designation of chairs or in academic expertise. But this branch of law, posing many challenging problems of fundamental import, is no less dependent on fundamental legal, philosophical, and scientific thought than, for example, constitutional law, criminal law, and international law, which have provided the bulk of problems for jurisprudential inquiries. Thus the author has felt a need to justify his theoretical approach to the law of torts and to defend it against "anti-theoretical style" in the area. He argues that "the theoretical style presented in this book has the following advantages . . .": (1) It makes the presentation "more readily comprehensible, systematical, and economic"; (2) it enables one to justify better "differences between decisions in various cases"; (3) it facilitates the establishment of "one's position in new cases, where decisions would be difficult to make if one could only build upon analogy of old ones" (p. 376).

The theoretical discussions of the author raise occasionally delicate terminological problems. I am not quite sure whether the terms "weak causes", "strong causes", "necessary condition", and "sufficient condition" are quite appropriate in the relevant contexts in view of the established (but by no means unchallengeable) logical terminology. I have wondered why Peczenik has avoided the use of the familiar term "reasonable man" and used instead the neologism *"vir optimus"*. I admit, however, that this term serves quite well its intended purposes.

ILMAR TAMMELO*

Underhill's Law Relating to Trusts and Trustees, thirteenth edition by David J. Hayton, London, Butterworths, 1979, cxl + 822 pp. (including index) $86.50.

Until the appearance of this edition, *Underhill* had been a venerable old man of the law of trusts. The characteristic format of broad principles or "articles" followed by more detailed exposition was well settled by the eighth edition in 1926, the last produced by Sir Arthur Underhill himself. Subsequently editors preserved the format, most of the principles and a good deal of the exposition, making few changes except where statute or case law forced them to do so. In the result, while it steadily grew in stature, the book tended to decline in dynamism and relevance to modern problems. For example, the Twelfth Edition (1970) dealt with the standard of certainty required for discretionary

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trusts in one bland paragraph,[1] although the law as formulated by Lord Upjohn in *Re Gulbenkian Settlement Trusts*[2] was then under siege, and was shortly to be overturned by the House of Lords.[3]

In the new edition Mr Hayton has sensibly undertaken the re-writing of many major parts of the book. He has performed the task with such clarity and scholarship that *Underhill* is rejuvenated. This book must now be regarded as the best available reference work on the English law of trusts for practitioners and students alike.

It would be impossible to give a complete account of the changes in a review of this length. Therefore, only a few of the more controversial areas will be selected for discussion. Though this review will concentrate on theoretical points, it is a feature of the book that it is peppered with practical advice.

Changes are evident very early in the exposition. In earlier editions trusts were divided into express trusts, which are created intentionally by the act of the settlor, and constructive trusts, which arise when legal and equitable titles are separated.[4] Underhill treated some resulting trusts as express, because they depend on the implied intention that property not otherwise disposed of should be held on trust for the settlor. Other resulting trusts were constructive on his analysis, because intention was irrelevant. Hayton takes a different approach.[5] He divides trusts into express trusts, which are the same as in Underhill's definition, and include the cases where the intention to create a trust is implied on the construction of the trust instrument; and trusts created by implication of a court of equity, which he calls "implied trusts". He further divides implied trusts into resulting and constructive trusts, and adopts Megarry, J.'s subdivision of resulting trusts.[6] He impliedly criticizes Underhill's approach for failing to distinguish the different substantive requirements for resulting and constructive trusts and takes Lord Denning, M.R. to task for his Lordship's claim that "the [question of resulting or constructive trust] is more a matter of words than anything else".[7]

Hayton's classification soundly reflects the modern orthodoxy, but two comments seem appropriate. First, the label "implied trusts" might surely be dispensed with in the next edition. It is highly ambiguous since it may be used to denote express trusts implied as a matter of construction, resulting trusts, a sub-species of resulting trusts, or all trusts which are not express (Hayton's usage). Its only virtue, surely a slight one, is that it preserves a semblance of continuity between the

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[1] R. T. Oerton (ed.), at p. 28-9.
[2] [1970] A.C. 508.
[3] *McPhail* v. *Doulton* [1971] A.C. 424.
[4] Twelfth Edition by R. T. Oerton (ed.), 1970, p. 9-10.
[5] P. 21-3.
[6] *Re Vandervell's Trust (No. 2)* [1974] Ch. 269.
[7] *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286, 1289.

