

Tracing and Common Law Claims to Substitute Assets: Separating Myth From Reality

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I confirm that the work submitted is my own. I further confirm that appropriate credit has been given within the thesis where reference has been made to the work of others.

Abstract

Tracing is a process by which a claimant shows that an asset represents a substitute for an original asset for the purposes of making a claim in respect of that substitute.

Orthodox tracing theory says that this process involves the following of the value inherent in the original into the substitute. Orthodox theory also states that tracing is a neutral process, unconnected to any claims that may be made in the substitute.

The effect of accepting this orthodoxy has been that the true nature of the tracing process has become obscured. In particular the failure of orthodox theorists to correctly identify tracing as being an exercise that can only be justified within the context of a fiduciary relationship has led to the widespread belief that it is possible to trace at common law. It will be argued in this thesis that this cannot be the case because the common law allows no claims with respect to substitute assets, and this makes the tracing exercise redundant. The notion that it is possible to trace at common law is contrary to properly understood authority and has no normative foundations. Its origins lie in a case that is now universally accepted as containing no common law reasoning. Despite this the right to trace at common law remains the prevailing orthodoxy. None of the cases cited in support of that orthodoxy have been satisfactorily explained. The most significant ones fail to adequately deal with the inherent difficulties in treating money in a bank account as being the equivalent of a physical mixture of tangible assets. The lack of any proper normative explanation of the right to trace expounded in these cases makes their utility even more questionable.

This thesis will argue that the rationale behind tracing is such that it can never be utilised to explain non-fiduciary liability.

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Table of Abbreviations.

B & C	Barnewall and Cresswalls Kings Bench Reports
B & S	Best and Smiths Queens Bench Reports
Bing	Binghams Common Pleas Reports
Bro CC	Brown's Chancery Cases
CB	Common Bench Reports
CLR	Commonwealth Law Reports
Cowp	Cowper's Kings Bench Reports
Cro Eliz	Crooke's Kings Bench Reports
De G M & G	De Gex, McNaghten & Gordon's Chancery Reports
D L R	Dominion Law Reports
E D Mich	District Court for Eastern District of Michigan
Giff	Giffords Chancery Reports
JCA	Jersey Court of Appeal Reports
Keny	Kenyon's Notes of Cases
LE & CA	Lee and Caves Crown Cases Reserved
LR	Law Reporter
M & S	Maule & Selwyn's Kings Bench Reports
Mer	Merrivale's Chancery Reports
Moo KB	Moore's Kings Bench Cases
P Wms	Peere Williams Chancery and Kings Bench Cases
NSWCA	New South Wales Court of Appeal
NYCA	New York Court of Appeals
Owen	Owen's Kings Bench and Common Pleas Reports
Salk	Salkeld's Kings Bench Reports
SCR	Supreme Court of Canada Law Reports
STR	Strange's Kings Bench Reports
TR	Turner & Russell's Chancery Reports
Taunt	Taunton Common Pleas Report
Vern	Vernon's Chancery Reports
Ves Jn	Vesey's Junior Chancery Reports
Y & C	Younge and Colliers Chancery Reports

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Introduction

The central argument of this work is that the common law recognises no claims to substitute assets. The notion that it does so is a historic mistake that has been perpetuated unnecessarily, despite the fact that it conflicts with other settled areas of law. Moreover, the notion has no normative force which could give such interference any credence. Thus, it will be argued that the process whereby a claimant shows that a substitute asset represents an original asset in which the claimant had common law rights, has no purpose at common law.

Discussions of substitute assets in private law inevitably centre around the law of tracing. To establish the veracity of the central argument it will be necessary to look closely at tracing, to understand its principles and limits, and to see how errors in the proper interpretation of the doctrine of tracing have led to errors in our understanding of the claims associated with that doctrine.

In the course of this thesis the expression “the orthodox theory of tracing” will be used. It is not possible to refer to any one work in order to determine the precise contents of that orthodox theory. Rather it must be regarded as a distillation of the leading judicial and academic pronouncements on the subject, although the works of Lionel Smith and Peter Birks, and both judicial and academic contributions of significance from Lord Millett, have done much to form the foundations of orthodox thinking.¹ Doubtless no single contributor agrees with all of the

¹ The leading monograph on the subject remains Lionel Smith, *The Law of Tracing*, (Clarendon Press 1997). Other significant contributions to the development of the orthodox position came from Smith himself in ‘Tracing’ in A. Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in memory of Peter Birks* (OUP

propositions listed below but, taken together, they can be said to represent a coherent statement of how tracing is generally thought to operate, and when and why claimants are permitted to commence the tracing process.

The following propositions, it is suggested, make up the orthodox theory of tracing. They can be separated into those that describe what tracing is, and how it differs from other, similar, processes; those that explain how tracing is supposed to operate; those that tell us when a claimant may undertake the process; and those that describe the normative justification for the process.

In the first category are the following:

a) there is a useful distinction to be made between tracing, following and claiming. So, according to Robert Chambers:

In *The Law of Tracing* Dr Lionel Smith usefully distinguishes three different concepts: following, tracing and claiming. We follow assets, trace value and claim rights.”²

In *Foskett v McKeown*,³ Lord Millett stated that:

The process of ascertaining what happened to the plaintiff’s money involves both tracing and following. These are both exercises in locating assets...the process of following and tracing are however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is

2006) 119 and from Peter Birks in *An Introduction to the Law of Restitution* (Clarendon Press 1989) 83-85, 358-401, ‘Mixing and Tracing: Property and Restitution’, (1992) 45 CLP 69, ‘On Taking Seriously the Difference Between Tracing and Claiming’ (1997) 11 TLI 2, ‘The Necessity of a Unitary Law of Tracing’, in R. Cranston (ed) *Making Commercial Law* (OUP 1997), ‘Property, Unjust Enrichment and Tracing’, (2001) CLP 54, 231. At a judicial level the decision of the House of Lords, and in particular the judgment of Lord Millett in *Foskett v McKeown* (2001) 1 AC 102 may be seen as an exemplar of the orthodox position.

² R. Chambers, ‘Tracing and Unjust Enrichment’, in J. Neyers, M. McInnes and S. Pitel (Eds), *Understanding Unjust Enrichment*, (Hart 2004) 263.

³ (2001) 1 AC 102.

the process of identifying a new asset as a substitute for the old...tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property...it enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend upon a number of factors including the nature of his interest in the original asset.

Importantly, as we shall see, these distinctions are utilised not just as aids to theoretical thinking, but as part of the substantive law itself.

b) that following is a simple exercise involving the following of a single asset as it passes through various hands. For Lionel Smith therefore, following is the: "purely physical exercise of locating a thing."⁴

According to Lord Millett:

Following is the process of following the same asset as it moves from hand to hand.⁵

Sarah Worthington says that:

A claimant follows her *original* asset from one person's hand to another, so that at the end of the process she can point to her asset as being the very property which is the subject of competing claims by different parties. Note that the asset being claimed is precisely the same at the start as at the end of the exercise.⁶

With respect to how tracing operates the following propositions are widely regarded as correct:

c) tracing involves using the "rules of tracing" to identify assets that may be regarded as substitutes for an original asset. Thus:

⁴ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 6.

⁵ *Foskett v McKeown* (2001) 1 AC 102, 127.

⁶ S. Worthington, *Equity* (2nd edn Clarendon Law 2006) 89.

The context of tracing is substitution. Tracing identifies a new thing as the potential subject matter of a claim on the basis that it is the substitute for an original thing which was itself the subject matter of a claim.⁷

According to Peter Birks:

The rules of tracing do not themselves confer rights. They answer the question whether one asset is wholly or partly the substitute for another.⁸

And according to Eoin O'Dell:

The plaintiff would like to be able to argue that the value which once inhered in (the original asset) in the recipient's hands now inheres in the (substitute). The rules of tracing perform that function.⁹

d) these rules involve the following of a stream of value through a series of transactions and it is this process which explains why it is that the substitute asset may be regarded as such. Smith's formulation of this is that:

The only connection which the plaintiff has to the new asset is that it was acquired with the old asset. The defendant acquired the value inherent in the new asset with the value inherent in the old asset. That is why we say that we trace value: it is the only constant that exists before, through and after the substitution through which we trace.¹⁰

Simon Evans' explanation is that:

Tracing identifies property in the defendant's hands as being connected with some item of value that the claimant has lost or that the defendant has acquired at the claimant's expense. It enables the claimant to point to that property as the new location of his or her value.¹¹

⁷ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 6.

⁸ P. Birks, *Unjust Enrichment* (2nd edn Clarendon Law 2005) 199.

⁹ E. O'Dell, 'Tracing', (1999) 21 *Dublin University Law Journal* 131.

¹⁰ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 119.

¹¹ S. Evans, 'Rethinking tracing and the law of restitution', (1999) 115 *LQR* 469.

e) although the rules for tracing at equity and common law may differ, this is an outmoded way of thinking because tracing, being a mere exercise in identification, has no need to locate its authority in either part of our law. Peter Birks maintained that:

More radically the very notion of there being two sets of rules for tracing is now shown up as rationally indefensible. It cannot be that a mere process of identification can be conducted on different bases in different cases as though the law might choose in such business to use its good or bad eye.¹²

In *Foskett v McKeown*,¹³ Lord Millett said that:

Given its nature there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing in law and in equity. One set of tracing rules is enough.¹⁴

The following two propositions sum up the orthodox position on when it is possible to set the tracing process in motion:

f) claims following the tracing exercise may exist at either common law or in equity.¹⁵

g) it is not necessary, in order to make a claim in respect of a substitute asset in equity, to show that the defendant was in a fiduciary relationship with the claimant. Lord Millett is certain of this:

There is certainly no logical justification for allowing any distinction between them (i.e. between rules for tracing at common law and rules for tracing in equity) to produce capricious results in cases of mixed substitutions by

¹² P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy', (1996) 26 University of Western Australia Law Review 1,83.

¹³ (2001) 1 AC 102.

¹⁴ Ibid 128.

¹⁵ Although direct quotes to this effect are not easy to find the belief that it is correct is true almost by definition. The cases discussed in Parts 2 and 3 are proof of this. Indeed there is a sense in which this is what this entire thesis is about. For a detailed analysis see L. Smith, *The Law of Tracing* (Clarendon Press 1997) 283-368.

insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules.¹⁶

Richard Calnan agrees:

The claimant's ability to trace does not depend upon the defendant being a fiduciary: it arises from the claimant's proprietary interest in the asset concerned. Why would a remedy devised to vindicate a person's property rights be dependent on the establishment of a personal duty of good faith?¹⁷

The final proposition concerns the normative justification for allowing tracing at all:

h) claims contingent on tracing are part of either the law of unjust enrichment or the law of property. Peter Birks wrote that:

It follows that, so far as concerns the acquisition of rights what we have to understand the effect and nature of non-consensual substitutions. The causative event must be allocated to its correct genus, which can only be unjust enrichment.¹⁸

Graham Virgo, by contrast, argues that:

At the heart of *Foskett v McKeown* is the recognition that the restitutionary claim of the beneficiaries fell within the law of property and was concerned with the vindication of property rights rather than with whether the defendant was unjustly enriched at the expense of the claimant.¹⁹

In order to justify the central argument of this thesis set out at the start of this introduction, it will be necessary, on the way, to set out reasons for disagreement with nearly all of the eight points made above.

It will emerge in argument that, taken individually and collectively, these propositions generate a false understanding of how tracing works.

¹⁶ *Foskett v McKeown* (2001) 1 AC 102.

¹⁷ R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 8.66.

¹⁸ P. Birks, 'Property, Unjust Enrichment and Tracing', (2001) 54 CLP 231.

¹⁹ G. Virgo, 'Vindicating Vindication: *Foskett v McKeown* Reviewed', in A. Hudson (Ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) 203, 204.

It will be argued that the notion that tracing is a process that must be rigidly separated from claiming is an over-simplification. Tracing and claiming are best regarded as overlapping parts of a single process. Because the availability of claims to substitute assets is far more restricted than the orthodox theory allows, it makes sense to restrict tracing to only those cases in which a claim would be possible if a substitute asset can be identified.

I will further argue that following cannot be explained as a simple exercise in identification. It is, generally speaking, a normative exercise in the allocation of claims. Moreover, the failure to understand the conceptual impossibility of following ownership of funds through bank accounts has led to serious misunderstandings of how both following and tracing work.

I will then argue that tracing is not about the following of value from one asset to another via a series of transactions. The meaning of value has proven to be somewhat elusive when used in this context. Whichever explanation has been provided for its meaning, such explanation has never managed to establish how its movement can be tracked from asset to asset. The rules of tracing cannot be explained in terms of such a transactional process. In fact tracing, no less than following, concerns the normative allocation of claims: it is the process by which the law identifies assets which are deemed to represent substitutes for original assets in order to justify the transmission of claims.

I will go on to argue that the proposition that, because tracing is merely an identification process, it does not make sense to have separate identification rules at common law and in equity is

fundamentally misconceived. This is because it overlooks the point that since the common law does not allow claims to rights in substitute assets it has no interest in any process of identification of such substitute assets whatsoever.

I will argue, however, that contrary to orthodox thinking, it matters a great deal whether the defendant in a claim in respect of a substitute asset is a fiduciary or not. If he is not then such a claim is unavailable and no tracing process can take place. As will be explained, equitable claims to the return of assets *in specie*, which do undoubtedly exist, are fundamentally dependent upon the existence of a fiduciary relationship between claimant and defendant. It will be argued that neither the law of property nor the law of unjust enrichment offers any explanation for these claims. Indeed, it is the lack of any possible proper basis that forms one of the pillars of doubt respecting the existence of any right to claim at common law, as opposed to equity, in respect of substitute assets. The other is the lack, properly understood, of any coherent authority for that right.

The remainder of the work is laid out as follows:

Part 1 is introductory, although it sets out some important principles. First, the nature of following is examined and explained an essentially normative exercise. Second, tracing is considered and revealed also to be a normative exercise in claim allocation.

Part 2 looks at what will be compendiously described as “common law tracing”.

Chapter 3, looks at how the notion that it is possible to make claims to substitute assets at common law was mistakenly developed from cases that were essentially concerned with equitable rights. This

leaves the common law without an analytical basis to support such claims. The two alternatives that have been put forward as being the underpinning of common law rights in substitute assets are looked at in Chapters 4,5 and 6.

Chapters 4 and 5 examine the notion of tracing as being the vindication of property rights, and thus as part of the law of property.

Chapter 6 looks at the radically different notion that claims to substitute assets are claims based on the defendant's unjust enrichment at the claimant's expense. This has nothing to do with "old rights" in the original property being vindicated. Rather it concerns establishing a new claim with new rights.

Chapter 7 looks at equitable claims to substitute assets. In this chapter, the normative basis of those claims is explained. This is followed by an examination of one of the inevitable consequences of that basis. This is that tracing may only be utilised where the defendant to a claim is a fiduciary, who has acquired rights in the course of performing his fiduciary endeavour, or has acquired rights by exploiting an opportunity arising in the course of that endeavour. This has the effect of firmly placing tracing where it belongs. It is an equitable process whose only purpose is to assist courts in upholding the fiduciary relationship.

Finally, the conclusion will look at the implications for claims to substitute assets generally. It will be argued that we must abandon the notion of tracing as being anything other than a metaphor that describes how courts allocate claims and that such claims are exclusively claims in equity.

Part 1.

Tracing, Following and Claiming.

Chapter 1. Following.

Introduction

It was explained in the introduction that the orthodox theory of tracing encompasses two propositions with respect to following.

The first is that there is a useful distinction to be made between tracing, claiming and following, and the second is that following is a simple exercise involving the following of a single asset through various hands. The validity of these propositions will be examined in this chapter.

The importance of understanding fully what is happening when we follow an asset is not merely of interest as a topic in its own right; it is a prerequisite to a complete understanding of tracing.

The basic premise that there is a distinction to be made between tracing and following is one that is supported in this work. Indeed it could hardly be otherwise in a thesis, one central objective of which is to show that the common law allows no claims contingent upon a successful tracing exercise. It is unquestionably true that the common law allows claims contingent upon successful *following*. The essence of the law of conversion, for example, is that the claimant is showing that his asset is in the hands of, or has been through the hands of, the defendant.

Unless we make the distinction between tracing and following clear the point that only one of these processes can result in a claim at common law will be lost.

Moreover, failing to distinguish between the two can lead to unnecessary confusion. Thus, in a seminal article,¹ published before the distinction between tracing and following was first established, Kurshid and Matthews set out to demonstrate the proposition that tracing at common law has no proper foundation in precedent.² Much of the argument is extremely difficult to follow however, because there are several concessions in the body of the work to the availability of the right to trace at common law, concessions which appear to defeat the entire argument. It is not until one realises that the word tracing is being used to describe both the process of identifying the same asset in different hands *and* the process of identifying of a substitute asset in the same hands that it is possible to understand the central thesis, which is that the common law has no basis for allowing substitute assets to represent existing assets.³

Despite the fact that this work supports the necessity of distinguishing between tracing and following, it is not possible to deny that there are difficulties with the way in which the distinction is generally expressed. As Lionel Smith's formulation, quoted at the outset of this work,⁴ suggests, following seems to be regarded as a simple matter; it is merely about identification, and does not even appear to be particularly related to legal matters. I can follow an asset whether it is,

¹ S. Kurshid and P. Matthews, 'Tracing Confusion' (1979) 95 LQR 78.

² They were actually showing that *claiming* was not possible at common law but they did not regard the two propositions as being distinct.

³ E.g. "The right to trace at law subsists only so long as the goods remain in their original form", S. Kurshid and P. Matthews, 'Tracing Confusion' (1979) 95 LQR 98, which is clearly a reference to following if one accepts the distinction between the two.

⁴ See text accompanying footnote 4 to the Introduction.

or ever has been, mine or not, and I can follow irrespective of whether I have any legal reason for doing so or not.

Lord Millett tells us that following's focal object is one asset, which we follow from person to person. This is now a widely accepted proposition, but some care is nonetheless needed before we can adopt it without reservation.

First, despite appearances, there is a distinctively normative aspect to following. This is not clear if we take the simplest of examples. A steals B's bicycle and sells it to C. B can clearly just follow his bicycle from his own hands into first A's and then C's. It is just a question of finding the bicycle. However, as will be shown later in this section, this simple example is not typical of the cases that deal with questions of following. They are generally more complex, and involve choices that the law has had to make as to what does, or does not, constitute the same asset. Suppose that A, having stolen the bicycle, breaks it up into its constituent parts, and sells those on to various parties. Can B follow each part? What if the part in question has been incorporated onto a different bicycle? What if what was stolen was not a bicycle but a vat of oil which is then mixed into a larger vat?

As we shall see in the remainder of this chapter the law does indeed have answers to all of these questions, but they are based on normative considerations not factual ones. They are grounded in convenience, or on what is seen to be just, not on whether, factually, identification remains possible.

Second, the simplicity of our first example disguises another important element of following. Following is also about the identification of intangibles as well as things. Although this is largely

uncontroversial, it does serve to emphasise the point that following's apparent simplicity is somewhat overstated.

The obvious intangible that we can follow is a right.⁵ If A owes B £100 and B assigns the debt to C then we can say that the right to be paid £100 by A can be followed from B to C. This, again, emphasises how careful we must be before accepting the notion that following is a simple process of identifying a thing as it moves from one hand to another.

Third, most following cases involve money in one form or another and consideration needs to be given to the question of whether different rules are, or should be, applicable to the following of money from those pertaining to the following of other assets.

Fourth, despite the fact that everyone seems to agree now on what following is, and how simple it is, statements such as the following still arise:

“the difference between following and tracing is essentially this:

following refers to the cases where owner A seeks to claim his property in the hands of another”.⁶

On the orthodox understanding, however, this apparently unexceptionable statement is wrong. Following, in accordance with that theory, is not about ownership at all. That is the realm of claiming. Following is about identification only. It is neutral. I can as well follow your bicycle from your hands into those of a *bona fide* purchaser from you as I can my bicycle from the hands of a person who steals it from me

⁵ In the Hohfeldian sense as the converse of a duty. See W. Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (Yale University Press) 1923.

⁶ M. Smith, 'The Vindication of an Owner's Rights to Intangible Property' (2013) 7 JIBFL 412.

into the hands of a purchaser from that thief who knows that it has been stolen.

Fifth, the apparently eminently sensible dislocation between following and claiming becomes increasingly hard to justify as we move along the chain of complication. In our initial example it would appear to be reasonable to say that B can follow his bicycle. On its own that says nothing about any claim that he may have in respect of it. However, when we get to those examples where the question of whether an asset can be followed is resolved by a normative decision put into legal reality, the division becomes harder to justify. This is because the *only* purpose of deciding whether following is allowed in such circumstances is to establish the respective rights of the parties. Up until the point at which the law is invoked it is easy to understand following as a purely neutral process. From that point onward this is a far more difficult conception.

Finally, although perhaps least importantly, despite the apparent certainty with which the distinction between following and tracing is proclaimed, such a distinction does not represent either academic or judicial practice prior to the end of the 20th Century.

In the highly important case of *in Re Hallett's Estate*,⁷ Mr Justice Fry, at first instance, used the word "trace" to describe the exercise that the claimant wished to undertake 18 times and the word follow just once. In the Court of Appeal the word trace was only used once and follow over 50 times. The expressions seemed to be interchangeable.

In *Sinclair v Brougham*,⁸ the terms also seem to be used interchangeably. There are countless references to tracing as the

⁷ (1878 H 147), (1880) 13 Ch D 696.

⁸ (1914) AC 198.

objective of the claimant's application, but the judgments are also liberally sprinkled with references to following, when the asset being followed is not the same as the asset with which the claimant started the exercise.

In *In Re Diplock*,⁹ Lord Greene MR said:

The claims *in rem* rest upon the application of the principles alleged to underlie the well known case of *In Re Hallett*, expanded (as it is said) in *Sinclair v Brougham* as to enable the appellants to "follow" or "trace" the moneys paid to the several respondents into the various assets held by such respondents.

Since all of the claims involved substitute assets (inevitably so because the original asset was money, the claimant's title to which was lost upon being deposited with the defendants) Lord Greene cannot be taken to be saying that following and tracing are alternatives. He is saying that the exercise may be described as following, or it may be described as tracing, but it is essentially the same exercise under different names.

This is the least important of the difficulties which we will look at with respect to following since it is perfectly arguable that what Lionel Smith has essentially done, by distinguishing between tracing and following, is to give us a tool with which to make our analysis of this difficult area clearer rather than suggest any change in the law itself. Given this we shall not trouble ourselves with this point any further.

[A Simple Example.](#)

We can commence our detailed examination of following by returning to the simple example with which we introduced the subject; A steals my bicycle. He gives it to B, who sells it to C, a bona fide purchaser who

⁹ (1951) AC 251.

knows nothing of the theft. Following, here, merely involves identification. I can follow my bicycle into B's hands and then into C's. Is there a problem with the breaking of the following chain? Suppose, for example, that I can identify my bicycle in C's hands but cannot show that it came to him directly from B? In practical terms the answer is "no". It is not a requirement of a claim in conversion, for example, that the claimant shows how the defendant came into possession of the asset. Even if following and claiming are therefore completely separate processes, it makes no sense to say that the following process must involve the identification of my asset through all of the intermediate hands that it has travelled. To that extent Smith's statement, that following involves merely the physical identification of a thing,¹⁰ is a better description than Lord Millett's contention that following involves the tracking of the asset from hand to hand.¹¹

Specification and Accession.

We can make the examples more complex than this without losing sight of the basic model. Even though these examples are only slightly more complex, it is already possible detect a movement away from the notion of following as a mere process, to one where normative decisions have to be made.

Suppose that the asset that we wish to follow has become affixed to another asset. Where separation of the relevant parts is relatively straightforward, we say that I may separate those parts and reclaim my asset, or at least sue in conversion for interference with it. So, in *Hendy*

¹⁰ See text accompanying footnote 4 to the Introduction.

¹¹ See text accompanying footnote 5 to the Introduction.

Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd,¹² generating parts were attached to engines. Each part was readily identifiable and just as easily separated from the engine. The parts were subject to a retention of title clause and, the parts not having been paid for, the supplier did therefore retain that title.

Where, however, the separate parts of the new asset cannot be straightforwardly removed (as for example when I paint your canvas with my paint) the owner of the greater and more valuable thing becomes the owner of the new combined asset.¹³

The above process is known in English law as accession. Another is known as specification.¹⁴ This occurs where my asset is taken by you and worked upon to produce a new product. In *Re Peachdart Ltd*,¹⁵ leather was supplied on retention of title terms for the purposes of making handbags. Upon the receivership of the buyer (who was the manufacturer of the handbags) a distinction was made between the leather that had already been incorporated into handbags and that which had not. Cases of this sort are ancient¹⁶ and it was once the rule that a claim could be sustained in respect of both the unused leather and the used leather.¹⁷ In respect of the latter the effect was to make the claimant the owner of the handbags.

¹² (1984) 2 All ER 152.

¹³ *Wood v Ash* (1586) Owen 139; *Appleby v Myers* (1867) LR 2 CP 651; *Seath v Moore* (1886) 11 App Cas 350.

¹⁴ These terms have been coined as a result of the not-overly creative process of taking the original Roman name for it (*accessio, specificatio*) and adding the letter “n”.

¹⁵ (1984) Ch 131.

¹⁶ *The Case of Leather* (1490) YB Hil 5 Hen 7 f 15.

¹⁷ *Ibid.* Also *Anonymous* (1560) Moo KB 19.

Re Peachdart appears to be decided upon the basis of the intentions of the parties, which the court took to be that title to the leather passed to the manufacturer as soon as it had passed the point at which it had any independent value as a raw material.¹⁸ It is clearly relevant in *Peachdart* that the delivery of goods from seller to manufacturer had occurred as a result of a contract, since it is a fundamental tenet of contractual interpretation that the court seeks to determine the intentions of the parties.

We can take the *Peachdart* example a stage further. In *Borden (UK) Ltd v Scottish Timber Products Ltd*,¹⁹ resin belonging to the claimant was mixed by the defendant with woodchips that belonged to him, to produce chipboard. The Court of Appeal held that the chipboard was a new product. Having been incorporated into that new product, title to the resin became meaningless and the resin had *ceased to exist*.²⁰ This is by no means a necessary conclusion. The New York Court of Appeals decided a similar matter differently as far back as 1850.²¹

We can see in these cases a very definite movement away from the notion of following being a simple process of identification.

Hendy Lennox is, in reality, barely distinguishable from the simple bicycle example given at the outset of the section. It was possible to point to the generators in *Hendy Lennox* in exactly the same way as it

¹⁸ *Re Peachdart Ltd* (1984) Ch 131, 142.

¹⁹ (1981) Ch 25.

²⁰ *My Italics*. Unless the Court of Appeal has jurisdiction over the laws of physics as well as the laws of England their reasoning is clearly incorrect. The resin continues to exist, albeit it in an altered form. All that the court could have meant was that *legally* the resin had ceased to exist, but this is a conclusion not a reason on which to base a conclusion.

²¹ *Silbury v McCoon* (1850) 8 NY 379, 1 NYCA 471.

would have been possible to point to my bicycle in C's garage. The engines were effectively just a storage place for the generators. But the same is also true in the painting example, and in *Peachdart* and, to a lesser extent, in *Borden*. The problem in these cases is not establishing whether any of the claimant's original asset constitutes a part of the new asset. It is in deciding the purely normative question of to whom ownership of the new asset should be given. The reality of these cases is that the following trail has not ended if following is a merely mechanical process of identification. What has ended is the ability of the owner of the original asset to assert any claim to the new asset based on his title to the original. Doubtless these are sensible and practical rules, but they cast some doubt on the assertion that following is a neutral exercise that exists completely independently from claiming. The question of who owns the new asset is inextricably linked with whether it is legally permissible to follow the original asset into the new one.

Consideration of such matters as intention, as occurred in *Peachdart*, are irrelevant where following is conceived of as a mechanical process. This is either the Raleigh bicycle that you stole from me or it is not. No amount of intention will make it otherwise. Intention is only relevant at the stage when what needs to be decided is who is to have ownership of any new asset created by joining together, or mixing, assets from different sources. At that point the difference between following and claiming is far from apparent.

This point is further enhanced by the case of *Jones v De Marchant*.²² In this case a husband took certain skins, to which he had title, and added them to other skins, to which he did not have title, in

²² (1916) 28 DLR 561.

order to make a fur coat. The court held that the owner of the converted furs had title to the coat. On the face of it this case is incompatible with *Peachdart*. What appears to be the crucial factor in *Jones v De Marchant* was that one of the parties was a wrongdoer. Again, there is nothing to be said against the reasoning, but it cannot be argued that the reason follows from the nature of following as presented at the outset of this chapter.

Mixtures.

We now turn from cases where one asset is attached to another, or where one asset is combined with another to form a new asset, to cases where effectively identical assets are mixed together to form a single mass. Such a mass can either allow ready separation into individual parts (as with grains of corn from two different sources placed in the same silo) or not (as with oil from one source being placed into a bunker with oil from another).

Superficially, it may be thought the analysis of such cases would be identical with those already discussed. Where the mass can be readily separated, as with say corn ears in a silo, then following might be thought very similar to a *Hendy Lennox* type case, whereas when it cannot, as in oil in a bunker, it would seem more appropriate to apply a *Borden* type of analysis. This is not the reality however, because, unlike in *Hendy Lennox* the parties who have contributed to the mixture cannot show exactly which parts of it belong to them. True the mixture is readily divisible into its individual parts, but this is in itself insufficient. In order to successfully follow both into and out of the mixture it is

necessary for the follower to identify the exact assets that are his. And he clearly cannot do so in our example.

English law (probably unlike Roman law)²³ appears to have treated both of these situations in the same way, although exactly how that treatment is best described is not totally certain.

Where the mixing is accidental or consensual there are two obvious alternative approaches. First the mixers could follow their asset into the mixture and continue to have ownership rights in respect of the asset that is the object of the following exercise. This is to treat the mixing as if it did not produce a new product at all. Suppose that A and B each contribute 50 sheep into an indeterminate mixture of 100 sheep. Using this approach if A were to non-consensually dispose of the entire 100 sheep to C then B would have claims in conversion against both A and C.²⁴ This is how Lionel Smith believes that following into mixtures works.

Since following identifies part of the mixture with the contribution, it allows the assertion over that part of the mixture of the *original*²⁵ proprietary rights which were held in the contribution.²⁶

But this is the easy example. It becomes far more difficult when the mixture is depleted in any way. What if 50 of the sheep are stolen before A disposes of the remainder? According to Smith:

The law appears to be that (B) can assert that her contribution exists in any part of the mixture *subject to*²⁷ the right of the other contributors to do likewise.²⁸

²³ P. Birks, 'Mixtures' in N. Palmer and E. McKendrick (eds) *Interests in Goods* (2nd edn) Lloyds of London Press 1998.

²⁴ *Jackson v Anderson* (1818) 4 Taunt 24.

²⁵ Italics in the original.

²⁶ L. Smith *The Law of Tracing* (Clarendon Press 1997) 70-76.

So, in our example both A and B can claim that of the 50 sheep that remained after the theft each was the owner of 25.

There is some authority to support this approach. If we go back to the original example, where there are still 100 sheep in the mixture, it would seem that, if B sold only 40 of those sheep, A could not sue either B or C in conversion since he could not show that any of the stolen sheep were his.²⁹ This would clearly indicate a continuing ownership approach to the mixture.

Despite these authorities, however, the better view appears to be that English law has adopted the second of the possible alternative approaches and treats the mixture as a new product and the mixers as joint owners of that product (again in proportion to their input).³⁰

Smith dislikes this because “if mixing creates a tenancy in common, it is of an unusual sort”³¹ and he certainly has a point. For example, if one contributor to a mixture disposes of the entire mixture this would appear to constitute the tort of conversion on the grounds that the mixture must contain that which belongs to the other party.³² However, as generally understood, at common law it is not a conversion for one tenant in common to dispose of the commonly owned asset.³³

²⁷ Italics in original.

²⁸ L. Smith *The Law of Tracing* (Clarendon Press 1997) 73.

²⁹ *Wiles v Woodward* (1850) 5 Exch 557; *Sandeman v Tyzack* (1913) AC 680; *Jones v Moore* (1841) 4 Y & C 351.

³⁰ *Buckley v Gross* (1863) 3 B & S 566, 122 ER 213; *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* 1988 (QB) 345; *Glencore International AG v Metro Trading International Ltd* (2001) 1 Lloyd's Rep 284.

³¹ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 75.

³² *Jackson v Anderson* (1811) 4 Taunt 24, 128 ER 235 (CP); *Wiles v Woodward* (1850) 5 Exch 557, 155 ER, 244.

³³ *Mayhew v Herrick* (1849) 7 CB 229, 137 ER 92.

Despite this apparent irreconcilability it nonetheless appears that is the way that the law is developing.

Attempts to reconcile the cases have proven almost impossible, with Matthews suggestion that there is joint ownership as between the contributors to the mixture and a third party but not as between the contributors themselves,³⁴ provoking Birks to say that he would “have to be dragged screaming to that degree of flexible pragmatism”.³⁵

One major reason for the irreconcilability of the cases is that they appear to be talking past one another – as Matthews points out³⁶ none of the cases supporting continued ownership was even cited in *Indian Oil Corporation*.

Whatever the merits and demerits of the argument, however, the joint ownership cases are largely more modern than the continued ownership ones and the type of co-ownership that Smith finds so difficult to comprehend has become commonplace as a result of the Sale of Goods (Amendment) Act 1995. This allows pre-paying buyers of goods in bulk to acquire an interest in common, and also provides that any such co-owner is deemed to consent to a delivery or removal of goods out of bulk by another co-owner, insofar as those goods fall within the co-owner’s undivided share.

It is difficult to reconcile this discussion with the orthodox notion of following as a simple process of identification. That difficulty is exacerbated when we discover that there are completely different rules

³⁴ P Matthews, ‘Proprietary Claims at Common Law for Mixed and Improved Goods’ (1981) CLP 159

³⁵ P. Birks, ‘Mixing and Tracing’ (1992) 45 CLP 69.

³⁶ P. Matthews, ‘The Legal and Moral Limits of Common Law Tracing’ in P. Birks (ed) *Laundering and Tracing* (Clarendon Press 1995) 23, 43.

that apply when one of the mixers is a wrongdoer (in the sense that the mixing itself constitutes a wrong). As was said above, why this should be the case is difficult to explain if following is a mere mechanical process of identification. If A wrongfully mixes 50 of his sheep with 50 identical sheep of B, A can either identify 50 of those sheep as his or he cannot. Why he mixed them is irrelevant, unless following has a normative element to it. The rule that has been adopted is a rule of evidence only. It does not displace clear facts as to identity. In general, the rule is that the mixture created is a tenancy in common but that where there is doubt as to the relative ownership between the wrongdoer and the innocent party (because the mixture has decreased in size for example or part of it has been stolen) then doubts must be resolved in favour of the innocent party.³⁷

Following Money.

Until now the discussion has centred on the following of tangible assets. Money, in the form of currency, is a tangible asset in exactly the same way as corn or oil and it might therefore be expected that the rules relating to the following of those products would also apply to money. This does not, however, appear to be the case. Thus, in *Jackson v Anderson*,³⁸ where A mixed his coins with those of B and sold them to C, B was able to claim in conversion against both A and C. Provided that B was able to identify his coins he was entitled to follow them. The explanation for this outcome would seem to be that provided that B was able to follow his coins into the mixture he could show that those coins, in which he still retained title, had been converted by both A and C.

³⁷ *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* 1988 (QB) 345.

³⁸ (1811) 4 Taunt 24, 128 ER 235.

However, as was explained above,³⁹ this no longer seems to be the explanation for such cases in respect of general assets. It now appears that such cases are treated as ones of common ownership. Birks certainly thinks that this is the normal case, but where the mixing of money is involved he rejects the common ownership model in favour of the continuing ownership one.⁴⁰ This would seem to be lacking in principle.

The greatest problem for an understanding of the process of the following of money has been created by the misunderstandings that have arisen from the notion that money has no earmark. It may well be the case that there are evidential difficulties in distinguishing between different coins and this may make identification difficult, but the same may be said of ears of corn. This is not a reason, however, for implementing a general rule that where the evidential difficulties can be overcome, and the money can be identified, it nonetheless can *never* be followed. Nevertheless, the expression that “money has no earmark” seems to have been interpreted as meaning rather more than that there are evidential difficulties associated with following money. Thus the Court of Chancery, in *Whitecomb v Jacob*,⁴¹ held, as a rule of substantive law, not as a rule of evidence, that money paid to an agent by a third party represented part of the agent’s estate in the event of the agent’s insolvency, whereas if that money had been invested by the agent in

³⁹ See text accompanying footnotes 30-36 above.

⁴⁰ P. Birks, ‘Mixing and Tracing’ (1992) 45 CLP 69, 79.

⁴¹ (1710) 1 Salk 160, 91 ER 149.

further goods than the goods would have been part of the principal's estate.⁴²

As far as the Courts of Equity are concerned this, somewhat unprincipled, doctrine was rejected in *Hallett's Case*,⁴³ although this rejection was expounded by Jessell MR, in a somewhat cavalier manner, by simply stating, without reference to any authority, that the doctrine did not represent the law at that date, even if it did at the time that *Whitecomb v Jacob* was decided.

Having been rejected in equity, this then left the possibility open that the notion that money has no earmark meant that, at *common law*, money could not be followed into a mixed fund. But this is clearly not the case. *Jackson v Anderson*⁴⁴ is a good example to the contrary and in *Pennell v Deffell*,⁴⁵ Knight Bruce LJ said that the normal common law principles for mixing applied to money.

Purely in respect of following, therefore, the expression money has no earmark is meaningless. However, once we move from the realm of following to that of claiming matters are somewhat different. When it comes to making claims in respect of followed money, commercial necessity requires that different considerations apply than do with respect to other assets. As a result, money as currency is an exception to the *nemo dat* rule. This is to what the expression "money has no earmark" truly relates. According to Lord Mansfield:

It has been quaintly said that "the reason why money can not be followed is that it has no earmark": but this is not true. The true reason is, upon account

⁴² See also dicta to very similar effect by Willes J in *Scott v Surman* (1742) Willes 400, 125 ER 1235, 404.

⁴³ *In re Hallett's Estate* (1880) Ch D 696.

⁴⁴ (1818) 4 Taunt 24.

⁴⁵ (1853) 4 De G M & G 388, 43 ER 551.

of the currency of it: it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and bona-fide consideration: but before money has passed in currency, an action may be brought for the money itself.⁴⁶

If A steals B's fifty pound note and buys a bicycle from C with that note, then (as long as C has no knowledge of the origins of the note) the title that A passes to C in respect of the note is not such title as A himself possesses (which is defeasible to B), but is a brand new title, good against the whole world. This is not true, in general, with respect to other tangible assets. Without such a rule, commerce would be impossible. If every time that a person purchases goods with notes or coins at a supermarket, the supermarket is at the risk of a third party suing it in conversion in respect of those notes or coins, there would soon be no supermarkets left. Moreover, the doctrine of relativity of title would compound this difficulty. In the example given above, if B had himself stolen the fifty pound note, C's title would be defeasible to both B and the person from whom B stole the note. This would create ineradicable difficulties. Sales of goods for money would become impossible if the seller could not be certain that he would obtain good title to the money tendered for that sale.

The expression "money has no earmark" does make sense when applied to *claims* to followed money therefore. Confusion has arisen because of the failure to properly distinguish between the processes of following and claiming when using the expression.

⁴⁶ *Miller v Race* (1758) 2 Kenny 189, 96 ER 1151, 459.

Following Money Through Bank Accounts.

We have seen that following is largely about identification, and the ways that the law has adapted to the evidential difficulties associated with such identification. If we take the mixing of two vats of oil into a single, larger, vat, then we can say that the mixture is undoubtedly the product of the two original vats, and all that we have to do is to decide the basis on which we allocate ownership of the new mixture. The new mixture, importantly, is something that is capable of being owned. It is itself an asset. Money as cash is very similar in terms of the process of identification, but for reasons of commercial reality we say that once it comes into the hands of a *bona fide* purchaser identification ceases to matter. The purchaser has a title to that money good against the entire world.

However, the vast majority of our cases do not concern money as a tangible commodity. They are not about notes and coins in the hands of the defendant. They involve transactions that result in money passing through (in some cases many) bank accounts. These accounts may be in credit, they may be overdrawn, they may move from one state to the other, they may be the result of transactions from a single source, they may be the result of transactions from many sources. Crucially, whatever state they are in, they have one critical difference from the vat of oil that we considered above.

This difference is so fundamental that it means that none of the following rules described above can relate to it. Money in a bank account is *not* the property of the account holder and as such it cannot be the subject of the process of following.

