bannister*.[22] As he points out, other commentators have treated fully secret trusts as constructive, and this, presumably, is the reason for their appearance in his book. If we were to accept two propositions, it might be simpler to treat all secret trusts as constructive trusts. Those propositions are that the category of constructive trusts is a residual category[23] and that some constructive trusts contain an element of intention (as in the cases of vendor and purchaser and mutual wills, where a contractual intention is needed). Mr. Oakley's attitude to these propositions is not clear.

In his treatment of mutual wills, Mr. Oakley is dissatisfied with Dixon, J's view in *Birmingham* v. *Renfrew*[24] that equity imposes a floating obligation which crystallizes into a trust on the death of the survivor. Mr. Oakley points out that such an obligation lacks the element of certainty of subject-matter which is one of the principal requirements of a trust. He concludes that the doctrine of mutual wills is an entrenched anomaly, which should not be extended into

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[18] (1975) 132 C.L.R. 373; as analysed by Heydon, *supra* n. 12.
[19] *Oakley,* 91.
[20] See *Oakley,* 93.
[21] *Oakley,* 100.
[22] [1948] W.N. 261.
[23] See *Hanbury and Maudsley's Modern Equity, supra* n. 13 at 308.
[24] (1937) 57 C.L.R. 666 at 689.

the field of secret trusts. Insofar as *Ottaway* v. *Norman*[25] suggests that a secret trust with similarly uncertain subject-matter is valid, that case should not, in his opinion, be followed. If Mr. Oakley's view is right, cases will arise in which the intentions of testators will be defeated solely for the sake of conceptual symmetry.

Chapter 6, on the constructive trust imposed on a vendor, contains a useful account of law which will be familiar to most conveyancers. However, the discussion of *Lake* v. *Bayliss*,[26] involving the purchaser's right to trace into the vendor's hands the proceeds of a sale to a third party,[27] should be noted. The short Chapter 7 on constructive trusts imposed on mortgagees, in which the author concludes that "so far as the mortgagee is concerned, the constructive trust no longer has any role to play", completes the book.

There is no mention of the trust which arises out of a voluntary assignment of legal property which fails as a legal assignment but is effective in equity. In such a case the assignor holds the property on trust for the assignee, but, while there is an intention to assign, there is apparently no intention to create a trust. The trust may therefore be constructive. The issue may be significant to the question whether Division 6 of the Income Tax Assessment Act 1936 (Commonwealth) applies to income derived after such an assignment.[28] Perhaps the second edition of Mr. Oakley's book might cover it.

Mr. Oakley's topic leads him into many of the most difficult and controversial areas of the modern law of trusts. His work will not produce revolutions in current thinking in those areas, but is a thoughtful and competent account of the issues.

R. P. AUSTIN*

Trade Practices and Consumer Protection, A Commentary on the Trade Practices Act 1974 (2nd ed.), by G. Q. Taperell, R. B. Vermeesch and D. J. Harland, Butterworths, 1978, xxxv + 732 pp. $21.00 (hard cover), $16.00 (limp cover).

The Trade Practices Act 1974 became law on 24 August, 1974,[1] and soon afterwards the authors published their excellent 274-page *Guide to the Trade Practices Act 1974*. Although intended primarily for laymen, the book proved even more useful to professional lawyers

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[25] [1972] Ch. 698.
[26] [[1974] 1 W.L.R. 1073.
[27] *Oakley*, 129-30.
[28] *Federal Commissioner of Taxation* v. *Everett* (1978) 9 A.T.R. 211.

* B.A., LL.M. (Sydney), Senior Lecturer in Law, University of Sydney.