Thirteenth Edition and its predecessors. Secondly, and more importantly, Underhill regarded every case of separation of legal and equitable titles as a constructive trust (in his extended sense of the term). Since Hayton abandons that classification, it is incumbent on him to deal with cases in which legal and equitable titles are separated but there does not appear to be a resulting or constructive trust in his sense. For example, if an assignor, purporting to make a voluntary assignment of company shares, does everything necessary to be done by him to effectuate the transfer, so that there is an equitable assignment though legal title remains in the assignor,[8] the assignor becomes trustee of the shares. But what kind of trust is it, on Hayton's classification? The best solution may be to abandon all attempts to provide a single, exhaustive classification of trusts, and opt instead for a more fluid exposition, in which the varieties of "intention" are recognized and classification is undertaken only when the solution of a legal problem demands it.

Article 8 ("Language sufficient to create a trust for persons") takes into account major recent developments with respect to discretionary trusts and the beneficiary principle. There is as yet no agreed terminology for the new law of certainty for discretionary trusts, and the reader should consult Hayton's definitions of "fixed" and "discretionary" trusts[9] before studying Article 8. The author provides a full analysis of *Re Baden (No. 2)*,[10] which turned on the meaning of the requirement laid down by the House of Lords, that a discretionary trust will be valid only if it is possible to say with certainty of any given claimant that he is or is not a member of the class of objects of the power.[11] Hayton supports Stamp, L.J.'s strict interpretation of that test, and disagrees with "the two common lawyers".[12] Megaw, L.J. re-formulated the test in a way that emphasized practical considerations; in his view the test would be satisfied if it could be said with certainty that a *substantial number* of persons were members of the class of objects, "substantial number" being a question of common sense and degree in relation to the particular trust, regard being taken of difficulties in the administration of the trust.[13] Hayton attacks this approach for three reasons, each of which this reviewer would dispute. First, he says, it is necessary to be able to ascertain claimants who are not class members, if it is alleged that the trustees have distributed to a non-member in breach of trust. Quite so, but Megaw, L.J. surely did not intend to deny this necessity. He was concerned, rather, to emphasize that it was unnecessary to be able to classify persons who would never

[8] *Re Rose* [1952] Ch. 499.
[9] Art. 5, p. 24ff.
[10] [1973] Ch. 9.
[11] *Supra* n. 3.
[12] Sachs and Megaw, L.JJ.; see *Underhill* at p. 45-7.
[13] *Supra* n. 10 at 24.

in practice be considered for distribution. Secondly, Hayton submits that Megaw, L.J.'s formulation introduces uncertainty into the test of certainty. But this may be a small price to pay for a formulation which achieves a just and common-sense result, and takes us away from the technicality which characterized the law before *McPhail* v. *Doulton*.[14] Further, it is doubtful whether Stamp, L.J.'s approach, which amalgamates elements of conceptual and evidential certainty, is more precise than Megaw, L.J.'s. Thirdly, Hayton argues that Megaw, L.J.'s approach is not far removed from the view (rejected by the House of Lords in *Re Gulbenkian's Settlement Trusts*[15]) that it is enough that the trustees can say of one or a few persons that they are within the class of objects, though many others cannot be classified. But there is obviously a difference between a few and a substantial number, particularly when the substantial number is determined by the question whether any practical difficulty would arise in the administration of the trust. Shortly after Hayton wrote, this reviewer published an analysis supporting Megaw, L.J., and is unrepentent.[16]