In the criminal case of *R v Preddy*,⁴⁷ the appellants had been charged with, and convicted of, mortgage fraud under s15(1) of the Theft Act 1968. The section required the prosecution to show that the defendant had “by deception... dishonestly obtained property belonging to another”. The property in question in this case was supposedly money standing to the credit of the lending institution with its bankers. The House of Lords overturned the conviction. Lord Goff said that the question of whether the money constituted property at all was irrelevant because even if it did it could not be described as property belonging to the lending institution. His Lordship said:

Let it be assumed that the lending institution's bank account is in credit, and that there is therefore no difficulty in identifying a credit balance standing in the account as representing property, i.e. a chose in action, belonging to the lending institution. The question remains however whether the debiting of the lending institution's bank account, and the corresponding crediting of the bank account of the defendant or his solicitor, constitutes obtaining of that property. The difficulty in the way of that conclusion is simply that, when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor. In these circumstances, it is difficult to see how the defendant thereby obtained property belonging to another, i.e. to the lending institution.⁴⁸

⁴⁷ *R v Preddy, R v Slade, R v Dhillon* (1996) AC 815.

⁴⁸ *Ibid* 834.

The notion of asserting a pre-existing title to the contents of a bank account on the basis that one's money constitutes part (or indeed all) of the contents of that account thus makes no sense.⁴⁹

The correct position was explained by Lord Millett in *Foskett v McKeown*:

We speak of money at a bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank...there is merely a single debt of an amount equal to the final balance standing to the credit of the account holder.⁵⁰

This is not to say that a bank account holder has nothing. He is a creditor of the bank to the value of the balance on his account and as such he owns a chose in action against the bank to that value.

This is not, however, the same thing as owning the contents of the account. If, in breach of trust, A transfers £10 from B's account to his own and then purchases a pen with that £10 then, even if A's bank balance stood at 0 before the transfer, he is not in any sense using B's £10 to purchase the pen. As a result of the transaction B's credit balance with his bank, and thus the value of his chose in action, has been reduced by £10 and A's has increased accordingly but B's £10 has not been transferred to A. Any rights that B may have against A in such cases cannot therefore arise from B showing that he has a persisting title to the transferred funds. He unquestionably has a personal claim against A

⁴⁹ Despite its fundamental nature the impossibility of treating money in a bank account as an asset of anyone but the bank has passed the courts by on regular occasions. There are countless examples of their treating bank deposits as if they were the equivalent of cash under the bed. See *Sinclair v Brougham* (1914) AC 398; *McDonald v Denys Lascelles Ltd* (1933) HCA 25; *Baltic Shipping Co v Dillon* (1993) HCA 4, (1993) 176 CLR 344; *ITS v G P Noble Trustees* (2012) EWCA Civ 195.

⁵⁰ (2001)1 AC 102, 127-128.

in respect of the value transferred but that is not the same as saying that he has a claim to any particular £10.

Mixed Bank Accounts.

The typical situation with which this section deals is where A, in breach of trust, puts money belonging to B into his bank account and then subsequently withdraws funds from that account to make a purchase on his own behalf.

Peculiarly the law seems to have adopted an analysis that treats such situations as being analogous with the irreversible mixing of physical assets. In *Foskett v McKeown* Lord Millet said that the “same principle operates whenever the mixture consists of fungibles, whether these be physical assets like oil, grain or wine or intangibles like money in an account.”⁵¹

The question of course therefore arises as to exactly what that principle might be. We have already seen that following is not a simple process of identification – that it involves a whole series of normative decisions as to the proper allocation of claims. We have also seen that the allocation of claims resulting from unauthorised transfers in and out of bank accounts is not based on any surviving proprietary interest of the innocent party in the contents of the wrongdoer’s bank account.

To return to our discussion above, we have seen that, where A mixes his money with that of B in a bank account, any claim that B might have in respect of his money does not depend upon showing that he retains any title to the money which is the subject of the mixing.

⁵¹ Ibid 141.

The bank account makes the bank a debtor of A to the value of the account and gives A a chose in action in respect of that debt. When A transfers money out of the bank account, then the chose in action is destroyed and is replaced by a brand new one to the value of the new balance on the account. Critically the debt owed to A, and therefore the chose in action, is not made up of a whole series of different contributions. It is not cumulative. It is a single item. Thus, if A mixes £50 of his money with £50 of B's, he is a creditor of the bank to the value of £100. If he now withdraws £40, his right against the bank to the payment of £100 is extinguished, and replaced by a new right to the value of £60. It follows from this that it makes no sense to ask, in the context of a mixed bank account, which of the parties to the mixture has contributed what money to an asset purchased from that mixture.

Despite this what has been developed are a series of what have been described as evidential tie-breakers,⁵² designed to do the very thing that cannot be done – determine the relative contributions of the parties to the mixture.

One suggestion, put forward in *Re Diplock*, was that where there are two parties to a fund which entirely consists of contributions made by themselves, and which has been mixed by a fiduciary agent, then the two parties, both being innocent, share the fund *pari passu*.⁵³

By contrast, in *Clayton's Case*,⁵⁴ the court adopted a 'first in first out' method of determining who had a claim to a mixed fund. The first payments into the fund were also to be regarded as the first payments

⁵² P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 85.

⁵³ (1948) Ch 465, 539.

⁵⁴ *Clayton's Case: Devaynes v Noble* (1816) 1 Mer 529, 35 WE 781.

out of it. This is such a patently unfair method of determination that, despite the fact that it has been subsequently followed,⁵⁵ it is treated more as a rule of evidence to be adopted in want of anything better than as a strict rule of law.⁵⁶

The best-known case on wrongful mixtures is *In re Hallett's Estate*,⁵⁷ where the Court of Appeal again equated the position of the wrongful mixer of a bank account with the wrongful mixer of physical products. The explanation for the outcome of the case appears to be that, where A wrongfully mixes his money with that of B in a bank account, any monies drawn from that account should, in the absence of any clear evidence of intention to the contrary, first be treated as being the money contributed by the wrongdoer. The basis of this assumption is that, since A is entitled to withdraw his own money, this is what it should be assumed that he is doing.⁵⁸

That this is only a rule of evidence rather than a rule of law can be seen from the case of *James Roscoe (Bolton) Ltd v Winder*,⁵⁹ where the balance in the mixed account fell, at some stage, to below the level contributed by the innocent party. When more money was subsequently put into the account, the innocent party could not be heard to say that he had a claim to any money above the lowest level to which the account had fallen. It was clearly impossible that such money could be his, because he had made no contribution to the account after the

⁵⁵ *Pennell v Deffell* (1853) 4 De GM & G 372, 43 ER 551; *Barlow Clowes International v Vaughan* (1992) 4 All ER 322; *Charity Commission for England and Wales v Framjee* (2015) 1 WLR 16.

⁵⁶ *Russell-Cooke Trust Co v Prentis* (2002) EWCH 2227.

⁵⁷ (1880) 13 Ch D 696.

⁵⁸ *Ibid* 728.

⁵⁹ (1915) Ch 652.

account had fallen to the lowest level. Thus there was no evidential difficulty to solve.

By way of contrast, In *Re Oatway*,⁶⁰ A, in breach of his fiduciary duty, mixed his own money with that of B and purchased shares from the mixed fund. The court held that, since A was not entitled to withdraw the purchase money from the account, B could opt to adopt the transaction and take the shares rather than the money. This reasoning is diametrically opposite to that in *Hallett's Estate*. In that case the reasoning was that A should be taken to have acted in good faith by using his own money when he had sufficient in the balance to do so, whereas in *Oatway* the court seems to be saying that the trustee was liable for the new rights acquired with the trust fund because he had no entitlement to withdraw any funds at all.

These cases all describe rules designed to deal with a perceived evidential gap. Some may be thought of as being better, or fairer, than others, but they all suffer from the same basic flaw. There is no evidential gap to fill, because the gap supposedly consists of a lack of certainty as to which of the parties to the mixed account owns which item of money. But the question is illusory.

Suppose that A withdraws £40 from an account in which he has mixed money of his own with that of B and that with the £40 he purchases shares that subsequently turn out to be worth £1 million. The cases that we have looked at say that because there is an evidential difficulty as to who owns the £40 with which the shares were purchased, some formula or other must be devised to solve that difficulty. *Oatway*, for example, suggests that the £40 should be regarded as belonging to B

⁶⁰ (1903) 2 Ch 356.

and goes on to say that B can therefore assert his rights to that £40 in the shares purchased with it.

But *there is no evidential difficulty* to solve. A's actions have resulted in the rights that he had in respect of the balance in his account of £100 being destroyed and replaced by rights in respect of the new balance of £60 and the acquisition of title in the shares.

There may be very good reasons for allowing B a claim in such circumstances to the £40 or to the shares, or to either, depending upon his ability to exercise an option, but such a claim is in no way resultant from B's ability to claim any title to the £40 itself. We can make any decision we like about the scope of liability in such cases but they are normative decisions. They do not follow from the rules that we have adopted in respect of physical mixtures (which it should be noted are themselves normative decisions).

Following and Tracing.

There is little harm in distinguishing between following and tracing. Indeed, it is, analytically speaking, desirable to do so. However, it is important, when doing so, not to fall into the trap of thereby oversimplifying the following process and turning it into a simple matter of identification. It is not. Normative decisions abound in determining when following can and cannot take place. The fact that we have different following rules where the mixing of assets takes place as a result of wrongdoing from those pertaining when there has been no wrongdoing demonstrates this point. Moreover, the line between following and tracing can be a very thin one indeed. If continuing ownership explains proprietary interests in a mixture, then that is

obviously based on notions of following. However, if the mixture is to be treated as being subject to common ownership, then it is a substitute for the assets which make it up and is therefore dependent upon tracing rules. This is the same asset and the same factual circumstances. All that has changed is the explanation for the interests of the parties.⁶¹ Care needs to be taken, however, that the narrowness of the line between the two processes does not obscure the very different normative justifications for each of them. Failure to take such care can lead to this:

B steals A's corn which he converts to whiskey. A can recover the whiskey.

B steals A's corn, which he swaps for whiskey sold to him by C. Why can't A recover the whiskey?⁶²

which might be thought of as a good example of missing the point.

Following and Claiming.

Here, again, the starting point is that it does no particular harm to distinguish following from claiming, and that at a certain level the distinction is reasonably clear. Suppose that I can follow my bicycle though the hands of A into those of B, in whose garage I can now show that it resides. Of itself this says nothing about the rights that I have in the bicycle. If A has stolen the bicycle then I have a claim in conversion against both A and B. But what if I have left the bicycle with A and made it generally known that A is to be my agent for the disposal of the bicycle? If B purchase it but subsequently, for whatever reason, I have changed my mind about the sale, the identification of the bicycle in B's garage will not avail me. The transfer was made under an exception to

⁶¹ As we saw above that explanation is itself far from universally agreed.

⁶² M. Smith, 'The Vindication of an Owner's Rights to Intangible Property' (2013) 7 JIBFL 412.

the *nemo dat* rule and B has obtained whatever title that I had with respect to the bicycle. Merely following the bicycle says nothing about rights and claims.

But this analysis is not conclusive. It depends upon a neutral view of following that, as was explained above, is not easy to sustain. In our example we can, of course, say that in both cases I can follow the bicycle from A to B, but that in one instance I can make a claim in respect of it, whereas in the other I cannot. It could equally be said, however, that in the first case (the theft) I *can* follow the bicycle from A to B but in the latter case I *cannot*. If following is mere identification, then this way of expressing the matter is of course incorrect. But take the case of A stealing B's paint and attaching it to his canvas to produce a painting. We say that it is no longer possible to follow the paint because it has become in some way or another now at one with the canvas. But this is just not true in any sense other than a legal one. We can perfectly well identify the paint and scrape it off. Its molecular structure does not make it as one with the canvas. It is not that we cannot *physically* follow the paint, it is that we may not *legally* do so. Following constitutes a process which involves a series of legal rules whose only purpose is to enable the follower to make a claim (or deny him one) with respect to an asset. It is not a neutral, value free process and it is certainly not a synonym for identification.

So, what then of the supposed distinction? It may be that it is best expressed by saying that being able to follow an asset tells the follower that he may have some claim in respect of that asset, but not precisely what the claim is. When he no longer can sustain any claim then we can say that the following process has come to an end.

Finally, it should be mentioned that we are in this work, and in all works where this matter has been discussed, speaking of following in a legal context. No doubt all people are at liberty to idly 'follow' their asset (or indeed any asset) for no good reason, other than that they wish to do so. Such conceptions have no place in legal works. It is no aid to clarity of thinking to describe that process as following.

Conclusion.

Following is not, in most instances, a simple exercise in the location of assets. Most of our following cases involve a normative decision-making process. The purpose of the process is to determine who, legally, may be said to have title to an asset, or part of an asset. Considerations, such as wrongdoing, which have nothing to do with the question of physical identification, are taken into account when such determinations are made. Critically, for the remainder of this work, it was established in this chapter that money passing through bank accounts cannot be regarded as being analytically similar to the treatment of physical mixtures. Money in a bank account does not belong to any of the parties who have contributed to the balance on that account. It belongs to the bank.

Chapter 2. Tracing.

Introduction.

This chapter will be concerned with tracing and establishing what we mean when we talk of the process of tracing.

It has been said that tracing is about substitutions, and that the distinction between tracing and following is that following is about the identification of the same asset (or what is legally regarded as the same asset) as it moves through a variety of hands, whereas tracing is concerned with identifying assets, which are in, or have been through, the hands of the defendant and that may be regarded as substitutes for an asset which was originally in the hands of the claimant.¹

Having looked at following we now need to turn to a more detailed analysis and explanation of tracing. This will involve looking at exactly what it is that is supposed to be being traced, how the tracing process is said to work, and the rationale behind that process.

It is first necessary to define more precisely what we mean by the expression “tracing”. According to Lionel Smith:

Tracing identifies a new thing as the potential subject matter of a claim on the basis that it is the substitute for an original thing which was itself the subject matter of a claim.²

This is the exchange product theory of tracing, and represents the overwhelming orthodoxy on the subject. The substitute asset is the

¹ Perhaps the definitive expression of this position is set out in the opinion of Lord Millett in *Foskett v McKeown* (2001) AC 102, 128.

² L. Smith, *The Law of Tracing* (Clarendon Press 1997) 6.

product of the original asset, so that any rights that the claimant had in the original asset are transmitted to the substitute.

The heart of this work concerns common law claims to substitute assets which have been identified as substitutes by the process of tracing. The above definition makes no distinction between tracing at common law and tracing in equity.³

For the purposes of this work, tracing at common law will mean those instances where the claimant's rights in the original asset were legal rights and where the rights that he wishes to assert with respect to the substitute asset are also legal rights. The rights in the substitute that are being asserted can supposedly result in either proprietary claims or personal claims.

It is important to bear in mind the point that common law tracing involves the assertion of *legal* rights with respect to the substitute asset or as a consequence of the defendant having come into contact with the substitute asset. It is not the purpose of this work to cast any doubt on the notion that where the claimant can show a legal right in the original asset he can, if that asset was the subject of the breach of a fiduciary duty, claim an equitable right in any substitute.⁴ Indeed it will be suggested in Chapter 7 that the central purpose of tracing is to assist in

³ It is a matter of considerable disagreement as to whether there are separate rules for tracing at common law and in equity. The logic of the argument put forward in this work is that there is only one set of rules but for reasons very different to those normally set out by supporters of unitary tracing. In their view tracing is simply an identification process (not dissimilar to their understanding of following) and it makes no sense, therefore, to have separate sets of rules. One can either identify an asset as a substitute for another or one cannot. In this work it will be argued that tracing is not a process allowed at common law at all and therefore there is by definition only one set of tracing rules – those adopted by equity.

⁴ Although any claim will not, as will be shown, depend upon the claimant establishing that the one right is a substitute for the other.

the protection of the rights of beneficiaries from the results of breaches of fiduciary duties by defendants.⁵

It is important to know what it is that is supposed to be the subject matter of the tracing exercise. In the quotation from Smith cited above he uses the word “thing” as representing both the subject matter of a potential claim and also as the subject matter of an original claim. This does not tell us enough

To take an example, suppose A is the trustee of a bracelet for the benefit of B. A, in breach of trust, sells the bracelet for £100. Smith’s “things” here might be the bracelet and the £100, but for reasons explained below this seems unlikely. There it will be suggested that the “things” are the rights that B had in the bracelet and the rights that he is asserting in the £100, rather than the assets themselves. However, even this is only a starting point because, although it tells us what is the subject matter of the claim, rights, it does not tell us how B can establish that rights in the £100 represent substituted rights for those he had in the bracelet. It does not follow, without more argument, that just because B had rights in the bracelet he must have rights in the £100. There must be something that links the rights in the bracelet to the rights in the £100. That something will enable us to say that the one right can be regarded as a substitute for the other.

For the orthodox theory that something lies in the concept of value. What links the rights in the bracelet with the rights in the £100 is that A has utilised the value inherent in the rights in the bracelet to

⁵ See Chapter 7 below.

acquire his rights in the £100. Indeed, nothing else, according to orthodox theory, links the two sets of rights at all.⁶

It will be suggested that this is not a satisfactory answer. In fact, it is responsible for a vast amount of confusion about the nature of tracing.⁷ The metaphysical notion of tracing value from one asset to another obscures the fact that tracing, no less than following, is about the normative allocation of claims. Tracing value has the apparent effect of making a successful claim following the tracing exercise inevitable, - as if it is in the very nature of things. As will be shown this is not the case at all.

A consequence of the exchange product theory is that tracing is seen as an essentially transactional process. It requires the claimant to establish a direct link between his original asset and the asset which he asserts is the substitute through a continuous series of transactions.⁸ The claimant is also, according to some, required to show an unbroken chain of title between the original and the substitute assets.⁹ The usefulness of such a characterisation will be considered. At the end of this chapter we will have set up sufficient background to enable us to properly consider matters of tracing at common law.

⁶ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 120.

⁷ T. Cutts, 'Tracing, value and transactions' (2016) (79)3 MLR 381; C. Rotherham, *Proprietary Remedies in Context*, (Hart 2002) 89-126.

⁸ D. Hayton, 'Equity's Identification Rules' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 1. Arguably cases such as *Scott v Surman* (1742) Wiles 400, *Taylor v Plumer* (1815) 3 M & S 562, and *In re Hallett's Estate* 13 (1879) Ch D 696 adopt a transactional approach to tracing as well, although as will be seen later in this work there are complications with adopting such an argument. Cases such as *Relfo v Varsani* (2014) EWCA Civ 360 may suggest a movement away from a strict transactional approach. If we are to follow the analysis in these cases we cannot, however, retain the notion that tracing is about following a continuous stream of value.

⁹ A. Burrows, *The Law of Restitution*, (3rd edn, OUP 2010) 119.

Tracing and Rights.

In Smith's definition of tracing adopted above,¹⁰ the emphasis was on the identification of things as substitutes for other things. Birks's explanation of tracing also centred around this idea of tracing things. In *Unjust Enrichment*, Birks divided wealth into abstract wealth (which is a single fund representing a person's total wealth) and discrete wealth (which is the individual items that go to make up that total wealth).¹¹ Tracing is concerned, he said, with discrete wealth. It deals with situations where a claimant can show that one item of discrete wealth has been used to acquire another. Tracing differs from following because following is about the same asset moving from person to person, whereas tracing is about new assets not new people. This is the all-pervasive modern view of tracing. It is about determining whether the claimed thing is the substitute for, or product of, the original thing.¹²

At one level, this makes sense. If A steals B's orange and swaps it for C's apple it could conceivably be argued that B can show that the apple is the substituted product of the orange. It can also be said, however, that B can show that the rights that A has in the apple are the product of the rights that B had in the orange. That this is the more satisfactory way of looking at it can be seen if we give a more complicated example. Suppose that A transfers ownership of his bicycle to B by mistake, but retains possession of it. B transfers his ownership rights to C in exchange for the ownership rights to a bracelet. If tracing is

¹⁰ See text accompanying footnote 2.

¹¹ P. Birks, *Unjust Enrichment* (2nd ed Clarendon Press 2005) 69.

¹² *Agip (Africa) Ltd v Jackson* (1991) Ch 547; *Alumimum Industrie Vaassen BV v Romalpa Aluminium* (1976) 1 WLR 676; *Re Peachdart Ltd* (1984) Ch 131; *Borden (UK) Ltd v Scottish Timber* (1981) Ch 25.

about rights this still makes perfect sense. A can potentially show that B's title to the bracelet is the product of A's original title to the bicycle. What he cannot meaningfully do, however, is the same exercise with the things involved. A cannot argue that the bracelet itself (the "thing") has been acquired in substitution for the bicycle (the other "thing") since he has at all times retained possession of the bicycle. But it is lacking in principle to reject A's claim on the grounds that he has retained possession of the bicycle when he no longer has any rights in it.

Despite the constant references to things in our tracing literature it is suggested that in reality it is rights not things which are the context of tracing. There are dicta which implicitly recognise this to be the case and they must be correct. For example in *Clough Mill Ltd v Martin*,¹³ Robert Goff L.J. discussed the well-known retention of title case, *Romalpa Aluminium*.¹⁴ *Romalpa* was concerned with a claim that certain monies, which were held by a receiver, were the traceable proceeds of aluminum owned by Romalpa as a result of a retention of title clause in its contract of sale. According to his Lordship:

(Romalpa) was concerned with the question whether sellers of aluminum foil under contracts containing a Romalpa clause could trace their title into money which was the proceeds of sale by the buyers of aluminum foil supplied by the seller...the question...was considered on the basis that...title to the foil itself had been retained by the sellers.¹⁵

This does have one important implication. If we go back to the apple and orange example above, the exchange product theory would argue that B can sustain a claim to the apple in A's hands because the rights that A

¹³ (1985) 1 WLR 111.

¹⁴ (1976) 1 WLR 676.

¹⁵ (1985) 1 WLR 111, 114.

has in the apple can be traced from the rights that B had in the orange. The problem is that the rights are not the same. The rights that B can claim in the apple are only such rights as A possessed in the apple, which in turn are only the rights that C was able to pass to A. B's rights in the orange were his own rights. His rights in the apple are defeasible to anybody with a prior and better title than that with which C was able to provide A.¹⁶ This would suggest either that B cannot trace in such circumstances, or that his ability to trace is not dependent upon showing that the rights in the apple are the product of the rights in the orange.

Tracing Value.

We have established that tracing is concerned with connecting the rights in asset A with the rights in asset B. In other words, when we talk of tracing being about identifying one thing as the product of another it is rights, not things, that we are talking about.

But that does not tell us what it is that we trace – it merely identifies what we are tracing from and to.

It is common orthodoxy that what we trace is value. According to Birks:

Tracing is no more than the means of finding out where at any relevant moment value is located...there are two quite separate questions. One is whether the value in question can be located. The other is whether, once it has been located a right of some kind may be exigible in respect of it.¹⁷

Lionel Smith says that:

The only connection which the plaintiff has to the new asset is that it was acquired with the old asset. The defendant acquired the value inherent in the new asset with the value inherent in the old asset. That is why we say that we

¹⁶ C may himself have stolen the apple for example, in which case B's rights to it are defeasible to those of the person from whom C stole it.

¹⁷ P. Birks, 'Mixing and Tracing' (1992) 45(2) CLP 69.

trace value: it is the only constant that exists before, through and after the substitution through which we trace.¹⁸

This is the orthodox position on tracing. It is a transactional process in which we start with the value inherent in the original asset and we then follow that value as it moves from asset to asset in a continuous stream. Moreover, it appears that at each stage of the tracing process the claimant must show that he has title to the asset in which the value adheres immediately prior to the substitution.

Thus, according to Burrows:

If C pays D £1000 by mistake and D exchanges the £1000 for a lottery ticket, which wins her £100,000, C can trace to the £100,000 but he will have no personal or proprietary rights to that substitute property of £100,000 unless he can establish that the £1,000 “belonged to” C in D’s hands prior to the substitution.¹⁹

This leaves open the question of what exactly is meant by value?

Unfortunately, proponents of the view that we trace value through a series of transactions have given us little idea of what they mean when they say that we trace value.

In what follows, various possibilities are considered and rejected.

Exchange Value

A layman thinks of the value of an asset in terms of how much money he would receive for its disposal. If I ask somebody what value he attributes to his house, he will probably tell me the figure that the estate agent put on it or the figure which a buyer and a seller would reach in order for a

¹⁸ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 119.

¹⁹ A. Burrows, *The Law of Restitution*, (3rd edn OUP 2010) 119. Burrows adheres to a strict distinction between tracing and claiming which it is suggested at above may not be correct.

sale of the house to take place between the two. He would also probably recognise that the value changes for reasons entirely extrinsic to the bricks and mortar themselves. So, if he were in deep financial distress and the house was being repossessed, he might well agree that the value of his house had gone down because a prospective buyer would probably no longer need to pay as much for it. Value in this sense is a measure, calculated in money terms, of the exchange value of an asset.

It is unlikely, however, that this is the meaning that is attributed to the term value in a tracing context. For example, there is no suggestion that, if A, having misappropriated £100 of trust assets, were somehow to exchange that £100 for an aeroplane, the beneficiary of the trust would be restricted to tracing into a part of the aeroplane worth £100. On the contrary in *Jones v Jones*,²⁰ after committing an act of bankruptcy, but before the presentation of the petition, the firm of FC Jones transferred money from its bank account to that of Mrs Jones, a wife of one of the partners. By the rules of the bankruptcy code then in place,²¹ once the petition had been presented the date of the bankruptcy related back to the date of the act of bankruptcy. From that date all assets of the bankrupt's estate belonged to the trustee. This meant that the money transferred from the firm's bank account to that of Mrs Jones belonged in law to the trustee. Mrs Jones successfully invested that money, amounting to £11,700, in potato futures. As a result she made a profit of £50,760. The Court of Appeal upheld the proprietary claim of the trustee to the rights in this entire sum of money.

²⁰ *Jones v Trustee of FC Jones & Sons* (1997) Ch 159.

²¹ Bankruptcy Act 1914, ss37-38.

Evidently, therefore, value does not mean exchange value. The relative values of the original and substitute rights are irrelevant.

In any case the notion of exchange value is a description of what an asset can realise, not what the asset possesses. Because of this it makes very little sense to conceive of exchange value somehow moving from one asset to another.

Value as Wealth

Possibly, the value that it is said that we trace from one right to another is represented by the change in the abstract wealth of the two parties as a result of a transaction. Again, this meaning of value corresponds with a common-sense notion of the word. If I buy your house, which has a market value of £500,000, for £400,000, it might not be inappropriate to say that as a result of the transaction my wealth has increased by £100,000 and that £100,000 of value has moved from you to me.

Again, however, it seems unlikely that this is the meaning of value when we speak of tracing value. Suppose that A mistakenly transfers an asset worth £100 to B for £50 cash. It is easy to see that value has moved from A to B. A's net worth has gone down £50 and B's has gone up by the same amount. But this is not the only way in which value can be regarded as moving from A to B. It is not necessary, in order for there to be a movement in value from the one to the other, for there to be an identifiable transaction between the two. Suppose instead that A mistakenly transferred an asset worth £100 to C for £50 cash and C, thinking that he had a bargain, wrote out a cheque to his nephew B for £50 from his savings account. The outcome of this process is the same as in the previous example. A is £50 worse off and B is £50 better off. There

has been a movement of wealth and it may not be unreasonable to describe it as having been from A to B. However, in the latter case the transactional theory of tracing does not permit the movement in value from A to B to support a claim even though the overall effect is the same – the movement of wealth from A to B of £50.²² B's rights in the £50 did not arise as a result of any transaction with A.

In any case *Foskett v McKeown*,²³ seems to stand in the way of the understanding of value as movements in wealth. In that case one Murphy took out a life assurance policy to the value of £1 million, the premiums for which were £22,000 per annum. The benefit of the policy was assigned to Murphy's children, the defendants. The first three premiums were paid from Murphy's own resources. It was uncertain where the next premium payment came from but the next two were removed from an account of which Murphy was the trustee for the benefit of the claimants. Murphy committed suicide and the policy paid out the proceeds to the defendants.

It was found, as a matter of fact, that because of the particular nature of the policy, the defendants would have received the same amount of money from it even if the two premiums that were paid as a result of Murphy's breach of trust had never been paid.

Despite this fact the claimants succeeded in a claim not just to the return of the premiums, but to a proportionate share of the policy pay out. They were permitted to trace from the rights that they held in the monies in the trust bank account into the rights that that money

²² *OJSC OIL Co Yuganreft v Abramovich* (2008) EWHC 2613.

²³ (2001) 1 AC 102.

acquired in the life policy, and then to follow those rights into the hands of the defendants.

This is not compatible with treating value as an increase in wealth. The premiums paid from the trust account contributed nothing towards increasing the net worth of the defendants. Lord Millett was not in the slightest concerned by this fact:

The question is one of attribution not causation. The question is not whether the same death benefit would have been payable if the last premium or the last few premiums had not been paid. It is whether the death benefit is attributable to all of the premiums or only to some of them. The answer is that death benefit is attributable to all of them because it represents the proceeds of realising the policy, and the policy in turn represents the product of all of the premiums.²⁴

It is not at all certain what is meant by saying that “the policy represents the product of all of the premiums” but the overall effect is clear.²⁵ Tracing value requires the claimant to show that he has rights in asset B because those rights are a substitute for rights that he previously held in asset A, but he does not have to show that the defendant has made any profit out of the transaction that has produced the substitution of those rights.

²⁴ (2001) 1 AC 102, 137.

²⁵ In giving his opinion Lord Millett appeared to treat the policy as an asset for which the purchase money was an, at the time, unknown number of premium installments. He emphasized the point that a life policy was not made up of a series of annual renewals but existed as a continuing entity to be paid for annually. The problem with this analysis is that if it is correct then the premiums paid for with monies from the trust accounts did not play any part in the purchase of the policy and so it should not have been possible to trace from the rights that the trust beneficiaries had in the trust funds into the rights associated with the policy. The one did not pay for the other. All that the premiums did was to help pay the debt associated with the purchase of an asset *that had already been purchased*. For an examination of the validity of this process (known as backward tracing) see M. Conaglen, ‘Difficulties With Tracing Backwards’ (2011) LQR 432.

The problem therefore remains of understanding what the term value means in the context of tracing value.

Value as Exchange-Potential.

A third possibility that has been suggested is that value means exchange-potential.²⁶ Unlike exchange-value, exchange-potential does not relate to a particular amount of money. Instead it refers to the potential that an asset has to realise *any* amount of money. So, if A steals B's apple and then exchanges that apple for an orange then we can say that the rights that A has in the orange are the traceable substitute for the rights that B had in the apple and that what connects those rights (i.e. what it is that can be traced) is the fact that A has acquired the exchange potential (the value) of the orange by exploiting the exchange potential of the apple.

The first problem with this potential solution to the problem of the meaning of value is that it does not seem to be what the users of the term value have in mind. Thus, according to Lionel Smith:

If a £100 banknote is used to buy a painting, then the value inherent in ownership of the banknote is traceable into ownership of the painting. Ownership of the painting might be, or might become, worth £10 or £100. This does not change the conclusion that this asset was acquired with the other; the seller transferred ownership of the painting in exchange for receiving ownership of the banknote. This is what is meant by the notion that it is value which is traced from the first asset into the second.²⁷

There is nothing here which supports the idea that Smith believes that value means exchange potential. In fact, there is no clue as to what he believes value means at all. He certainly says that it does not mean

²⁶ See T. Cutts, 'Tracing, value and transactions' (2016) (79)3 MLR 381.

²⁷ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 16-17.

exchange value, but that is all that he says. If anything, what Smith seems to be suggesting is that we trace are ownership rights, but that would leave us with the curious situation in which we say that when we trace we seek to show that A's rights in one asset are a substitute for his rights in another asset, and also that what we trace are those same rights. This tells us very little that we did not know already and certainly does not help us to determine how we can tell that an *exchange* of rights has taken place. Smith pays lip-service to the notion of value, but having done so, that notion does no more work until the last sentence, when it reappears as a conclusion supported by nothing that has preceded it. According to Birks:

The exercise invariably begins from a point at which it was undoubtedly the case that a certain number of units of value, measurable in money but not necessarily in the form of money, were held by a particular person, and the exercise aims to discover whether all of those units of value can be said to have passed into other assets so that they, the original units of value, are held by the defendant in those assets.²⁸

As with Smith, Birks does not furnish us with any explanation about what he means by the term value. But he is unlikely to be thinking of exchange potential because he insists that the units of value that we trace are measurable in money. Exchange potential is not measurable in money. In order to be measurable in money, the exchange potential in an asset has to be realised via an actual exchange, at which point it is no longer exchange potential at all. But once the exchange potential is realised it must be as either the actual value of the exchange or as a causative increase in wealth. We have already seen, however, that for the purposes of tracing, value cannot mean either of these.

²⁸ P. Birks, 'Persistent Problems in Misdirected Money: A Quintet' (1993) LMCLQ 218.

This is the central problem with the idea of value as exchange potential. Even more than exchange value or wealth accretion, exchange potential is obviously a metaphorical description. Exchange value cannot move from one asset to another as a result of a transaction. It merely describes a quality of an individual asset, or more specifically in our examples, of a right.

Another problem with the notion of value as exchange-potential is the idea that all assets have exchange potential. Suppose that it becomes unlawful to buy or sell apples. A holds some apples in trust for B which he, unlawfully, exchanges for oranges with C. Does the exchange product theory not allow B to trace into the oranges? The apples have no exchange potential²⁹ at all since one of the rights of ownership of the apples is no longer the right to exchange them. B cannot therefore trace the exchange potential of his apples into the exchange potential of the orange.

[Improvements to Assets.](#)

The confusion that is caused by treating tracing as involving the location of value can be exemplified by looking at those situations where there has been an improvement in the exchange value of an asset in the defendant's hands. *Re Diplock*,³⁰ was such a case. In this case executors of an estate mistakenly paid monies to certain charities, some of which was used to improve the quality of those charities land and buildings. Although many of the resultant claims were purely personal, certain proprietary claims were made with respect to those improvements, which were denied because the Court of Appeal held that once the

²⁹ At least they have no lawful exchange potential.

³⁰ (1948) Ch 465.

money was spent on the improvements the claimants could no longer trace into it. Smith thinks that this is wrong because the value that is being traced can be shown to be present in the enhanced asset and that enhancement can only be attributed to that value.³¹

But this completely contradicts the orthodox position³² that tracing is about substitutions. Smith's analysis concerns exchange value but we know from Smith himself, and from *Foskett v McKeown*,³³ that increases in exchange value are supposedly irrelevant to the capacity to trace. The inability of orthodox theorists to properly explain what they mean by tracing value is the cause of great problems in understanding their analysis of tracing.

Tracing Through Transactions.

As has been said above, the orthodox theory of tracing states not only that what we trace is value but also that we trace a constant stream of value through a series of direct substitutions, and that tracing comes to an end where it is no longer possible to identify such a substitution.

Moreover, according to Burrows:

the claimant must establish that it had (legal or equitable) title to the property in the substituting persons hands immediately prior to the substitution.³⁴

The courts have, perhaps, not been quite so emphatic on the latter point but their general position is not in doubt. In *OJSC OIL Co v Abramovich*,³⁵

Christopher Clarke J said:

³¹ L. Smith *The Law of Tracing* (Clarendon Press 1997) 241.

³² Clearly supported, indeed if not invented, by Smith.

³³ (2001) 1 AC 102.

³⁴ A. Burrows, *The Law of Restitution*, (3rd edn OUP 2010) 119.

³⁵ (2008) EWHC 2613 (Comm).

In order to be successfully able to trace property it is necessary for the claimant, firstly, to identify property of his, which has been unlawfully taken from him (“a proprietary base”); secondly, that that property has been used to acquire some other new identifiable property. The new property may then have been used to acquire another identifiable asset (“a series of transactional links”). Thirdly the chain of substitutes must be unbroken.

Even if this idea of tracing by direct substitution can be made to work when we are speaking of apples and oranges, unsurprisingly, most of our tracing cases do not involve apples and oranges or even bicycles and bracelets. They concern money, and more specifically, they concern money being transferred in and out of one, or more, bank accounts.

We saw in Chapter 1 difficulties that monies passing through bank accounts creates for the orthodox view on following. Bank accounts are not repositories of the property of the account holder. They are merely the evidence of a debtor/creditor relationship between the bank and the account holder. As a result, if A puts B’s money into his bank account and then purchases a car utilising the balance on that account it cannot be said that he has used B’s money to purchase the car. For the orthodox theory, the basis of tracing involves the claimant showing that there has been a continuous stream of value which connects the rights in one asset to the rights in its substitute, and that that stream of value must be identified via a series of direct substitutions. But everything that has been said about the difficulties of following money out of a bank account applies to tracing as well. In fact, tracing and following out of a bank account would appear to be the same thing.

The solution to this problem has been the adoption of the idea that where bank accounts are involved in the tracing process, instead of

the need to show a series of direct substitutions, the claimant must show one or more transactional links.³⁶

This is illustrated by the case of *Relfo v Varsani*.³⁷ The basic facts of the case were that a Mr Gorecia, a director of Relfo Ltd, in breach of his fiduciary duty to that company caused it to pay \$890,050 to Mirren Ltd. The next day a company called Intertrade Group LLC paid the sum of \$878,479 to the bank account of a Mr Varsani.

The argument of the claimant, the liquidator of Relfo, was that the transactions were linked, and part of an overall scheme to benefit Mr Varsani who was a friend and colleague of Mr Gorecia. In the Court of Appeal Arden LJ acknowledged that:

At trial Relfo accepted that it could not point to specific transactions passing between the Mirren and Intertrade accounts to show how the Relfo/ Mirren payment was translated into the Intertrade payment which went to Mr Bhimji Varsani's account with Citibank Singapore. Mirren and Intertrade could have had other accounts.

On the face of it that, at least according to the orthodox account of tracing, should have been the end of the matter. There seems no way of reconciling liability in this case with the need for direct substitutions.

However, that was not the end of the matter. Both the court of first instance and the Court of Appeal found for the claimant. They did this by establishing a transactional link between the rights that Relfo had in the initial money and the rights that Mr Varsani had in the proceeds of the Intertrade payment.

³⁶ See the dicta of Christopher Clarke J in *OJSC OIL Co v Abramovich* in the text accompanying note 35 above.

³⁷ (2014) EWCA Civ 360.

It has been convincingly suggested that this is a proper course to adopt.³⁸ Nevertheless we must be clear about the purpose of a search for a transactional link. The notion of a transactional link is a replacement for the supposed need to demonstrate direct substitutions. It is not an indirect way of establishing that such substitutions have taken place. Having established a connection between the rights that the claimant had in an original asset and the rights that a defendant has in a substitute asset by the process of establishing a transactional link, it is not then correct to proceed as if there had been a series of direct substitutions all along. The effect of establishing a transactional link is to show that the claimant has some sort of claim in respect of the defendant's rights in the substitute. It does not show that the claimant's rights in the substitute are the product of his own rights in the original. A transactional link is an evidential step designed to overcome the problem that in cases such as *Relfo v Vrsani* there is no other way of showing any connection between the various payments. It says nothing about what rights the claimant may then assert in the substitute.

Because of the relative dearth of cases dealing with the notion of a transactional link in the specific context of substitute assets, what facts are necessary to establish that link is uncertain, but the best view is that it is shown by demonstrating that such a link was the intention of the parties involved.³⁹ The parties' intention was that one, or more, of a series of transactions would result in a given outcome.⁴⁰ Thus, in *Relfo v*

³⁸ T. Cutts, 'Tracing, value and transactions' (2016) 79(3) MLR 381.

³⁹ *Ibid.*

⁴⁰ The principle that the intention of the parties determines the nature of transactions between them is a common one in English law. It applies in the law of contract (see *Chitty on Contract* (32nd edn On-Line Version) Para 14-001; company

Varsani it could be argued that it was the intention of Mr Gorecia, in causing Relfo to pay Mirren, that this would result in Intertrade paying Mr Varsani. This in itself would be sufficient to establish the necessary transactional link.

This certainly appears to have been the approach adopted at first instance, where Sales J said that:

It is a fair inference that the Intertrade payment was the product of a series of transactions between a number of entities and across a number of bank accounts designed to produce the result that funds paid in the Relfo/ Mirren payment were...paid to Bhimji Varsani.⁴¹

Unfortunately, when the case reached the Court of Appeal, in dismissing Varsani's appeal, Lady Justice Arden said:

I accept Mr Salter's submission that Mr Gorecia's intention would not be enough in itself to make the Intertrade payment substitute property for the purposes of the tracing rules. However intention can be a relevant factor in the basket of factors from which a judge may draw an inference that it is in fact a substitution.⁴²

Her Ladyship was now faced with the need to reconcile the irreconcilable. The *only* thing that can possibly link the transactions was the intentions of the parties. Absent such an intention the transactions have no connection at all. Her Ladyship went on to identify various factors which, in her opinion, strongly suggested a link between the transactions, such as the previous dealings between the parties, the relationships between them, and a number of other similar matters, but these factors cannot link the transactions themselves. Links require

law (*In re George Inglefield* (1993) Ch 1 19); land law (*Antoniades v Villiers* ((1998) 3 WLR 1205) and, perhaps most notoriously, in tax law (*Ramsay v IRC* (1982) AC 300).

