Equity, Fiduciaries and Trusts, edited by TIMOTHY YOUDAN. (Law Book Company, Carswell, 1989), pp i-xxix, 1-433, with Footnotes and Index. Cloth recommended retail price $79.50 (ISBN 0 455 20932 4).

A pot-pourri of symposium papers seldom makes a good book. *Equity, Fiduciaries and Trusts* is a co-ordinated collection of sixteen paper presented at the international symposium on Trusts, Equity and Fiduciary Relationships at the University of Victoria (Canada) in February, 1988. This review was therefore undertaken with some circumspection. It is fair to foreshadow that the result is surprisingly well-integrated and useful.

The sixteen chapters deal with six principal themes – the fiduciary principle, pension plan trusts, business trusts, constructive trusts and unjust enrichment, trusts and taxation, and new directions in equitable doctrines. Whilst the subject matter does not purport to cover the field of modern trusts law, it covers a good deal of the perceived dynamic areas of that subject.

The quality of the book derives largely from the fact that so many of the leading figures in the world of equity chose to participate. The Australian contributors included the Honourable Mr Justice Gummow, J.R.F. Lehane, Professor P.D. Finn, Professor R.P. Austin and Professor Marcia Neave. Distinguished contributors from the (dare I use the expression) common law countries have produced a tidy statement of comparative law with the emphasis upon commonality. In particular, eminent contributors from England, Canada and the United States reveal the trends and developments in those countries. Generally speaking the North American contributions are more on a practical than a scholastic level. That observation is not made in any critical or patronising vein – it is a fact of life. It is no surprise then that the "Business Trust" discussions come from the North American authors. This particular area has more in common with the unit trust concept (and its offshoots) than with the traditional field of equity, and in a practical sense it has more to do with corporate law and statutory regulation than equitable principle.

The book commences with three useful chapters concerning the fiduciary principle. One may detect a growing concern in Dr Finn for this creature of which he has made a special study. Once can discern a fear that it is growing into an unmanageable beast and that it needs more discipline that its keepers are currently administering. Indeed the fiduciary principle has become something of a growth industry. It is in dire need of rationalisation and controlling criteria. The enthusiasm of some writers is unbounded. "Society is evolving into one based predominantly on fiduciary relations"[1] says one commentator. Some seem to see this field of legal duty as a label under which courts can justify their intervention if it seems right and fair to rectify an imbalance when people of unequal strength deal with one another.

One does not need to be for or against the extension of remedies based upon fiduciary duty. The lower end of the spectrum has recently been

presented by Gautreau J. (in an article published a year after this particular symposium). He concludes that fiduciary duties are distinguished from the other legally recognised duties only by their remedies.[2] Obviously the position lies somewhere between that asserted respectively by the enthusiasts and the debunkers. On a 180 degree spectrum Professor Finn would appear well on the higher side of 90 degrees, but his writings are marked by an earnest search for rational explanation and respect for legal evolution.

In an attempt to make the fiduciary standards more identifiable Professor Finn suggests a three-tiered hierarchy of standards whether such duties may arise out of voluntary or consensual relationships. The "standards" are discussed under the headings of unconscionability, good faith, and the fiduciary principle. The author does not pretend to present a solution but offers signposts which help identify some apparent order in a disorganised growth. For my part, the simplest description of this area of the law is that it is a body of principles of equitable parentage designed to protect those vulnerable to exploitation in situations in which conventional legal protection is lacking. It is thus an invasive doctrine. It is as important that the courts limit their interference by reference to defined standards and recognisable situations as it is that they fill a gap where fair play is absent. If they neglect the former the life of the nation will be managed by busybody lawyers and judges.

The principle is taken up by the Hon. Mr Justice Gummow who deals with the specifics of compensation for breach of fiduciary duty. By this stage in the book the discussions have already demonstrated what we may have started to appreciate – there are no longer any discrete topics of law. The principal legal subjects of contracts, torts and trusts are expanding across the traditional domains of the other, all offering to take over the field. It may or may not be surprising to find discussion in Mr Justice Gummow's chapter presented under such sub-headings as "The Duty of Reasonable Care", "Causation", "Honest and Reasonable Conduct – An Excuse?", "Contract and Tort – A Sufficient Guide", and "Exemplary Damages". His conclusion still identifies a different perception between common law (i.e. tortious or contractual) rights, and rights derived from equitable doctrine. His conclusion is that any rationale that develops to determine the character of compensation awarded for breach of fiduciary duty "will have to allow for the natural sophistication of equity".