Hayton attempts to give content to a very puzzling *dictum* at the end of Lord Wilberforce's speech in *McPhail* v. *Doulton*.[17] There his Lordship referred to a case "where the meaning of the words used is clear but the definition of the beneficiaries is so hopelessly wide as not to form anything like a class so that the trust is administratively unworkable", and he gave as an example "all the residents of Greater London". This is interpreted by Hayton to mean that "a discretionary trust will . . . be void if there are no criteria expressly or impliedly provided by the trust instrument or by extrinsic admissible evidence sufficient to enable the court to distribute the trust fund itself, or to determine persons appropriate to be appointed new trustees, or to appoint representatives of different classes of beneficiaries to agree a scheme of distribution to be approved by the court (or in default to be imposed by the court itself or by new trustees appointed by the court)".[18] The reviewer respectfully doubts whether Lord Wilberforce's *dictum* can be given any coherent meaning distinguishable from both the test of certainty which he adopted and the one that he rejected.[19] Hayton's formulation seems to be unsuccessful, for what criteria, in addition to the criteria which make it possible to classify claimants as within or outside the class of objects, would enable the court to take the steps which he outlines, such as determining persons appropriate to be appointed new trustees? One hopes that Australian courts will feel

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[14] *Supra* n. 3.
[15] *Supra* n. 2.
[16] "Discretionary Trusts: Conceptual Uncertainty and Practical Sense" (1980) 9 *Syd. L.R.* 58.
[17] *Supra* n. 3 at p. 457.
[18] At p. 54-5.
[19] Further see L. McKay, "*Re Baden* and the Third Class of Uncertainty" (1974) 38 *Conv.* 269.

free to say that Lord Wilberforce's *dictum* adds nothing to the "is or is not" test and should be disregarded.

Hayton's treatment of the beneficiary principle reflects the liberal approach which is now widely accepted in England. For every valid non-charitable trust there must be one or more beneficiaries, corporate or human. But according to *Re Denley*,[20] which Hayton supports, a trust for a purpose which directly or indirectly benefits individuals is outside this rule, and is valid if it satisfies the requirements as to certainty and perpetuity. These principles have important implications for the validity of gifts to unincorporated non-charitable associations, which "raise technical problems that would amaze or confound laymen".[21] Hayton sets out five possible constructions of a gift of this kind. This exposition is the clearest account of the modern law known to the reviewer. But it does not provide much guidance as to the determination of the testator's intention. That, we are told, is a question of construction, the courts will prefer some results to others, and it will be important to see whether the association's rules treat it as a perpetual institution.[22] It may be unfair to regard this as an inadequacy in the book. The lay testator surely does not form a precise intention amongst the five possible constructions outlined bv Hayton, and the courts have not yet identified the principles (if any) by reference to which an intention is imputed.

The analysis of trusts of voluntary covenants, so far pursued with more vigour in journals than in judgments, is given a substantial nudge in the right direction by Hayton's insistence that the crux of the matter is the presence or absence of an intention to create a trust of the voluntary covenant.[23] But the search for an intention to create a trust of the covenant, as opposed to an intention to create a trust of the property covenanted to be settled, or an intention to benefit in some way or another, is bound to be difficult or even impossible. The next step in the debate ought logically to be the development of principles to aid in what must, in all honesty, be a process of imputation (like the search for "intention" in a gift to an unincorporated non-charitable association). Hayton suggests that the presence of a covenant for further assurance is an indicator of the requisite intention; that a covenant relating to future property should produce a rebuttable presumption of the absence of the requisite intention; and where A covenants with B on trust wholly for C, and the transaction would otherwise be futile, there should be a presumption the other way.[24] But

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[20] [1969] 1 Ch. 373. The case has been criticized in Australia: R. P. Meagher and W. M. C. Gummow (eds), *Jacobs' Law of Trusts in Australia*, 4th ed., 1977, p. 216.

[21] *Underhill*, p. 68, and see *Re Grant's Will Trusts* [1980] 1 W.L.R. 360.

[22] At p. 70-72.

[23] At p. 113.

[24] At p. 118-9.

why "should" these presumptions arise, if not merely to reconcile the cases? Now that Hayton has cleared away side issues and focussed attention on the central problem, a start can be made in answering this question.