⁴¹ *Relfo v Varsani* (2012) EWHC 2168.

⁴² (2014) EWCA Civ 360.

something to forge themselves into a chain. That something in this case is the intentions of the parties. The factors put forward by Her Ladyship are merely strong evidence supporting the proposition that it was the intention of the parties that the transactions should be linked.

By saying that various factors may be put together to allow a judge to draw an inference that there has been a substitution, Lady Justice Arden appears to be conflating direct substitutions with transactional links. A transactional link does not allow a judge to draw an inference that there has been a substitution. It cannot, because there has not been one. It merely allows the judge to treat the facts as if there had been one.

It is suggested that it would be far easier to understand tracing if the metaphorical notions of tracing value through direct substitutions were abandoned completely. The decision in *Relso v Varsani* seems the correct one, but it is inexplicable in terms of the orthodox analysis. Trying to make it fit into that analysis distorts our entire understanding of tracing.

A similar factual pattern, albeit a more complicated one, occurred in *El-Ajou v Dollar Land Holdings Ltd.*⁴³ The question in that case was whether it could be inferred that certain monies, used to carry out a joint-venture property development in London, represented the product of a sophisticated fraud carried out using bank accounts in Geneva and Panama. Millett J held that they could “only just” be held to do so. The crucial factors appear to have been the similarities between the sums transferred from account to account and the lack of an obvious alternative source for the funds.

⁴³ (1993) 3 All ER 717.

Again, it is not suggested that the outcome was wrong. But it has nothing to do with the exchange product theory of tracing. Rights in one asset had not been substituted for rights in another in a direct unbroken chain. The transactional link, as described by Millett J, is a fiction designed to overcome the problem that the orthodox version of tracing cannot accommodate cases such as this. Millett J was no doubt correct in saying that there was no other potential source of funds available to the fraudster. This certainly suggests that the original source was the claimant's money. But the orthodox theory of tracing is not about the original source of the money; it is about substitutions. Tracing is not about showing what the original source of the money may or may not have been. In fact, according to Millett J's formulation there is no tracing involved at all. He is merely saying that on the balance of probabilities the funds for the development were obtained at the expense of (we do not even need to use the expression "were a product of") the claimants. It is a holistic exercise looking at the facts of the case as a whole; it has nothing to do with movements of value or substitute assets.

If we accept that it is the intention of the parties that forms the basis of the link it is far easier to see how the link between the assets can be forged. The entire series of transactions is *one transaction*. Both Millett J and Lady Justice Arden viewed the test for the existence of a transactional link as being whether it is a fair inference to be drawn on the balance of the evidence. This is unsatisfactory and, at least in the case of *El-Ajou*, apparently, very nearly produced a completely different outcome, since Millett J clearly believed that the test was only just satisfied in that case.

Tracing and Credit.

Understanding transactional links as the product of the parties' intentions also helps in the analysis of another well-known problem faced by orthodox tracing analysis, namely issues involving credit.

Suppose that B purchases a motor car for £500, the payment to be made in 30 days. During the course of those 30 days B misappropriates trust monies into his bank account and from that account pays for the car. Orthodox tracing analysis cannot deal with this situation very well because title to the motor car passed at the moment that the contract was made. Even if it can be shown that it was trust money that was paid to the car dealer, tracing into the car would not be possible because the trust money was used to pay off the debt owing to the dealer, not to purchase the car. Payment of a debt merely results in the debtor being freed from an obligation. There is nothing to trace into as a result of such a transaction.⁴⁴

In fact, our cases seem divided on whether this process, known as backward tracing, is possible.⁴⁵ Even where they accept that possibility it comes largely without analysis. Very often the question of whether a case involves backward tracing or not depends upon how the factual nexus of the case is understood. Thus, as Penner has pointed out,⁴⁶

⁴⁴ See M. Conaglen, 'Difficulties With Tracing Backwards' (2011) LQR 432.

⁴⁵ Possibly in favour are *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) AC 669; *In re Diplock* (1948) Ch 665; *Agip (Africa) Ltd v Jackson* (1991) Ch 547; *Law Society v Haider* (2003) EWHC 2486 (Ch). Conceivably against are *Serious Fraud Office v Lexi* (2009) 1 Cr.App.R 23; *Re BA Peters plc (In Administration)* (2008) EWHC 2205 (Ch); *Denton v Davies* (1812) 18 Ves Jr 499, 34 ER 406.

⁴⁶ J. Penner, 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 306, 320-322.

Foskett v McKeown,⁴⁷ when properly understood, is a backward tracing case, although Lord Millett did not seem to see it as such. Once his Lordship had explained that premiums for a life insurance policy do not pay for annual renewals of that policy, but effectively represent instalments (although, unusually, of an unknown number) for a purchase already made, it inevitably followed that the premiums paid with the misappropriated monies were merely paid to reduce a debt, rather than to pay for the policy itself. Burrows' explanation, that the tracing process went from the misappropriated premiums straight into the monies paid out to the beneficiaries, cannot be correct. The premiums did not result in the beneficiaries receiving any money. This resulted from the realisation of the life policy. Burrows has missed a transactional step. On the orthodox approach this is impermissible.

Smith's attempt to explain backward tracing is little better. In the example of a car purchased on credit, he says, quite correctly, that in the hands of the seller rights in the debt created are the traceable substitute of the rights that the seller had in the car, and the rights to the money that he receives from the settlement of the debt are the traceable substitute of the debt. His mistake is to conceptualise the position of the buyer as a mirror image of the position of the seller. When the buyer purchases the car with credit, the credit is not an asset in his hands, but a liability. All that happens when the buyer pays the seller is that the liability is expunged. There is no movement of value, that can be traced from one asset through to another. Smith's explanation only works on the basis that tracing is concerned with causative increases in wealth. Such a belief, however, would be in sharp distinction to the rest of

⁴⁷ (2001) 1 AC 102.

Smith's work which explains tracing as based on the pursuit of value through immediate substitutions.

A better way of explaining backward tracing is by identifying a transactional link dependent on the intention of the parties.

This accords with the general approach of the law to the effects of transactions concerned with the passage of property. In the above example it could be said that tracing is possible from the misappropriation of the beneficiaries money, through the payment of the debt and into the car because it was the intention of the buyer of the car to pay for it using trust monies. This intention forms the necessary transactional link that allows us to ignore that, in form, the claimant is seeking to trace through a debt. Support for this approach comes from the decision of the Privy Council in *Federal Republic of Brazil v Durant*.⁴⁸ The Court rejected Smith's argument that money used to pay a debt can in principle be traced into whatever was acquired in return for that debt, on the grounds that:

It would take the doctrine of tracing far beyond its limits in the case law today (and)...as a statement of general application the Board would reject it.⁴⁹

However, the Privy Council clearly thought that backward tracing could be applicable in certain instances. It can occur where:

The claimant establish(es) a co-ordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim (sic), looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund . This is likely to depend on inference from the proved facts.⁵⁰

⁴⁸ (2016) AC 297.

⁴⁹ Ibid 311.

⁵⁰ Ibid 313.

Earlier the court had said that:

A court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect...if the court is satisfied that the various steps are part of a co-ordinated scheme.⁵¹

The words “true overall purpose” can hardly refer to anything other than the intention of the parties to the transaction.

Tracing as a Normative Exercise.

The above analysis has made it clear that tracing cannot be conceived of as a process of identifying rights in substitute assets by following them through a series of transactions.

In fact, tracing is, like following, a normative exercise in the allocation of claims. This was made clear by the Supreme Court of Jersey in *Federal Republic of Brazil v Durant International Corp*,⁵² where the court said:

The starting point is to recognise the true nature of the exercise with which the court is engaged when it is asked to trace a plaintiff’s property [It] is being asked to identify an asset which represents the plaintiff’s property, in other words, an asset which is not in reality the plaintiff’s original property but one which the law is prepared to treat as a ‘substitute’ for the original. That being the true nature of the process, ... the court is liable to be making an evaluative judgment ... [and] is accordingly making a policy choice as to whether the law is prepared to recognise one asset as representing, or as a substitute for, another on the particular facts of the case in hand.

There is no suggestion here of tracing value through transactions. The court is simply asking itself when it would be right to treat one asset as a substitute for another. It is “making a policy choice”. This approach was

⁵¹ Ibid 312.

⁵² (2013) JCA 71.

supported when *Durant* came to the Privy Council,⁵³ as the above two quotations from the judgment of the Board make clear.

If further confirmation that tracing is a normative exercise is needed it can come, perhaps surprisingly, from Peter Birks. Speaking of situations where the price of an original asset is placed into a mixed bank account, from which another asset is subsequently purchased, he says:

There is no natural way of saying which debit is represented by which credit. That being so, there is no natural answer to the question whether the second asset was bought with the price of the first...this kind of problem has led to the introduction of artificial rules whose purpose is to prevent the defendant from having a wholly fortuitous defence.⁵⁴

Later, he says:

When evidential difficulties have been created by a wrongdoer the resulting impasse can legitimately be resolved against the interest of the wrongdoer...where a trustee pays trust money into his own account, and then draws on the account and dissipates some of the money, the beneficiary can insist that what is left is the trust money.⁵⁵

Both of these statements are absolutely correct. But they have nothing to do with tracing as following value through a series of transactions, and everything to do with it being a series of normative decisions as to who should have the benefit of a claim.

Tracing and Claiming.

It is not entirely certain exactly who was the originator of the notion that there is a distinction of significance to be drawn between the processes

⁵³ *Federal Republic of Brazil and Another v Durant International Corp and Another* (2016) AC 297.

⁵⁴ P. Birks, *Unjust Enrichment* (2nd edn OUP 2005) 199.

⁵⁵ *Ibid* 201.

of tracing and claiming. Peter Birks referred to it in an essay in 1991,⁵⁶ and Millett L.J. insisted on the importance of the distinction in *Boscawen v Bajwa*,⁵⁷ in 1996. Birks returned to the theme in 1997,⁵⁸ but it is Lionel Smith who is generally credited with demonstrating its centrality to the orthodox theory of tracing,⁵⁹ and Smith's work has subsequently been cited with approval on many occasions.⁶⁰ Eoin O'Dell went so far as to describe it as a "truly powerful insight."⁶¹ In *Foskett v McKeown*,⁶² Lord Millett said:

Tracing is thus neither a claim nor a remedy. It is merely the process by which the claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property...but it does not affect or establish his claim.⁶³

Whilst it is possible to accept the existence of such a distinction, it is critical that its importance is not overstated. If treated as an analytical tool, enabling us to see more clearly how, and why, tracing operates, it

⁵⁶ P. Birks, "Overview: Tracing, claiming and defences" in P. Birks (ed) *Laundering and Tracing* (Clarendon Press 1995) 289.

⁵⁷ (1996) 1 WLR 328, 335.

⁵⁸ P. Birks, 'On Taking Seriously the difference Between Tracing and Claiming' (1997) 11(1) TLI 1.

⁵⁹ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 10-15.

⁶⁰ For example, P. Birks, 'On Taking Seriously the Difference Between Tracing and Claiming' (1997) 11 TLI 2; E. O'Dell, 'Tracing' (1999) 21 Dublin University Law Journal 131; A. Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) LQR 412, 423; R. Chambers 'Tracing and Unjust Enrichment' in J. Neyers, M. McInnes and S. Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) 263; K. Turek, 'Proprietary Remedies for Unjust Enrichment: An Impossibility?' (2009) 5 CSLR 158; *Foskett v McKeown* (2001) 1 AC 102, 128.

⁶¹ E. O'Dell, 'Tracing' (1999) 21 Dublin University Law Journal 131.

⁶² *Foskett v McKeown* (2001) 1 AC 102.

⁶³ *Ibid* 128.

can serve a useful purpose. Clearly the identification of a substitute asset says nothing, in itself, about what claim, if any, the claimant may have to that substitute. To that extent, therefore, the distinction is evident. Where it is necessary to take care, is in allowing this analytical distinction to become the basis of conclusions concerning the nature of the substantive law.

Unfortunately, this is what has occurred. Starting from the underlying premise that tracing is an entirely neutral, evidential, process,⁶⁴ orthodox theorists have used the tracing/claiming dichotomy to argue that there can only be one set of rules for tracing, an argument which will be addressed in the next section, and that those rules may be invoked by any claimant who wishes to do so, an argument that will be looked at in both Parts 2 and 3 of this work.

The problem facing the orthodox approach is that the underlying premise is itself questionable. Tracing is not a neutral process of identification. Tracing, as we have seen, is not a simple process of following value from one asset to another. Tracing is a normative exercise in the allocation of claims. Since this is the case, it is not at all absurd, as orthodox theorists maintain, to say that it may only be undertaken given certain circumstances, which will themselves inevitably be related to the underlying normative purpose of the tracing rules. In fact, such absurdity as there is in the argument goes the other way. It is the cumulative argument of Parts 2 and 3 of this work that, when properly understood, claims to substitute assets may only be made against defendants who stood in a fiduciary relationship to the

⁶⁴ P. Birks, 'The Necessity of a Unitary Law of Tracing' in R. Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode*, (Clarendon Press 1997) 239, 243.

claimant with respect to the original asset. It would be ridiculous to say that the law adopts rules for the identification of a substitute asset, where it is inevitable from the outset that no claim can be made in respect of that substitute. Smith seems to agree with this principle:

Tracing identifies a new thing as the potential subject matter of a claim on the basis that it is the substitute for an original thing which was itself the subject matter of a claim.⁶⁵

He recognises the point that tracing is an exercise related to a potential claim. It would seem to follow that if there is no potential claim there is no right to trace. It is thus correct to say, if the argument of this work is accepted, that it is not possible to trace, either at common law or in equity, against a non-fiduciary defendant. It is true that, even where a fiduciary is the defendant it is useful to bear in mind that the mere identification of a substitute asset says nothing about any claim that the claimant may have, but this is not at all the same thing as saying that, because tracing and claiming are entirely separate exercises, tracing may be commenced against any person at any time.

It is important, however, to stress that even as an analytical tool, the distinction is not without its difficulties, and is by no means accepted by all commentators.⁶⁶ It is the case that the mere identification of a substitute asset says nothing about any claim that may be made with respect to it. Putting the matter this way emphasises the distinction between the two processes. However, it is equally true that in order to make a claim with respect to a substitute asset it is first necessary to identify it. This way of putting the matter is far more suggestive of a

⁶⁵ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 6.

⁶⁶ C. Rotherham, *Proprietary Remedies in Context* (Hart 2002) 91.

single process divided into separate stages, than of the carrying out of two completely separate processes.

Tracing and claiming may be different exercises but they are inextricably linked by the fact that tracing can only take place where a claim is potentially available. Where no such claim is potentially available it is pointless to say that tracing can take place.

It is important to understand that it is the potential to make the claim rather than the actual right to do so in an individual instance that is critical. It may well be the case that a claim to a substitute asset in the hands of a defaulting fiduciary fails for some reason. This does not call into question, however, the right to trace against that fiduciary. The potential to make the claim existed if the substitute asset could be identified. But claims at common law and claims against non-fiduciaries can never succeed. There is no potential claim, and thus no right to trace.

It therefore makes perfect sense to say that the common law has no rules relating to tracing at all, and that equitable tracing requires the pre-existence of a fiduciary relationship between claimant and defendant. A conclusion on the supposed dichotomy between tracing and claiming would therefore be that whilst it is used merely as an analytical tool it possibly has some uses, but it cannot be used as the basis for conclusions on the substantive law itself. More particularly, it cannot be used to justify either the proposition that there cannot be different rules for tracing at common law and in equity, or the one that tracing in equity does not require the pre-existence of a fiduciary relationship. Far from being a powerful insight the dichotomy between tracing and claiming is a minor addition to our understanding of the role

of tracing in ensuring that fiduciaries acquire no rights in the course of the performance of their fiduciary duties.

Tracing at Law and in Equity.

There is much discussion concerning the question of whether there is a distinction to be drawn between the rules of tracing at common law and in equity. The weight of authority currently suggests that such a distinction does exist. This position was summed up by Rimer J in *Shalson v Russow*.⁶⁷

There have traditionally been differences as to the rules applicable to tracing at common law and in equity. The common law did not permit tracing into a mixed fund, whereas equity did, although it has long been regarded as a precondition to tracing in equity “that there must be a fiduciary relationship which calls the equitable jurisdiction into being”: *Agip (Africa) Ltd v Jackson* (1991) Ch 547, 566H, PER Fox L.J. This difference has been criticised. Lord Millett voiced his disagreement with it in *Foskett v Mckeown* (2001) 1 AC 102, 128, 129, and in his dissenting speech Lord Steyn, at p 113, expressed similar sentiments. Mr Smith submitted that I should regard *Foskett v Mckeown* as deciding that there is no longer any difference between the common law and equitable rules of tracing and in particular no need to identify a fiduciary relationship as a precondition to tracing into a mixed fund. I do not regard *Foskett v Mckeown* as having decided that.⁶⁸

Having analysed the speeches of all of their Lordships in *Foskett v McKeown*, Rimer J concluded that:

Overall my view is that it cannot be said that *Foskett v McKeown* has swept away the long recognised difference between common law and equitable tracing.⁶⁹

⁶⁷ (2005) Ch 281.

⁶⁸ Ibid 314.

⁶⁹ Ibid 315.

The question then arises as to what the differences are between the two sets of rules. Rimer J identifies these as being first, that the common law cannot trace into a mixed fund and second, that a pre-condition of equitable tracing is the existence of a fiduciary relationship. The equitable pre-condition will be looked at in some detail in chapter 7. It is the supposed inability of the common law to trace into mixed funds that will be looked at here.

Common Law Tracing and Mixed Funds.

The common law's inability to trace into a mixed fund is generally thought to have arisen from the decision in *Taylor v Plumer*.⁷⁰ Lord Ellenborough CJ in that case held that the right to trace ceased where:

The means of ascertainment fail, which is the case where the subject is turned into money, and mixed and confounded in a general mass of the same description.⁷¹

Taylor v Plumer was for a long time regarded as a decision on the right to trace at common law. In *In Re Hallett's Case*,⁷² it was held that, whatever the position at common law, equity enabled a claimant to trace into mixed funds. We now know, of course that *Taylor v Plumer* was not a decision based on the common law at all,⁷³ but the distinction identified in *Hallett's Case* has been reaffirmed on many occasions.⁷⁴ One of the curious side-effects of *Taylor v Plumer* being recognised as a case based on equity is that Lord Ellenborough appears to be saying that tracing is not possible into a mixed fund in equity. This did not unduly

⁷⁰ (1815) 3 M&S 562, 105 ER 721.

⁷¹ (1815) 3 M&S 562, 575, 105 ER 721,

⁷² (1880) 13 Ch D 696 (CA).

⁷³ See Chapter 3 for a detailed discussion of this point.

⁷⁴ *Re Diplock*, (1948) Ch 465, 518; *Agip (Africa) Ltd v Jackson* (1991) Ch 447, 566; *Re J. Leslie (Engineers) Ltd*, (1976) 1 WLR 292; *El-Ajou v Dollar Land Holdings Ltd* (1993) BCLC 735 (Ch).

concern the court in *Hallett's Case*, however, where it was merely concluded that his lordship had made a mistake. *Taylor v Plumer* is being utilised as the source of a line of authority which it cannot support. There is little doubt, however, that this line of authority reflects the law as it stands today.

Orthodox theorists attack this line of authority on the grounds that the bifurcation of the rules of tracing is illogical.⁷⁵ Since tracing is merely a process of identification, it makes no sense to have different rules for the two branches of the law. This approach fundamentally depends upon the insistence on the strict division between tracing and claiming which was referred to earlier in this chapter. It turns tracing into an exercise in identification wholly isolated from its purpose or consequence. Birks gives the example of a thief who steals money from the legal owner and who passes that money through various bank accounts and then purchases durable and valuable assets with it. The stolen money turns out to be trust money. According to Birks:

It would be a curious system which concluded that the question whether the stole money could be traced to those durable assets, and is so, to which, must be answered quite differently depending on whether the exercise was attempted by the legal or the equitable victim of the theft – that is by the trustee or the beneficiary.⁷⁶

Birks does not say why it would be curious, however, and it is not at all certain that it is. What is curious, perhaps, is Birks's choice of example. It is far from certain in Birks's scenario that the beneficiary can trace at all. If he can, no principled reason has been put forward explain this right.

⁷⁵ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 120-130.

⁷⁶ P. Birks, 'The Necessity of a Unitary Law of Tracing' in R. Cranston (ed) *Making Commercial Law* (OUP 1997) 239, 243.

The thief has unquestionably received trust money and, if he were a fiduciary, it may well be the case that the beneficiary's rights in the money persist into the property purchased with that money. This is, as has been explained above, a normative decision and has been the subject of many of our cases. But the thief was not a fiduciary⁷⁷ and there is no good reason why the beneficial owner should be in any different position in those circumstances to the legal owner. Neither can trace, and both should be left to personal remedies against the thief.

This is not to say that the notion that there are different rules for tracing at law and in equity is correct. It is not. The reason for this, however, is that there are no rules for tracing at common law. The effect of the misunderstanding of *Taylor v Plumer* is not, as orthodox theorists would lead us to believe, that the distinction between the rules for tracing at law and in equity is misplaced, it is that there is no authority for the right to trace at law at all.⁷⁸ To reiterate the point made above if the common law does not allow claims to substitute assets it makes no sense at all to speak of the rules it has adopted for identifying those assets.

Conclusion.

Most of the confusion surrounding tracing comes from the orthodox theorist's belief that it is a series of steps by which we identify value from transaction to transaction and that as a result we can identify, at the end of the process, an asset in which the value inherent in the claimant's original asset now subsides.

⁷⁷ *Shalson v Russow*, (2005) Ch 281.

⁷⁸ See Part 2 for justification for this argument.

Even if it were possible to treat tracing of, and through, tangible assets in this way (and it is not because there is nothing in the notion of value that explains what it is that we are tracing) most of the cases concern money moving through bank accounts and in such cases the claimant can never show that he has any interest in any such property once it has been paid in to the bank.

Part 2.

Claims to Substitute Assets at Common Law.

Introduction

Common law tracing was defined in Part 1 of this work, as a process by which a claimant, who has common law rights in an original asset, seeks to show that a different asset may legally be regarded for the original, for the purpose of asserting common law rights in that substitute. The argument of Part 2 of this work is that such a process does not exist.

That it is possible to trace at common law is an almost universally accepted proposition.¹ That the authority on which much of the edifice of the right to trace at common law is built² cannot possibly bear that weight is also, now, generally accepted.³

¹ *Boscawen v Bajwa* (1996) 1 WLR 328; *Agip (Africa) Ltd v Jackson* (1991) Ch 547; *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548; *Shalson v Russow* (2005) Ch 281; H. Norman, 'Tracing the Proceeds of Crime: an Inequitable Solution?' In P. Birks (ed) *Laundering and Tracing* (Clarendon Press 1995) 95, 10; P. Birks, 'Overview: Tracing, Claiming and Defences' In P. Birks (ed) *Laundering and Tracing* (Clarendon Press 1995); P. Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69; P. Birks, 'On Taking Seriously the Difference Between Tracing and Claiming' (1997) 11 TLI 2; P. Birks, 'The Necessity of a Unitary Law of Tracing' in R. Cranston (ed) *Making Commercial Law* (OUP 1997); P. Birks, 'Property, Unjust Enrichment and Tracing' (2001) CLP 54 231; A. Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) LQR, 412; R. Chambers, 'Tracing and Unjust Enrichment' in J. Neyers, M. McInnes and S. Pitel (eds) *Understanding Unjust Enrichment* (Hart 2004) 263; D. Fox, 'Common Law Claims to Substituted Assets' (1999) RLR 55; R. Goode, 'The Right to Trace and its Impact on Commercial Transactions' (1976) 92 LQR 360; C. Rickett, 'Old and New in the Law of Tracing' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson Reuters 2005) 119; L. Smith, 'Unravelling Proprietary Restitution' (2004) 40 Canadian Business Law Journal 317; P. Millett, 'Tracing the Proceeds of Fraud' (1991) LQR 71; P. Millet, 'Bribes and Secret Commissions' 1993 (1) RLR 7; R. Grantham and C. Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 MLR 903, are just examples of countless numbers of judicial and academic dicta that accept the existence of a right to trace into substitute assets at common law without discussion. They all differ as to the exact nature of that right but its existence is accepted as a given.

² *Taylor v Plumer* (1815) 3 M&S 362.

³ *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159; *Boscawen v Bajwa* (1996) 1 WLR 328; A. Burrows, *The Law of Restitution*, (2nd edn OUP 2011) 124.

We will look in Chapter 3 at how what was essentially a claim based on a fiduciary relationship, and the intentions of the parties involved, became extended to cover situations involving agents acting outside the scope of their fiduciary authority, and how this, wrongly, turned into an acceptance that the common law made claims available in respect of substitute assets. It will be shown that some further cases which may, at first sight, support the notion of such availability are explicable in terms of equitable principles. In each case a fiduciary duty could be said to have existed between claimant and defendant.

In the following three chapters, we move on to cases where no fiduciary duty exists at all, or at the very least where, if one does exist, the court has explicitly said that such existence played no part in the outcome.

Chapters 4,5 and 6 look at the two most commonly ascribed explanations for a common law right to make claims to substitute assets. These are, first, that such claims form part of the law of property, and act so as to vindicate rights that the claimant had in the original asset, or, second, that such claims are part of the law of unjust enrichment and operate so as to reverse (or to prevent) the unjust enrichment of the defendant at the claimant's expense. The general trend of the argument between supporters of these alternatives has entailed two unspoken assumptions. The first is that only one of these two explanations can be correct; they are mutually exclusive. The second is that they are the only two possibilities. Much of the argument supporting the notion that such claims are part of the law of property has been as involved in debunking the idea that they may be part of the law of unjust enrichment as it has been in positively explaining why it is that the law of property is the

correct source. And this also applies in reverse. There has been no serious attempt to unearth any other normative explanations for these claims and these chapters will not, therefore, address any others.⁴

What will emerge from these chapters is not only that there are surprisingly few cases in which common law analysis plays a crucial role, but also that, even in those cases where it, arguably, may be said to do so, courts have failed to ascribe any proper reasoning for the existence of a common law right to trace. Given the explanatory collapse of the exchange product theory, as outlined in Part 1 of this work, this failure leaves a hole, which cannot, it seems, be filled.

For judicial pronouncements describing how tracing at law supposedly works we can look at dicta from cases decided 75 years apart. In *Sinclair v Brougham*,⁵ Lord Haldane LC stated:

If money in a bag is stolen and can be identified in the form in which it was stolen, it can be recovered *in specie*. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable as being earmarked as purchased with the money can be claimed by the true owner of the money. This is a principle not merely of equity but of the common law. It is explained in the judgment of Lord Ellenborough in *Taylor v Plumer*⁶...but Lord Ellenborough laid down as a limit to this proposition that if the money had become incapable of being traced, as for instance where it had been paid into the broker's general account with his banker, the principle had no remedy excepting to prove as a creditor for money had and received.⁷

⁴ This is course very different in the case of equitable claims to substitute assets in which a viable (indeed convincing) alternative has been provided. See Chapter 7 below.

⁵ (1914) AC 398.

⁶ (1815) 3 M&S 362.

⁷ (1914) AC 398, 418.

In *Agip (Africa) Ltd v Jackson*,⁸ Millett J said:

The common law has always been able to follow a physical asset from one recipient to another. Its ability to follow in the same hands into a changed form was established in *Taylor v Plumer*⁹...in following the plaintiff's money into an asset purchased exclusively with it no distinction is drawn between a chose in action such as a the debt to a bank to its customer and any other asset: *In Re Diplock*¹⁰ ...money can be followed at common law into and out of a bank account and into the hands of a subsequent transferee, provided that it does not cease to be identifiable by being mixed with other money in the bank account derived from some other source: *Banque Belge v Hambrouck*.¹¹

There is no indication in either judgment as to the basis of this supposed right. *Taylor v Plumer*,¹² is, as we now know, a red herring in this regard¹³ and *Re Diplock*,¹⁴ was a case concerning equitable tracing in which some dicta of Lord Greene MR seem rather to support the proposition that common law tracing is unknown. His Lordship speaking of *Sinclair v Brougham*,¹⁵ said:

It is noticeable that in this...case the common law did not base itself on any known theory of tracing such as adopted in equity. It proceeded on the basis that the unauthorised act of purchasing was one capable of ratification by the owner of the money.¹⁶

By the end of Part 2 it will have been shown that there is no sound underlying basis for the existence of the right to trace at common law.

⁸ (1991) Ch 547.

⁹ (1815) 3 M&S 362.

¹⁰ (1948) Ch 265.

¹¹ (1921) 1 KB 321.

¹² (1815) 3 M&S 362.

¹³ See text accompanying footnotes 16-23 below for a detailed examination of this point.

¹⁴ (1948) Ch 465.

¹⁵ (1815) 3 M&S 362.

¹⁶ (1948) Ch 465,518.

Chapter 3. The Origins of the Notion of Common Law Tracing

Introduction.

In the first two chapters we looked at following and tracing and demonstrated that both are normative processes designed to allocate claims in respect of substitute assets. Importantly, it was shown that tracing does not involve the following of rights as they somehow transmit themselves from one asset to another.

For the next four chapters we will look at the notion of tracing at common law. For the purposes of this work tracing at common law will mean the supposed process by which a claimant with a legal interest in an original asset can establish that he has a legal interest in a substitute asset.

The purpose of this chapter is to show how the notion of common law tracing developed in the first place and to show that an error occurred in that development – an error so fundamental that it casts serious doubt on the entire process.

Equitable Claims to Substitute Assets.

Equity and Bankrupt Agents.

Until the early years of the 18th century, principals who vested goods in agents were faced with the problem that in the event of the agent's bankruptcy the law decreed that anything found in the agent's hands at the time of the bankruptcy became subject to distribution to his creditors.

In *Burdett v Willett*,¹ Willett, acting as a factor, sold cloth belonging to the plaintiff to a third party for £115. Before payment was received Willett became bankrupt and died. His wife, as administrator of the estate, argued that the unpaid monies should come into the hands of the estate, for distribution to its creditors. The Court of Chancery disagreed, and held that, although the estate might be entitled to the money at law, in equity it belonged to the principal.

Equity had long adopted the principle that a specifically enforceable obligation to convey title to land gave the purchaser a proprietary interest, in the form of a trust² and *Burdett v Willett* merely extended that principle to debts, so that where the court recognised an obligation to assign a right *in specie* (as was the case with a principal and a factor) it thereby recognised a trust.

This represented equity's solution to the problem outlined above. Where the original goods could be distinguished in the hands of the factor,³ or an identifiable asset could be found in the hands of the factor which had been acquired by him in return for goods exchanged by him pursuant to his agreement with the principal, a trust arose in favour of the principal.

It should be borne in mind that the basis of equity's jurisprudence on this issue was agreement. The trustee and the factor had to transfer the right *in specie* to the beneficiary or the principal because that is exactly what he had agreed to do.

¹ (1708) 2 Vern 638, 23 ER 107.

² As was explained later in *Beckford v Wade* (1805) 17 Ves Jun 87, 34 ER 1181, 96.

³ *Copeman v Gallant* (1716) 1 P Wms 314, 24 ER 404, *Paul v Birch* (1743) 2 Atk 621, 26 ER 771.

Whatever the common law judges' true thoughts on this matter might have been, it soon became clear that it would be pointless for them to declare that the rights in question belonged, at law, to the defendant, only for the claimant to commence a different action in the courts of equity, whereby those rights would be found to be held in trust for him.

This is illustrated by the case of *Scott v Surman*,⁴ which because it was tried in a common law court, and because of the background to the case being misunderstood, has led certain writers to conclude that it represents authority for the right to make claims to substitute assets at common law.⁵

The facts of the case were that a quantity of tar was shipped by the claimants to one Richard Scott, to act as their factor for its sale. Scott sold the tar, on the basis that payment was to be made by two promissory notes, payable four months after delivery, after the deduction of £31 that was owing to the vendees by Scott. The vendees delivered the promissory notes, two days after which Scott committed an act of bankruptcy. Scott delivered his notes to his assignees in bankruptcy (the defendants) who subsequently realised their value. The claimants claimed that the money received by the assignees was received by Scott as their factor, and should therefore be considered as monies received to their use.

There are two important factors that need to be identified before analysing the only judgment given in the case, that of Willes CJ.

⁴ (1742) Wiles 400.

⁵ See M.Scott, 'The Right to "Trace" at Common Law (1966) 7 Western Australia Law Review 463.

First, by the bankruptcy regime that was in place at the time⁶ everything in a bankrupt's hands at the time of his bankruptcy became subject to distribution by his creditors.

Second, this was a case in which the bankrupt factor had acted within his authority, in disposing of the claimant's goods and receiving the proceeds in return. In *Burdett v Willett*,⁷ it had been decided that the proceeds of a sale held by a factor acting within his authority were held in trust for his agent, and were not therefore available for distribution to the body of creditors in the event of the factor's bankruptcy. But it was not suggested in that case that the principal would, in such instances, have any claim to the *legal* title to the proceeds of the sale. The basis of the decision was that, since the factor was under an obligation to transfer the proceeds of the sale to the principal, as a result of an agreement between the parties, equity would give the principal a beneficial interest in those proceeds. A general principle therefore emerges that where A disposes of B's goods to C with B's authority, legal title to the proceeds rests with A, whilst B obtains a beneficial interest which, whatever its breadth, is sufficient to defeat A's assignee in bankruptcy. In fact, this may be over-stating the principle somewhat. A better formulation may be that, in such circumstances, legal title to the proceeds passes to whom C intends it to pass, and the question of who has the beneficial interest in the proceeds is a matter of determining the

⁶ "An Act for the Further Description of a Bankrupt And Relief of Creditors Against Such as Shall Become Bankrupts and for Inflicting of Corporal Punishment upon the Bankrupt in Special Cases", 21 Jac 1. Cap 19. 1623.

⁷ (1708) 2 Vern 638, 23 ER 1017.

intentions of A and B in that regard, with the evidential tie-break falling in favour of it being B.⁸

The problem facing the court in *Scott v Surman* was therefore this. If they were to find that, as a matter of law, title to the proceeds of the sale lay with the factor's assignees, and, as a result, dismiss the claimant's action, the claimant would simply go to a court of equity for a ruling that the proceeds were held in trust for them.

Willles CJ did not regard this as a sensible allocation of the resources of the assignees or of the court's time. Having said that all of the members of the court were of the opinion that the equity of the case was with the claimants, he went on to say:

Wherever the equity of the case is clearly with the plaintiff, I will always endeavour, if I can, and if it be any ways consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim of law, that the law will always avoid circuitry of action, if possible, to prevent trouble and expense to the suitors; and for the same reason I think a fortiori we ought to endeavour, if possible, to prevent suits in Court of Equity. But to be sure no motive whatsoever is sufficient to warrant our determining contrary to law.⁹

He then went on to say that in his opinion, based on *Burdett v Willett*, the assets available to the assignees for distribution did not include the proceeds of the sale of the tar, because those proceeds were held in trust for the claimants. Assets in which the bankrupt did not have both

⁸ The wider formulation can be seen in cases such as *Foley v Hill* (1848) 2 HLC 28; *Burdick v Garrick* (1870) 5 Ch App 233; *King v Hutton* (1900) 2 QB 504; *Ex parte Cooke* (1876) 4 Ch D 123. The reason for adopting the narrower formulation is that, certainly in the 20th Century commercial courts have been reluctant to impose such equitable reasoning into commercial transactions and in cases such as *Henry v Hammond* (1913) 2 QB 515 and *Neste Oy v Lloyds Bank* (1983) 2 Lloyds Rep 658 have emphasized the point that there must be a genuine examination of the intentions of the parties and there must be evidence of a clear intention to create a trust before one can be said to have been formed.

⁹ (1742) Wiles 400, 402.

the legal and beneficial interest did not fall into the bankrupt estate. From this he concluded that the common law courts should allow the claimant an action in money had and received to enforce his *equitable* interest in the proceeds of the sale of the tar. He stated that:

It would be very absurd to say that anything shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account...if therefore the bankrupt were seised of a trust estate in lands , for the reasons already mentioned I should think that it did not vest in the assignees at all , but that the legal estate in that should still remain in the bankrupt for the benefit of the cestui que trust.¹⁰

That this was the correct method of disposal of the case was effectively confirmed within the following 50 years. In *Winch v Keeley*,¹¹ Ashhurst J stated that:

It is true that formerly the Courts of Law did not take notice of an equity or a trust: for trusts are within the original jurisdiction of the Courts of Equity: but of late years, it has been found productive of great expense to send the parties to the other side of the Hall: wherever this Court has seen that the justice of the case is with the plaintiff, they have not turned him round on this objection. ¹²

However, Willes CJ could not persuade the other two members of the court that this was the correct approach to take, and he therefore sought to find an alternative explanation, which would permit the matter to be disposed of in a common law court without the need to send it “to the other side of the hall”.

¹⁰ Ibid.

¹¹ (1787) 1 TR 619.

¹² Ibid 622.

This apparently involved an attempt to demonstrate that the claimants had a *legal* interest in the proceeds of the sale. But the argument deployed is both confused and confusing.

The essence of the argument appears to be that had the assets in question (the tar) been found in the hands of the factor *in specie* they would have remained the property of the claimants. But, had the proceeds been found in the factor's hands in the form of money, the claimants would have no claim at all. Where the proceeds were found in a form other than money, they should be treated as if they were still the original property of the claimants:

For why are goods considered still as the owners? Because they remain *in specie* and so may be distinguished from the rest of the bankrupt's estate. But as money has no earmark it cannot be distinguished. Otherwise to be sure in reason the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt it is equally distinguishable...The general rule is that if a man receive money which ought to be paid to another or to apply to a particular purpose to which he does not apply it this action will lie for money had and received...to apply this general rule to the present case. The assignees having received money which belongs to the plaintiffs and ought not to be applied to pay the bankrupt's debts, and they ought to have paid it to the plaintiffs and not having done so this action will lie against them for so much money had and received to the use of the plaintiffs.¹³

As a supposed foundation of the idea that it is possible to trace at common law these dicta are unsatisfactory.

Nowhere in them, or indeed anywhere else in the judgment, is it explained how it can come about that the proceeds of the sale, which

¹³*Scott v Surman*, (1742) Wiles 400, 404.

were unarguably within the legal ownership of the factor, could transmit themselves to being in the legal ownership of the assignees.

It is possible to get some feel for what is being suggested. This is that what has happened is that the thing produced (the promissory notes) has followed the nature out of which it was produced (the tar). But this is not common law tracing, or anything like it. Tracing, as was shown in part 1, is about rights not things. In this case the legal rights to the proceeds were unquestionably with the factor. The buyer of the tar had intended to pass title to the notes to the factor and the factor had been acting within his authority. In fact, in the light of the 20th century authorities cited above, it is not even certain, in a commercial context, that the principal would even be considered the *beneficial* owner. Had the factor purchased anything with the proceeds of the promissory notes he would have been purchasing them with his own money. There would have been nothing to trace.

Willes CJ must have had in mind some sort of equitable tracing. This would make sense given his overall impression of the case. If the proceeds of the sale of the tar were held in trust for the claimants, then they would undoubtedly have been able to trace from those proceeds into anything subsequently purchased with those proceeds. Given the fiduciary nature of the relationship between the parties, it could well be said in this case that the promissory notes were the traceable proceeds of the tar. But this has nothing to do with the claimants establishing any legal title to those notes.

Nothing said by Willes CJ explains why the basic rule that, in a situation where B sells A's asset to C, with the authority of A, legal title

to the proceeds depends on C's intention, and the question of beneficial ownership depends upon the intentions of A and B, should not apply.

His Lordship went on to say that:

The general rule is that if a man receive money which ought to be paid to another or to apply to a particular purpose to which he does not apply it this action will lie as for money had and received. So held Owen that if money be delivered by A to one to buy a horse or any other thing if he do not lay out the money accordingly an action of debt will lie or an action on the case for so much money had and received to A's use...if a man receive money for a special purpose, and neglect or refuse to apply it, to the uses to which he received it, an action on the case will lie for money had and received.¹⁴

This may well be true, but it is impossible to discern even the germ of common law tracing in these dicta. He then drew together the threads of his argument by saying:

To apply this general rule to the present case. The assignees have received this money which belongs to the plaintiff and ought not to be applied to pay the bankrupts debts and they ought to have paid it to the plaintiffs and not having done so this action will lie against them for so much money had and received to the use of the plaintiffs.¹⁵

This is unquestionably correct, but it is not the same thing at all as saying that the reason that it belongs to the plaintiffs is that they had legal title to it. It belonged to them under a trust.

It might well be argued that Willes CJ has arrived in exactly the place that he said that his brethren would not accept, but via a rather circuitous route. It might also be argued that the case is wrongly decided because, once it was found unacceptable to allow a common law claim in protection of trust property, the only proper solution was to have

¹⁴ Ibid.

¹⁵ Ibid 405.

found for the assignees and left the claimants to their relief in equity. In the absence of any conceptual basis, or indeed any acknowledgment that such a basis was required, for permitting the claimants to obtain a legal interest in the promissory notes, the case has nothing to say about common law tracing.