Thus the vision of Mr Justice Gummow, more than a century after fusion, is still able to see equity running in a different stream, and in this way to identify the preferred solutions. This may be contrasted with the North American trend where one finds a virtually unitary approach. Here we find Mary Dickson Q.C. speaking of the "common law principles of trust" (p.147) and Sheldon Jones referring to "common law business trusts" (p.161, n.1). These differing approaches are of great philosophical interest which it is not the province of a book review to solve. The different

methods and attitudes are certainly well exposed in the contributions here presented.

The chapters dealing with "Pension Plan Trusts" or superannuation investments are of more than passing interest. It is true that this topic seems destined for statutory regulation according to the needs of the nation concerned, but equitable principles have already intruded. The sheer enormity of the funds involved is staggering. For example, by 1985, defined benefit pension plans in Britain had surpluses of up to 50 billion. In Ontario the aggregate surplus in plans with more than 1000 members averaged $1.4 billion during 1984-1986 (p.131). In Australia where plans will be administered respectively by unions and employers, it is foreseeable that with vast surpluses at stake there will be room for contest as to ultimate entitlement, and even scope for extensions of the doctrine of tracing. In such an event, the availability of this book will aid the researcher with the experiences and solutions of other countries.

The chapters dealing with constructive trusts and family property disputes touch a fertile field of litigation. Whilst academic writings abound in this area, the relevant chapters are of particular value in drawing together diverging theories and explaining them in a cohesive way. The writers concentrate upon the position in England and Australia, with sufficient awareness of the position in Canada and the U.S.A. to add a little peripheral vision.

In this lively area one finds a tension as the writers search for a rationale for the relief which is so commonly granted. Thus one moves from the English solution of constructive trust[3] through a concession that palm tree justice is a better explanation than the principle of unjust enrichment[4] through Professor Neave's statements of the advantages of the unjust enrichment theory, followed by a concession that the High Court has currently founded such relief upon prevention of unconscionable conduct. Quite apart from the theoretical bases, practical examples are presented which will aid the practising lawyer in advising his client upon the chances of obtaining relief in a particular fact situation.

The "New Directions" chapters cover a wide range of current doctrines. With the benefit of a modest though adequate index, the book qualifies as a text book on topics that might be described as the particularly dynamic areas of equity.

This is more than a random collection of learned essays. It is a co-ordinated study of current trends in the main equity-practising countries. This is of considerable value to the practising lawyer as well as the scholar. The comparative surveys have the happy feature of permitting one to leave one's home base, to examine a principle from a distant and sometimes apparently greener pasture, and to see more clearly the wisdom or the folly of a current trend. Such studies tend to increase peripheral vision and stimulate lateral thinking. The book is a credit to the foresight of those who planned the symposium and attracted such outstanding

contributors, as well as to Professor Youdan who has presented a satisfying compilation.

J.B. Thomas*

* The Hon. Mr Justice J.B.Thomas, Judge of the Supreme Court of Queensland.

1 T.Frankel, "Fiduciary Law" (1983) 71 *Calif L Rev* 795, 798.
2 The Hon. J.R.M. Gautreau, Judge of the District Court of Ontario, "Demystifying the Fiduciary Mystique" (1989) 68 *Can Bar Rev* 1.
3 As presented by Professor Hayton in the chapter, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfying Approach?", in T Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), 205ff.; cf.Malcolm Cope "The Constructive Trust as a Remedy for Mistake, Fraud, Duress and Undue Influence" (1987) 3 *QITLJ* 111.
4 Hayton, *id.*, 244.

BOOKS RECEIVED

Annotated Admiralty Legislation, S.Hetherington (Law Book Co., 1989), pp. i-xxvi, 1-183. Recommended retail price $49.50, cloth (ISBN 0 455 20810 7).