The treatment of resulting and constructive trusts is most distinguished. In recent years there has been intense interest here and in England as to the principles of trusts which govern the acquisition by a spouse (or person in a similar position) of an interest in a matrimonial home title to which is vested in the other spouse. According to Hayton, resulting trust principles may be invoked to give the spouse an interest corresponding to her contribution; constructive trust principles can be invoked to confer a beneficial interest corresponding to what was agreed or intended by both spouses. In *Allen* v. *Snyder*[25] Glass, J.A. preferred to treat the latter kind of trust as an express trust exempted from the requirement of writing[26] by the doctrine which prevents the Statute of Frauds from being used as an engine of fraud. But the difference between calling the trust "constructive" or "express but exempted from the writing requirement" may be merely a matter of words.

The statement of the relationship between constructive trust, accountability and tracing is a forthright attempt to inject structure into a gelatinous group of cases. It does not, and cannot, accord with all of them, and was written too early to assess the implications of Goulding, J.'s judgment in the *Chase Manhattan* case.[27] But it is worth recording that he insists with cogency that a person who becomes a constructive trustee by assisting with knowledge in a breach of trust is under a personal liability to account, but there is no trust of any kind unless he receives and becomes chargeable with specific property.[28]

The first six editions of *Underhill* were offered by the author to students as well as practitioners. But inevitably the size of the book increased from one edition to the next, and in the Preface to the seventh edition (1912) he acknowledged the "parting of the ways", and elected to devote his work to the practitioner. Its size and price continue to make it inappropriate as a students' text, and in any case the English law of trusts is comparatively well endowed with books tailor-made for students. But Mr Hayton's revisions will make the book eminently useful as a reference work for students and law teachers. In particular, the concise statements of principle should greatly assist students to develop a "picture" of the subject, showing the structure of principles and their relationships. It must be added, however, that the structural imperative to produce a clear picture occasionally forces the editor to

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[25] [1977] 2 N.S.W.L.R. 685, at p. 692.

[26] Where the subject matter is land: Conveyancing Act, 1919 (N.S.W.) s. 23C(1)(a).

[27] *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd.* [1980] 2 W.L.R. 202.

[28] At p. 330ff.

paint in spaces which the judges may have noticed only in the most impressionistic way.

Sir Arthur Underhill's objective was to produce a book of a "really practical, but concise, character". The Thirteenth Edition comes closer to this ideal than any produced since the author's death, and is warmly commended.

One final parochial, but disturbing matter must be mentioned. It arises from the reviewer's investigation of *Underhill's* history. In 1913 a Special Australasian Edition of *Underhill* was produced by H. S. Nicholas (later to become N.S.W. Chief Judge in Equity). In his Preface he deplored the considerable differences in State legislation concerning trusts and called for the adoption of comprehensive uniform Acts. It is truly a scandal that discrepancies of State legislation have become worse in the ensuing 67 years. The editors of the Fourth Edition of *Jacob's Law of Trusts in Australia* (1979) have described the situation as intolerable, and have attributed many of the discrepancies to legislative caprice. How much longer must we endure this confusing and irrational regime?

R. P. AUSTIN*

The Law of International Business in Australia, by P. J. O'Keefe and Mark A. G. Tedeschi, Sydney, Butterworths, 1980, 220 pp.

This book is a short but very worthwhile and useful contribution to international business law. The authors state its purpose succinctly:

> . . . to present an analysis of those laws, either Australian or international, which affect a person engaged in international business either in Australia or from Australia. We have examined those laws which peculiarly affect an Australian doing business overseas or an overseas person doing business in Australia.

The work relies primarily on Australian and international law, with useful references to the laws of other countries. The work then can clearly be categorized as *transnational.*

In a book of this size, the authors must necessarily be selective as to content. Having regard to the dichotomy of the subject matter, namely, Australians doing business overseas, and overseas persons doing business in Australia, the authors have defined the scope of their work by commencing with an introductory chapter on the nature of

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