We can conclude by saying that what *Scott v Surman* did was to allow the action for money had and received to lie for the realised value of a right that already belonged, in equity, to the claimant. The reason that the right already belonged in equity to the claimant was the same reason as was identified above. The defendant had agreed to sell the goods on behalf of the plaintiff, and hand over the proceeds to him, and equity treated such an obligation as sufficient to create a trust in favour of the claimant.

Claims such as this are not in any way based upon any ownership rights that the claimant had in the original asset. They are based entirely on what the defendant had promised to do on the disposal of that asset, and equity's response to that agreement.

Being based on agreement, all of the above analysis pre-supposes an agent acting within the scope of his authority. When it comes to unauthorised investments it might be thought that very different considerations would apply.

Agents Acting Outside the Scope of Their Authority.

Surprisingly, this is not the case and a central reason for this is the judgment of the court in *Taylor v Plumer*.¹⁶

¹⁶ (1816) 3 M & S 562, 105 ER 721.

The facts were that one Walsh was a stockbroker for Sir Thomas Plumer (the defendant). The defendant gave Walsh monies to purchase exchequer bills on his behalf. Instead of doing so Walsh purchased some American stock and some gold doubloons in his own name. Walsh then absconded, an act of bankruptcy, and was overtaken by agents acting for the defendant in Falmouth, from whence he had intended to go to America. The agents recovered the securities and the money. The action was brought by Walsh's assignees in bankruptcy, in trover (effectively an early form of conversion), for the money and the securities. It was heard by Lord Ellenborough CJ in the court of the Kings Bench. The court found for the defendant. *Taylor v Plumer* is of great interest for two reasons.

The first reason is that the court appears to have extended the liability of an agent acting within the scope of his authority, to one acting outside that scope, without producing any reasoning to support such a step.

Counsel for the plaintiff argued that since the draft came into Walsh's hands not as a result of any trust, but rather in fraud of it, the defendant should not be allowed to recover, an argument which seems to reflect the ratios of both *Burdett v Willett* and *Scott v Surman*. Lord Ellenborough, however, was unwilling to accept an outcome which, as he saw it, would be tantamount to allowing the plaintiff to pray in aid his own wrongdoing. Relying on his own interpretation of *Scott v Surman* his Lordship said that:

If the property in its original state and form was covered withy a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any more valid claim in respect to it, than they respectively had before such a change...for

the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such.

More will be said about this passage below since it represents the effective beginning of the whole notion that it is possible to trace at common law, but for present purposes, its essential error lies in Lord Ellenborough's use of *Scott v Surman* to support it. In *Scott v Surman* the reason that Willes J found that a trust had arisen in respect of the asset in question was that the agent had promised to convey the proceeds of the sale to the principal, and equity treated rights subject to an obligation to transfer under such circumstances as being held in trust.

No such promise or agreement existed in this case. If a trust existed, therefore, a reason for it must be found. Lord Ellenborough does not tell us what it is because he did not recognise the lacuna. He commences with what is essentially a conclusion – that a trust exists – without explaining why that should be so, and from there goes on to say that rights in the substitute are therefore held in trust as well. But why should it be that a fiduciary should have to account *in specie* for a right acquired when acting outside his authority? The answer to this question will be considered in Chapter 7 of this work but, to anticipate the conclusion contained therein, it is that it relates entirely to the nature of the fiduciary relationship itself and cannot therefore be utilised to explain any claims to substitute assets where such a relationship does not exist, and certainly cannot explain common law claims.

The second consequence of Lord Ellenborough's judgment is that, being delivered in the court of the Kings Bench, it led to the combined belief that *Taylor v Plumer* is a central authority for the existence of a right to trace at common law, and that such a right is explained by the

claimant's ownership of the original asset. It is the foundation of a number of later judgments, which are themselves regarded as authority for the same proposition.

That *Taylor v Plumer* is itself not such an authority is no longer in doubt, but later cases cannot be understood without an understanding of it, so it would be wrong to treat it as being of historical interest only.

Sitting, it should be recalled, in a common law court Lord Ellenborough said:

It makes no difference in reason or in law into what other form, different from the original the change may have been made, whether it be into that of promissory notes for the security of money...or into other merchandise...for the product of or substitute for the thing still follows the nature of the thing itself, so long as it can be ascertained to be such and the right only ceases when the means of the ascertainment fail, which is the case where the subject is turned into money, and mixed and confounded in a general mass of the same description.¹⁷

The fact that this case was heard in a common law court led to a whole series of judgments, some of considerable influence, using it as authority for a right to trace at common law.¹⁸

The case was not invariably treated as such, see for example the dicta of Lord Jessel MR in *Re Hallett's Estate*,¹⁹ but it was not until the 1970s that the now universally accepted interpretation of the case began to gain acceptance, to the point that it is now generally agreed that *Taylor v Plumer*, despite being a decision of the court of the King's

¹⁷ (1815) 3 M & S 562, 575.

¹⁸ *R v Bunkall* (1864) Le & Ca 371; *Sinclair v Brougham* (1914) AC 398; *Banque Belge Pour L'Etranger v Hambrouck* (1921) 1 KB 321 CA; *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

¹⁹ (1880) 13 Ch D 696. See also the judgments of James LJ and Bramwell JA in *Ex Parte Cooke* (1876) LR 4 Ch D 123.

Bench, and despite being heard before a common law judge, was a decision concerning the claimant's equitable, not common law rights.²⁰

According to Lionel Smith:

The most important thing about *Taylor v Plumer* as a potential limitation on tracing to establish common law rights is that the defendant Plumer did not establish any common law proprietary rights; his success was due to the successful assertion of *equitable* proprietary rights. It is commonly thought that he won because he established that he was the legal owner of the US stock and gold. This is incorrect. Plumer actually established that he was the equitable owner... and that Walsh, the legal owner, held these assets on trust for Plumer.²¹

In *Jones v Jones*, Millett LJ said that:

In *Agip (Africa) Ltd v Jackson* I said that the ability of the common law to trace an asset into a changed form in the same hands was established in *Taylor v Plumer*...In this it appears that I fell into a common error, for it has since been convincingly demonstrated that, although *Taylor v Plumer* was decided by a common law court, the court was in fact applying the rules of equity.²²

An immediate problem with treating Lord Ellenborough's dicta as being concerned with equitable rights is that he seems to be suggesting that tracing cannot take place through a mixed fund. The fact that the claimant's money had been mixed with other monies was not, historically, regarded as a bar to tracing in equity. This problem was dispensed with, somewhat laconically, by Jessell MR in *re Hallett's*

²⁰ See S. Kurshid & P. Matthews 'Tracing Confusion' (1979) 95 LQR 78; P Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 23, L. Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of the King's Bench' (1995) LMCLQ 240; *Boscawen v Bajwa* (1996) 1 WLR, 328; *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159.

²¹ L. Smith, "Tracing in *Taylor v Plumer*: Equity in the Court of the King's Bench' (1995) LMCLQ 240.

²² *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159, 169.

Estate.²³ The Master of the Rolls said that “Lord Ellenborough’s knowledge of the rules of equity was not quite commensurate with his knowledge of the common law”.

So it would appear that all that *Taylor v Plumer* really stands for, in this regard, is the affirmation of the position stated in *Scott v Surman* (albeit only in passing by Willes CJ) and *Winch v Keeley* that where A is the legal owner of an asset and B is the beneficial owner the asset is not available to the assignee in bankruptcy of A. Despite the fact that the case will be mentioned many times in the remainder of this work it has nothing to do with common law tracing.

Following *Taylor v Plumer* there have been a number of cases in which courts have appeared to have decided them on common law principles, or in which there have been dicta suggesting that it would be possible to do so, but which, on examination turn out to be applying equitable principles instead.

R v Bunkall,²⁴ for example, was a criminal case, the facts of which were that the defendant owned a horse and cart and was engaged by one Hart, a blacksmith, to purchase half a ton of blacksmith’s coals and deliver them to him. It would appear that, having made the purchase, he, without authority, offloaded a quantity for himself before delivering the remainder to Hart.

The criminal prosecution turned on the obscurities of the Victorian laws of larceny and embezzlement. Willes J however, during argument, cited *Taylor v Plumer* as authority for the proposition that “if I

²³ (1880) 13 Ch D 696.

²⁴ (1864) LE & CA 372.

give a man money to buy a horse for me and he buys a cow for himself with it, the cow is mine”.

We now know, of course, that, if by the word “mine” Willes J meant “I am the legal owner of”, *Taylor v Plumer* is authority for no such thing.

Moreover, in the context of the case the point was made that the seller of the coals knew only of the defendant and intended the sale to be made to the defendant. There can be no question that the defendant was the legal owner of the coal and had purchased it as the agent of Hart. Any tracing that was involved must have been equitable tracing. If the claimant did have any rights in the coals those rights can only be attributed to the rule, discussed in chapter 7 of this work, that a fiduciary must transfer to his principle any rights that he obtains in the course of the performance of his fiduciary duties.

In addition, Willes J’s statement was obiter. Judgment was given by Cockburn CJ and, although it is difficult to tell from the wording of the judgment, it seems that the case was decided on the basis that the defendant had appropriated the goods to Hart before taking them for his own use. If this is correct, the case becomes simply one of following. Hart owned the coal, the defendant took some of it, and Hart identified *that very coal* as belonging to him.

Cattley v Loundes,²⁵ exhibits similar characteristics, in that it also probably depends upon equitable principles which are insufficiently expounded. This is a somewhat obscure case, generally ignored by text writers. This is undoubtedly due, partly at least, to the difficulty in

²⁵ (1885) 34 WR 139, 2 TLR 136.

establishing either the facts of the case, or the details of the judgments, from the two, conflicting, reports of it.

Matthews summary of the facts is that the claimant had been acquitted of theft of money from the till of the defendant. It would seem that the claimant had been in the defendant's employment at the time as a barmaid, and was resident at the inn, which was her place of employment. On the claimant leaving, the defendant refused to release certain articles which he maintained were the product of the theft. The claimant sued in conversion, but failed.²⁶

A L Smith is reported as stating in judgment that the true owner of a stolen sovereign could claim the two half-sovereigns into which the thief changed it²⁷ and Matthews J apparently said that "the money, though converted into goods could be followed, and no action in trover for them would lie."²⁸

No authority is given for either proposition, however, and it is very difficult to put the dicta into any context, given the paucity of factual information known about the case.

A tentative suggestion would be that the case was about equitable rights. This could well be so if the claimant was indeed an employee of the defendant, and some strength, although admittedly not much, is added to this possibility by the fact that the reporter in the Times Law Reports saw fit, for no apparently good reason, to refer to some dicta of Willes J in *R v Bunkall*,²⁹ which undoubtedly relate to fiduciary relationships. This would explain the outcome since a trustee is

²⁶ P. Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P. Birks (ed) *Laundering and Tracing* (Clarendon Press 1995) 23, 52.

²⁷ 34 WR 139.

²⁸ 2 TLR 136.

²⁹ (1864) Le & Ca 371.

unable to maintain a claim in conversion against a beneficiary in possession for refusing to give up that possession.³⁰

Finally, and still, admittedly unconvincingly, the case was cited by Ames in an American journal for the proposition that:

It is now well settled that one who has been deprived of his property by fraud, or theft, or by any wrongful conversion, may charge the fraudulent vendee, the thief or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property.³¹

This is an unsatisfactory description of English law, both then and now, and Ames was clearly speaking of American jurisprudence only, but it is at least confirmation that one leading scholar regarded *Cattley v Loundes* as a decision on equitable rights.

Whether the judges in *Cattley v Loundes* did indeed have equitable principles in mind is impossible to say. However, it is clearly not a case that can form the basis of any support for the notion of common law rights in substitute assets.

Although both of these cases are somewhat obscure, and possibly of little importance, the same cannot be said of *Marsh v Keating*.³²

Marsh v Keating formed a central part of the basis of the judgments of the House of Lords in *Lipkin Gorman*,³³ and, since that latter case is so fundamental,³⁴ *Marsh v Keating* must be treated with respect and examined closely.

³⁰ A. Tettenborn, 'Trust Property and Conversion: An Equitable Confusion' (1996) 56 CLJ 36.

³¹ J.B Ames, 'Following Misappropriated Property into its Product' (1905-1906) 19 Harvard Law Review 511.

³² (1834) 1 Bing (NC) 198.

³³ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

³⁴ See Chapter 6 for a discussion of *Lipkin Gorman*.

The facts are that Mrs Keating owned £12,000 of Government stock, transferable at the Bank of England. One of the partners of her stockbrokers forged her signature on a power of attorney, and sold £9000 of the annuities to an innocent third party. The monies for the sale found themselves into the account that the stockbrokers held with Martin & Co, a bank. When the stockbrokers were declared bankrupt Mrs Keating brought proceedings against them for a declaration that she had a right of proof in their bankruptcy. She had by then written to the Bank of England, informing them of what had occurred, and asking them to replace her stock, and to pay her all dividends from when the stock had been transferred. This the bank did.

The action brought by Mrs Keating was one for money had and received. At no stage was it ever suggested by her that she had any proprietary right to the money in the defendant's hands. The opinion of the judges was given by Park J.

The essence of the judgment was that Mrs Keating was able to affirm the sale of her stock and, therefore, could claim that the proceeds received by the defendants were received by them to her use. Most of what Park J said was refuting the notion that Mrs Keating was unable to affirm the transaction, either because the transfer was void and the stock was therefore still owned by Mrs Keating, or because ratification would effectively be to ratify a felony (the fraudulent transaction).

In delivering his judgment, Park J used some fairly loose language but, on examination, there is little doubt about what he was trying to say. Having outlined the considerable practical difficulties that would be associated with Mrs Keating having to reaffirm her interest in the stock itself the judge went on to say:

Is she compelled to adopt this circuitous process or is she at liberty to abandon all further concern with her stock and to consider the price which was paid by the purchaser for that which was her stock to be her money, and to follow it into the hands of the present defendants?³⁵

He also said that:

We are of the opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock...and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.³⁶

In other words the question of who owned the stock was irrelevant. The only question that mattered was whether Mrs Keating was able to claim in respect of the money that was received by the firm as a result of the sale. But there is no suggestion that the proceeds of the sale fell to Mrs Keating as the *legal* owner. No doubt the purchaser of the stock intended that the proceeds should ultimately end up with the person from whom he purchased it, but it is very unlikely that he expected the very notes or coins that he used to make the purchase to pass to the previous owner.

As far as the second objection goes the court said that there was a distinction to be drawn between ratifying the felonious act (which was the act of forgery) and making a claim in respect of the outcome of that act (which was the receipt of the sales monies). Mrs Keating, said the court, had not sought to affirm the felony. All that she sought to do was to:

³⁵ (1834) 1 Bing (NC) 198, 215.

³⁶ Ibid 214.

Abandon all further concerns with her stock and to consider the price which was paid by the purchaser for that which was her stock to be her money and to follow it into the hands of Marsh & Co.³⁷

On the face of it these dicta suggest that Mrs Keating could indeed trace her stock into the contents of the bank account held by Marsh & Co at their bankers. They appear to be saying that she could ratify the contract of sale, although, despite the language used by Park J, there appears to be no conceptual analysis of whether the act of ratification would lead to Mrs Keating obtaining legal title to the proceeds of the sale. However, this is an unlikely interpretation of Park J's dicta for several reasons.

First, this was, as stated above, an action for money had and received. At no stage did Mrs Keating ever suggest that the money held to the credit of Marsh & Co was her legal property. There was no suggestion that any action would lie in trover against Marsh & Co.

Second, Park J went on to say that:

If the goods of A are wrongfully taken and sold it is not disputed that the owner may bring trover against the wrongdoer or may elect to consider him as their agent, may adopt the sale, and maintain an action for the price.³⁸

These are the dicta that explain the case. It is concerned with waiver of tort, and the ratification of unauthorised acts of an agent.

Our understanding of the doctrine of waiver of tort was fundamentally changed by the decision of the House of Lords in *United Australia Ltd v Barclays Bank Ltd*.³⁹ In that case it was explained that waiver of tort has nothing to do with the claimant ratifying the tortious action. Indeed, as Lord Atkin pointed out, ratifying the tortious action is the very opposite

³⁷ Ibid 215.

³⁸ Ibid

³⁹ (1941) AC 1.

of what the claimant is seeking to do, since it would give no grounds for any subsequent action in money had and received. Waiver of tort is merely an election to seek gain based rather than loss based damages.⁴⁰ However, there is one exception to this rule. Having explained the general restitutionary nature of waiver of tort Lord Atkin went on to say:

If the plaintiff in truth treats the wrongdoer as having acted as his agent, overlooks the wrong and by the consent of both parties is content to receive the proceeds this will be a true waiver. It will arise necessarily where the plaintiff in truth treats the wrongdoer as having acted as his agent: in that case the lack of authority disappears and the correct view is not that the tort is waived but by retroaction of the ratification has never existed.⁴¹

Mrs Keating ratified the fraudulent actions of the claimant's employee, as a result of which the claimants acted as her agents in the disposal of her stock. They thus received the proceeds as fiduciaries of the claimant. When Park J speaks of tracing into the proceeds of the sale it is equitable tracing that he has in mind. There is not the slightest suggestion that he is speaking of legal rights to a substitute asset.

Marsh v Keating may not be the simplest case to understand and it must be admitted that the case was not argued in equity, so it stands on a different basis to *Scott v Surman* and *Taylor v Plumer*. However, the firm were undoubtedly Mrs Keating's agents, so there seems little doubt that Mrs Keating at all times retained beneficial ownership of the monies in question. Given this, there is nothing in the case to support any notion of the right to trace into substitute assets at common law.

⁴⁰ See J. Edelman, *Gain-Based Damages* (Hart 2002), P. Birks, *Unjust Enrichment*, (2nd edn Clarendon Press 2005) 15.

⁴¹ (1941) AC 1 28.

Conclusion.

The idea that it is possible to make claims in respect of substitute assets at common law derives, almost entirely, from *Taylor v Plumer*.

That case said no such thing. It was decided on equitable principles alone. Any future case that relied entirely on *Taylor v Plumer* for authority in respect of common law tracing is, at least, unsatisfactory.

The other cases discussed in this chapter are revealing because they have the appearance of being cases in which the common law has involved itself in the question of substitute assets. When looked at more closely, however, it can be seen that the principles in play are equitable ones. They help to explain why it is that the common law, on the face of it, seems to have a jurisprudence concerning claims to rights in substitutes. But, in reality, they represent a far from satisfactory foundation.

Chapter 4. Tracing and the Law of Property Part 1.

Introduction.

This is the first of three chapters in which we take a closer look at why it is thought that a claimant is able to make a common law claim to rights in a substitute asset.

In this, and the next, chapter we will look at the argument that tracing operates entirely within the parameters of the law of property. It is a widely held belief.¹ The leading statement to this effect is that of Lord Millett in *Foskett v McKeown*. His Lordship said:

The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are

¹ Just a small sample gives us *Trustee of the Property of F C Jones & Sons (A Firm) v Jones* (1997) Ch 159; *Foskett v McKeown* (2001) 1 AC 102; C. Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016); P. Jaffey, *Private Law and Property Claims* (Hart 2007) 158-184; E. Ball, *Enrichment at the Claimant's Expense* (Hart 2017) 145-181; R. Grantham and C. Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' (1997) *New Zealand Law Review* 668; R. Grantham and C. Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 *MLR* 903; R. Grantham and C. Rickett, 'Property Rights as a Legally Significant Event' (2003) *CLJ* 717; P. Millet 'Proprietary Restitution' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson Reuters 2005) 309; J. Penner, 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 306; C. Rickett, 'Old and New in the Law of Tracing' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson Reuters 2005) 119; G. Virgo, 'Vindicating Vindication: Foskett v McKeown Reviewed' in A. Hudson (Ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) 203.

determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.²

Lord Hope perhaps put it more succinctly:

The purpose of the remedy is to enable them to vindicate their claim to their own money.³

It is noteworthy that neither Lord Millett nor Lord Hope explains exactly what it is about our law of property that allows a claimant to vindicate his property rights in this way. We are not even told which property rights are being vindicated. What is being suggested is that simply by dint of the claim being allocated to the legal category of the law of property certain consequences inevitably result. But to say that "the claimant succeeds, if at all, by virtue of his own title" tells us nothing. The question is *why* should title to the original asset have any relevance in determining claims in a substitute?

For reasons set out below this is not a discussion that can take place at a particularly high level of abstraction. It more or less comes down to explaining tracing either as being a process of the transmission of rights from one asset to its substitute, or of saying that the rights in the original property itself includes a right to the proceeds of the disposal of its traceable substitute. Neither turn out to be satisfactory explanations even at the level of institutional practice, and little attempt has been made to elevate the discussion to any higher level of abstraction than that.

² *Foskett v McKeown* (2001) 1 AC 102 127.

³ *Ibid* 118.

Property as a Principle.

The major problem faced by anyone trying to explain the normative basis for any legal rule as being the principal of property, is that the concept itself is not fertile ground for the explanation of rights created by positive law.

In his study, *Property and Justice*,⁴ Jim Harris shows that any supposition that private property rights are grounded in notions of natural law must be rejected. Thus, all property rights are contingent. They cannot be deduced from first principles. They depend upon an individual society's conception of what such rights should look like. Based on the connection between private property and freedom, however, Harris does accept that every citizen of a modern state has a moral background right that, his, or her, society, maintain, or introduce, a property institution with certain features. The most significant of these features are exclusionary and trespassory rules. That is rules which protect the owner of property rights from those rights being interfered with by others without his authority.

However, the moral background right has nothing to say about the actual content of any property specific rules, and equally little to say about when non-property specific rules⁵ should be permitted to take priority over any property specific rules. In addition, it has nothing to say about how any property rights created by those rules should be enforced or protected.⁶

⁴ J. Harris, *Property and Justice* (OUP 1996).

⁵ That is rules of a general nature which are not themselves directly related to the law of property but which have an effect on how a property owner may deal with his property. Taxation is a non-property specific rule, as is a law preventing fly-tipping.

⁶ This is one of the central problems with Eli Ball's analysis of common law tracing. He identifies "the right to trace" as being "an inherent feature of common law

We term the greatest right that the law gives to an individual in respect of an item of private property “ownership”, but, notoriously, English law has no definition of ownership, and scarcely even bothers to seek one. But, to reiterate the point, even if a satisfactory working definition of ownership rights could be agreed, that would still not tell us how such rights should be protected or enforced. That remains entirely a matter for the positive law. This point is, in fact, largely uncontroversial.⁷ In an extra-judicially written essay,⁸ Lord Millett stated his approval of Lord Ellenborough’s dicta in *Taylor v Plumer*,⁹ to the effect that:

the product of or substitute for the original thing still follows the nature of the thing itself.

He then went on to say:

Admittedly Lord Ellenborough did not explain why the product or substitute belong to the person who owned the original thing: but he obviously thought, as I do, that it belongs to him *because*¹⁰ he owned the original thing.

property rights” but gives no reason why that might be the case. In fact he seems to acknowledge that it is not possible to provide any good reason when he says that it is history just as much as abstract logic or reason that must determine how the law operates. This may be true but it amounts to saying that we can trace because we can trace. See E. Ball, *Enrichment at the Claimant’s Expense: Attribution Rules in Unjust Enrichment* (Hart 2017) 158.

⁷ There are writers who subscribe to notions of natural law property rights but even they struggle to explain individual rules of property institutions within those terms. See R. Nozick, *Anarchy, State and Utopia* (Blackwell 1974) 10-12, 150-153; Jeffrey Goldberg, ‘Involuntary Servitudes: A Property-Based Notion of Abortion Choice’ (1991) 38 *University of California, at Los Angeles, Law Review* 1597; G.A. Cohen, *Self-Ownership, Freedom and Equality* (CUP 1995); J.S. Mill, ‘Principles of Political Economy’ in J.M. Robson (ed), *Collected Works of John Stuart Mill* (Routledge and Keegan Paul 1965).

⁸ P. Millet, ‘Proprietary Restitution’ in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson Reuters 2005) 309.

⁹ (1815) 3 M & S 562, 105 ER 721, 726.

¹⁰ Italics in the original

In other words the consequence is an ordinary incidence of the English law of property.¹¹

But he made it clear that no explanation can be extracted from any abstract conception of property as a principal:

It is the law of property which deals with the creation, acquisition, disposal and transmission of property rights...one of the rules of our law of property, common to both equity and the common law, is that the owner of a thing can claim ownership of its traceable proceeds. The rule is not a rule of natural law...we do not need to have such a rule. We choose to have it.¹²

It would seem, therefore, that we cannot look for any explanation of rights in substitute assets based on abstract principals of private property.

The Transmission of Rights.

One way of looking at the statements of Lord Millett quoted above is to say that he believes that the rights that the claimant held in the original asset somehow transmit themselves to the substitute. That this is what he did mean is indicated by a further quotation from the same article. In speaking of dicta of his in *Foskett v McKeown*,¹³ he said that:

I was concerned to say that a claimant has the same interest in the proceeds as he had in the property which they represent.¹⁴

Unjust enrichment theorists dismiss this entire explanation as being based on “the fiction of persistence”.¹⁵ This is largely part of an agenda

¹¹ P. Millet, ‘Proprietary Restitution’ in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson Reuters 2005) 309, 314.

¹² Ibid.

¹³ (2001) 1 AC 102.

¹⁴ P. Millet, ‘Proprietary Restitution’ in S. Degeling and J. Edelman (eds), *Equity in Commercial Law*, (Thomson Reuters 2005) 309 325. Admittedly *Foskett v McKeown* concerned equitable rights in substitute assets but it has nowhere been suggested by those who regard the transmission of property rights as explaining these claims that common law rights operate in any different way.

that seeks to explain claims to substitute assets as being claims to new rights based on unjust enrichment, but it not necessary to accept their reasoning in order to show that the idea of the transmission of rights works at neither the theoretical, nor the practical, level.

At a theoretical level the problem is that property rights are rights to things, and they are not separable from that thing. This, as Chambers explains, is why title to unascertained goods does not pass at common law.

At a practical level the problem with the transmission of rights theory is that it does not explain the substantive law. One can take a very simple example. Suppose that A steals B's bracelet and then exchanges it with C for a watch. Even if one allows that such an example gives B a claim to the watch in A's hands it is not at all the case that the rights that B has in the watch are the same rights as that which he had in the bracelet. One of the rights that B had in the bracelet was the right to sue anyone in conversion (including both A and C) who came into possession of it without his authority. This is not true of B's rights in the watch, since it would seem that conversion does not lie against an innocent party who has unknowingly interfered with the claimant's rights to a substitute.¹⁶

Moreover, B's right in the bracelet cannot be the same right as that which he has in the watch because the former is a fully formed right, whereas the latter is only a power to acquire a right.¹⁷

¹⁵ P. Birks, *Unjust Enrichment* (2nd edn Clarendon Press 2005) 198.

¹⁶ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

¹⁷ B. Hacker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) CLJ 324. Admittedly this may not be a correct understanding of *Lipkin Gorman* but if it is not then it leaves other problems with

In addition, the doctrine of relativity of title means that any rights that B has in the watch are only those rights that C was able to transfer to A. They may well be defeasible to a third party, who can prove prior and superior rights.¹⁸

Thus, no rights have transmitted themselves from the bracelet to the watch. The rights that B has in the watch are wholly different to those that he had in the bracelet.

Vindication of Original Rights.

Another way of explaining claims in substitute assets in terms of the law of property is to say that one of the rights contained in the ownership of the original asset is the right to the proceeds of the disposal of that asset. In our example above, the watch would be treated as if it were the proceeds of the disposal of the bracelet. This is what Charlie Webb appears to be saying in his recent work *Reason and Restitution*.¹⁹

Webb starts from the premise that ownership interests are interests in determining the use and enjoyment of a particular asset, and that only the owner of the asset has the right to this determination. Owners are also entitled to determine how and when they may dispose of these interests and one consequence is that owners are in a position to acquire other items of wealth through the exchange of their current items. Only the owner of an asset is permitted to take advantage of this

understanding the nature of the right in question. See chapter 6 below for a more detailed discussion of that case and the problems associated with it.

¹⁸ *Armory v Delamire* (1772) 1 Str 505, 93 ER 664, *Costello v Chief Constable of Derbyshire* (2001) 1 WLR 1437, G. Battersby and A.D. Preston, 'The Concepts of "Property", "Title" and "Owner" as Used in the Sale of Goods Act 1893' (1972) 35 MLR 288.

¹⁹ C. Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 180-185.

exchange potential. When another person exploits this potential without the owner's authority, by taking that asset into his possession, the matter can be simply remedied by the owner recovering the asset. However, if the asset has been disposed of it is of course too late to require the its return but:

In these circumstances, however, my interest in that asset...provides a ground for recognizing me as having an equivalent interest in the substitute...for the substitute is the product of the wealth-acquiring potential of the original asset, and since this potential...is mine and mine alone to take advantage of, taking the substitute asset to be mine ensures that it is me and me alone who derives any such advantage.²⁰

The first basis on which one can take issue with Webb is that his theory seems to be based on a concept of property rights that is largely unsustainable.²¹

There has been, over the last few years,²² a retreat from the Hohfeldian notion of property rights being merely a series of jural relationships between individuals with the consequence that the difference between rights *in personam* and rights *in rem* is a quantitative rather than a qualitative one.²³ It is no longer quite as acceptable as it once was to look down upon the "layman's" notion of a property right as being a right to a thing, in contrast to the lawyers understanding that property refers not to a thing itself but to the rights that encompass it.

²⁰ Ibid 184.

²¹ See J. Penner, 'The Bundle of Rights Picture of Property' (1995-96) University of California, at Los Angeles, Law Review 711 for a clear analysis of the issues and J. Penner, *The Idea of Property in Law*, (Clarendon Press 1997) for a more complicated one.

²² For a summary of the debate see J.W. Harris, *Legal Philosophies* (Butterworths 1980) Ch 7.

²³ W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 67 (Walter. W. Cook ed) 1923.

But in the retreat from Hohfeld another conceptual hurdle has been placed in the way of a proper understanding of property rights, and that is the “bundle of rights” notion of ownership.²⁴

There would be nothing amiss with a bundle of rights conception of ownership that merely utilized the bundle to explain incidences, or examples, of what ownership entails. The problem is that a process of disaggregation has set in which has resulted in all of the various incidents being seen, not as individual parts of a single ownership concept, but, as actual rights in themselves. Thus, Webb identifies the right to exploit the wealth-acquiring potential as a discrete right of ownership.

It is certainly a right that an owner possesses as a consequence of his over-riding ownership right of exclusion. Ownership comprises the exclusive right to determine the use or disposition of an alienable thing.²⁵ The right to utilise the wealth-acquiring potential of the thing is not, however, one the breach of which constitutes a claim any different to a claim for the breach of the exclusionary right itself. This makes perfectly good sense. Indeed, the alternative would lead to the most unfortunate results.

Thus, in Webb’s example, what the defendant has done is interfered with the claimant’s right of ownership by disposing of his asset without his authority. But the defendant has done many things that breach his duty; he has taken the asset out of the claimant’s possession; he has exploited its wealth-creating potential; he has taken

²⁴ Most famously espoused by A.M. Honoré, in ‘Ownership’ in A.G Guest (ed) *Oxford Essays in Jurisprudence* (OUP 1961).

²⁵ See J. Penner, ‘The Bundle of Rights Picture of Property’ (1995-96) *University of California, at Los Angeles, Law Review* 711, 742.

away the right to any income that the claimant may have been able to realize from the use of the asset and he has taken away the claimant's power to destroy the asset. But these individual breaches of duty will all occur every time that a defendant takes an asset out of the claimant's possession. The law deals with such breaches of duty by allowing the claimant to bring an action against the defendant. But each incidence of ownership does not bring with it its own individual action. In very general terms the law deals with all of these breaches of duty in the same way – it allows a claim against the defendant in the law of conversion or trespass or money had and received. If any individual breach of duty brought with it its own separate action we would be left with the absurd situation that a claimant could bring multiple actions against the defendant in respect of the defendant's various infractions of his duty with respect to the same asset.

With respect to title what the common law does, when faced with a defendant who has interfered with the rights of an owner by attempting to transfer title away from him without his authority, is to treat the defendant's actions as having no effect in that respect at all. Since only the claimant may take advantage of the wealth-acquiring potential of his property, when the defendant purports to do so the legal effect is to treat his actions as having failed in this regard.

So if, again, we take our example, in terms of rights A gains nothing by stealing B's bracelet. To make things simple, assume that both bracelet and watch are valued at £100. How can it be said that A has utilized the wealth-acquiring potential of the bracelet when he is liable in conversion to B for the sum of £100? The wealth potential in the bracelet, having been realized, has accrued to B (to whom it should) not to A. Admittedly

B may prefer the bracelet to the £100 but, for these purposes, that is not relevant, since he cannot have that anyway. In addition, the law treats the transaction between A and C as having no effect on whatever rights that B had in the bracelet. C cannot add to his wealth by transferring the watch away to D, because C would then be in exactly the same position as A. In fact C is arguably worse off than anybody because he has lost something that was his (the watch)²⁶ and gained in return a liability to B.

Questions of title have proven difficult for the common law, especially in relation to the rights of innocent third parties,²⁷ but the resolution of these difficulties has been carefully worked out over many generations. Webb has proposed an explanation for ownership rights that concentrates entirely on the relationship between A and B. But there is a third actor here, namely C. If, contrary to what will be argued below, the law of property contains within itself the rules for the transmission of property rights, one of them would surely be the right of the owner to transfer his property to whomsoever he chooses.²⁸ This is, in fact, how the law seems to work. Title to personal property at common law passes with the intention of the parties.²⁹ In this instance C intended to pass title to the watch to A. He knows nothing of B. Why should it be the case that, because of an interference of A with B's

²⁶ The transfer of the watch to A may of course be voidable, but unless and until C actually avoids it, it remains good.

²⁷ See D.Sheehan, *The Principles of Personal Property Law* (Hart 2011) Ch 3.

²⁸ There are of course exceptions to this rule. Laws concerning dispositions on death are an example. But equally there must be exceptions to Webb's notion of the right of an owner to exclusively realize the wealth potential of his asset. Capital gains tax would be an example of such an exception.

²⁹ D.Sheehan, *The Principles of Personal Property Law* (Hart 2011) 56. See also *The Sale of Goods Act 1979* ss 16-20; *Doe d Garnons v Wright* (1826) 5 B & C 671, 108 ER 250; *Cochrane v Moore* (1890) 2 QBD 57; *Re Ridgway* (1885) 15 QBD 447.

property rights, C's rights to determine to whom he may transfer his property should be overridden? There is nothing at a theoretical level to suggest that a right to make a claim with respect to a substitute asset is part and parcel of the rights that the claimant has in the original asset.

There are further objections to Webb's explanation. Like Lord Millett, he seems to regard the capacity of an owner to dispose of his property as emanating itself, from the law of property. This may be true of some types of disposal but, in respect of others it does appear to be asking too much of the law of property. Realising the wealth-acquisition potential of one's property would normally involve exchanging that property, but the right to exchange one's property is not one that can be ascribed to the law of property itself. The right to exchange one's property lies, somewhere, at the boundaries of the law of property and the law of contract. The fact that I own a bracelet cannot, of itself, give me a right to exchange that bracelet. I may well have a right to give it away. I may also have a right that, if exchange is permitted, nobody else may exchange it but me (this is merely a derivative of my right to exclusive use), but the actual right to exchange requires the existence of the institution of contract. The mere fact of ownership is insufficient to give me a right to exchange.³⁰

Thus, even if Webb's example were good it cannot be used to show that the explanation for any rights arising in the substitute asset are attributable to the law of property, since they are also dependent upon a law relating to exchanges which is itself not a derivative of property law.

³⁰ J. Penner, *The Idea of Property in Law* (Clarendon Press 1997).

Webb's is just one example of an attempt to demonstrate that ownership of an asset contains within itself the right to a traceable substitute. The difficulty with such attempts is that they fail to offer any satisfactory explanation of why this should be the case and how any explanation links in to the institutional practice of the law.

It may, of course, be the case that there is no good explanation, but that we can see by observation that the law nonetheless does treat rights in a substitute as being one that derives from rights in the original. As will be seen in this and the next chapter, this, unprincipled, approach has led to serious errors in our understanding of the law and to the creation of rights for which there is neither a normative explanation nor authority.

Property as a rights-creating event

There is another difficulty in the way of treating rights in substitutes as being the vindication of rights in the original asset. This is that it is extremely doubtful whether the law of property can be regarded as a rights-creating event at all.³¹

Peter Birks's basic position was that property rights, rights *in rem*, are distinguishable from personal rights, rights *in personam*, on the basis of exigibility. Rights *in personam* are good only against an individual

³¹ The main, although by no means only, contributors to this debate have been Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989); *Unjust Enrichment* (2nd edn Clarendon Law 2005); 'Property and Unjust Enrichment: Categorical Truths' (1997) *New Zealand Law Review* 623; 'Personal Property: Proprietary Rights and Remedies' (2000) 11 *KCLJ* 1 and Grantham and Rickett in; R. Grantham, 'Doctrinal Bases for the Recognition of Property Rights' (1996) *OJLS* 561; R. Grantham and C. Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' (1997) *New Zealand Law Review* 668; R. Grantham and C. Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 *MLR* 903; R. Grantham and C. Rickett, 'Property Rights as a Legally Significant Event' (2003) *CLJ* 717.

whereas rights *in rem* are good against the whole world. But neither rights *in rem* nor rights *in personam* are sources of rights. They are responses to rights-giving events, such as consent, or wrongdoing or unjust enrichment.

Grantham and Rickett, by contrast, maintain that, whilst the creation of an original right *in rem* is indeed a response to a variety of possible rights-giving events that do not include the law of property, once the claimant possesses the right *in rem*, that right itself constitutes the rights-giving event for the purposes of its vindication. Property is thus, uniquely, both a rights-giving event and a response to rights-giving events. They argue that the reason that this is not apparent in respect of common law property rights is that the institutional practice of the law has developed in such a way that common law property rights are largely protected by the law of wrongs. But this historical accident, they say, should not be allowed to obscure the fact that the wrongs in question are based, at heart, on rights *in rem*. They argue that quite clearly rights *in rem* are inert, in the sense that the right attaches to property not to people, and they therefore can only be vindicated by claims to rights *in personam*, but the *in personam* right, whatever its form, is merely a vindication of the right *in rem*.

The reasons for the difference between the Birksian and the Grantham and Rickett approach may well be that they are operating at differing levels of abstraction. Thus, if B sells his bracelet to A, A's rights in the bracelet arise as a result of a consensual transaction. The element of consent is sufficient to explain A's rights. If C steals the bracelet from A, it may be true to say, at one level of abstraction, that A's right to claim in conversion against C is based on the property rights that he has

in the bracelet, but it is questionable whether that explanation goes deep enough. If one goes to a higher level of abstraction, and asks *why* A has property rights in the bracelet the answer is that they arose as a result of a consensual transfer of the bracelet from B.

It is true, of course, that if D steals the bracelet from C, it is very difficult to identify a “Birksian” reason for C’s right to claim against him.³² Neither consent nor unjust enrichment will do. We would probably say that D has interfered with C’s right of possession, which has arisen due to the mere fact of the possession itself. It is therefore to the law of wrongs that we would probably turn for an explanation but, even if this is considered incorrect, that gives no greater credibility to the idea that the source might be the law of property itself.

When it comes to substitute assets the Grantham and Rickett approach appears to be another attempt to show that the claimant is asserting rights in the substitute because the rights that he had in the original asset allow him to do so:

It should not be surprising that the property rights in the traceable product arise as a response to the plaintiff’s rights in the original asset. Indeed, it would be more surprising if they did not. Property rights are a significant matter in the common law and represent one of the fundamental building blocks of the Anglo-American legal tradition...from such a perspective the idea that a plaintiff’s property rights should be extinguished, to be replaced by rights born of unjust enrichment, merely because the subject matter of the right has changed form would be a contraction quite out of keeping with the otherwise generous protection rights afforded to property.³³

³² Which he unquestionably has: *Armory v Delamire* (1722) 1 Str. 505.

³³ R. Grantham and C. Rickett, ‘Tracing and Property Rights: The Categorical Truth’ (2000) 63 MLR 903, 911.

Leaving to one side the reference to unjust enrichment, this statement exemplifies the property based approach to tracing. But it lacks adequate analysis. The fact that a property right is “significant” says nothing about its content. Moreover, to say that a property right should not be replaced by other rights “merely” because the subject matter of the rights has changed form is to miss the point that the right only exists at all because of the thing to which it relates. It would actually be a lot more surprising if a right to a thing could be transferred to a different thing. It would then no longer be a right to a thing at all – it would be a right floating around looking for something to which to attach itself.

[The Transfer of Personal Property Rights.](#)

Another substantial difficulty that stands in the way of accepting that the law of property is the source of rights to substitute assets is the internal structure of the substantive law itself. The general principle in respect of transfers of property, is that the transfer is governed by the intentions of the parties. There certainly seems to be no principle of English law which would suggest that where A intends to pass property to B, the law will step in and say that *legal* title has in fact passed to C.