Annotated Trade Practices Act, R.V.Miller (Law Book Co., 1989, 10th ed.), pp. i-xvi, 1-447. Recommended retail price $39.50, limp (ISBN 0 455 20922 0).

Courts and Administrators – A Study in Jurisprudence, M.J.Detmold (Wiedenfeld and Nicolson, London, 1989), pp. i-x, 1-229 (ISBN 0 297 79497 3).

Forensic Science and the Expert Witness, J.H.Phillips and J.K.Bowen (Law Book Co., 1989, Revised edition), pp. i-x, 1-139. Recommended retail price $29.50, limp (ISBN 0 455 20958 8).

Guide to the Practice of the Supreme Court of New South Wales, G.C.Lindsay (Law Book Co., 1989), pp. i-xxv, 1-246. Recommended retail price $39.50, limp (ISBN 0 455 20929 4).

Income Taxation: Commentary and Materials, G.S.Cooper, R.E.Krever and R.J.Vann (Law Book Co., 1989), pp. i-liv, 1-1259. Recommended retail price $99.00 (cloth) (ISBN 0 455 20899 9), $79.00, limp (ISBN 0455 209000 6).

Intellectual Disability, M.Ierace (Redfern Legal Centre Publishing, 1989), pp. i-xvii, 1-210. Recommended retail price $34.95, limp (ISBN 0 947205 09 8).

International Law and Aboriginal Human Rights, B.Hocking (Law Book Co., 1988), pp. i-xxii, 1-195. Recommended retail price $29.50, limp (ISBN 0 455 20807 7).

Journalism and Justice: How Crime News is Reported, P.Grabosky and P.Wilson (Pluto Press, 1989), pp. 1-149. Recommended retail price $14.95, limp (ISBN 0 9491 3828 2).

Judging the World, G.Sturgess and P.Chubb (Butterworths, 1988), pp. 1-573. Recommended retail price $49.95, cloth (ISBN 0 409 30116 7).

Land Law, P.Butt (Law Book Co., 1988, 2nd ed.), pp. i-liii, 1-668. Recommended retail price $79.50, cloth (ISBN 0455 20788 7), $49.50 (limp) (ISBN 0455 20789 5).

Law in the Making – A Comparative Survey, A.Pizzorusso (ed.) (Springer Verlag, 1988), pp. i-xxii, 1-392 (ISBN 3 540 18445 7).

The Law of Quasi-Contract, S.J.Stoljar (Law Book Co., 1989, 2nd ed.), pp. i-xxv, 1-261. Recommended retail price $49.50, cloth (ISBN 0 455 20808 5).

Measures of Investment Yield, I.Woods (Law Book Co., 1989, 2nd ed.), pp. i-xvii, 1-217. Recommended retail price $29.50, limp (ISBN 0 455 20913 8).

Public Duties and Public Law, A.J.Harding (Oxford University Press, 1989), pp. i-xv, 1-321. Recommended retail price $90.00, cloth (ISBN 0 19 825607 8).

Regulated Credit: The Credit and Security Aspects, A.J.Duggan, S.W.Begg and E.V.Lanyon (Law Book Co., 1989), pp. i-lx, 1-848. Recommended retail price $127.50, cloth (ISBN 0 455 20832 8).

Security for Costs, J.Delany (Law Book Co., 1989), pp. i-xvii, 1-215. Recommended retail price $38.00, cloth (ISBN 0 455 20780 1).

Understanding Law, R.Chisholm and G.Nettheim (Butterworths, 1988, 3rd ed.), pp. i-xii, 1-145. Recommended retail price $13.95, limp (ISBN 0 409 49519 0).

Wayward Governance: Illegality and its Control in the Public Sector, P.N.Grabosky (Australian Institute of Criminology, 1989), pp. 1-344. Recommended retail price $20.00, limp (ISBN 0 642 14605 5).

Wills and Intestacy in Australia and New Zealand, I.J.Hardingham, M.A.Neave and H.A.J.Ford (Law Book Co., 1989, 2nd ed.), pp. i-xlvi, 1-561. Recommended retail price $85.00, cloth (ISBN 0 455 20896 4), $65.00, limp (ISBN 0 455 20897 2).