Thus, s17 of the Sale of Goods Act 1979 states that property passes when the parties intend it to pass. The next part of the Act details rules that are to apply where it is not possible to say when the parties intended the property to pass but they are merely default positions to take effect in the absence of discernible intention.

Although in the case of gifts the mode of transfer is different to that pertaining to the sale of goods (generally speaking transfer by way

of gift must be perfected by delivery or by deed) the intention principle remains the same. For property in an asset to pass by way of gift the donor must intend to pass it as a gift and the donee must accept it as such.³⁴

With respect to choses in action, the governing law is s136 of The Law of Property Act 1925. Without going into detail over precise mechanisms, a fundamental aspect of the transfer is the intention of the transferor. The assignor must manifest his intention to transfer the chose in action and the identity of both the chose in action itself and the assignee must be clear.

Thus, it is reasonably clear that the transfer of legal interests in assets requires the intention of the seller, or giver, or assignor that such a transfer take place, and also that the transfer be made to an identifiable transferee. In the case of gifts where no consideration passes from transferor to transferee it is actually made specific that the donee's acceptance is a fundamental requirement of the transfer

There are, of course, other methods of acquiring legal interests in assets other than via consensual transfer.

It is possible for example to take into possession a previously ownerless thing, such as a wild animal. Or if I own an animal and that animal has young then I also own the young. More controversially I may take into my possession a previously abandoned asset.³⁵

This is not to say that the law never recognises non-consensual transfers. We have already seen that this occurs in the case, for example, of accession and mixtures. In these, and in similar cases, the

³⁴ *Cochrane v Moore* (1890) 2 QBD 57 (CA).

³⁵ It is not at all certain that this is the case in English law, abandonment being as unworked a concept as most others covered by personal property law.

law has had to resolve ownership issues in the absence of any obvious intention on the part of the parties. It has done its best to create a set of fair and workable rules but it is suggested that these cases are exceptions to the general rule and that the cause of the exception is evidential difficulty in applying that rule. In the majority of transfers the transferor has expressed a clear intention to transfer the asset in question to the transferee and where this is the case then, with a few exceptions that will be discussed below, it is the intention of the transferor that is determinative. Obviously, intention can have no part to play where there is none but that does not defeat the general point that where it does exist it is critical.

Contrary to the general rule set out above, where there has been an unauthorised disposal of B's asset by A to C common law tracing requires us to accept the proposition that C, having intended to transfer whatever the proceeds of the disposal may have been to A, has, in fact, passed that legal title to B, despite the fact that he is almost certainly ignorant of B's existence. Nothing in the general law concerning the passage of title prepares us for such a possibility.

It should also be borne in mind that, where A passes legal title in an asset to B as a result of, for example a mistake, and B then becomes bankrupt it is nowhere suggested that A has any *common law* property claim to that asset. Although the two cases are by no means identical some explanation is called for as to why it would be reasonable to ignore C's intention to pass title to the asset to A in the first case but not to ignore A's intention to pass title to B in the second case, especially as in

the first case B has never previously owned the asset whereas in the second case A was at least a previous owner.³⁶

Remedies for Interference with Property Rights.

One final reason for questioning the proposition that claims to substitute assets fall exclusively within the parameters of the law of property is that, at common law, claims to interference with property rights fall within the purview of the law of tort. Just as the law of property does not contain within itself the rules relating to the transfer of property, nor does it contain the rules for the vindication of property rights themselves.

Choses in Possession.

It is generally accepted that the common law has no *vindicatio*.³⁷ With a few exceptions,³⁸ it is not possible for a claimant to go to a common law court and ask it to compel the defendant to return a specific item of property. Instead the common law protects personal property interests obliquely via the law of torts.

Historically trespass to goods and detinue were torts which dealt with claims that the defendant was either in possession of goods belonging to the claimant and had removed them without the claimant's

³⁶ P. Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 23.

³⁷ . Birks, 'Property and Unjust Enrichment: Categorical Truths' (1997) *New Zealand Law Review* 623. However cases such as *Trustees of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159 and *Armstrong DLW v Winnington Networks Ltd* (2012) EWCH 10 (ch) may be indications that the law is heading in a new direction, although there appears to be little in the way of principled reasoning in these cases.

³⁸ The law relating to the delivery up of specific goods is a possible example although even here the remedy is discretionary.

authority³⁹ or that the defendant, being in possession of the claimant's goods, refused to return them.⁴⁰

Detinue, as a claim, suffered from the major disadvantage, from the claimant's point of view, that it was subject to wager of law. As a result the claim in trover emerged as a species of case in its own right.⁴¹ Initially trover required the claimant to show that he was possessed of goods that he had accidentally lost and which had been found by the defendant who then converted them to his own use. The losing and finding elements were quickly treated as pure fictions which the defendant was unable to deny.⁴² The change from claims in detinue to claims in trover did, however, have the disadvantage that the conversion alleged in a trover claim had to be a positive act whereas detinue was based on a negative act – the refusal to return goods to the claimant. Eventually the courts took the view that refusal to return goods was a positive act and detinue declined as an action, more or less limited to those cases where conversion could not be shown because re-delivery was prevented by the loss or destruction of the goods in question.⁴³ This use of detinue ceased with the passage of the Torts (Interference With Goods) Act 1977, in which detinue was abolished⁴⁴ and conversion (which had been formed in the 19th century out of the action in trover) was enlarged to include the cases where re-delivery was impossible.

³⁹ Trespass to Goods.

⁴⁰ Detinue.

⁴¹ It was originally an action in trespass in which the claimant alleged that the defendant had converted the claimant's goods to his own use.

⁴² *Gumbleton v Grafton* (1600) Cro. Eliz 781, 72 ER 799; *Isaack v Clark* (1614) 2 Bulstrode 306, 80 ER 1143.

⁴³ *Owen v Lewyn* (1673) 1 Ventris 223, 86 ER 150.

⁴⁴ By s2.

Conversion is now so all-encompassing a tort that trespass to goods is of declining importance. There is, however, a clear distinction between the two. Trespass is a tort against possession, whereas, in conversion, the claimant says that the defendant has interfered with his rights of ownership.⁴⁵ It remains an open question as to whether a claimant in a trespass action has to be in actual possession at the time of the interference complained of or was a person entitled at that time to immediate possession. The High Court of Australia seems clearly of the opinion that actual possession is required.⁴⁶ English courts are less certain⁴⁷ although it is suggested that much of the confusion is caused by English courts regarding an immediate right to possession as being the equivalent of possession itself.⁴⁸

Trespass is a wide-ranging tort. According to Latham CJ in the High Court of Australia:

Unauthorised use of goods is a trespass; unauthorised acts of riding a horse, driving a motor car, using a bottle, are all equally trespasses, even though the horse may be returned unharmed or the motor car unwrecked or the bottle unbroken. The normal use of a bottle is as a container and the use of it for this purpose is a trespass if...it is not authorised.⁴⁹

⁴⁵ *Sanderson v Marsden & Jones* (1922) 10 Lloyds Rep 467.

⁴⁶ *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204.

⁴⁷ *Wilson v Lombank Ltd* (1963) 1 WLR 1294.

⁴⁸ See A. Hudson, 'Trespass to Goods' in N. Palmer & E. McKendrick (eds), *Interests in Goods* (2nd edn LLP 1998) 809-825.

⁴⁹ *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204.

Conversion.

Conversion, as our courts have accepted,⁵⁰ more or less defies definition, but Atkin J gave us probably the best attempt at it that we have when he said that:

It appears to me plain that dealing with goods in a manner inconsistent with the rights of a true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.⁵¹

Conversion is therefore a tort against ownership. But because of the conflation in English law of the notions of ownership and possession it is also a tort against possession. A claimant in conversion only has to show a superior right of possession to the defendant. He is not required to demonstrate anything approaching an indefeasible right to an absolute interest in the asset in question.⁵² Moreover a person with a right to immediate possession may also sue in conversion.⁵³

Since liability in conversion is strict⁵⁴ it can be seen that the tort gives very wide-ranging protection to owners who have been deprived of their assets by third parties. Where A disposes of B's asset without his authority and that asset successively ends up in the hands of C through to Z, every single person from B to Z is liable to A in conversion

⁵⁰ *Burroughs v Bayne* (1860) 5 H & N 296. Per Bramwell B.

⁵¹ *Lancashire and Yorkshire Railway Co v MacNicol* (1918) LKKB 601, approved by Scrutton LJ in *Oakley v Lyster* (1931) 1 KB 148.

⁵² *Armory v Delamire* (1772) 1 Str. 505 KB 93, ER 664; *Costello v Chief Constable of Derbyshire* (2001) 1 WLR 1437.

⁵³ *North Central Wagon & Finance Co v Graham* (1950) 2 KB 7.

⁵⁴ *Willis v British Car Auctions* (1978) 1 WLR 438; *Marfani & Co Ltd v Midland Bank* (1968) 1 WLR 956.

irrespective of his knowledge or otherwise of how B came by the asset in the first place, or indeed of the very existence of A and B.

The greatest weakness to a claim in conversion from the point of view of a claimant is that, as a personal claim, it is of limited value in the case of the insolvency of the defendant. However, a trustee in bankruptcy in possession of a converted asset may not deal with it as part of the bankrupt estate. It remains the property of anyone who can show prior and better title to the bankrupt.

It should also be stressed that where a party obtains title to an asset as a result of one of the *nemo dat* exceptions he cannot be sued in conversion by the person from whom he obtained the title, but this does not preclude the right of a person with a prior and better title to the disponent from taking such action.

What has been said above about the conversion of assets applies equally to money in the form of notes and coins.⁵⁵ It should be borne in mind, however, that money as currency cannot be converted by a *bona fide* purchaser of that money⁵⁶ because money as currency is an exception to the *nemo dat* rule. Moreover, it is a complete exception in that the *bona fide* purchaser of money obtains a title good against the whole world, not just the title of the disponent.

Choses in Action

As a matter of principle conversion does not lie in respect of a chose in action⁵⁷ because conversion is an action in which the claimant asserts an immediate right of possession and, in English law, intangible assets

⁵⁵ *Miller v Race* (1758) 1 Burr 452; *Jackson v Anderson* (1811) 4 Taunt 24.

⁵⁶ As was pointed out by Lord Templeman in *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548 although the relevance of the rule to that particular case is uncertain.

⁵⁷ Confirmed in *OBG Ltd v Allan* (2007) UKHL 21.

cannot be possessed. This is an unfortunate combination of rules, the outcome of which is both illogical and the source of some unprincipled attempts to circumvent the perceived injustices that arise from it.

The case of *Armstrong DLW v Winnington Networks Ltd*,⁵⁸ is discussed in some detail in Chapter 5 below, but the judge in that case seems to have been heavily influenced by the fact that the claimants had no obvious alternative claim when finding that there exists at common law a claim that he described as a “proprietary restitutionary claim”. The justification for the existence of such a claim from authority was unconvincing, but a system which treats the protection of personal property rights as a matter for the law of tort, cannot simply ignore the growth in importance of intangible property, and leave the main tort designed for the protection of those rights, conversion, powerless to assist rights holders in such a significant area.

Intangible property can be stolen,⁵⁹ a rule derived from the fact that it can be bought and sold freely. It makes no sense to argue from that starting point that it cannot also be possessed for the purposes of the law of conversion. *Armstrong* was a difficult case because none of the alternative claims that might normally be available to protect intangible property rights, such as inducing breach of contract or causing loss by unlawful means,⁶⁰ was available against the defendant and unjust enrichment could not have been called in aid first because the judge decided that title to the property in question remained at all times with the claimant and second because the defendant, having paid full

⁵⁸ (2012) EWCH 10 (ch).

⁵⁹ *Attorney General of Hong Kong v Nai-Kueng* (1987) 1 WLR 1339.

⁶⁰ Although there seems to be no reason why the thief who actually caused the loss in this case should not be the subject of this action.

value for the asset, could hardly be described as having been enriched at all.

This brief survey of the vindication of property rights illustrates the point that such vindication has nothing to do with the law of property. It is a matter for the law of tort. The existence of a property right (which *is* very much a matter for the law of property) carries with it no implications about how such a right should be vindicated. Thus, it cannot be said that the mere existence of a right to an asset gives any indication that it should be vindicated by granting a claimant rights to any substitute asset that can be identified.

The Authorities.

Since it would appear that no viable explanation has been put forward, either as a matter of principle, or as a matter of the substantive law, that common claims to substitute assets are based on the law of property, that might be taken to conclude the discussion.

The matter cannot, however, be dealt with so simply, because there is, arguably, a line of authority that establishes that, however strong the theoretical argument may be against it, claims to substitute assets are recognised by the common law. In the remainder of this chapter we will look at the two authorities that are most often cited as establishing the right to make such claims. In each case the outcome is generally regarded as having been determined on the basis of the existence of such a right. In the next chapter we will go on to examine other cases which have been cited in support of the existence of the right, but which are either dependent upon the two cases discussed in

this chapter, or which can be more satisfactorily explained on other grounds.

Banque Belge Pour L'Etranger v Hambrouck.⁶¹

Banque Belge has been relied upon many times, both judicially,⁶² and in academic writings,⁶³ to support the notion that it is possible to trace at common law into substitute assets. Exactly what the case stands for, and the basis of the court's decision, therefore repays careful consideration.

The facts are fairly straightforward. One Hambrouck worked for a firm, owned by Mr Pelabon. By some method, Hambrouck was able to obtain a number of cheques, to the value of £6000, drawn in his favour, on Mr Pelabon's purported authority, at Mr Pelabon's bank. The bank (the claimant in the original case, and the respondent in the court of Appeal) paid the money to Hambrouck, who deposited it with his own bank. Hambrouck wrote out cheques to his mistress, Mlle Spanoghe (the defendant in the original action, and the appellant in the Court of Appeal), who received them, and paid them into her own account at the London Joint City and Midland Bank. By the time that the fraud was discovered the balance in favour of Mlle Spanoghe at her bank was £315. The respondent claimed against both Mlle Spanoghe and her bank, asking for a declaration that this balance of £315 was its property. The London Joint City and Midland Bank paid the £315 into court and the proceedings against it were stayed.

⁶¹ (1921) 1 KB 321.

⁶² *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548; *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159; *Agip (Africa) Ltd v Jackson* (1991) Ch 547.

⁶³ A. Burrows, *The Law of Restitution*, (3rd edn OUP 2010)125-128; G. Virgo, *The Principles of the Law of Restitution* (2nd edn OUP 2006) 627; P. Birks, *An Introduction to the Law of Restitution*, (Revised Edition Clarendon Press 1994) 361.

The bank obtained its declaration at first instance, and Mlle Spanoghe appealed that decision.

A strong Court of Appeal (Bankes LJ, Scrutton LJ and Atkin LJ) dismissed the appeal. All three judges delivered judgments and one of the problems of the case is that their reasons for doing so were by no means identical.

Bankes LJ, having rejected the argument that the bank was not the proper claimant in the case, went on to say that had the action been for the recovery of a chattel, rather than for the recovery of money, there would be no question but that the claimant must succeed. He then examined three arguments put forward by the appellant as to why the present case should be distinguished from that concerning a chattel. He rejected all three.

The first was that the appellant, having no notice that Hambrouck obtained the money fraudulently, had good title to the money, given to her by him as a gift. This was, correctly, given short shrift.

The second was that the rules applicable to chattels have no application when applied to currency. Whether counsel was, or was not, correct in this submission turns on what exactly he meant, in this instance, by currency. If all that he meant was that the rules for following money are different from the rules for following any other chattel, his argument was correctly identified by Bankes LJ as resting upon the same misunderstanding of the notion that money has no earmark, that had been rejected by Jessell MR in *Hallett's Case*.⁶⁴ Where counsel's submission would have been correct, however, is if what he meant was that once money passes into currency, a bona fide purchaser

⁶⁴ *Re Hallett's Estate* (1878 H147), (1880) 13, Ch D 696.

of the money obtains a good title to it.⁶⁵ Bankes LJ did not address this aspect of the submission, but it is largely irrelevant, because it is unlikely that the appellant could be regarded as a bona fide purchaser of the money.

The third argument raised by counsel was the crucial one for our purposes. It was that:

The fact that the appellant had paid the money into her banking account prevented any following of the money by the plaintiff bank, and that an action for money had and received would not therefore lie.⁶⁶

Banks LJ'S response requires setting out in full. He said:

The last contention for the appellant cannot in my view be supported. The law on the subject has been so fully discussed recently in *Sinclair v Brougham*⁶⁷ that I only need point out that the law as laid down by Lord Ellenborough in *Taylor v Plumer*⁶⁸ as to the right of an owner to recover property in common law courts from a person who can show no title to it where the property was capable of being traced . whether in its original form or in some substituted form, was fully accepted and it was explained that the rule in equity which was applied in *Hallett's Case*⁶⁹ was only introduced to meet cases where the money sought to be traced could no longer be identified owing to its having become merged in the bank's assets and the relationship of debtor and creditor between the customer who had paid the money into the bank and the bank into which the money had been paid, having intervened.⁷⁰

Given that in this case counsel for the appellant did not dispute the point that the money in the appellant's bank account had come from

⁶⁵ *Miller v Race* (1758) 1 Burr 452.

⁶⁶ (1921) 1 KB 321,326.

⁶⁷ (1914) AC 398.

⁶⁸ (1815) 3 M&S 562.

⁶⁹ (13) Ch D 696 CA.

⁷⁰ (1921) 1 KB 321, 327.

the proceeds of Hambrouck's fraud, Bankes LJ was satisfied that the claimants could trace into that money without the help of equity.

Bankes LJ clearly thought, therefore, that the right to trace into substitute assets is a part of the law of property. However, there are substantial difficulties with his analysis of the case.

First, the comparison between chattels and money in a bank account is misplaced. It is certainly true that, had Hambrouck fraudulently obtained jewellery, in circumstances that gave him a voidable title to that jewellery, and had he then gifted the jewellery to the appellant, the defrauded party could have avoided the fraudulent transaction and made a claim to that jewellery. But that case is not this case. In that case the defrauded party could point to the jewellery, and simply follow it into the hands of the appellant. It is not a matter of substitute assets, it is one of following the same asset. It certainly does not follow that, had the appellant herself, exchanged the jewellery for some other asset, a claim could be sustained in respect of that other asset. That case would be this case, and entirely different considerations come into play.

Second, Bankes LJ's only authority for the proposition that the common law permits a claimant to trace into substitute assets is *Taylor v Plumer*,⁷¹ and, as we have seen, that case is not authority for that proposition. This would be less critical if there were some other, independent, discussion of why the tracing process should be permitted, but there is not, which leaves the basis for the decision lacking in any proper foundation.

⁷¹ *Taylor v Plumer* (1815) 3 M & S 562.

Third, even if *Taylor v Plumer* were such authority in general, there is nothing in the facts of that case, or of the dicta of Lord Ellenborough, to suggest that it could be extended to encompass monies paid into a bank account. In fact, *Taylor v Plumer* is a poor authority for such a notion. It was generally thought to be the case that Lord Ellenborough's dicta, concerning tracing becoming unavailable when the means of ascertainment failed, meant that it was impossible at common law to trace through a mixed bank account. But in *Sinclair v Brougham*,⁷² Viscount Haldane LC explained that it meant more than that:

The common law...looked simply to the question of whether the property had passed, and if it had not, for instance where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it.⁷³

Thus, the creation of a debtor/creditor relationship causes the means of ascertainment to fail. Since that is exactly what a bank account is, the reasoning in *Taylor v Plumer* cannot be extended to encompass tracing through bank accounts. Bankes LJ seems to half recognise that point when he speaks of money in a bank account resulting in a relationship of debtor and creditor which "intervened" in any proprietary interest that the defrauded party had in the original money. The fact that the monies were not in a mixed account has no effect on that basic proposition.

Bankes LJ seems content to regard the monies in the appellant's bank account as the respondent's property, which it clearly cannot be. It is the property of the appellant's bankers. If authority is needed for such

⁷² (1914) AC 398.

⁷³ *Ibid* 420.

a proposition, it comes from Lord Millett. In *Foskett v Mckeown*,⁷⁴ his lordship said:

We speak of money at the bank, and of money passing into, and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank.⁷⁵

Moreover, the appellant's bankers had a debtor/creditor relationship with the appellant and nobody else. Bankes LJ did not seem to recognise that one effect of his judgment is that at the moment before the appellant's bankers paid the money into court they actually had a debtor/ creditor relationship, not with the appellant, but with the respondent. This cannot be the case.⁷⁶

In a very short judgment, Scrutton LJ said that a common law claim for money had and received could not lie in this case because the money paid to the appellant was not the property of Banque Belge. The payment of the money taken from Banque Belge into Hamnbrouck's bank account had "changed its identity".

As far as common law tracing is concerned, therefore, Scrutton LJ's remarks are, *obiter*, because he decided the case on equitable grounds. He does seem to be suggesting that the reason that it is not possible to trace at common law, in this particular case, is that the original asset has lost its identity. This leaves open the question of whether such tracing could take place in different circumstances. But he does not address that matter and his judgment can certainly not be used

⁷⁴ (2001) 1 AC 102.

⁷⁵ *Ibid* 128.

⁷⁶ As was pointed out by Peter Birks in, P. Birks, 'On Taking Seriously the Difference Between Tracing and Claiming' (1997) 11 TLI 2.

to support any wider notion that the common law allows claims to substitute assets.

According to Atkin LJ:

The money was obtained from the plaintiff bank by the fraud of Hambrouck...it appears to me that the plaintiff bank intended to pass property in and the possession of the cash which under the operations of the clearing house they must be taken to have paid to the collecting bank. I will assume therefore that this is a case not of a void but of a voidable transaction by which Hambrouck obtained a title to the money until the plaintiffs elected to avoid his title, which they did when they made their claim in this action. The title would then revert in the plaintiffs subject to any title acquired in the meantime by any transferee for value without notice of the fraud.⁷⁷

This analysis is of no assistance to the respondent in this case, because the payment by Hambrouck of the money into his own bank account did give that bank a title acquired for value without notice of the fraud. The election by the respondent to avoid Hambrouck's title, if that was what it was, came too late to avoid title to the money being passed to Hambrouck's bank. Hambrouck by that stage had no title to the money at all. He merely had a debtor/creditor relationship with his own bank. If the respondent bank had made a claim against Hambrouck, it would have to have been a personal claim in money had and received. The backdating effects of rescission were discussed by Rimer J in *Shalson v Russow*.⁷⁸ Disagreeing with Lord Mustill's opinion in *In Re Goldcorp Exchange Ltd*,⁷⁹ that rescission merely gave the innocent party a

⁷⁷ (1921) 1 KB 321,332.

⁷⁸ (2005) ChD 281.

⁷⁹ (1995) 1 AC 74.

personal right for the repayment of the value of the property that has passed between claimant and defendant, he said:

In particular I cannot see how the bank in *Banque Belge pour L'Etranger v Hambrouck* could have achieved the recovery it did from the fraudster's mistress, since unless the rescission operated retrospectively to re-vest in the bank a proprietary title to the money sufficient to justify a tracing claim, the mistress's plea that the fraudster had given her the money ought to have been an answer to the bank's claim.⁸⁰

The important point here is that Rimer J was referring to equitable, not legal, title. He clearly saw *Banque Belge* as a case involving equitable tracing.

Atkin LJ's judgment is of interest because he appears to be willing to extend what he regards as the rule in *Hallett's Estate*,⁸¹ that equity can trace into a mixed bank account, to the common law. But this is based on the presupposition that there were at the time two sets of rules for tracing, one at common law and one in equity. This, in turn depends on the now familiar misunderstanding of *Taylor v Plumer*. He says:

The question was always, had the means of ascertainment failed? But if in 1815 the common law halted outside the bankers door, by 1879 equity had the courage to lift the latch, walk in, and examine the books: in *re Hallett's Estate*. I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings.⁸²

The error in this analysis lies in the notion that, in 1815, the common law halted at the banker's door, and that all that he was proposing was an alignment of common law and equitable rules. This is, as we have seen,

⁸⁰ *Ibid* 125.

⁸¹ *Re Hallett's Estate* (1878 H 147), (1880) 13 Ch D 696.

⁸² (1921) 1 KB 321,335.

entirely incorrect. The common law had no rules at all, because *Taylor v Plumer* was decided in equity, not at common law.

Even if his argument could be sustained, Atkin LJ received no support for it from the other members of the court. Scrutton LJ regarded the claim as one based in equity, and Bankes LJ, who also believed that there were separate tracing rules at common law and in equity, was clearly of the view that the rules in *Hallett's Estate* regarding the means of ascertainment, applied only to tracing in equity. It was the incorrect concession by counsel for the appellant, that the proceeds of the appellant's bank account had come from the proceeds of Hambrouck's fraud, that led him to say that the means of ascertainment had not failed for common law purposes in this case. But, like Atkin LJ, the only basis for Bankes LJ's notion that there were separate rules for tracing at common law and in equity was *Taylor v Plumer*.

None of the judgments, therefore, can be said to represent authority for the proposition that it is possible to make a claim to rights in a substitute asset at common law, based on the rights that the claimant had in the original asset. Scrutton LJ does not even try to engage with this argument, whilst Bankes LJ and Atkin LJ rely entirely on *Taylor v Plumer*. Both, in fact, want to extend their understanding of *Taylor v Plumer* to cover cases which involve the payment of monies through bank accounts, without explaining how this can be done. The authority most relied upon to explain this was *Sinclair v Brougham*,⁸³ but that case does not support the reasoning in this one at all. The House of Lords in *Sinclair v Brougham* had no doubt that the passage of money into a bank account created a debtor/creditor relationship, which, for

⁸³ (1914) AC 398.

common law purposes, meant that tracing failed.⁸⁴ The depositors claim was successful in that case because it was held that the acceptance of the deposits being *ultra vires* the powers of the building society, no debtor/creditor relationship was ever created. According to Viscount Haldane LC:

The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient in my opinion to bring the transaction within the general principles.⁸⁵

The question arises, therefore, as to whether there is any satisfactory common law explanation of the outcome of the case. This, essentially equitable reasoning, has nothing to do with any common law explanation for *Banque Belge*.

Kurshid and Matthews,⁸⁶ having rejected the exchange product theory as an interpretation of *Banque Belge*, put forward two possible alternatives. First, they suggest that maybe:

A transferee who is not a *bona fide* purchaser for value without notice...from a person under a quasi-contractual liability in money had and received...in respect of the *res* actually transferred (here Banque Belge's money) can be made equally liable in money had and received.⁸⁷

This notion, originally suggested by Professor Goode,⁸⁸ has some support, as a general proposition, from both Peter Birks⁸⁹ and Charles

⁸⁴ See text accompanying footnote 73 above.

⁸⁵ *Sinclair v Brougham* (1914) AC 398, 421.

⁸⁶ S. Kurshid & P. Matthews, 'Tracing Confusion' (1979) 95 LQR 78.

⁸⁷ *Ibid* 93.

⁸⁸ R. Goode, 'The Right to Trace and Its Impact on Commercial Transactions' (1976) 92 LQR 360.

⁸⁹ P. Birks, *Unjust Enrichment*, (2nd edn Clarendon Press 2005) 87-98.

Mitchell.⁹⁰ The simplest example is where X mistakenly hands £50 to Y who gifts that same £50 to D. The problem facing X in this example is that D's enrichment appears to have come from Y, not from X, and it is therefore not possible for X to maintain an action in money had and received against D. However, according to Mitchell

The evidential process of following identified by Lord Millett in *Foskett v McKeown*,⁹¹ enables X to show that D's enrichment has been remotely gained at his expense.⁹²

Mitchell goes on to say that where the asset in D's hands is not the same asset as the asset that X gave to Y, X may be able to use a combination of tracing and following to make a claim to the asset that is now in D's hands. The authority that he gives for this is *Banque Belge*. But at this point this is no longer an alternative explanation of *Banque Belge*. It is exactly the same explanation, based on the ability to trace through the contents of bank accounts, that has been rejected above. It would still, on this analysis, be necessary to show that the money in the appellant's bank account in *Banque Belge* was the traceable product of the respondent's money, and this cannot be done.

There is an alternative way of looking at Kurshid and Matthews's suggestion. This is to say that, whilst it is impossible to show a transactional link between the respondent's money and the balance to the credit of the appellant at her bank, it is possible to establish a causal connection between the two, which would be sufficient to enable the conclusion to be drawn that the appellant's enrichment came at the

⁹⁰ C. Mitchell, 'Liability Chains' in S. Degeling and J. Edelman (Eds), *Unjust Enrichment in Commercial Law*, (Thomson Reuters 2008) 131.

⁹¹ (2001) 1 AC 102, 127-8.

⁹² C. Mitchell, 'Liability Chains' in S. Degeling and J. Edelman (Eds), *Unjust Enrichment in Commercial Law*, (Thomson Reuters 2008) 131, 133.

respondent's expense. The issue of whether a causal link is sufficient to enable a claimant to demonstrate that the defendant's enrichment has come at his expense, and if so what qualifies as a causal link, is controversial.⁹³ But this is not an argument that needs investigating here because, even if the answer is that a causal link is sufficient, establishing such a link has nothing to do with tracing. An example of a causal link would be where X pays Y £50 by mistake, Y puts the £50 into his bank account, and then, from a different account gifts £50 to D. Whether X can show that D has been enriched at his expense is uncertain but if he can it is not because the £50 that Y gave to D is the traceable substitute of the £50 that X gave to Y. Were the respondent in *Banque Belge* able to show a causal link between the payment of its money to Hambrouck and the money to the credit of the appellant at her bank, it is possible, without deciding, that this would enable the respondent to maintain an action for money had and received against the appellant. To the extent that it would this could be seen as a plausible explanation of the outcome of the case, although it was not one ever argued in court.

The second possible explanation put forward by Kurshid and Matthews was that:

where money and negotiable instruments are concerned the change of identity argument...is inapplicable.⁹⁴

Thus, one £5 note is just the same as any other £5 note and can be treated as if it were exactly the same. This would have the advantage of

⁹³ David Hayton and Peter Birks say that a causal connection is sufficient. D. Hayton, 'Equity's Identification Rules' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 1-2; P. Birks, *Unjust Enrichment* (2nd edn Clarendon Press 2005). Andrew Tettenborn says it is not, A. Tettenborn, 'Lawful Receipt: A Justifying Factor' (1997) RLR 1.

⁹⁴ S. Kurshid & P. Matthews, 'Tracing Confusion' (1979) 95 LQR 78, 94.

explaining the outcome of the case without recourse to any notions of tracing or substitute assets. If one £5 note can be treated as if it is the same as any other £5 note then the identification process becomes one of following rather than tracing. The asset in the hands of the appellant would be the same asset as left the hands of the respondent.

But *Banque Belge* is not, of course, a case about £5 notes, it is about bank transfers. This argument is therefore extended to bank transfers by saying that, when Hambrouck paid the money that he obtained from the respondent into his own account, his bank became the absolute owners of that money, but when he then transferred funds from his account into that of the appellant, it was treated as if it was the same money that Hambrouck had paid into his account, i.e. the same money that the respondent gave to Hambrouck. Clearly this proposition is devoid of authority. But, in addition, it has little merit. It is, of course, a fiction. It is not being suggested that the money *is* the same money, it is being said that it should be treated as if it were, and like most legal fictions it is uncertain where its boundaries lie. But it is surely extending the fiction beyond breaking point to say at one and the same time that the money both is, and is not, the same money as originally possessed by the respondent. This suggestion of Kurshid and Matthews has little merit.

One other possible explanation for the outcome of the case is that it was an example of a common law court upholding an action in money had and received in respect of monies in which the respondent already had equitable rights in the form of a trust.⁹⁵ Atkin L.J. did specifically mention this possibility, but gave it no further consideration, because he

⁹⁵ As in *Scott v Surman* (1742) Wiles 400. See Chapter 3 for a discussion of this case.

considered that the claim could be upheld on specifically common law grounds. Even without Atkin LJ's comment, however, it is very difficult to see how such a procedure could ever have been adopted in this case because it requires the claimant to have a pre-existing right in the form of a trust, and the respondent in this case cannot have possessed such a right. They had no such right because there were no assets which could have formed the subject matter of a trust. There were merely a sequence of debtor/creditor relationships, as monies were transferred from one account to another.

Hambrouck did not have any fiduciary relationship with the respondent bank. In fact, he had no relationship with it at all. Admittedly, if the respondent bank had repaid the sum taken from Mr Pelabon's account to him, Hambrouck would have caused the bank a loss. But it is difficult to see how that alone would have given the bank any interest in the proceeds of Hambrouck's balance with his own bank, in the form of a trust, or otherwise. Furthermore, if there was a trust of the monies that Hambrouck obtained from the respondent, one wonders why, given that the claim was solely to the balance of the monies standing to the credit of the appellant with her bankers, the action against the appellant was formulated as being in money had and received rather than in knowing receipt.

Banque Belge is a difficult case to understand. One problem was undoubtedly the curious procedural course that the case took. It appears that, originally, the appellant's bank was included as a defendant in the action and, presumably in order to extricate themselves from that action, they paid a sum of money, representing the balance on the appellant's account, into court. They were effectively

therefore asking the court to decide who was the owner of that money, but the correct answer to that question is that they were. Legal title to the money was passed to the appellant's bank by Hambrouck's bank, who themselves had legal title because they were purchasers of the money for value, and acquired title before the claimant's rescinded the transaction.

The court of first instance treated the case as being a claim for money had and received, which is a personal claim, despite the fact that the argument of the claimant was that the actual money placed into court, belonged to it.

Moreover, it was never explained why, if the claim was one for money had and received, it was restricted to the monies paid by the appellant's bank into court. If an action for money had and received would lie against the appellant, it would presumably lie for the entire monies that she received, not just for the sum remaining to her credit at her bank. To succeed in money had and received the respondents should have had to show that the appellant received into her bank account money, which legally belonged to them. This would have nothing to do with the entirely different question of whether the monies paid into court belonged to them.

The fact that, it seems, the respondent bank did not repay Mr Pelabon the money taken from his account, makes its position looks even less meritorious. The Court of Appeal did not seem to think that this mattered much since, in their opinion, the money in the appellant's bank account *would still belong to the claimant*. But this is, yet again, a conclusion not an argument (in fact it is more or less what the entire case is about), and moreover, as we have seen, it is an incorrect

conclusion. The respondent seems merely to have been a middle man, passing money from Mr Pelabon to Hambrouck with no loss to itself. It is hard to see what possible beneficial interest the respondent could have had in any rights associated with the money.

In fact, it is hard to see what the respondent is doing in the case at all. Even if an action would lie against the appellant for unjust enrichment (which as an indirect enricher is at least questionable) that enrichment was not at the expense of the respondent. The respondent has suffered no loss.⁹⁶

This was a complicated case made all the more complicated by the unusual course that it took. Irrespective of whether it is really about equitable tracing, or whether there is some other explanation, or whether it should be regarded as wrongly decided, the only justification put forward in the judgments for the ability to trace at common law was the authority of *Taylor v Plumer* and that is insufficient.

F.C. Jones & Sons (Trustee in Bankruptcy) v Jones.⁹⁷

There are undeniable echoes of *Banque Belge* in the case of *F.C. Jones & Sons (Trustee in Bankruptcy) v Jones*, certainly in the procedural history of the case.

A partnership committed an act of bankruptcy, following which one of the partners wrote cheques to his wife drawn on the partnership account to the value of £11,700. Mrs Jones, the wife, invested the money in potato futures. The investment was successful and resulted in

⁹⁶ L. Smith, 'Restitution: The Heart of Corrective Justice' (2000-2001) 79 Texas Law Review 2115; M. McInnes "At the Plaintiff's Expense": Quantifying Restitutory Relief" (1998) CLJ 472.

⁹⁷ *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch. 159.

Mrs Jones being able to withdraw £50,760 from her brokerage account which she deposited at Raphaels bank.

Although no trustee in bankruptcy had been appointed at the time that Mr Jones transferred the moneys to his wife it was a principle of bankruptcy law at the time⁹⁸ that the effective date of the bankruptcy was the date of the presentation of the petition and from that date the legal interest in the partnership bank account was vested in the trustee. This is known as the doctrine of relation back.

The Official Receiver therefore demanded the entire balance held at Raphaels bank in the name of Mrs Jones. Raphaels interpleaded, placed the money into court and asked the court who could give it a good receipt for its money.

It would seem that if the court wished to find for the Official Receiver the easiest mechanism would have been to find that Mrs Jones was the legal owner of the money but that, owing to the doctrine of relation back, she held the money on trust for the trustee in bankruptcy. Millett LJ, however, would have none of this:

As from the date of the act of bankruptcy the money in the bankrupts joint account at the Midland Bank belonged to the trustee. The account holders had no title to it at law or in equity. The cheques which they drew in favour of Mrs Jones were not “void” or “voidable” but in the events which happened they were incapable of passing any legal or equitable title.⁹⁹

So Mrs Jones held no legal interest and was not a trustee. The case is simply one of an owner asserting his rights to his own property.

It is what Millett LJ said next that makes it impossible to regard the reasoning in *Jones v Jones* as anything but defective:

⁹⁸ Bankruptcy Act 1914 (4&5 Geo. 5, c. 59) ss37, 38.

⁹⁹ (1997) Ch 159, 164.

They were not, however, without legal effect, for the bank honoured them. The result was to effect the identity of the debtor not the creditor, and to put Mrs Jones in possession of funds to which she had no title. A debt formerly owed by the Midland Bank, apparently to Messrs F.W.J. Jones & A.C. Jones, but in reality to their trustee, ultimately became a debt owed by Raphaels apparently to Mrs Jones but in reality to the trustee.¹⁰⁰

This reasoning is unsupportable. Mrs Jones was never “in possession of funds” if by that expression it is meant to indicate the contents of her bank account. A bank account cannot be possessed, it is an intangible. If this judgment is correct then, by some completely unknown means, the contractual arrangement of debtor and creditor, entered into between Raphaels and Mrs Jones, has been superseded by one between Raphaels and the trustee in bankruptcy. The common law knows no such expropriation of personal rights. In fact the expropriation appears to have turned a personal right into a proprietary one, since the trustee was entitled not only to the £11,700 that Mrs Jones had obtained from the partnership account at the Midland Bank, but to the entire balance of her account at Raphaels. In addition, Millett LJ went on to say that the trustee could have recovered in debt from Raphaels. This means that Mrs Jones could not have done so, and so could not have given a good receipt for the money to them. Payment to Mrs Jones by Raphaels would not therefore have been good against the trustee. As Smith points out this would make the position of banks and finance houses untenable.¹⁰¹

¹⁰⁰ (1997) Ch. 159, 167.

¹⁰¹ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 330.

Finally, it should be pointed out that Millett LJ's analysis is probably incompatible with *Lipkin Gorman v Karpnale Ltd.*¹⁰² That case emphasised the point that where a person draws money from a bank account in a manner unauthorised by the account holder, but is effective as between the account holder and the bank, the withdrawer becomes the legal owner of the money.

Moreover, *Jones v Jones* also appears to suggest that assets traced at common law are immediately vested in the claimant. This would also seem to be difficult to square with *Lipkin Gorman* which appears to stand, if anything, for the proposition that such assets are only vested in the claimant following some action or other on his part.

Jones v Jones is not a reliable source of authority for the existence of common law tracing.

Lionel Smith interprets the case as one concerning equitable rights and suggests that that the action for money had and received in this case was yet another example of that action being utilised for the protection of existing equitable rights.¹⁰³ It is difficult to find any justification for that approach in the judgments. As we have seen from the quotation cited above, Millett LJ specifically denied that the defendant ever had any title of any sort in the money in question.

Moreover, the action in this case was not one for money had and received. It was a direct claim by the claimant to the money that had been paid into court by Raphaels. It seems to have been based on a

¹⁰² [1991] 3 WLR 10.

¹⁰³ L.Smith, 'Simplifying Claims to Traceable Proceeds' (2009) LQR 338.

common law equivalent of a *vindicatio*. Which is in itself another reason why the outcome is hard to justify.¹⁰⁴

Smith's analysis also fails to explain how equitable tracing could be engaged in this case. It is fundamental to equitable tracing that there has been a breach of fiduciary duty with respect to the original asset.¹⁰⁵ The only potential fiduciary in this case is Mr Jones. But Mr Jones was not the defendant. Mrs Jones was the defendant, and this was therefore a claim against a non-fiduciary. There is some merit in the argument that Mrs Jones was liable in equity for the £11,700 on the basis that a transactional link could be established between Mr Jones breach of fiduciary duty (if there was one) and Mrs Jones receipt of that money. But this would not allow the claimant to get at the profits. There are cases where claims to the profits acquired as the traceable proceeds of the result of a breach of fiduciary duty have been allowed, but these were claims against the *fiduciaries themselves*. It does not follow that such a claim could be maintained against non-fiduciaries.

Macfarlane, like Smith, suggests that adopting an equitable analysis enables one of the most troubling aspects of the case, that the claim was not to the value of the monies taken from the account, but to the entire profit made by Mrs Jones in her investment activity, to be explained. He says that this merely confirms the decision in *Foskett v McKeown*.

There is, however, a striking difference between the two cases. In *Foskett v McKeown*, Murphy, who was a wrongdoer, took trust money

¹⁰⁴ Given that the common law knows nothing in the nature of a *vindicatio*. The common law protects property rights via actions in tort and money had and received. See text accompanying notes 36-60 above.

¹⁰⁵ *Shalson v Russow* (2005) Ch 281.

and invested that money in a life policy of which he, or at least his estate, was the beneficiary. Whether that fact in itself should have been sufficient to allow the trust beneficiaries to trace into a proportionate share of the life policy is a matter of considerable controversy, but at least the money involved was trust money. In *Jones v Jones* the money transferred from Mr Jones to his wife was not trust money at all. Mrs Jones did not take the money as trustee. Macfarlane argues that the effect of the decision in *Westdeutsche*,¹⁰⁶ is that Mrs Jones became a trustee of the money at the point at which she was aware that it belonged to the trustee in bankruptcy.¹⁰⁷ However, Lord Browne-Wilkinson's dicta, which are the basis of this explanation, have been doubted. In *Shalson v Russow*,¹⁰⁸ Rimer J considered them not to follow from the authorities cited by his Lordship in support of them. If Rimer J's analysis is correct, and a thief cannot be held to be a constructive trustee of a stolen asset, it must surely follow that an innocent recipient can be in no worse a position than the thief.

There is an alternative interpretation of *Jones v Jones*, which will be discussed in Chapter 6. This is that the case has nothing to do with property rights, but is based on unjust enrichment. As we shall see not only is this unjustifiable on the basis of both the facts and the outcome, it also explains nothing, since unjust enrichment is as inadequate an explanation for claims to substitute assets as is the law of property.

¹⁰⁶ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) AC 669.

¹⁰⁷ *Ibid* 715. Per Lord Browne-Wilkinson.

¹⁰⁸ (2005) Ch 281.

Conclusion

The law of property is an unconvincing candidate for the role of explaining the basis of rights in substitute assets. Supporters of its validity in the role seem to operate at the level of mere assertion. No good explanation has been provided as to why a right in asset A should, in the absence of a consensual transfer, be allowed to transmit itself to asset B merely because of the existence of the original right. Birks is correct. This is “the fiction of persistence”.¹⁰⁹

At the level of the substantive law *Banque Belge* does give undeniable support to the idea of the right to trace at common law based on proprietary interests in the original asset. But *Banque Belge*, on examination, depends heavily on *Taylor v Plumer* and where it takes the reasoning in that case further it offers little justification for doing so. Nothing in *Banque Belge* even begins to acknowledge the impossibility of following money through bank accounts. It is best regarded as a case dependent entirely on the peculiar procedural route that it took.

The judgment in *Jones v Jones* is difficult to support. It seems to be at odds with the decision of the House of Lords in *Lipkin Gorman*, but, aside from that, it provides no explanation of the claimant’s proprietary right that is not in conflict with our general understanding of how the law of property allocates such rights and how it protects them.

¹⁰⁹ P Birks *Unjust Enrichment* (2nd ed Clarendon Press 2005) 35.

Chapter 5 Tracing and the Law of Property – Part 2.

Introduction.

In Chapter 4, the two most significant cases which appear to support the proposition that claims to substitute assets at common law are best explained as being part of the law of property, were examined. The lack of any theoretical basis for this proposition was argued in the first part of the chapter. Upon examination, it was shown that neither of the cases looked at were able to overcome the theoretical objections set out in that argument. This chapter will look at the remaining authorities, which, it has been suggested, support the proposition. They are of less significance than those discussed in the last chapter. Some of them are dependent upon those authorities as the basis of their outcome. Some were decided on entirely different grounds, but contained dicta that might be considered relevant. Yet others contain difficulties with understanding either the factual basis of the claims, or the judgments themselves, and are thus difficult to classify. Nonetheless, they are all of some importance because they could be seen as giving credence to the availability of common law claims to substitute assets. Because all of the theoretical work was done in the first part of the previous chapter this chapter is, therefore, merely a deconstruction of these particular cases.

[Agip \(Africa\) Ltd v Jackson and Others.](#)¹

Banque Belge,² examined in detail in the previous chapter, formed the basis of some dicta in this case, in which it seems to have been suggested that there does exist a right to trace into substitute assets at common law. The case, therefore, needs addressing despite the fact that, in the event, it was decided on equitable grounds.

The important facts were, that the chief accountant of the claimant company forged a payment order, made out by that company in the name of a shipping company, by changing the name on the order to Baker Oil Services Ltd. On receipt of the money Baker Oil transferred sums into an account of the defendants, a firm of chartered accountants acting for Baker Oil, who themselves transferred it to their clients account in the Isle of Man. Its ultimate destination from there remained uncertain, but it was not suggested that the defendants themselves had committed any fraudulent act.

The claim was one for money had and received. The basis of the claim was that the claimant's bank had made a mistake when paying the money to Baker Oil, instead of to the intended shipping company, and that the defendants, as recipients of the proceeds of that mistaken payment from Baker Oil, were equally liable in money had and received.

In order to succeed in a claim for money had and received against the defendants, the claimants had to show that the defendants had received the claimants' money. They tried to do this by claiming that, at common law, the monies received by the defendants were the traceable proceeds of the monies paid by the claimant to Baker Oil.

¹ (1990) Ch 265. The case went to the Court of Appeal where it was reported at (1991) Ch 547.

² *Banque Belge Pour L'Etranger v Hambrouck* (1921) 1 KB 321.

There is little doubt that Millett J was of the opinion that authority held that it is possible to trace at common law in principle, and that it is possible to trace into the contents of un-mixed bank accounts in particular. The authorities cited in support of this opinion were *Taylor v Plumer*,³ and *Banque Belge*. He said:

The common law has always been able to follow an asset from one recipient to another. Its ability to follow an asset into the same hands into a changed form was established in *Taylor v Plumer*..in following the plaintiff's money into an asset purchased exclusively with it, no distinction is drawn between a chose in action such as the debt of a bank to its customer and any other asset; *In re Diplock* (1948) Ch 466...But it can only follow a physical asset, such as a cheque or its proceeds, from one person to another. It can follow money but not a chose in action. Money can be followed at common law into and out of a bank account and into the hands of a subsequent transferee, provided that it does not cease to be identifiable by being mixed with other money in the bank account derived from the same source: *Banque Belge pour L'Etranger v Hambrouck* (1921) 1 KB 321. Applying these principles, the plaintiffs claim to follow their money through Baker Oil's account where it was not mixed with any other money and into Jackson & Co's account at Lloyds Bank.⁴

In the instant case, however, Millett J held that common law tracing was not available to the claimants, on the specific facts of this case, on two grounds.

The first was that the nature of the transaction meant that the monies received by the defendants into their bank account had first been through the New York clearing system, which therefore meant that

³ *Taylor v Plumer* (1815) 3 M & S 562.

⁴ (1990) Ch 265, 285.

they had been mixed with other monies. The common law, said Millett J, cannot trace through mixed bank accounts.

The mechanism of clearing does undoubtedly create a difficulty for the orthodox theory of tracing, but the issue of mixing is not it. The orthodox theory says that we trace value from asset to asset through an uninterrupted series of transactions. But this is not what happens in clearing. If A makes a payment order to his bank to credit B with a sum of money, his bank will comply with that order by instructing B's bank to credit B's account with that sum. The difficulty with a theory of tracing that says that we trace value from one asset to another is showing how the rights that B has now acquired are directly linked with A's instruction to his bank at all. The issue of the mixing of funds in a clearing system is irrelevant to the tracing process because it relates entirely to how the banks settle debts amongst themselves. A, in our example, is not trying to show that the money which B's bank credited to B was the same money that A gave to his bank. In fact, A is not concerned whether the two banks ever settle the debt amongst themselves.

The involvement of the clearing system in this way does little to add to the plausibility of the body of doctrine that makes up the supposed right to trace at common law. How, it may be asked, can an administrative system, set up to enable banks to more easily settle vast numbers of transactions between themselves, possibly affect the rights of individuals, vis a vis each other, making transfers between their bank accounts? As was said in the High Court of Hong Kong, in the case of *Kwai Hung Realty Co Ltd v Yip Fung Sheung*,⁵ in response to the

⁵ (1997) HKEC 683.

suggestion that two rights could not ever be connected if clearing intervened:

The point is, after all, a simple one, namely whether the money received by Wing Lung under each cheque of the plaintiff is the money of the plaintiff, and from the plaintiff. Any layman would have no hesitation in saying yes.

The fact that, if all of the parties in *Agip* had banked with the same banker different considerations would have applied, makes it even more difficult to accept Millett J's approach, which appears to lack principle as well as rationality. The outcome of cases such as this should not depend upon the accidental circumstance of which bank the various parties happen to bank with.

The second reason for rejecting the claim was that Millett J said that the tracing process was not engaged at all because only physical things could be followed, at common law, from one set of hands to another.

In following the plaintiff's money into an asset purchased exclusively with it, no distinction is drawn between a chose in action such as the debt of a bank to its customer and any other asset...but it can only follow a physical asset, such as a debt or its proceeds, from one person to another.⁶

That it is possible to trace at common law through the contents of unmixed bank accounts is undeniably a conclusion that some have drawn from the outcome of *Banque Belge*. But to ascribe the right to trace the contents of a bank account into the hands of a third party as arising because a debt, or its proceeds, constitute a physical asset, is curious. It was never suggested in *Banque Belge* that the defendant had received a physical asset. Bankes LJ was content to assume, in that case, that the claimant could trace through the contents of the various bank

⁶ Ibid 285.

accounts *as if* they were physical assets. It was not asserted that they were. In fact the contents of a bank account are no more a physical thing, capable of being followed, than the “stream of electrons”⁷ which the claimant was trying to follow in *Agip*. It is correct to say that in *Agip* there was nothing to trace. There was merely a series of payment orders which resulted in the claimant losing a right and the defendant gaining a right. What is incorrect is distinguishing this case from *Banque Belge* on the grounds that that case concerned physical assets.

Moreover, even if the claimant in *Agip* had been able to show that the defendant did receive the traceable proceeds of his money, he would still not have succeeded. Despite being clearly unconvinced by the case,⁸ Millett J said of *Banque Belge* that:

I think that at first instance I am bound to regard that case as authority for the proposition that an action for money had and received is not limited to the immediate recipient or his principal but may be brought against a subsequent transferee into whose hands the money can be followed and who still retains it.⁹

But he doubted that there was any authority for the proposition that a claim in money had and received could lie, in the absence of fraud, against an indirect recipient of that money who no longer had it in his possession. Again, however, this is questionable reasoning because the defendant in *Banque Belge* did not have any money in her possession. All that she had was a chose in action representing the balance on her account with the bank. In addition, there is no particular reason why the

⁷ P. Millett, ‘Tracing the Proceeds of Fraud’ (1991) 107 LQR 71, 73.

⁸ He said of it when writing extra-judicially that it was “another case which is largely what one chooses to make of it” P. Millett, ‘Tracing the Proceeds of Fraud’ (1991) LQR 71.

⁹ (1990) Ch 265, 285.

issue of possession matters. Money had and received is a personal claim. The question of what the recipient did with the money that he received is irrelevant.

Ultimately there is not much in Millet J's dicta to support the idea that it is possible to trace at common law. His general acceptance of the idea is firmly based on his (mis)understanding of *Taylor v Plumer* and his comments on the ability of the common law to trace into unmixed bank accounts, which he derives from *Banque Belge*, are, at best, *obiter*, since he is clearly of the opinion that, in this case, the monies went through a mixed account. At worst the comments are entirely unhelpful because he seems to think that following money through bank accounts can be equated with following physical objects.

[Armstrong DLW v Winnington Networks Ltd.](#)¹⁰

This case is of considerable interest because it may be thought of as sitting at the boundaries of the laws of property, unjust enrichment, tracing, restitution and equity. It demonstrates many of the areas of confusion that sit along those boundaries.

Moreover, in its discussion of common law claims to substitute assets, it reflects exactly the analytical division that is being examined in this part of the work, that is the differing explanations of tracing as being either part of the law of property or as a response to unjust enrichment.

In addition, it also shows how the uncertainties surrounding the proper explanations of *Lipkin Gorman*,¹¹ and *Jones v Jones*,¹² have led a subsequent court to cite them as authorities in a case in which they have

¹⁰ (2013) Ch 156.

¹¹ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

¹² *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* (1997) Ch 159.

nothing to say and for propositions for which they undoubtedly do not stand.

The background is that the claimant was a company registered in Germany, which, as a result of its manufacturing process, produced emissions of carbon dioxide. As a result, it was required to participate in the European Union Emissions Trading Scheme.¹³ This scheme required producers of carbon emissions to purchase EU allowances (EUAs). These allowances were individually numbered and recorded in each member state, in a registry. Companies were allowed to trade in these allowances (i.e. to buy and sell them) provided that at the end of each year they had sufficient EUAs to cover their emissions. Moreover, companies that did not themselves emit carbon were also permitted to trade in the EUAs.

Although the precise facts of the case were somewhat complicated they can be reduced to a fairly simple core. As a result of a fraud (not perpetrated by the defendant) a quantity of EUAs was transferred, without the authority of the claimant, from the claimant to the defendant. The defendant sold the EUAs on to a third party.

The claimant put forward three alternative claims. The basis of at least one of them, the proprietary restitutionary claim, was uncertain. It would also seem that the claims were mutually exclusive, and depended on how the court saw the facts of the case.

First, the claimant put forward what the judge described as a “restitutionary proprietary claim”.¹⁴ The essence of this claim was that the EUAs at all times remained the property of the claimant and that, as

¹³ Pursuant to European Parliament and Council Directive 2003/87/EC.

¹⁴ (2013)Ch 156, 159.

a result of the decisions in *Lipkin Gorman, Jones v Jones* and *Foskett v McKeown*,¹⁵ the claimant could trace from the EUAs into the monies received by the defendant for their onward sale. This analysis, which was accepted by the judge in theory but was rejected by him on the facts, tells us why the claimant has a claim, but nothing about what that claim is. It will be recalled that *Jones v Jones* did not strictly involve a claim at all. A bank paid money into court and asked the court to decide who could give it a good receipt for that money. *Lipkin Gorman* was a personal claim for money had and received and *Foskett v McKeown*, at its heart, concerned a defaulting trustee. It appears, in *Armstrong*, that the claimant was arguing for a personal remedy only, but it is difficult to tell how the judge regarded the claim, since he used very unspecific language in describing it, and the expression “proprietary restitutionary claim” suggests something rather more than a personal claim.

The second claim put forward was one in unjust enrichment. This will be looked at in more detail in the next chapter. This also, apparently, relied on *Lipkin Gorman*, although a different understanding of that case from the one relied on for the purposes of the first claim. It depended on the EUAs in the defendant’s account no longer being the legal property of the claimant. The judge appeared, at one stage, to have rejected this claim on the basis that, on the facts, the defendant could not be said to have been enriched at all, but this is uncertain.

The third claim, and the one that won the day, was a claim that the defendant received property, the EUAs, subject to a constructive

¹⁵ *Foskett v McKeown* (2001) 1 AC 102.

trust in favour of the claimant and as a result was liable to the claimant in knowing receipt.

It is suggested that the claimant's formulation of these claims represents a very considerable over-complication. If title to the EUAs passed to the fraudster then the claimant had to ground its claim in equity. If title to them remained with the claimant the claim was a simple one in money had and received, without any recourse to questions of tracing, or proprietary restitution. What seems to have been overlooked is that the point that, because no common law action appears to be available against the defendant for the receipt of the EUAs themselves, that does not mean that no common law action is available against them for the receipt of monies for their onward sale.

First it is necessary to look at the nature of the property concerned.

The EUAs.

A considerable amount of space was taken up in the judgment in deciding exactly what type of property interest is created by an EUA. Whatever type of interest it is, it certainly appears to be one which is capable of being legally owned and transferred¹⁶ although not, apparently, one capable of protection by the law of conversion.¹⁷

Ultimately it was decided that the property was intangible property but probably not a chose in action, because it could not be claimed or enforced by action. The expression "other intangible" was used by the judge as a possible description of its nature.¹⁸

¹⁶ (2013) Ch 156, 173.

¹⁷ Ibid.

¹⁸ Ibid 176.

The problem with identifying the property as an “other intangible” is that this says nothing about how rights in that property can be protected or vindicated. Indeed, counsel for the defendant suggested, convincingly it is submitted, that such property was not protected by English law at all. The Deputy Judge clearly felt that, since the EUAs constituted property, rights in them must be protected in some way, and the court’s task was to find that way. The judge held that the claimants were basing their claim on a pre-existing, legal, property right. Thus he held that the EUAs in the possession of the defendant were the legal property of the claimant, and could be followed by the claimant from the German registry, through the fraudster, and then into the defendant’s registry. The EUAs were *the same EUAs* throughout. This, of course, has nothing to do with tracing. It is a matter of following. There remains the difficulty, however, that, even after following the EUAs into the hands of the defendant, formulating a claim in respect of them is not easy.

Conversion will not lie in the case of intangible property, since the essence of the tort is the claimant’s right to immediate possession, and intangible property cannot be possessed.¹⁹ There appears to be no common law *vindicatio* which would enable the court to simply order the return of intangible property *in specie* to the claimant. *Jones v Jones* would not apply here because in that case the court was not ordering one party to give up property to another, it was deciding who owned property that had been placed into court by a third party. In any case the notion that *Jones v Jones* involved a *vindicatio* is another argument against the reasoning in that case. Finally, a claim in unjust enrichment

¹⁹ *OBG Ltd v Allan* (2008) 1 AC 1.

appears to be barred by the fact that, the claimant having retained title to the property, the defendant had not been enriched by its receipt. Nonetheless, unjust enrichment may be the most fruitful area to explore here. The reason that a defendant is not enriched by the receipt of tangible property to which the claimant retains title is that he has gained nothing. He is merely in possession of something to which the claimant has a prior and better right, and, importantly the claimant is able to enforce that right against him. In the case of EUAs this is not the case. The claimant appears to have no alternative mechanism for enforcing his rights and it is therefore, tentatively, suggested that a defendant who receives an EUA to which the claimant has retained title may be enriched because he appears to have no requirement to account for it to the claimant.

However, the question of what claim the claimant may have had in respect of the EUAs was largely irrelevant, because the assets were disposed of by the defendant immediately on receipt. The issue therefore became could the claimant make any claim in respect of the monies received by the defendant for the onward sale of the EUAs?

This is not the same question as how the claimant could vindicate their rights in the EUAs themselves. It by no means follows that, simply because there might have been no action available to the claimant in respect of its rights in the EUAs themselves, there is also no action available in respect of the monies received for their sale. The lack of availability of an action in conversion of the EUAs, for example, does not mean that title to the EUAs did not remain in the hands of the claimant, and that any disposal of them without the authority of the claimant could not lead to the claimant being able to formulate claims in respect

of the proceeds. As was explained above this possibility was put forward in three different ways.

The Equitable Claim

In the event it was this claim which succeeded. The judge found that the fraudster had obtained “some form of de facto legal title to the EUAs”,²⁰ sufficient to enable him to hold them in trust for the claimant. He then went on to find that the defendant had the requisite knowledge that the EUAs were trust assets, for a successful claim to be brought against it in knowing receipt.

This was a somewhat problematic conclusion, but its problems are only tangentially related to this work. Suffice it to say that, as a result of it, all of the dicta on common law claims were essentially *obiter*, and that, on that basis alone, they stand as doubtful authority in respect of those claims.

The common law issues arose because the judge was himself in some doubt as to the correctness of his formulation of the claim as an equitable one, and he therefore took the time to examine what the position would have been if no equitable claim could be shown to have been available. This he divided into two distinct possibilities. First that the claimant had a “restitutionary proprietary” claim and second that he had one in unjust enrichment.

The Restitutionary Proprietary Claim.

The nature of a restitutionary proprietary claim will be examined in more detail in Chapter 6. It suffices here to say that, as generally understood, it involves the claimant asserting a claim to a particular item

²⁰ (2013) Ch 156, 276.

of property in the defendant's hands. There is considerable controversy as to the circumstances in which such a claim can succeed, but unless *Jones v Jones* can be cited to the contrary, all successful claims have been entirely equitable in nature.

But that is not how the judge in *Armstrong* seems to have understood the meaning of the expression. It is certainly true that use of the term proprietary is often adopted in a looser sense, to indicate that the claim is in respect *of* property, but is not *to* that property. Thus, a claim in conversion may be thought of as a proprietary claim because the essence of the claim is that the claimant is asserting certain rights in an item of property that is in the hands of, or has been through the hands of, the defendant. But the claim itself is a simple money claim for compensation. In the case of conversion the compensation usually takes the form of damages. Money had and received would seem to be the prime example of a claim for restitution where the basis of the claim is that the defendant has received money belonging to the claimant. But, again, the claim is not to any particular item of money in the defendant's hands. It can be satisfied by the defendant paying any money, as long as it is the correct amount, to the claimant. In reading the judgment, it would seem that this is what the judge had in mind when he described the claim as being a restitutionary proprietary claim, since it is at no point suggested that the claimant is making a claim with respect to any particular money in the possession of the defendant.

But if this is the case then all of the judge's references to tracing and to *Lipkin Gorman* and *Jones v Jones* are irrelevant. Neither case provides any authority that is of any assistance in the disposal of *Armstrong* argued as a personal claim.

It again needs to be borne in mind that the claim in *Armstrong* was not in respect of the EUAs themselves but concerned the monies received for their onward sale.

In order to show the irrelevance of *Lipkin Gorman* to this situation it is necessary to quickly summarise the facts of that case, which will be looked at in considerable detail in the next chapter.

Norman Cass was a salaried partner in the firm of the appellant solicitors. In order to fund a gambling addiction he began drawing on the proceeds of the appellant firm's client account, of which he was a signatory. He withdrew both cash and sums of money by way of banker's draft. The money was spent at a casino (the Playboy Club) then in the ownership of the respondents. The procedure was that Cass exchanged the cash or drafts for chips which enabled him to both gamble at the casino tables and also to purchase refreshments within the confines of the club. Unused chips could be exchanged back for cash. As is usually the way with such things Cass was both a winner and a loser at the tables but the overall effect of his gambling was to produce very substantial losses. Because Cass was constantly replacing parts of his drawings back into the client's account the court found it difficult to determine the net sum of money that had been withdrawn but it was agreed that it could not have been less than £220,000.

As a result of the then law relating to gambling the club had not given good consideration for the receipt of the monies from Cass.

The claim was one for money had and received, but the crucial question, and the only reason that the issue of tracing arose at all, was who owned the money with which Cass had gambled.

The House of Lords held that the money belonged to the firm because it was the traceable proceeds of the money originally misappropriated by Cass. It will be explained in the next chapter why this was an erroneous decision, but for present purposes the important point is that it has nothing to do with the situation in *Armstrong*. The judge in *Armstrong* conceived of *Lipkin Gorman* as a case involving the question “if B steals A’s property and sells it to C does A have a claim against C for the property or its value”.²¹ But as Birks pointed out this is not a possible characterisation of the issue in that case.²²

What it was about was whether A had given C, B’s money or his own. Once it was decided that, using the process of tracing, it was B’s money then everything else followed as a matter of the general law of money had and received.

In *Armstrong* this issue did not arise. On the judge’s alternative assumption, that title to the EUAs lay with the claimants at all times, there was nothing to trace unless the claim was to specific monies in the hands of the defendants, which it was not. All of the references to *Lipkin Gorman* as authority for the right to trace through intangible property rights, even if they were correct, have no relevance to *Armstrong* because in *Armstrong* the defendant received monies for the sale of the claimant’s property and the claimant merely asked the court for a money judgment to its value. This is a straightforward case of money had and received. It has nothing to do with tracing.

The judge did not appear to see it that way. He said:

Mr Joffe however submits that, whatever the position as regards money, there is no authority for there being such a basis of claim (or cause of action)

²¹ Ibid 168.

²² P. Birks, *Unjust Enrichment* (2nd edn Clarendon Press 2005) 95.

where the asset in respect of which the claimant brings his claim is a chose in action or other intangible property. In such a case he submits there is no identifiable “cause of action” known to law...there is, he submits no warrant for extending the law to cover such a cause of action, particularly in the light of the firm view of the majority in the House of Lords in *OGB Ltd v Allen*²³ rejecting the possibility of there being a common law claim for conversion of a chose in action.²⁴

He then went on to say:

I do not agree with this submission. In my judgment, there is no reason why, in an appropriate case, a claimant does not have a personal claim at law to vindicate his legal proprietary rights in respect of a chose in action or other form of intangible property...I do not accept that the proprietary restitutionary claim has to be characterised as, or brought in the form of, an action for money had and received. It is no longer necessary to fit any particular claim into any particular “form” of action.²⁵

But all of this appears to confuse the distinction between an action in respect of the EUAs themselves and one for the proceeds of their onward sale. Either the law never allows a claim where the basis of the claim is the ownership of an intangible asset, in which event the *Armstrong* claimant must fail, or it does, in which case the claim in this instance is for money had and received.

Moreover, the last four lines quoted above are confusing. It is doubtless true that a claim no longer has to fit any form of action, but it has to disclose rights that the law acknowledges that the claimant possesses. In this case the right is to the value of monies received for the sale of property belonging to the claimant. Which, whatever one calls it, amounts to a personal claim for money had and received.

²³ (2008) AC 1.

²⁴ (2013) Ch 156, 183.

²⁵ *Ibid.*

If anything, *Jones v Jones* is even less relevant than *Lipkin Gorman*. In *Jones v Jones*, as with *Lipkin Gorman*, tracing was utilised to demonstrate that the monies which were at the heart of the case belonged to the claimant. Unlike in *Lipkin Gorman* the matter concerned specific monies, and who had what rights in those monies. It was about rights in substitute assets, which *Armstrong* was not. Moreover, it does not establish the existence of a “proprietary restitutionary claim” because it did not involve a claim. An interpleading bank asked the court which of two parties could give it a good receipt for monies held in an account at that bank. The court had to give an answer. It did not have the option of saying that it did not know. *Jones v Jones* does not, as *Armstrong* suggests, extend *Lipkin Gorman* from the realms of personal claims to that of claims to rights in specific property. But even if it did that would not be relevant to *Armstrong*, because *Armstrong* was a personal claim.

The judge also cited *Foskett v McKeown* in support of his argument for the existence of a common law proprietary restitutionary claim. He said:

Whilst it is the case that on the facts the claimants were seeking to enforce their equitable property rights (arising under the pre-existing trust of their purchase moneys) it seems to me there is no reason why the distinction drawn by Lord Millett between the two types of action (that is between actions in unjust enrichment and actions to vindicate property rights) does not apply with equal force where the claimant is seeking to enforce his subsisting legal title to property.²⁶

The problem with this reasoning will be examined in greater detail in Chapter 7 but, in brief, it is that there is an explanation as to why a

²⁶ Ibid 182.

person who is asserting equitable property rights can demand the return of property subject to those rights *in specie*, where that property has been transferred without authority by his fiduciary. That reason is that a fiduciary may not acquire rights arising from the conduct of his fiduciary duties²⁷. No such rule arises in the absence of a fiduciary relationship and there is no satisfactory alternative basis on which an equivalent common law requirement could be founded. Simply asserting that it somehow follows from the law of property is insufficient without an indication as to why that should be the case. *Foskett v McKeown* is not about common law rights at all.

[Littlewood v Williams.](#)²⁸

According to Calnan,²⁹ this case gives “some credence to the idea that it is possible to trace into a substitute asset at common law”. It is difficult to see how this may be so, and in any event Calnan himself goes on to reject the idea,³⁰ but the case does warrant a brief examination.

The facts were that the sexton of a church was in the custom of receiving money from the executors of deceased persons who did not live within the parish of Hendon but expressed a wish to be buried there. Half of this money had traditionally been paid over to the vicar of the parish and half to the churchwardens for the benefit of the poor. On appointment, the defendant vicar told the sexton that he was in future to hand the entire proceeds over to him. The churchwardens sued the vicar for half of the proceeds as money had and received to their use.

²⁷ *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223.

²⁸ (1815) 6 Taunt 277.

²⁹ R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 7.117.

³⁰ *Ibid* 7.120.

A major problem with citing this case as authority for anything is that we do not know enough of the facts. Nothing, however, leads to the implication that the outcome, which was a judgment for the churchwardens, depended on questions of the common law and substituted assets.

There would seem to be two possibilities concerning title to the money delivered to the sexton. The first is that the executors knew nothing of the vicar and the churchwardens and passed the money to the sexton intending him to have legal title to it. If this were the case then legal title would indeed have passed to him. Undoubtedly he would have held the money in trust for either the vicar, or the churchwardens, or both, depending upon the correct understanding of the agreement between the various parties, but this is an equitable matter and has nothing to do with the common law, except, in the sense of the common law using the action for money had and received to prevent the unnecessary replication of actions where the claimant already possesses an equitable right to the money in question in the form of a trust.

The second possibility is that the executors did know of the arrangement between the vicar and the churchwardens and only gave the money to the sexton as stakeholder. They therefore intended legal title to pass to whomsoever it might be that they so intended. If they intended legal title to pass to the vicar then the obvious action for the churchwardens to undertake would have been against the executors themselves for the payment of their portion. They would also presumably have an action against the vicar for money had and

received³¹ and possibly they could establish that the vicar held their portion in trust. Whatever would have been the case it has nothing to do with common law tracing.

Gibbs CJ appears to have come to the conclusion that the money was paid to the sexton as stakeholder to both the vicar and churchwardens in equal proportion. They therefore each had legal title to their respective portion. He said that:

I am of the opinion that the moiety received by the sexton, which used to be received for the use of the churchwardens, was received specifically for them, and that the money in the custody of the sexton was the money of the churchwardens, and that when the vicar prevailed on him to pay over that money, he was prevailing on him to pay over the money of the churchwardens and therefore the churchwardens had a right to recover it back from him...³²

His Lordship may, or may not have been correct on the facts. There is nothing in the report to back up this interpretation but that cannot be conclusive. But there is no suggestion in the judgment that the churchwardens are entitled to any particular money. It looks like a personal claim only. Admittedly his Lordship says that “the money in the custody of the sexton was the money of the churchwardens” but to establish a general right to common law claims to substitute assets from such scanty detail is not possible.

There is nothing in the report that tells us what the sexton did with the money. There is no suggestion, however, that he paid the money into any bank account before paying it over to the vicar. What he appears to have done is to mix money belonging to the vicar with money

³¹ This might be an example of Birksian interceptive subtraction. See P. Birks, *Unjust Enrichment*, (2nd edn Clarendon Press 2005) 75-78.

³² (1815) 6 Taunt 277, 282.

belonging to the churchwardens and paid those monies to the vicar. But this has nothing to do with substitute assets. It is about following not tracing. It looks like those cases of following into a physical mixture discussed in Part 1.³³ This would have been an identical case had the asset in question been ears of corn rather than money. As we saw in part there are different views on how such cases should be dealt with but the outcome here is within the range detailed there.

[Branwhite v Worcester Works Finance](#)³⁴

This is a far from convincing case. It is included here because it is, according to one author, a “key case”³⁵ indicating that a legal tracing claim can be brought against a third party in relation to a substitute asset, although this designation is somewhat devalued by his later saying that as an authority on common law tracing it “leaves a lot to be desired” and that “it is difficult to establish from it any general principle of tracing at law”.

The judgment comes from the House of Lords. The facts were that the appellant owned a Talbot motor car and wished to purchase a Rapier as a replacement. He agreed a purchase price of £430 with the dealer who was selling the Rapier, the price being made up of £130 in part exchange for the Talbot and £300 to be funded by the appellant entering into a hire purchase agreement with the respondent finance company. The appellant signed the hire purchase forms in blank and the dealer substituted higher figures into the paperwork resulting in the respondents purchasing the car for a considerably higher figure. The

³³ See Chapter 1. In particular the text accompanying footnotes 23-37.

³⁴ (1969) 1 AC 552.

³⁵ R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 7.104.

£130 was still treated as an initial payment and was deducted by the respondent from the money paid to the dealer. On discovering that his repayments were higher than expected the appellant made no payments under the terms of the agreement and the respondents repossessed the Rapier. The appellant in these proceedings sought the return from the finance company of £130.

On the face of it this is a reasonably straightforward agency case. The respondents had received the £130, and were liable to repay it, because the dealer had effectively received it on their behalf as their agent. The majority of the House of Lords, however, refused to take this route, saying that a dealer who holds the paperwork of a finance company in such circumstances is not acting as an agent for that company, but as a principal on his own behalf. It is hard to justify such a conclusion but nonetheless it shut off the most obvious route to the appellant's recovery of his money.

Since the appellant could not show that the £130 was received by the dealer as agent for the respondent, he was left to claim that the respondent actually received that £130 from the dealer and that the money paid was at that time the appellant's money. It is noteworthy that neither the word "trace", nor the word "follow" occurred once in any of their Lordship's judgments. The case proceeded on the basis of a concession by counsel for the respondent that the £130 should be treated as if the dealer had made an actual payment of that amount to the respondent. But he did not of course. He merely deducted it from the amount that the respondent owed him from the car.

The problem with treating this as a tracing case is that there are no assets the rights to which can be the subject of a tracing exercise. The

appellant sold his car to the dealer for £130. He did not give the dealer £130, he created a liability in the dealer to give him something in return for that £130.³⁶ That is not an asset which the dealer can pass on to the respondent. The respondent received nothing belonging to the appellant and nothing that could be the subject of a tracing exercise. The notion that the respondent did receive the appellant's money was a fiction. Whether that fiction did or did not produce a desirable outcome is not relevant for our purposes. It is taking the fiction too far, however, to suggest that the rights to fictional proceeds can be traced through a fictional transaction. This case has nothing to do with common law tracing.

[Re Leslie Engineers.](#)³⁷

This is yet another case that is not easy to understand, but it does not seem to have enough substance to support any principle of tracing at common law.

Following the presentation of a winding up petition against the company a director of that company arranged two payments to a creditor. The first was for £250 and was effected by the director making a company cheque out to cash, cashing it himself at the bank, and then taking that cash to the post office where he purchased 5 money orders for £50 each, which he sent to the creditor. The second was for £800. In this case the director sent the creditor a cheque for £800 drawn on his personal account. That account was overdrawn and the cheque was ordered to be re-presented. By the time that it was re-presented the director had paid into his own account a cheque drawn on the company

³⁶ See the analysis in Part 1 concerning backward tracing for a similar analysis.

³⁷ (1976) 1 WLR 292.

for an amount that both paid the creditor and cleared his overdraft. Under the then current insolvency provisions a compulsory winding up commenced at the date of the presentation of the petition.³⁸

By s227 of the Companies Act 1948, any dispositions of the property of the company made after the commencement of the winding up are void unless subsequently validated by the court. The issue, on the liquidator's claim, was therefore whether either transaction could be termed a disposition of the company's property.

As far as the £250 was concerned, Oliver J stated that:

I therefore feel no difficulty – and I may add no doubt – about the initial payment of £250. The bank notes received from the bank were as much the company's property, and identifiable as such, as were the money's in the account...there was throughout a clearly identifiable property of the company which passed directly from the company's hands...to those of the respondents: see for instance *Taylor v Plumer*...that disposition was, in my judgment, clearly invalidated by the section unless and until this court decides otherwise.³⁹

On the face of it the obvious defect in these dicta is their reliance on *Taylor v Plumer*. However, this may not be the case. Oliver J says that the money orders in the hands of the creditor were the property of the company, but he does not say what the nature of the property rights were. He may well have had in mind the possibility that the company had a beneficial interest in the money orders. Whether this would be a sustainable argument or not does not matter for our purposes. The property right in question cannot have been a legal right. When the post office gave the director the money orders in return for the cash they

³⁸ Insolvency Act 1986, ss127 and 129.

³⁹ (1976) 1 WLR 292, 297.

undoubtedly intended to transfer legal title to him, and to nobody else. The money orders received by the creditor were thus the legal property of the director, not of the company.

The judge saw the £800 payment somewhat differently. He disallowed the liquidator's claim on the grounds that, since the claim was not to the payment by the bank of the money to the director but was for the payment of the money from the director's bank account to the creditor, it did not constitute a disposition of the company's property for the purposes of s227. Despite commentary to the contrary⁴⁰ it is possible to see some logic in Oliver J's decision. If it were based on a right to trace at common law then it would make sense, because the alleged right to trace at common law, supposedly demonstrated in *Taylor v Plumer*,⁴¹ ceased when the means of identification failed and, in respect of the second payment the placing of the money into the director's bank account, and the resultant mixing of funds would, on orthodox tracing theory, have resulted in the means of identification failing.

Those who consider that the property right identified by Oliver J with respect to the £250 was an equitable right maintain that exactly the same analysis should have applied to the £800, and to that extent the case was wrongly decided.⁴²

If, however, it was a legal right that Oliver J had in mind then the problem, once again, becomes that the only authority cited by the judge for the availability of such a right is *Taylor v Plumer*, and he engages in

⁴⁰ R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 7.96.

⁴¹ (1815) 3 M&S 562.

⁴² R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 7.97.

no alternative, independent, reasoning which would explain how such a right arises.

Re Leslie Engineers is not a convincing authority for the existence of a right to trace at common law. It may be that it is best seen as a technical decision on the meaning of s227 of the 1948 Act.

Conclusion.

As was said in the introduction to this chapter none of the cases discussed here represent any threat to the proposition that it is not possible to make a claim to a substitute asset at common law. *Agip* is not uncommonly cited as establishing the availability of such claims but it was a case decided on equitable grounds and the dicta within it concerning common law claims are susceptible to all of the problems contained in a reliance on *Taylor v Plumer* and *Banque Belge. Armstrong*, when properly understood has nothing to do with tracing at all. The remaining cases never address questions of substitute assets directly. In respect of the earlier ones there are too many gaps in our knowledge of the facts for them to represent proper authorities. Of the later ones *Branwhite* cannot be about tracing because there is no asset capable of being traced and *Leslie Engineers* is about equitable tracing, if it is about tracing at all. Which is far from certain.

It should be borne in mind that the reason that these cases have been discussed here is because they have been put forward by others as possibly supporting the notion of common law rights to make claims to substitute assets. They have not been chosen here because they are relatively simple to dismiss as authorities for that notion. They have been discussed because they are all that there is. There is a great paucity

of direct authority on the subject. Cases that appear to rely solely on common law rights are rare. Together with the claims discussed in the previous 2 chapters, and the ones discussed under the heading of unjust enrichment in the next, these cases represent almost the entirety of those cases which have been put forward in defence of the availability of common law claims.

Chapter 6 Unjust Enrichment and Claims to Substitute Assets

Introduction.

Having dismissed the notion that common law claims to substitute assets can have anything to do with rights that the claimant may have had in the original asset, it is now necessary to consider the idea that such claims arise as a response to, or in order to prevent, the unjust enrichment of the defendant at the claimant's expense.

It is now generally accepted, by both the courts¹ and academic commentators² that an unjust enrichment claimant must show that:

- a) The defendant has been enriched;
- b) That the enrichment was at the expense of the claimant; and
- c) That the enrichment was unjust.

Unjust enrichment supposedly explains rights in substitute assets by showing that, as a result of the defendant's interference with the claimant's rights in the original asset, he will be unjustly enriched at the claimant's expense, unless the claimant is able to make a claim to a new right in a substitute. The most important difference between the law of property and the law of unjust enrichment as explanations of substitute assets becomes, therefore, immediately apparent. Law of property

¹ *Banque Financiere de la Cite v Parc (Battersea) Ltd* (1999) 1 AC 221 HL; *Portman Building Society v Hamlyn Taylor Neck* (1998) 4 All ER (2002) (CA); *Rowe v Vale of White Horse DC* (2003) 1 Lloyds Rep 418; *McDonald v Coys of Kensington* (2004) EWCA Civ 47.

² There are too many to mention but important ones are P. Birks, *An Introduction to the Law of Restitution*, (revised edn Clarendon Press 1989); G. Virgo, *The Principles of the Law of Restitution* (OUP 1999) 9; A. Burrows, *The Law of Restitution*, (3rd edn Oxford 2012) 27; A. Burrows Assisted By An Advisory Group of Academics, Judges and Practitioners, *A Restatement of the English Law of Unjust Enrichment*, (Oxford 2012) 3-4; Lord Goff of Chievely and G. Jones, *The Law of Restitution*, (6th edn Sweet and Maxwell, 2002).

explanations favour the notion of the transmission of rights from the one asset to the other. Unjust enrichment explanations reject this possibility in favour of explaining the rights in the substitute as new rights created to reverse, or prevent, an injustice.

[Tracing and the Institutional Structure of Unjust Enrichment Law.](#)

The major difficulty with accepting the proposition that tracing is a response to unjust enrichment is that this does not fit in with the way that the substantive law of unjust enrichment law has been developed.

In order to ease the complications of the following argument two different scenarios will form the centrepiece of the discussion. These scenarios are related but dissimilar in one significant way. It will be argued that the dissimilarity is insufficient, however, to enable differing conclusions in respect of them.

The first scenario is the familiar one whereby A steals B's bracelet and then swaps it for C's watch.

In the second scenario A steals £100 from B and with the process purchases a watch from C, an innocent seller.

Although for the purposes of this section it is only the issue of rights in the watch in A's hands that is critical, it is also instructive to consider the matter of rights in the bracelet and the £100.

The structure of the law of unjust enrichment, a matter of considerable controversy, adopted for the purposes of this section will be that outlined above. Forgetting any available defences, the claimant is required to show a) that the defendant has been enriched, b) at the expense of the claimant, c) in circumstances where the law considers

that enrichment to be unjust. Each of these requirements, in so far as they affect our examples, will be dealt with in turn.

Enrichment.

The first thing that the claimant has to show is that the defendant has been enriched at all.

With respect to the original assets (the bracelet and the £100) it is suggested that this cannot, one possibility aside, be made out.

The defendant is not enriched by the receipt of the original asset, because legal title to that asset remains at all times with the claimant.³ If one were to take a snap shot of the defendant's personal balance sheet one would see that he is in possession of a bracelet, or of £100, but, that at the same time, he has a liability to the claimant in respect of the exact same item or amount. The defendant has acquired no rights in respect of the stolen property.

It is true, of course, that the defendant has gained the capacity to use both the bracelet (he can wear it for example) and the £100, but this is a very different issue. Any claim that the claimant may have in respect of the use of the asset in question, is based on the wrong of interference with the claimant's property rights.⁴ Such a claim may be restitutionary, that is damages may, under certain circumstances, be assessed on the basis of the defendant's gain rather than the claimant's loss, but the restitutionary award has nothing to do with the law of autonomous unjust enrichment. It is a matter of disgorgement for wrongs.

³ *Portman Building Society v Hamlyn Taylor Neck* (1998) PNLR 664; *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* (1997) Ch 159; A. Tettenborn, 'Restitution of Property You Do Own Anyway' in A. Hudson (Ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) 223.

⁴ R. Grantham and C. Rickett, 'Disgorgement for Unjust Enrichment' (2003) CLJ 159. Although c/f P. Birks, *Unjust Enrichment*, (2nd edn Clarendon Press 2005) 79.

For Peter Birks this line of argument made no sense. Speaking of the notion that a person in possession of another's property has not been enriched he said:

Although it is presented as though it (the argument that there has been no enrichment) were logically irresistible the logic is the logic of technicality. It collapses as soon as the invitation is accepted to look beyond technicality and consider factual reality instead. If you find my money it no doubt stays my money, and it is true that, technically, it forms no part of your estate. The factual reality is that you have the spending power and I do not...The technical truth is that the money is still mine does not necessitate the conclusion that you are not enriched.⁵

Birks seems to be saying that the law concerns itself with "factual" rather than "technical" enrichments. One would expect such a counter-intuitive assumption to be backed up by authority. But no authority is forthcoming. On the face of it Birks's assumption makes little sense. For the purposes of the law of unjust enrichment there is a legal understanding of enrichment. That understanding is "technical" because it treats the term enrichment in a specialised manner. It is uncertain where these references to factual realities are supposed to be taking us.

In any case, such authority as there is goes the other way. In *Esso Petroleum Company Ltd v Hall Russell & Co Ltd, The Esso Bernicia*,⁶ Esso paid money to certain crofters pursuant to a voluntary agreement, following the spillage of oil from one of its tankers. It subsequently transpired that responsibility for the spill lay with the defendant designers poor construction of a tug that had been in attendance during

⁵ P. Birks, 'Property and Unjust Enrichment: Categorical Truths' (1997) New Zealand Law Review 623, 654-655.

⁶ (1989) AC 643.

the docking of the tanker. Esso claimed reimbursement of the money that it had paid to the crofters from the defendants.

There can be no question that the defendants had been factually benefitted. The crofters, as a result of Esso's payment, were no longer in a position to sue them. This did not help Esso at all. Although the crofters, factually, could not make a claim (because they had sustained no loss) technically the arrangement with Esso did not have the effect of discharging the defendant's liability. Thus Esso had not enriched them.

In each of *Portman Building Society v Hamlyn Taylor Neck*,⁷ and *Jones v Jones*,⁸ Millett LJ made the point, in very different contexts, that an unjust enrichment claim is unavailable against a defendant who receives monies belonging to the claimant, in circumstances where the defendant never obtains title to that money.

We can conclude, therefore, that where the claimant retains legal title to the original asset the defendant cannot be said to have been enriched.

The bracelet and the £100 do differ in one respect. This is that, in our examples, the claimant's rights in the bracelet are still in existence, whereas in the case of the £100 the claimant has lost his rights because money as currency is an exception to the *nemo dat* rule.⁹ But this does not affect the analysis. A still remains liable to B for £100, so he has still not been enriched by its theft.

There have been suggestions that, in respect of both the bracelet and the £100, A is a trustee, of the bracelet, or the £100, for B, but it is

⁷ (1998) PNL 664.

⁸ *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* (1997) Ch 159.

⁹ D. Fox, 'Property Rights in Money' (OUP 2008) Ch 2.

very difficult to see how this is supposed to work¹⁰ and there is no authority to support the suggestions. Such authority as there is, and it is scant, points the other way.¹¹

We know from *Sinclair v Brougham*,¹² that for a trust to arise the legal and beneficial ownership of property must be in different hands. For this to apply in the case of theft, it can only mean that the legal owner of the stolen property is the thief, and the beneficial owner is the victim.

But our learning is replete with denials that a thief obtains legal ownership of the proceeds of his theft.¹³ The thief undoubtedly acquires something; he acquires a possessory title good against the whole world, except anyone who can show a prior and better title than himself.¹⁴ He cannot possibly hold that possessory title in trust for the victim of his theft, however, because the victim already has a better possessory title by dint of his ownership. The trust model cannot work here, although others argue differently.¹⁵

¹⁰ A lively debate took place between John Tarrant and Sue Barkerhall Thomas on this point. See J Tarrant, 'Property Rights to Stolen Money' (2005) 32 *University of Western Australia Law Review* 234 and 'The Theft Principle in Private Law' (2006) *Australian Law Journal* 531 and S. Barkerhall Thomas, 'Thieves as Trustees: The Enduring Legacy of *Black v S Freedman & Co Ltd*' 3 *Journal of Equity* 52.

¹¹ Possibly *Shalson v Russow* (2005) Ch 281.

¹² (1914) AC 398. It was held in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) AC 669 that the division of legal and equitable title did not necessarily create a trust (per Lord Browne-Wilkinson at 706) but no doubt was cast on the proposition that there cannot be a trust without such a division.

¹³ *National Employers Mutual General Insurance Association v Jones* (1990) 1 AC 24, a decision of the House of Lords is the latest.

¹⁴ *Armory v Delamire* (1772) 1 Str 505, 93 ER 664.

¹⁵ John Tarrant does so and it would seem that Robert Chambers does as well. R. Chambers 'Trust and Theft' in E. Bant and M Harding (eds). *Exploring Private Law* (CUP 2010) 222. Chambers thinks that trusts would be unworkable if this were not the case because all personal property is subject to the possibility that the title of the possessor is not the best title. But the discussion is largely pointless because B is

Whether the trust model does or does not work in this instance is not of great importance for an examination of common law rights, however because even if it does the resultant claim will be an equitable rather than a common law one. In Chapter 7 it will be argued that it also fails with respect to equitable claims.

The fact that A has been enriched by the acquisition of a legal right to possession, good against the whole world save B, is more relevant but, as we shall see when we look at the at the expense of the claimant requirement for a claim in unjust enrichment, it is insufficient to bring the receipt of the original property within the law of unjust enrichment.

As far as the watch is concerned the matter is somewhat different. It would be very hard to argue that A has not been enriched by the acquisition of the watch. He now has rights in property, which, in the absence of an unjust enrichment claim, are not defeasible to B. It is true that he is still liable to B for the conversion of the bracelet and the £100, but that has nothing to do with his rights in the watch. It is suggested therefore that A is enriched by the receipt of the watch.

At the Expense of the Claimant.

The second element required of the unjust enrichment claimant is that he shows that the defendant's enrichment came at the claimant's expense.

How this element can be satisfied is the subject of fierce debate. Space does not allow an examination of that debate here. Suffice it to say that, on balance, this writer considers that the best explanation of

the owner of the best possessory title anyway. He has no need of any beneficial interest in the second best title.

the meaning of the expression “at the expense of the claimant” is that, whatever the correct method of assessing the quantum of restitution that follows from this explanation,¹⁶ the claimant must have suffered at least some loss before a claim in unjust enrichment can be made out.¹⁷

If we take this understanding of “at the expense of the claimant” and apply it to the original assets we can immediately see that difficulties arise. A’s enrichment, it will be recalled, is represented by the acquisition of a possessory title good against the whole world except B. But the last two words of the previous sentence are crucial. B has lost nothing. He previously had a possessory title good against the whole world, and he still has a possessory title good against the whole world. A has not acquired his title at B’s expense. He has acquired it by his own action of taking possession. B is not even “sharing” possessory title with A. A’s title is entirely defeasible to B. In the case of the original asset, therefore, B cannot show that A has been enriched at his expense.

Things are more complicated with respect to the watch. Here the benefit received by A is represented by the rights that he has in the watch. However, the rights that A has in the watch are such rights as C was able to pass to him. They are not B’s rights at all. There have been attempts to show that the rights that A has in the watch are indeed B’s

¹⁶ The quantum may or may not be capped by the lower of the claimant’s gain and the defendant’s loss. It is an open question as to whether all that the claimant need do is establish a loss and that once this has been done the measure of restitution becomes the defendant’s gain.

¹⁷ A position supported, one way or another, in G. Virgo, *The Principles of the Law of Restitution* (2nd edn OUP 2006); R. Grantham and C. Rickett, ‘Disgorgement for Unjust Enrichment’ (2003) CLJ 159; L. Smith, ‘Restitution: The Heart of Corrective Justice’ (2000-2001) 79 *Texas Law Review* 2115; M. McInnes “At the Plaintiff’s Expense”: Quantifying Restitutionary Relief” (1998) CLJ 472.

rights, but the ones that have any claim to coherence at all are restricted to showing that the rights in question are equitable.

The best authority for the proposition that the rights that A has in the watch come from B comes from Lord Browne-Wilkinson:

I agree that the stolen monies are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.¹⁸

Two things emerge from this statement. First, the lack of supporting authority even for Lord Browne-Wilkinson's view, and second, the irrelevance of unjust enrichment to the whole matter. On Lord Browne-Wilkinson's position the trust is created in response to a wrong, not to A's unjust enrichment at B's expense.

Unjust enrichment lawyers, obviously, have other ideas. They maintain that the trust in question is a resulting trust, not a constructive trust, and that the trust in question (always) arises in response to unjust enrichment.¹⁹

This analysis depends upon the assumption that a resulting trust arises when the defendant acquires property, which has been paid for by the claimant, where the claimant has no intention of making a gift to the defendant.²⁰ A more traditional understanding of the resulting trust is that the last of these requirements is not that the claimant had no

¹⁸ *Westdeutsche Landesbank Girozentrale v Islington Borough Council* (1996) 1 AC 669, 716.

¹⁹ P. Birks, 'Restitution and Resulting Trusts' in P. Birks and F. Rose (eds), *Restitution and Equity, 1 Resulting Trusts and Equitable Compensation* (Mansfield Press 2000) 265, R. Chambers, *Resulting Trusts* (Clarendon Press) 1997.

²⁰ R. Chambers, *Resulting Trusts* (Clarendon Press) 1997.

intention of making a gift to the defendant, but that there is a presumed intention on the part of the defendant to make a trust in favour of the claimant.²¹

If the traditional understanding is correct, then quite clearly this formulation cannot work in the case of theft. It is generally speaking impossible to impute to a thief an intention to create a trust in favour of his victim.

Once again, however, it is not necessary here to decide which side to take. Whichever side is correct the rights that the claimant may obtain as a result of the imposition of the trust are equitable not common law rights.

The only suggestions that the rights that B may have in the watch in our examples, are common law rights based on unjust enrichment, come from one or two cases, which will be examined in detail later in this chapter, and be shown to be incorrectly analysed. The argument comes down to nothing more than the assertion that B can trace at common law into the watch, because the watch represents the traceable proceeds of B's original asset. But to the question why does the watch represent the traceable proceeds of B's original asset, the only answer appears to be because he would be unjustly enriched if he could not. But the whole purpose of the "at the expense of the claimant" test is to help determine whether A has or has not been unjustly enriched. This is not aided by saying that the very reason that he can show that A's enrichment came at his expense is because, otherwise, A has been unjustly enriched. Whatever the position at

²¹ W. Swaddling, 'A New Role for Resulting Trusts?' (1996) LS 110.

equity it is not possible to show, in either of our examples, that A's enrichment has come about at B's expense.

Unjust Factors and the Alternative Claim Analysis.

The discussion here centres around the notion that B may sustain a claim in unjust enrichment by, somehow, divesting himself of the title to the bracelet or the money. If he can do this, the argument goes, then A will have acquired the rights in that property at B's expense. This could potentially form the basis for showing that the rights that A subsequently obtains in the watch have also come at B's expense.

We need not go into the question of whether this latter step could be taken, because the action of divesting title in favour of A, results in the collapsing of any claim that B may have in unjust enrichment.

The obvious method of divesting title would be for B to elect to pass title to the A. Now A has clearly, according to Peter Birks, been enriched at the B's expense.²² This is apparently what happened in *Holiday v Sigil*,²³ and *Moffat v Kazana*.²⁴ This argument needs quoting in full:

The enrichment of the defendant is established with the aid of an election. The claimant elects not to insist on his pre-existing title. To insist on that title would be to assert that the asset was never added to the defendant's wealth. By contrast by treating it as if it had indeed enriched the defendant he accepts the facts of it having passed to him and abandons the contrary technicality.

²² P. Birks "Receipt" in P. Birks and A. Pretto (Eds), *Breach of Trust* (Hart, Oxford 2002).

²³ (1826) 2 C & P 176.

²⁴ (1969) 2 QB 152.

Although not specifically saying so, this sounds remarkably like a recantation of Birks's previous argument, that factual enrichment is sufficient for the purposes of unjust enrichment law.

Setting that to one side, however, the first question that the proposition cited brings to mind is how does this transfer operate?

We know that Equity provides for elections in circumstances where a trustee makes an unauthorised disposition of trust property, but Birks gives no authority for such a power existing at common law. Indeed the only cases that there are on the subject suggest that it is not possible to convey title by intent alone,²⁵ and that, even if the fact that in this instance A is already in possession of the *res* in question were to enable *Cochrane v Moore* to be distinguished, *Standing v Bowring*,²⁶ would still allow the him to repudiate the transfer.

But even if Birks is right, and, somehow, an election to pass title could be validated, it would be largely a pyrrhic victory because there is now no unjust factor. Ignorance cannot apply since it is obviously with the full knowledge of B that A has gained title. In fact there has been no vitiation or qualification of intent at all. A claim in autonomous unjust enrichment would have to fail. Ironically a claim in conversion would now also have to fail since the person entitled to immediate possession of the *res* is now A.

Perhaps, instead of transferring title to A, B may simply renounce it? This was a later proposition of Birks:

There is no parallel provision [to that which arises where a claimant is successful in a claim in conversion] for extinguishing the title of the claimant.

Nor should there be. The reason is that Cs election to assert that D has been

²⁵ *Cochrane v Moore* (1890) 25 QBD 57.

²⁶ (1885) 31 Ch D 282.

unjustly enriched at his expense supposes a renunciation of his title. Asserting his title or complaining of a wrongful interference he denies the enrichment but in claiming the value of the asset as an enrichment of the defendant at his expense he is renouncing his title. That is the choice that the claimant has in this type of situation.²⁷

Again, the first thing that has to be said is that this sounds like even more of a renunciation of previous arguments than did the quotation above.

Yet again it is *Holiday v Sigil* and *Moffatt V Kazana* that are asked to bear the weight of the proposition. They are both incapable of doing so. Neither case has anything to say about title, let alone representing authority for *both* of the arguments that Birks is seeking to run. Such arguments as there are appear to deny Birks proposition.

Even assuming that it is possible to divest oneself of title in the way that Birks suggests, there yet again arises the problem that doing so would be fatal to a claim in unjust enrichment. The only reason that B could claim in unjust enrichment against A in our examples is that B is in some way connected to A's enrichment. If B has proprietary rights in neither the bracelet nor the money, what is the connection? B must have renounced all of his proprietary rights to both, including any mere possessory rights, since otherwise A has still not been enriched, because he must still return the property in question to B. But now there is no unjust factor available to B to sustain his claim in unjust enrichment. A simply appears to be in possession of property to which B has renounced

²⁷ P. Birks 'Restitution for wrongs' in E. Schrage (ed) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot Berlin 1995).

his rights. Yet again B appears to have foregone any rights to a claim in conversion for no good reason.

This is not the place to discuss the complicated, and highly uncertain, law regarding abandonment of chattels, but, suffice it to say, Birks theory runs directly contrary to the venerable authority of *Doctor and Student*,²⁸ where it is asserted that “there is no such law in this realm as goods forsoeken”. The venerability of the authority may represent a reason to challenge it, but Birks does not do so. He cites no authority other than *Holiday v Sigil* and *Moffat v Kazana*,²⁹ which are not authority for Birks theory at all, and he makes no attempt to explain why they might be.

The Argument from Authority.

Just as we saw in the previous chapters, when looking at the law of property, the arguments from principle set out above, are potentially capable of being faced with the response that, irrespective of their correctness, there is a line of authority that clearly establishes that claims to substitute assets at common law are part of the law of unjust enrichment, and, that the theoretical position will have to adjust itself to accommodate that reality.

Just as in the previous chapter, however, it will be shown that the cases establish no such thing. It is unquestionably true that unjust enrichment reasoning has been used, by both courts and academics, to

²⁸ C. St. Germain, *Dialogus de fundamentis legume Anglie et de conscientia* (Book II c.51; S.S. 1528) 290-292. This book is commonly known as *Doctor and Student*.

²⁹ *Mofatt v Kazana* is to all intents and purposes a simple case of conversion. There is certainly no identification of a specific cause of action. Similarly *Holiday v Sigil* looks more like a case of restitution for wrongs than a claim in autonomous unjust enrichment.

analyse some cases concerning substitute assets, but the reasoning has been unconvincing.

In one case the court specifically said that the tracing permitted in it was a response to the defendant's unjust enrichment,³⁰ whilst in another, much academic effort has been poured into explaining it on that basis, even though the court seemed not to regard it in that way.³¹ These cases require examination to see how they can best be explained. A third case, in which some unjust enrichment analysis was undeniably used,³² has been looked at in some detail in the previous chapter but will also be discussed, briefly, in reference to its unjust enrichment analysis.

Lipkin Gorman v Karpnale Ltd.

The facts of the case are, that one Norman Cass was a salaried partner in the firm of the appellant solicitors. He had a gambling addiction for which his salary supplied him with an inadequate income. He therefore began drawing on the proceeds of the appellant firm's client account, of which he was a signatory. He withdrew both cash and sums of money by way of banker's draft. The money was spent at a casino (the Playboy Club) then in the ownership of the respondents. The procedure was that Cass exchanged the cash or drafts for chips, which enabled him to both gamble at the casino tables, and also to purchase refreshments within the confines of the club. Unused chips could be exchanged back for cash.

As is usually the way with such things Cass was both a winner and a loser at the tables, but the overall effect of his gambling was to produce very substantial losses. Because Cass was constantly replacing

³⁰ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

³¹ *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* (1997) Ch 159.

³² *Armstrong DLW v Winnington Networks Ltd* (2012) EWCH 10 (Ch).

parts of his drawings back into the respondent's client's account, the court found it difficult to determine the net sum of money that had been withdrawn, but it was agreed that it could not have been less than £220,000.

The claim was framed as one for money had and received. The claimants failed at first instance and, by a majority, in the Court of Appeal. In the event the House of Lords held that the appeal should be allowed, and that the claim should succeed, but only to the extent that the defendant club had not changed their position as a result of the receipt of the claimant's money. It was held that payment by the club to Cass of his winnings represented such a change of position, and the total award was therefore reduced to £150,960.

The club, (the respondent in the appeal) sought to argue, *inter alia*, that a claim in money had and received must fail because it could not be shown that the money received by them had any connection with the appellant at all.

Surprisingly, a salient fact was not mentioned in any of the headnotes to the reports of the case, and can only be discovered by reading the judgment of Lord Goff. This fact was that Cass did not, in all instances, simply withdraw money from the partnership account, and take that money to the respondent's club to gamble with. He also, from time to time, withdrew money from the account, and placed that money in various building society accounts. He subsequently withdrew money from those accounts and took that money to the club to gamble with.

This is not the easiest case to classify. It is certainly arguable that it should be analysed as one that falls to be determined by equitable

principles, since, at its heart, lies a fiduciary who has breached his duty, by acquiring rights during the course of his fiduciary endeavour.

The case could also have been analysed in the previous chapter on the law of property. Irrespective of what their Lordships thought that they were doing, much of their reasoning suggested that the claimant had a claim to a substitute asset because of the rights that he held in the original asset.

However, neither of these possibilities fits particularly well with the passages in the judgments, in which Lord Templeman and Lord Goff made it clear that, whatever the nature of the remedy available to the claimant, they treated the basis of the claim as being in unjust enrichment. Therefore, it is as an unjust enrichment case that it will be treated here.

Two themes run through the speech of Lord Templeman; the first, is that the money received by the respondent from Cass was money belonging to the appellant; the second, is that appellant's claim should be categorised as being in unjust enrichment.

Reconciling these two themes is difficult. Equally difficult is understanding their internal logic. The difficulty with the proposition that Cass gave the respondent the appellant's money was made clear by Lord Goff:

The respondents relied in particular upon two decisions of the Privy Council as showing that where a partner obtains money by drawing on a partnership bank account without authority, he alone and not the partnership obtains legal title to the money so obtained. These cases, *Union Bank of Australia Ltd v McClintock*,³³ and *Commercial Banking Co of Sydney Ltd v Mann*,³⁴ were in

³³ (1922) 1 AC 240.

³⁴ (1961) AC 1.

fact concerned with bankers cheques but for the respondents it was submitted that the same principle was applicable in the case of cash. The solicitors argued that these cases were wrongly decided...I am not prepared to depart from decisions of such high authority as these. They show that where a banker's cheque payable to a third party or bearer is obtained by a partner from a bank which has received the authority of the partnership to pay the partner in question who has, however, unknown to the bank, acted beyond the authority of his partners in so operating the account, the legal property in the banker's cheque thereupon vests in the partner. The same must a fortiori be true when it is not such a banker's cheque but cash which is so drawn from the bank by the partner in question.³⁵

So, it is reasonably clear that the money with which Cass gambled belonged to Cass and not to the appellant. Lord Goff, as we shall see, spent much time over the matter of reconciling this fact with the notion that the appellant's claim should succeed. Lord Templeman, on the other hand, did not refer to either of these cases at all, and was content to assume that the money in question belonged to the appellant at all times.

Moreover, Lord Templeman made no attempt to distinguish between the money that Cass withdrew from the partnership account and paid over to the club directly, and the money which he withdrew from the account and, first, put into various building society accounts, before withdrawing it from those accounts, and paying it over to the club. This should have created an even greater barrier to his Lordship's view that Cass gave the respondent the appellant's money. The extract from Lord Goff's opinion, quoted above, show that the money, on withdrawal from the partnership account, belonged to Cass, not to the

³⁵ (1991) 2 AC 548, 573.

appellant. When Cass placed the money into the building societies the money placed became the property of those societies, not of the appellant, and not of Cass. Lord Templeman, at no stage, refers to this issue.

If the money did belong to the appellant at all times, the following statement of his Lordship is irrelevant:

Conversion does not lie for money, taken and received, as currency...but the law imposes an obligation on the recipient of stolen money to pay an equivalent sum to the victim if the recipient has been “unjustly enriched” at the expense of the true owner...the club was enriched as and when Cass staked and lost to the club money stolen from the solicitors.³⁶

It is irrelevant, because the money with which Cass gambled, since it belonged to the appellant at all times, and since the respondent was not a bona-fide purchaser of that money for value, was never taken and received as currency. It was a fundamental aspect of the findings of their Lordships that, because the money was expended by Cass at the club in pursuit of a contract made void by s18 of the Gaming Act 1845, the club gave no valuable consideration for that money. Conversion does lie for money received under such circumstances³⁷ and would have been the obvious claim for the appellant to have made.

It may be thought that, when Lord Templeman said that the appellant owned the money at all times, he had in mind, at the very least in the case of the monies that had passed through the building societies, some sort of equitable rather than legal ownership. However,

³⁶ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548, 559.

³⁷ *Miller v Race* (1758) 1 Burr 452, 97 ER 398.

this is not the case. Having cited this passage from *Black v S Freedman & Co*,³⁸ in the High Court of Australia:

Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands.³⁹

He went on to say:

Although the decision in this case went on the grounds of trust, the reasoning applies equally to a claim for money had and received.⁴⁰

Similarly, it is equally clear that Lord Templeman is not saying that the reason that the appellant has title to the money gambled by Cass, is that it is the traceable product of the appellant's money. This can be the only feasible explanation, even if it is incorrect, of how the appellant has retained title to the monies that passed through the building societies. However, the only reference his Lordship made to tracing in his speech was this:

In the course of argument there was a great deal of discussion of tracing in law and in equity. In my opinion in a claim for money had and received by a thief the plaintiff victim must show that the money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched, and remained unjustly enriched.⁴¹

There is no suggestion that, in this case, tracing was required in order to show that the money paid by Cass to the respondent was money belonging to the appellant. On the contrary, tracing was never mentioned again.

In support of his belief that the appellant must have, at all times, retained title to the money, Lord Templeman cited certain dicta of

³⁸ (1910) 12 CLR 105.

³⁹ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548, 565

⁴⁰ *Ibid.*

⁴¹ *Ibid.* 560.

Bankes L.J. in *Banque Belge Pour L'Étranger v Hambrouck*.⁴² In dealing with the argument that the placing, by a thief, of stolen monies into a bank account, meant that the victim of the theft lost legal title to it, Bankes L.J. said:

To accept either of the two contentions with which I have so far been dealing would be to assent to the proposition that a thief who has stolen money, and who, from fear of detection, hands that money to a beggar who happens to pass, gives a title to the money to the beggar, as against the true owner – a proposition which is obviously impossible of acceptance.⁴³

These dicta are, of course, entirely incorrect. They fail to recognise the distinction between the inability to follow money as currency, as it becomes when placed into a bank account, and money as a chattel, which it remains when gifted to a beggar in the circumstances outlined above. A claim for conversion would lie against the beggar in this example, just as it would lie against the respondent in *Lipkin Gorman*, if Lord Templeman's proposition, that the appellant at all times retained title to the stolen money were correct.

Because Lord Templeman fails to refer to the irreconcilability of his belief that the appellant at all time retained title to the money, with the authorities of *Union Bank of Australia Ltd v McClintock*,⁴⁴ and *Commercial Banking Co of Sydney Ltd v Mann*,⁴⁵ his analysis is somewhat incomplete. This incompleteness is especially stark with respect to the monies paid into the building society.

Lord Templeman's second theme was that the appellant's claim was one in unjust enrichment. It will be recalled, from the beginning of

⁴² (1921)1 KB 321.

⁴³ Ibid 327.

⁴⁴ (1922) 1 AC 240.

⁴⁵ (1961) AC 1.

this chapter, that the elements that have to be established in order for a claimant to succeed in an unjust enrichment claim are; that the defendant has been enriched; that the enrichment was at the expense of the claimant; and that the enrichment was unjust. Because Lord Templeman considers none of these elements directly, it is necessary to try and infer how he understands that the appellant has successfully maintained its claim.

With respect to the requirement that the respondent be enriched, Lord Templeman said that:

the club was enriched as and when Cass staked and lost to the club money stolen from the solicitors.⁴⁶

This statement is wholly incompatible, however, with Lord Templeman's conclusion on title that has just been discussed. If the appellant had at all times retained title to the money in Cass's hands, it must follow that it continued to retain title to it in the hands of the respondent. This is because it was found that the respondent was not a bona-fide purchaser of the money for value. But, if the appellant retained title to the money in the respondent's hands, the respondent has not been enriched at all.⁴⁷ The only way that the respondent could have been enriched would have been if Cass had good title to the money, and passed that title to them.

On the question of whether the respondent had been enriched at the appellant's expense, Lord Templeman's analysis puts him on firmer ground. If, contrary to what has been said above, he can show that the respondent has been enriched, there seems to be little doubt that that enrichment would have come from the appellant, because the

⁴⁶ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548, 559.

⁴⁷ See the discussion accompanying footnotes 3-15 above.

appellant, on that analysis was the owner of the money that was passed over to the respondent. It would appear to be a case of direct enrichment. As we shall see below, a far greater difficulty stands in the way of establishing that the respondent has been enriched at the appellant's expense if title to the money that was paid to the respondent lay with Cass.

With respect to the third element of an unjust enrichment claim, the unjust factor, Lord Templeman is silent. In the extract cited from his Lordship's opinion set out above⁴⁸ the words "unjustly enriched" in line 3 are, curiously, in inverted commas. Why this should be is uncertain, but it suggests that the expression is somehow devoid of precise meaning, or that the term is being used in a metaphorical, or unusual, way, rather than as the description of a specific legal doctrine. It indicates that the words unjustly enriched constitute a catch-all phrase rather than one that can be analysed with precision.

Lord Templeman sees the issue as reasonably straightforward. If the respondent has been enriched, as a result of receiving money stolen from the appellant, that, of itself, is sufficient to demonstrate the unjust nature of the transaction. But this is incorrect. As Birks pointed out, the term "unjust" looks down to the cases: "It can never be made to draw on an unknowable justice in the sky."⁴⁹ In order for an enrichment to be unjust it is necessary to bring it within the analogical reach of previously decided cases. Lord Templeman makes no attempt to do so. Admittedly, he does cite *Banque Belge*,⁵⁰ in support of his argument, but says that

⁴⁸ See text accompanying note 36 above.

⁴⁹ P. Birks, *An Introduction to the Law of Restitution*, (revised edn Clarendon Press 1989) 99.

⁵⁰ *Banque Belge Pour L'Étranger v Hambrouck* (1921) 1 KB 321.

the “judgments deal with the case on the basis of following trust assets”, which rather excludes unjust enrichment as the basis of the claim. In fact, the only support that he actually utilises from *Banque Belge* is Atkin LJ’s statement that:

As the money paid into the bank can be identified as the product of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received.⁵¹

But even if this is a supportable argument, it has nothing to do with unjust enrichment. It is a pure law of property analysis.

It does appear that Lord Templeman gave no consideration to what the unjust factor might be in this case. Indeed it is uncertain exactly how Lord Templeman conceives of the action in unjust enrichment in general. Because of this it would be difficult to rely on his judgment to support the notion that *Lipkin Gorman* demonstrates that common law claims to substitute assets are claims in unjust enrichment.

Lord Goff’s speech is entirely different from that of Lord Templeman. Indeed, it is difficult to understand how Lord’s Griffiths and Ackner could say that they agreed with the reasoning in both speeches, since those speeches contain contradictory arguments. Lord Templeman argued that money gambled by Cass was the same money that Cass stole from the appellant, whilst Lord Goff regarded that conclusion as contrary to principle, and said that the appellant was asserting rights in a substitute asset.

On one point they agreed. Lord Goff, like Lord Templeman, regarded the case as being one based on the law of unjust enrichment. Referring to the submission of counsel for the respondent, that the

⁵¹ (1991) 2 AC 548, 566.

appellant's claim in money had and received could only succeed if the appellant could show that the respondent was unjustly enriched at the appellant's expense, Lord Goff said:

I accept that the solicitor's claim in the present case is founded on the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors.⁵²

The remainder of Lord Goff's speech, however, was devoid of any analysis of why the appellant could make out such a claim in the present case. He, correctly, says that a court does not have *carte blanche* to reject a claim in unjust enrichment merely because it thinks that would be unfair to the defendant to allow it. Recovery, or the lack of it, depends upon established legal principles. But those principles are never expounded. The only unjust enrichment issue directly addressed by His Lordship was whether the defence of change of position was available to the respondent. The only way to determine why Lord Goff thought that the appellant had successfully made out a claim in unjust enrichment, is to look at the part of his speech which concerns title, to see if anything may be gleaned from that.

Because Lord Goff was clear that when Cass withdrew the money from the partners account, he became the legal owner of that money, his judgment was concerned with attempting the task of making the appellant the legal owner of the money with which Cass gambled at the respondent's club.

Lord Goff accepted that the appellant had no legal property in the money in its bank account before it was withdrawn, because it was

⁵² Ibid 578.

merely a debt owed to the appellant by the bank. But he then went on to say:

Such a debt constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the solicitors at common law. There is in my opinion no reason why the solicitors should not be able to trace their property at common law in that chose in action, or in any part of it, into its product, i.e. cash drawn by Cass from their client account at the bank. Such a claim is consistent with their assertion that the money so obtained by Cass was their property at common law.⁵³

This analysis does not hold good. It was established in *R v Preddy*,⁵⁴ that when a sum of money leaves a bank account, the chose in action in respect of that sum is extinguished. There is nothing from which a tracing exercise can be commenced. No rights are transferred from the chose in action into anything else. Cash taken from a bank account is not in any sense the traceable product of a chose in action. There has been no substitution.⁵⁵

This is most clearly illustrated in the instances where Cass placed the monies that he withdrew from the appellant's account into various building society accounts. When the bank paid the money to Cass they paid their money to him, and it became legally his. The appellant's chose in action with their bank was extinguished as a result of the transaction, and a new chose in action arose, representing the value of the new debt. There is no such thing as "any part" of such a chose in action – it is a single entity. Lord Goff seems to be treating a bank account as being the

⁵³ Ibid 576.

⁵⁴ (1996) AC 815,841.

⁵⁵ See also *Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82 [139], and *Hillig v Darkinjung* [2006] NSWSC 1217 [20].

equivalent of a physical mixture. But it is not. A bank account, in credit, is a single debt owed by the bank to the customer. There was nothing that could be traced.

The rights that Cass acquired as a result of depositing those monies were personal rights, constituted by a debt owing to him from those societies, at law. They were totally different rights to those that the appellant had with respect to its bankers.

Lord Goff supported his analysis by reference to *Taylor v Plumer*,⁵⁶ and *Marsh v Keating*.⁵⁷ As we now know *Taylor v Plumer* is concerned only with the ability to trace in equity.⁵⁸ As was explained in Chapter 3, *Marsh v Keating* also had nothing to do with common law tracing. The appellant firm in that case undoubtedly had a fiduciary relationship with Mrs Keating, but, in the event, Mrs Keating made no attempt to trace into its bank account. She merely brought an action for money had and received on the basis that the firm was accountable to her for the proceeds of the sale of her stock. She was not claiming that any particular monies at the firm's bank belonged to her.

If Lord Goff's analysis were correct, it would leave insoluble difficulties in its wake. The legal title to the money, which Lord Goff says undoubtedly belonged legally to Cass, appears to have been transferred to the appellants, since both Cass and the appellant cannot possibly both be legal owners at one and the same time. The question of when, and how, that transfer took place, and exactly what legal interest the appellant has acquired, is not capable of an easy answer. Nor is the question as to why it should be that the appellant, having started out

⁵⁶ (1815) 3 M & S 562.

⁵⁷ (1834) 1 Bing (NC) 198.

⁵⁸ See Chapter 3 above.

with a personal obligation owed to them by their bank, should end up with a proprietary interest in money.

If the case were treated as being one founded in equity, and the property interests involved were therefore equitable ones, a solution to these problems would be could be found. But this solution is unavailable because Lord Goff himself specifically denies that that is what he is referring to.

It therefore needs establishing when and how it could be that the appellant regained legal title to an asset, or its traceable substitute, which it had unquestionably lost when Cass withdrew money from the its bank account. Unfortunately, Lord Goff is entirely unhelpful in the quest for the nature of this property right.

The first question concerns the point at which the appellant acquired its right. The claim, according to Lord Goff was one in unjust enrichment. Liability in unjust enrichment arises at the moment of receipt.⁵⁹ Thus the money that the respondent received from Cass must have already belonged to the appellant by that time. But Lord Goff has already conceded that it belonged to Cass at that point. It could not have *legally* have belonged to both – English personal property law does not work in that way- so to whom did it belong?

No answer is provided to this question. Indeed, there is not even any recognition that there is a problem at all. Instead His Lordship says this:

Of course tracing or following property into its product involves a decision by the owner of the original property to assert his title to the product in place of

⁵⁹ A fact that has caused almost insoluble problems to those who have sought a satisfactory normative explanation for the claim. See L. Smith, 'Justifying the Law of Unjust Enrichment' (2000-2001) 79 Texas Law Review 2177.

his original property. This is sometimes referred to as ratification. I myself would not so describe it, but it has in my opinion at least one feature in common with ratification, that it cannot be relied upon so as to render an innocent recipient a wrongdoer.⁶⁰

The fact that this process requires the original owner to displace the ownership of the new owner seems to have passed un-noticed. No reason is forthcoming as to why he should be able to do so. All that we are told is that one potential explanation – ratification- is incorrect.

It is not even certain what the property right now acquired by the original owner consists of. It would seem that it is sufficient to allow the holder of the right to maintain an action in unjust enrichment, but not, apparently, one in conversion. This is despite the fact that the whole purpose of the law of conversion is to protect property rights, and one of the ways that it does so is to, indeed, “render innocent recipients wrongdoers”. Why this property right should have this characteristic is uncertain. It appears to be a new right previously unknown to our law. This, in itself, makes any analysis of the contents of the right somewhat problematic.

Lord Goff advances no principled reason for displacing the rule that legal title passes on the basis of the intention of the transferor. The appellant clearly intended to pass title to the money to Cass, and Cass to the respondent. Cass had authority to draw on the account. No doubt if the bank had been made aware of all of the facts its intention may have been affected in some way, but that would, at best be a factor in an unjust enrichment claim by the bank against Cass. It would not change the position that title had passed.

⁶⁰ (1991) 2 AC 548, 573.

Moreover, the fact that this case concerns money that has passed through a bank account, and title to which was therefore lost to the appellant, obscures the difficulties that would arise from Lord Goff's analysis in cases where the claimant *does not* lose title to the original asset.

To take a simple example, if a thief steals my bicycle and then swaps it for a bracelet, I must have retained my legal rights in the bicycle, *pace* the *nemo dat* rule, but it seems that I can now also assert a title to the bracelet. Lord Goff gives no answer to how this may be resolved, partly because he never discusses how the I might lose my interest in the bicycle in the first place.

There have been suggestions that Lord Goff was thinking of a power in the appellant to regain a property right, rather than that the right arose automatically.⁶¹ This, it is said, would have allowed the appellant to re-vest title to the cash that Cass withdrew from the appellant's bank account in itself.

But a power is not a property right, it is merely a right to obtain one, and so the does not explain what property right is being acquired by the exercise of the power, now why that the respondent would have that right.

In fact, the power analysis does not explain how rights to the monies that were deposited in the building societies come to be vested in the appellant at all. The appellant must, presumably, have been required to exercise its power in some way before it could take effect, even if the exercising of the power does not, in all circumstances,

⁶¹ B. Hacker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) CLJ 324; P. Birks, *Unjust Enrichment*, (2nd edn Clarendon Press 2004)198.

require communication of that fact to the other party.⁶² Some action on the part of the appellant would have been necessary, but whatever action that was, it could not, on the facts have occurred before Cass placed some of the monies withdrawn from the partnership account into the building societies. At that moment, title to those monies passed to the building societies, and, unless the power involved is some type of previously unknown right, it could not be revested in the appellant since the building societies were bona-fide purchasers of that money for value. Since Lord Goff makes no attempt to distinguish between the monies that Cass gambled with directly upon receipt from the bank, and monies that he gambled with after they had been deposited in the building societies, it is unlikely that he could have had a power analysis in mind.

In any case, if there is a power involved it is an unusual one since, it appears, unlike the power that arises when a contract is obtained by fraud, to enable the victim not to revest title in himself to an asset that he once owned, but to claim title to something that has never previously been his. The cash with which Cass gambled was owned, at various stages, by the appellant's bank, by Cass himself, and by the building societies. It was never owned by the appellant. Nothing was transferred, which at any stage, belonged to the appellant, and in which title could be revested. It seems highly unlikely that the explanation of how the appellant came to acquire the rights to the money gambled by Cass can be based on a power analysis.

⁶² *Car and Universal Finance Company Ltd v Caldwell* (1965) 1 QB 525.

When looking at what the right that the appellant has acquired itself, Lionel Smith, for one, is clearly in some difficulty in trying to describe its nature. He says it is:

A proprietary right, less than ownership, which does not carry with it a right to immediate possession; hence it will not generate liability in conversion. Moreover although it will generate a ...liability in money had and received on the part of a subsequent recipient it will not generate that liability on the part of a trustee in bankruptcy.⁶³

All of this, Smith confesses, might seem “contrived”,⁶⁴ which it certainly does.

Smith is also unable to say when this peculiar right is created. Possibly it is created whenever a right to restitution arises as a result of an unjust enrichment. The right would therefore arise at the moment of enrichment. He tentatively suggests that in addition to this common law right there may also be an equitable property right. He clearly feels uncomfortable with the entire approach, however, accepting that there is enough opposition to the idea that unjust enrichment can ever create equitable property rights without adding common law property rights to the mixture.⁶⁵

When speaking of how this proprietary right is to be protected Smith is no more enlightening. Apart from an action in money had and received, Smith also suggests a personal right that is “somewhat analogous to detinue”⁶⁶ in that the value of the claim is to be measured at the time of the trial not at the point of interference with the claimant’s rights. The basis for this right cannot, we now know, be unjust

⁶³ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 337.

⁶⁴ Ibid.

⁶⁵ Ibid 338.

⁶⁶ Ibid 339.

enrichment because the Supreme Court has decided that liability in unjust enrichment arises at the moment of receipt, and the whole notion of measuring enrichment by value surviving has been rejected.⁶⁷ What the basis of the action might therefore be is unknown.

This un-named, and previously unknown, action is also one in which the protection of a proprietary right appears to give rise to a personal right only since otherwise it would give rise to priority in bankruptcy and Smith denies such a possibility.⁶⁸

Smith even considers the possibility that this proprietary right differs from all other common law property rights in that it need not have as its subject matter tangible assets.⁶⁹ He makes no attempt to explain how this fits in with the law as we currently understand it, nor does he refer to any dicta of Lord Goff supporting this idea. He is effectively forced into it because it is a consequence of Lord Goff's conclusion, rather than his reasoning.

Smith concludes that "all of this is speculative and uncertain",⁷⁰ which may be thought to be a somewhat generous summary.

None of Lord Goff's reasoning contains any germ of an explanation of how the appellants could successfully maintain a claim in unjust enrichment. His problems in this regard are exactly the same as Lord Templeman's. If the respondent received the appellant's money they did not gain title to it, and were thus not enriched at all. If they received Cass's money they may well have been enriched, but they were

⁶⁷ *Benedetti v Sawiris*. (2014) AC 938.

⁶⁸ L. Smith, *The Law of Tracing* (Clarendon Press 1997) 339.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

enriched at Cass's expense, not at that of the claimant, and nothing was said about what the unjust factor might have been.

Peter Birks undoubtedly considered *Lipkin Gorman* to be an unjust enrichment case,⁷¹ but this was on the basis, shown above to be erroneous, that a claimant is able to renounce title to an asset that has been transferred to him and, subsequently, make a claim based on the defendant's possession of that title. As we have seen, this cannot be correct, since, if the defendant has retained title to the asset, there appears to be no unjust factor, which would underpin an unjust enrichment claim.

On examination *Lipkin Gorman* is just another case where the reasoning rests almost entirely on *Taylor v Plumer*. The addition of *Marsh v Keating* as authority is, as we have seen, unsatisfactory, given that that case had nothing to do with common law tracing. The other case on which some reliance was placed, *Clarke v Shee & Johnson*,⁷² is equally inappropriate. In that case an employee of the claimant was required to collect debts owing to him on the claimant's behalf. On receiving the money he used it to gamble on the lottery. The claimant sued the persons who had received the gambled money, in money had and received. They were successful because, lotteries being illegal at the time, the defendants could not show that they had given value for the monies received. But the crucial difference between this case and *Lipkin Gorman* is that in *Clarke* it cannot be doubted that at all times the claimant was the legal owner of the money. It is obvious that the debtors who paid the claimant's employee must have intended to pass

⁷¹ P. Birks, *Unjust Enrichment* (2nd edn Clarendon Press, 2005) 69.

⁷² (1774) 1 Cowp 197.

legal title to the money in question to the claimant, not to the employee. The notes that the employee used for gambling purposes actually belonged to the claimant, and the defendants were unable to bring themselves within a *nemo dat* exception. This has nothing to do with tracing and nothing to do with *Lipkin Gorman*.

Arguably, the best analysis of *Lipkin Gorman* is that it involves a claim to trust money. This was never put before the court however, and, moreover, it was specifically rejected by both Lords Templeman and Goff as being in any way part of their reasoning. In any event there are difficulties with a trust analysis on the facts of the case as we know them. If we take the simplest transactions, those where Cass did not place the relevant monies into a building society account, then it is relatively easy to say that, since Cass was a fiduciary, the beneficial ownership of the monies with which he gambled lay with the solicitors. It is also true to say that, since the club gave no consideration for the receipt of the monies, the solicitors retained a persisting equitable interest in them when the club received them. However, no attempt was made to show that the club still retained any of the gambled monies, so we simply do not know if this was the case. If they were no longer in possession of them it is difficult to see how any claim could be made out against the club in respect of them. The fact that the club gave no consideration for the monies cannot have had the effect of making them the equivalent of knowing recipients. They took the monies in good faith, and having parted with them, could no longer have been liable for them. They certainly could not have been liable for any traceable proceeds of the monies because, as we will see in Chapter 7, equitable

claims to substitute assets may only be made against a fiduciary, and it is impossible to categorise the club as such with respect to the solicitors.

As befits the overall nature of this thesis, the examination of *Lipkin Gorman* has concentrated on analysing the reasoning adopted by the House of Lords in coming to its decision. It is worth bearing in mind, however, that it is far from certain that the outcome produced by that reasoning could be regarded as fair and just, even if the reasoning had been shown to have been impeccable.

The critical feature of the case, the one that allowed the solicitors to have any prospect of a successful claim against the club, was the fact that the effect of s18 the Gaming Act 1845 was that the club gave no consideration to Cass in return for the monies that he expended with them. This was because that Act provided that there was no enforceable agreement between the parties. Had Cass spent the money that he obtained from his fraudulent activities at his local supermarket, no claim could have arisen against the supermarket. It is hard to justify such a discrepancy in outcomes. The club was just as much an innocent recipient of Cass's money as the supermarket would have been. It could, of course, be argued that gambling is an activity which should be discouraged, and this may, or may not, be correct in social terms, but the same could well be said of both smoking and excessive consumption of alcohol, but, to repeat the point, no claim could have been made by the solicitors against any supermarket at which Cass had spent the money, even if he had expended it all on cigarettes and drink.

The members of the House of Lords may well have thought the solicitors the more worthy party of the two, and contrived to find a solution to fit this perspective, but, if this is the case, then it is suggested

that not only is the decision doctrinally defective, it is also socially questionable. If conformation is needed of this latter point it may well be seen in the fact that, a mere 24 years after judgment in the case was handed down, Parliament passed the Gambling Act 2005. By s334 of that Act, s18 of the Gaming Act 1845 was directly repealed, and by s335 gambling contracts became legally enforceable. Thus, *Lipkin Gorman* could not today have been argued in the way that it was.

Thus, not only was the analysis in the case defective, the outcome was also far from satisfactory. But, leaving this to one side, whatever explanation of the case may be found, it certainly cannot be unjust enrichment.

Unjust Enrichment and Proprietary Claims.

The next authority to be examined in this chapter is that of *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones*.⁷³ Like *Lipkin Gorman*, *Jones v Jones* has been put forward as a case that demonstrates that common law claims to substitute assets arise as a response to unjust enrichment.⁷⁴

Jones v Jones was discussed in Chapter 4, where it was analysed in response to arguments made by some that it demonstrated that such claims lie entirely within the boundaries of the law of property. This was shown to be incorrect, but the notion that its origins lie in the law of unjust enrichment are equally untenable.

Before re-examining the case in any detail, one specific aspect of it must be dealt with. This is that, in this case, we are asked to accept

⁷³ (1997) Ch. 159.

⁷⁴ P. Birks, 'At the Expense of the Claimant: Direct and Indirect Enrichment in English Law' in R. Zimmerman (ed), *Unjustified Enrichment*, (CUP 2002) 493.

that a successful claim in unjust enrichment may lead to proprietary, rather than merely personal relief. It will be recalled that the claimant was identifying specific money, placed into court, as belonging to it rather than to the defendant. It is far from certain that a claim in unjust enrichment can ever lead to a proprietary response. Moreover, it had never previously been suggested, by those who support the notion that a successful unjust enrichment claim may lead to the gaining of proprietary rights, that those rights are *legal* rights. There was no authority for that proposition at all.

The leading authority for the availability of a proprietary restitutionary claim is the unsatisfactory case of *Chase Manhattan Bank NA v Israel- British Bank (London) Ltd.*⁷⁵

The essential facts are not complicated. C, a bank incorporated and trading in the state of New York, paid money into M, another bank incorporated and trading in New York, for the benefit of D, a bank incorporated and trading in London. As a result of a mistake by one of its employees, C paid the money to M twice, and each time M credited it to the account of D. It was found that D was aware of the mistake within two days of its occurrence. About one month later D petitioned the High Court in London, praying to be wound up, and a winding-up order was duly made two months later. Immediately it became aware of the petition, C sought leave to trace in equity and recover the second tranche of moneys paid to D. C was also allowed to prove in Ds insolvency, the High Court having held that nothing precluded it from asserting both a proprietary claim over specific assets, and a personal

⁷⁵ (1981) Ch 105.

claim for money had and received.⁷⁶ The insolvency left C with the likelihood of only a small return from its personal claim.

The case came before Goulding J as one turning on matters of Private International Law. The question was whether the correct law governing the case was the law of New York or that of England. In the event, the judge decided that the conflict of laws issue did not matter because the law of New York and the law of England were the same on the crucial issue. He held that, despite having no authority to cite for his proposition, the recipient of a mistaken payment is a constructive trustee of that payment for the mistaken payer. This certainly reflects the law of New York, but there is a fundamental difference between the nature of the constructive trust in New York and in England.

In *Re Omegas*,⁷⁷ a creditor claimed that the bankrupt debtor had defrauded it by assuring it of its solvency, when the debtor was in fact on the point of insolvency. The creditor argued that, as a result, the debtor held moneys transferred to it by the creditor, as constructive trustee of the creditor. This is hardly an argument likely to succeed before an English court,⁷⁸ but the point is that the United States court held that, even if a constructive trust had arisen, a mere entitlement to a constructive trust was not an interest that would exclude the assets in question from distribution amongst creditors in bankruptcy. The reasoning is anathema to the ears of English equity lawyers and is summed up by the court saying:

⁷⁶ *Chase Manhattan Bank NA v Israel- British Bank (London) Ltd* As per Oliver J (Unreported).

⁷⁷ 16 F 3d 1443 (6th Cir., 1994).

⁷⁸ See for example *Re Goldcorp Exchange* (1995) 1 AC 74.

A constructive trust, unlike an express trust, is a remedy, it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment.

This is not to say that the decision in *Re Omegas* has been welcomed. It may not even be correct. But even its critics recognise that it represents an attempt to deal with the widely regarded, perceived unfairness that constructive trusts have the potential to cause in insolvency situations. Having roundly condemned the reasoning in *Re Omegas*, Spector J in *Re Dow Corning Corp*,⁷⁹ went on to say, however:

Cases in which the remedy of constructive trusts are sought run the gamut: some supplicants like... (that in *Re omegas*) have a dubious call upon equity; while others...present far more sympathetic situations. In the middle lie the vast majority of cases where fine distinctions necessitate extremely subjective determinations. Trial courts are, as a result of *Omegas* mercifully spared from this onerous task.

This takes us as far from an English legal conception of a constructive trust as it is possible to get. An essential purpose of a constructive trust in English law is to give priority in bankruptcy. This American version seems neither fish nor fowl. It seemingly creates non-proprietary property rights.

This part of the decision in *Chase Manhattan* did not survive the House of Lords determination of *Westdeutsche Landesbank Girozentrale v Islington District Council*.⁸⁰ In delivering his opinion in *Westdeutsche* Lord Browne-Wilkinson gave it as his opinion that *Chase Manhattan* was wrongly decided. His Lordship considered that the court's error was fixing the date of the formation of the constructive trust at the point of

⁷⁹ 192 BR 428 (Bankr. Ed Mich., 196), Quoted in C. Rotherham, *Proprietary Remedies in Context*, (Hart, 2002) 61.

⁸⁰ 1996 (AC) 669 (HL).

the mistaken payment, rather than at the date that the defendant became aware that the payment had been made by mistake. This difference is crucial. The remedy for the making of the mistaken payment (and hence the unjust enrichment) was a personal one only. The creation of the trust in favour of the claimant should have been a response not to the defendant's unjust enrichment *per se* but to the unconscionability of his retaining money which he knew had been transferred to him by mistake, and which, he knew he should return to the claimant.

A problem with the *Chase Manhattan* judgment is that no reason was given why the claimant should have acquired a proprietary right. The purpose of the law of restitution is to make the defendant "give back" to the claimant that which he has unjustly gained at the claimant's expense.⁸¹ It is arguable, therefore, that where the subject of the claim is the transfer of a right from the claimant to the defendant, the correct restitutionary response is to require him to return that right to the claimant.⁸² But this is not what happened in *Chase Manhattan*. No transfer of a right took place. All of the transfers simply created various debtor/creditor relationships between the parties. The purpose of the trust would presumably be to enable title to the money to be revested in the claimant but nothing was transferred from claimant to defendant in this case in which title could possibly be revested.

It is against this background, that there is no good authority for the existence of proprietary remedies as a response to unjust enrichment even in equity, that the question of whether *Jones v Jones*

⁸¹ M. McInness, "At the Plaintiff's Expense": Quantifying Restitutionary Relief" (1998) CLJ 472.

⁸² A.V.M. Lodder, *Enrichment in the Law of Unjust Enrichment* (Hart 2012).

can be said to be authority for the existence of such a remedy at common law must be examined.

The facts were that a partnership committed an act of bankruptcy, following which one of the partners wrote cheques to his wife drawn on the partnership account to the value of £11,700. Mrs Jones, the wife, invested the money in potato futures. The investment was successful and resulted in Mrs Jones being able to withdraw £50,760 from her brokerage account which she deposited at Raphaels bank.

Although no trustee in bankruptcy had been appointed at the time that Mr Jones transferred the moneys to his wife it was a principle of bankruptcy law at the time⁸³ that the effective date of the bankruptcy was the date of the presentation of the petition, and from that date the legal interest in the partnership bank account was vested in the trustee. This is known as the doctrine of relation back.

The Official Receiver therefore demanded the entire balance held at Raphaels bank in the name of Mrs Jones. Raphaels interpleaded, placed the money into court, and asked the court who could give it a good receipt for its money.

It was Peter Birks who first suggested that, properly understood, *Jones v Jones* is an unjust enrichment case. He described it as an “unequivocal example” of interceptive subtraction⁸⁴ – a concept tied entirely to the law of unjust enrichment. Birks entered into correspondence with one of the judges who decided the case in the Court of Appeal, Millett LJ, on that very issue, Millett LJ being equally

⁸³ Bankruptcy Act 1914 (4&5 Geo. 5, c. 59) ss.37,38.

⁸⁴ P. Birks, ‘At the Expense of the Claimant: Direct and Indirect Enrichment in English Law’ in R. Zimmerman (ed), *Unjustified Enrichment*, (CUP 2002) 493.

unequivocal that the case had nothing to do with unjust enrichment at all. The correspondence was later published.⁸⁵

At one level Birks cannot be correct, since the case involved no claim of any sort. It will be recalled that the issue was, who was entitled to money deposited at Raphaels bank. The bank interpleaded, asking which of the parties could give it a good receipt for the money. It is possible, however, to re-characterise the action, and describe it as being one in which the claimant was saying that, if the defendant were to have rights to the money in the account the defendant would be unjustly enriched at the claimant's expense. To a certain extent that did appear to be Beldam LJ's understanding of the case. Even if one does this, however, there are substantial problems in the way of viewing the case as one based on unjust enrichment.

First, liability in unjust enrichment is determined at the point of receipt of the enrichment. The quantum of liability therefore should have been restricted to the £11,700 that Mrs Jones initially received. Birks has tried to get around this problem by saying that liability should be for not just the receipt of the value by the defendant, but also for the ability to exploit the value received. For him it was a clear case of interceptive subtraction since the defendant

Must be understood as intercepting wealth already attributed by law to (the claimant) by virtue of arising from the earning opportunities inherent in the ownership of the original sum.⁸⁶

This is a complete re-write of what had up until that point been regarded as the nature of interceptive subtraction. The point of this

⁸⁵ P. Millet, 'Jones v Jones: Property or Unjust Enrichment' in A. Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in memory of Peter Birks* (OUP 2006) 265.

⁸⁶ P. Birks, *Unjust Enrichment*, (2nd ed, Clarendon Press 2005) 82.

doctrine was to allow a claimant to make a claim against a defendant who had intercepted a benefit that was certainly on its way to the claimant. To quote an earlier Birksian version of the doctrine:

If the wealth in question would certainly have arrived at the plaintiff if it had not been intercepted by the defendant *en route* from the third party, it is true to say that the plaintiff has lost by the defendant's gain.⁸⁷

Interceptive subtraction has become, on the new understanding of it, a device to prevent a defendant from making a profit by using the claimant's property. But this sounds very much like the law of property argument, rejected in the previous chapters, that the rationale behind tracing is that the claimant may make a claim to rights in a substitute asset simply as a result of having had rights in the original.

In the case of *Jones*, moreover, the entire profit was made as a result of Mrs Jones skill in investing wisely in the market. If anybody stood to be unjustly enriched, it was the claimant who had received the benefit of Mrs Jones's skill and effort, in circumstances where she certainly did not intend to benefit the claimant in that way.

Another difficulty with the Birksian analysis is that it fails to address the question of correspondence of loss. It is a moot point as to whether an unjust enrichment claimant must show a loss and, if so, whether the quantum of the claim is restricted to that loss. Birks did not believe it to be the case that a loss must be shown at all⁸⁸ but judicial dicta on the matter are contradictory and confusing⁸⁹ and it is by no

⁸⁷ P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 133.

⁸⁸ *Ibid* chap 4.

⁸⁹ *Hambly v Trott* (1776) 1 Cowp 371, 98 ER 1136 (arguably) supports Birks whereas *B.P. Exploration Co (Libya) v Hunt (No2)* (1979) 1 WLR 783 (arguably) goes against him. Most of the authorities on the issue come from the United States or Canada.

means certain that Birks's argument has won the day.⁹⁰ On the face of it the only loss made by the claimant was the £11,700 paid by Mr Jones to the defendant. As we have seen, Birks would extend liability to cover the entire sum in the defendant's account, on the basis of his new understanding of interceptive subtraction, but, unconvincing as that argument is, it is not the same thing as saying that the claimant has made a loss equal to the increased sum. That would require further justification, which has not, so far, been forthcoming.

There is an alternative argument, which follows from an extended understanding of the term "enrichment".⁹¹ According to this argument enrichment consists of both the acquisition of value, and the acquisition of rights. Thus, if A mistakenly transfers to B a painting, B is enriched both by the value of the painting and by the acquisition of rights in that painting. If the painting is worth £1000 at the point of receipt, then the enrichment in terms of value is £1000. If it subsequently increases in value to £5000 and is then sold the enrichment in value terms remains at £1000, but the claimant may claim the £5000 representing the traceable proceeds of the rights that he had in the painting. Whether this analysis works or not with paintings it cannot work in the case of *Jones*. In *Jones* Mrs Jones received a cheque and banked it. She then

⁹⁰A. Burrows, *The Law of Restitution*, (3rd edn OUP 2010) 64 and M. Rush, *The Defence of Passing On*, (Hart 2006) 143-171 seem to agree with Birks whereas M. McInnes, "At the Plaintiff's Expense": *Quantifying Restitutionary Relief*" (1998) CLJ 472, M. McInnes, 'The Measure of Restitution' (2002) 52 *University of Toronto Law Journal*; L. Smith, 'Three party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 *OJLS* 481; L. Smith, *Restitution: The Heart of Corrective Justice*' (2000-2001) 79 *Texas Law Review* disagree.

⁹¹ AVM Lodder *Enrichment in the Law of Unjust Enrichment* (Hart 2012), and R. Chambers, 'Two Meanings of Enrichment' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 242.

made a series of investments that resulted in a different sum appearing to her credit in her bank account. Unlike in the case of the painting, and as we saw in Chapters 1 and 2, the right that the claimant was claiming in the £50,760 could not have been the same right as he had in the £11,700. Such analysis does not work with bank accounts.

The final case that we will look at in this chapter is *Armstrong DLW v Winnington Networks Ltd*,⁹² a case discussed in some detail in the previous Chapter. To summarise the facts briefly, the claimants were fraudulently induced to transfer some EUAs (a transferable European carbon trading right, and thus an intangible asset) to the defendants, who sold them on to a third party. The claim succeeded in equity on the grounds that the fraudster had obtained sufficient legal title to the EUAs to enable him to hold them on trust for the claimants. The defendants had thus received trust assets in circumstances which, the judge found, constituted knowing receipt.

However, the judge took time to look at what the position would have been had this conclusion been incorrect. He decided, based on his understanding of *Lipkin Gorman*, that the claimants would have had a “restitutionary proprietary claim” to the proceeds of the sale of the EUAs if legal title to them had at all times remained in their hands. This argument was criticised in the previous chapter, but in practical terms it is of little significance, since the judge had already decided that title had passed to the fraudster.

Following his discussion of the proprietary restitutionary claim the judge went on to consider the possibility that the claimants may have had a claim in unjust enrichment. There is a curious contradiction here.

⁹² (2013) Ch 156.

According to the judge there are two distinct ways of looking at *Lipkin Gorman*. It can either be seen as authority for the existence of a proprietary restitutionary claim or it could be viewed as being based on unjust enrichment. In order for there to be a claim in unjust enrichment, however:

By definition such a claim would suggest that the claimant has lost, and the defendant has gained property.⁹³

This is correct, which makes the statement further on in the judgment that:

So, if contrary to my conclusion above, the *Lipkin Gorman* case were to be correctly analysed as a restitutionary claim for unjust enrichment (because, for example *Foskett v Mckeown* cannot be said to apply to legal title) then I would accept that Armstrong's claim in the present case could have been made on this basis, if legal title to the EUAs did not pass to anyone.⁹⁴

On the face of it the last words of the paragraph are a complete contradiction of the previous dicta. The judge appears to be saying here that the claim in unjust enrichment will lie *provided* that legal title at all times remained with the claimants. Which is both incorrect, and a reversal of what he had previously said.

The most likely explanation for this is that the judge has not made it clear that any successful claim in unjust enrichment must be in respect of the monies received by the defendants for the onward sale of the EUAs, not for the receipt of the EUAs themselves. As far as the EUAs themselves are concerned, if title to them remained at all times with the claimants, it would be unable to maintain an unjust enrichment claim in respect of them because the defendants have not been enriched. If title

⁹³ Ibid 177.

⁹⁴ Ibid 186.

passed to the defendants, then the claimants would still struggle to show that the defendants had been enriched because he gave full value for them.⁹⁵

However, the monies that the defendant's received for the onward sale of the EUAs are a different matter. If title to the EUAs remained with the claimants then, since the defendants sold property belonging to the claimants, they must be liable to an action for unjust enrichment with respect to the monies received for the sale. If title had passed to the defendants it is hard to see how they could be liable at common law for the receipt of monies for the sale of property to which they held an unencumbered legal title.

But whatever the rights and wrongs of these arguments they have nothing to do with tracing and nothing to do with *Lipkin Gorman*. The reason that tracing mattered in *Lipkin Gorman* was that it somehow had to be shown that Cass was gambling with the solicitor's money. That is not an issue here. The EUAs had, on the judge's alternative analysis, been found to be the property of the claimants. Tracing is therefore irrelevant to any personal claim to the monies received by the defendants for the sale of that property.

The judge had, in fact, already rejected the reading of *Lipkin Gorman* as an unjust enrichment case but this does not matter for our purposes. *Lipkin Gorman* is not a relevant authority for the facts in *Armstrong* at all. The fact that it is not a case supporting any direct

⁹⁵ This is not a universally accepted explanation of the way that unjust enrichment works, although it was how Lord Templeman saw it in *Lipkin Gorman*. Another explanation would be that the defendant would have been enriched but would have had a defence of change of position available to it.

proprietary claim does not automatically make it an authority for an unjust enrichment based claim.

Conclusion.

The purpose of this chapter was to examine the proposition that common law claims to substitute assets are a part of the law of unjust enrichment. It has been shown that this proposition cannot be reconciled with the substantive law of unjust enrichment. Because two cases of great significance have been put forward, by academic and judicial authority alike, as demonstrating the contrary argument, both cases have been looked at in this light. Close analysis of each case shows that neither are, properly understood, unjust enrichment claims at all. In neither case did the court explain how the facts of that case allowed the claimant to establish such a claim.

Part 3.

Equitable Claims to Substitute Assets.

Chapter 7. Equitable Claims To Substitute Assets.

Introduction.

Part 2 of this work was devoted to explaining why it is that the common law does not allow claims in respect of rights to substitute assets, and why, therefore, it is meaningless to speak of a right to trace at common law.

There is no doubt, however, that it is possible to make claims in respect of rights to substitute assets, and there is equally no doubt that there are “rules of tracing,” that are part of the substantive law, which do determine when one asset may be regarded as a substitute for another for the purpose of making a claim.¹ It is obvious that claims are available in equity in respect of rights in substitute assets. The problem arises in explaining the basis on which equity allows such claims, and how and why it differs in that respect from the common law. I have argued that the explanation for claims to substitute assets cannot come from either the law of property or the law of unjust enrichment.² This leaves the common law without any foundational basis for such claims. What we need to understand is why equity is able to permit such claims, and the circumstances in which it does so.

This chapter seeks to explain the basis of the equitable claim, as an idiosyncrasy of equity itself. The explanation is the rule that a fiduciary may not acquire rights during the course of the performance of

¹ See, for example, *Clayton's Case: Devaynes v Noble* (1816) 1 Mer 529, 35 WE 781; *Pennell v Deffell* (1853) 4 De G M & G 388, 43 ER 551; *Re Hallett's Estate* (1878 H147), (1880) 13 Ch D 696; *Re Oatway* (1903) 2 Ch 356; *James Roscoe (Bolton) Ltd v Winder* (1915) Ch 65; *Re Tilley's Will Trust* (1967) Ch 1179.

² See Part 2 of this work.

his fiduciary duties, and that if he does so he must return those rights *in specie*, to his principal.

In Part 1 it was argued that tracing is an exercise in the normative allocation of claims. The purpose of that normative allocation, it will be shown here, is to assist courts in ensuring that fiduciaries are held to their fiduciary responsibilities. This has the effect of placing tracing where it belongs, firmly within the realm of equity. The effect of this is to add further strength to the fundamental argument of this work, that tracing, and claims contingent upon it, have nothing to do with the common law. There is a reason why equitable claims to rights in substitute assets might be available and that reason is unique to equity. The reason is the nature of the fiduciary relationship itself. This is important, because it also resolves the argument as to whether a fiduciary relationship is, or is not, a *sine qua non* of the application of the rules of tracing. Clearly it must be, since the whole purpose of those rules is directed at ensuring that a fiduciary does not acquire rights in the course of the performance of his fiduciary duties. This argument will be developed further in the second section of this Chapter. First, however, it is necessary to establish the basic point - that the explanation for the right to assert claims to substitute assets lies in the nature of the fiduciary relationship itself.

[Agents Acting Within Their Authority.](#)

The starting point for the explanation of the basis of equitable claims to substitute assets lies in the situation of principals whose agents have become bankrupt.

We saw in Chapter 3 that until the early years of the 18th century principals who vested goods in agents were faced with the problem that in the event of the agent's bankruptcy the law decreed that anything found in the agent's hands at the time of the bankruptcy became subject to distribution to his creditors. In *Burdett v Willett*,³ this perceived injustice was resolved by a court of equity holding that where the original goods could be distinguished in the hands of the factor⁴ or an identifiable asset could be found in the hands of the factor, which had been acquired by him in return for goods exchanged by him pursuant to his agreement with the plaintiff, a trust arose in favour of the plaintiff.

Equity did this by extending the long-held principle that a specifically enforceable obligation to convey title to land gave the purchaser a proprietary interest, in the form of a trust,⁵ to debts, so, that where the court recognised an obligation to assign a right *in specie*, (as was the case with a principal and a factor) it thereby recognised a trust. The basis of equity's jurisprudence on this issue was agreement. The trustee and the factor had to transfer the right *in specie* to the beneficiary or the principal because that is what he had agreed to do.

We then saw that in *Scott v Surman* an action for money had and received was allowed to lie for the realised value of a right that already belonged, in equity, to the claimant. The reason that the right already belonged in equity to the claimant was the same reason as was identified above. The defendant had agreed to sell the goods on behalf of the plaintiff and hand over the proceeds to him and equity treated

³ (1708) 2 Vern 638, 23 ER 107.

⁴ *Copeman v Gallant* (1716) 1 P Wms 314, 24 ER 404; *Paul v Birch* (1743) 2 Atk 621, 26 ER 771.

⁵ As was explained later in *Beckford v Wade* (1805) 17 Ves Jun 87, 34 ER 1181, 96.

such an obligation as sufficient to create a trust in favour of the claimant. Claims such as this are not in any way based upon any ownership rights that the claimant had in the original asset. They are based entirely on what the defendant had promised to do on the disposal of that asset.

As it is based on agreement the above analysis pre-supposes an agent acting within the scope of his authority. When it comes to unauthorised investments, such agreement is obviously lacking, and it might be thought that an alternative basis of reasoning needed to be found. But Chapter 3 showed that this was not the case. The decision in *Taylor v Plumer*,⁶ extended the principle to agents acting outside the scope of their authority. The problem then became to identify the underlying basis for this new principle. That it cannot have anything to do with the rights that the claimant had in the original asset was shown in Chapter 4 and that it is nothing to do with unjust enrichment was demonstrated in Chapter 5.

[Justifying Claims Against Agents Acting Outside Their Authority.](#)

The answer proposed here is that the basis is the nature of the fiduciary relationship itself. This has nothing to do with fiduciaries making profits or acting unconscionably. It is because the fiduciary by accepting his fiduciary role accepts that he must prioritise the interests of his principal within a particular sphere of activity. As a consequence, by the very nature of the fiduciary relationship, the fiduciary may not acquire rights in the course of pursuing his fiduciary duties and if he does do he has to

⁶ (1815) 3 M & S 562.

return them to his beneficiary, *in specie*. This is a purely equitable analysis. It cannot be extended to rights arising at common law.

In *Keech v Sandford*,⁷ a trustee was granted a lease to hold on trust for an infant. When the time for renewal came the landlord refused to renew for the benefit of the infant. The trustee renewed for himself. The Court ordered the trustee to assign the benefit of the lease to the infant and to account for all profits arising from it.

There are two significant features of this decision. First it can have nothing to do with the principle that a trustee cannot make a profit *at the expense of* his beneficiary. The beneficiary in this case did not, and would not in the ordinary course of events, have had the benefit of the lease, and therefore could not be said to have made a loss as a result of the trustee's action. Second the court did not order that the lease be set aside. It ordered that the lease, together with the profits of the lease, be conveyed to the beneficiary. This might be thought of as treating the fiduciary as if he had acted within the legitimate sphere of his authority but a more compelling suggestion, especially given the way that the law subsequently developed, is that the court adopted the principal that a principal can claim any gains that a fiduciary acquires in the course of his duty.

20 years after *Keech v Sandford*, Lord Hardwicke held in *Whelpdale v Cookson*,⁸ that a trustee could not benefit from the purchase of trust property irrespective of whether the beneficiary had suffered a disadvantage as a result of the purchase.⁹

⁷ (1726) Sel Cas Ch 61, 25 ER 223.

⁸ (1747) 1 Ves Sen 9, 27 ER 856.

⁹ A similar principle can be found enunciated in *York Building Co v MacKenzie* (1795) 7 Bro pc 42, 3 ER 432,67.

Each of these cases was cited as authority by Lord Eldon when he enunciated the principle that:

This doctrine as to purchases by trustees, assignees and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this: *that the purchase is not permitted in any case,*¹⁰ however honest the circumstances: the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.¹¹

We therefore have a clear principle being applied consistently at this stage to the effect that a fiduciary cannot act self-interestedly in any activity that arises from the performance of his fiduciary duty. Somewhat inexplicably, over the course of time, the fairly clear principle outlined in this line of cases became altered.

In *Bristol & West Building Society v Mothewe*,¹² for example the court seems to have regarded a fiduciary who makes a profit in pursuance of his fiduciary duty as being in breach of some ill-defined obligation of loyalty, or even of a direct obligation not to make a profit out of the trust. According to Millett LJ:

The distinguishing obligation of a fiduciary is the obligation of loyalty. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or for the benefit of a third person without the active consent of his principal.¹³

But this ignores the order that was made in *Keech v Sandford*, which was not that the lease be set aside, but that it be conveyed to the

¹⁰ Italics not in original.

¹¹ *James, Ex Parte* (1803) 8 Ves 337, 32 ER 385.

¹² (1998) Ch 1.

¹³ *Ibid* 18.

beneficiary. If the defendant in *Keech v Sandford* had been found to have committed some sort of wrong the correct remedy would have been to put the parties back to the position that they were in before the wrong was committed. This could not have resulted in the order that the court actually made in that case. Prior to the defendant's acquisition of the lease neither claimant nor defendant had it. The effect of *Keech v Sandford* is not to remedy a wrong committed by a fiduciary against his beneficiary, but to prevent a fiduciary from ever coming into conflict with his principal's interests in the first place. And it does this by making the fiduciary immediately liable for any gain made as a result of any transaction carried out in the course of his position.

Perhaps even more inexplicably, it somehow came to be accepted that a loss to the principal is a relevant factor in breach of fiduciary duty cases. In *Sinclair v Versailles*,¹⁴ Lord Neuberger said that:

The beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset, or money is, or has been, beneficially the property of the beneficiary, or the trustee acquired the asset, or money, by taking advantage of an opportunity or right which was properly that of the beneficiary.¹⁵

In other words the trustee's actions must have caused the beneficiary a loss. Such a proposition has no basis either historically or in principle. As Lord Russell stated:

The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit in no way depends on...whether the profit should or would otherwise have gone to the plaintiff,

¹⁴ (2012) Ch 453, applied in *FHR European Ventures LLP v Mankarious* (2013) EWCA Civ 17.

¹⁵ *Sinclair v Versailles* (2012) Ch 453.

or whether the profiteer was under a duty to obtain the source of profit for the plaintiff...or whether the plaintiff has in fact been damaged or benefitted by his action...the liability arises from the mere fact of a profit having...been made.¹⁶

It is difficult to think of a more explicit statement of the principle involved. In commenting on the later case of *FHR European Ventures LLP v Mankarious*,¹⁷ Lionel Smith explained Lord Russell's words as laying down a rule that:

It is not activated by wrongdoing...it is a direct implication of the fact that a fiduciary acts, within a sphere of activity, for and on behalf of the principal. The implication is that whatever may be extracted from that sphere of activity is attributed, as between the fiduciary and the beneficiary, as a matter of primary right, to the beneficiary.¹⁸

Smith also referred to the case of *Soulos v Korkontzilas*,¹⁹ admittedly a Canadian case but nonetheless one that seems perfectly in accordance with English law, in which a fiduciary was required to transfer a right acquired in the course of his duty, to his beneficiary despite the fact that the principal had actually made *a loss* as a result of the transaction.

The last part of Lord Neuberger's dicta cannot be regarded as saying that it is a requirement that the beneficiary could, or would, have had the possibility of actually enjoying the relevant right or opportunity, because we have been told that such a question is irrelevant in determining the proprietary liability of principals in such

¹⁶ *Regal (Hastings) Ltd v Gulliver* (1942) 2 AC 134.

¹⁷ (2013) EWCA Civ 17.

¹⁸ L.Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260.

¹⁹ (1997) 2 SCR 217.

circumstances.²⁰ It can only realistically, therefore, mean that the mere acquisition by the fiduciary of an opportunity or right, which was properly that of the beneficiary, is sufficient to trigger liability. It is the principal's acquisition, not the beneficiary's loss, which triggers proprietary liability.

In fact, Lord Neuberger had the opportunity to revisit similar issues in *FHR European Ventures LLP v Cedar Capital Partners LLC*.²¹ In that case he recognised that the acquisition of a benefit by a fiduciary pursuant to an opportunity which results from his fiduciary position, is to be treated as having been acquired on behalf of his principal, thus giving rise to a proprietary liability. The fiduciary does not have to have committed any sort of wrong, and it does not matter that he may have acted outside the scope of his fiduciary duty. The fact of acquisition is sufficient.

The role of a fiduciary is to act solely in the interests of his principal within the sphere of the fiduciary activity. It is inevitable, therefore that, as Lionel Smith explains:

Whatever may be extracted from that sphere of activity is attributed, as between the fiduciary and the beneficiary, as a matter of primary right, to the beneficiary.²²

If we now re-examine *Taylor v Plumer* in the light of these authorities, we can see that the best explanation for the case is that by acquiring substitute rights in the course of performing his fiduciary duties, and the management of trust rights is clearly performing such duties, Walsh acquired those rights as a trustee. The effect of *Keech v*

²⁰ *Keech v Sandford*, 1726) Sel Cas Ch 61, 25 ER 223; *Boardman v Phipps*, (1967) 2 AC 46.

²¹ (2014) 3 (WLR) 535.

²² L.Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260, 262.

Sandford is that there was no other capacity in which he could have acquired them. Having thus acquired them he became immediately accountable to his principal in respect of them.

This, then, is the explanation for the basis of the new right that a claimant may assert when a fiduciary has acted outside the scope of his authority. His accountability arises solely from the fact that the right has been acquired in the course of his fiduciary endeavour. It has nothing to do with any loss made by the principal. If the fiduciary is a trustee then showing that a right acquired by him has arisen as a result of a transactional link²³ between the acquisition of that right and a right originally held on trust for the beneficiary is sufficient for that right to be transferred to the beneficiary *in specie*. The question of whether the beneficiary has made a loss as a result of the acquisition is irrelevant. The transactional link demonstrates that the right was acquired in the course of the defendant's fiduciary endeavour. Tracing and the transmission of value are irrelevant to the analysis.

When speaking of new rights acquired by trustees and other fiduciaries, therefore, proprietary claims do not fit into the pattern of the orthodox theory of tracing. They are not explicable by the exchange product theory. They have nothing to do with the transmission of claims from one right to its traceable proceeds. The reason that the claimant has rights in the substitute asset has nothing to do with the rights that he had in any original asset. It is purely attributable to the defendant having obtained his rights in the course of performing his fiduciary duties.

²³ See Chapter 2 and the text following footnote 34 for a discussion of transactional links.

Fiduciary Liability Without Assets.

We have seen that a fiduciary must account *in specie* for any right acquired by him in the course of performing his fiduciary endeavour. Nor may he acquire rights by exploiting an opportunity acquired in the course of such endeavour. The latter emphasises the point that the rule is not based on any rights that the beneficiary had in some original asset and that it operates in exactly the same way irrespective of whether such an asset existed or not. Thus, in *Boardman v Phipps*,²⁴ the appellants were solicitors to the trustees of a will and a beneficiary of that trust. They purchased a controlling interest in a company in which the trust itself had a substantial number of shares. The purpose was to liquidate the company and return a profit to the trust in respect of the shares that it held. The remaining beneficiaries of the trust were not informed of the plan. The plan was carried out successfully. One of the effects of the success of the plan was that the appellants themselves made a profit. In upholding the decision of the Court of Appeal the House of Lords made it clear that, although no wrongdoing could be attributed to the appellants, they had acquired the rights to the shares whilst acting in their fiduciary capacity and that, therefore, they had to account for the profit made to the beneficiaries of the trust.

No trust property has been transferred without authority in this case. It has nothing to do with original rights or tracing. It exemplifies the point that the rules regarding claim against fiduciaries are not based on any rights that a beneficiary may have in an original asset. They are based on the nature of the fiduciary relationship itself.

²⁴ (1967) 2 AC 46.

The Boundaries of Liability.

Clearly there has to be a limit to the scope of the fiduciary's liability, and that limit is that the fiduciary is only liable for the acquisition of rights that he acquires in the actual course of the performance of his fiduciary duty. He is not, however, accountable for rights acquired as a result of an opportunity that he himself discovers, even if exploitation of such opportunities is within the general scope of activities of his principal.

Thus where a director of a property investment company sees a potential investment plot on his way to work and purchases it on his own behalf no liability to account arises²⁵ because the fiduciary exploited an opportunity that did not arise as a result of the performance of his fiduciary duties.²⁶ By contrast where the director is sent by his company to assess a plot of land and decides to purchase it for himself instead of his company liability to account does indeed arise since the fiduciary has exploited an opportunity arising from the performance of his fiduciary duty itself.²⁷ The general point of importance here is that the presence or absence of a conflict of interest between the fiduciary and his beneficiary is irrelevant. The boundaries of fiduciary liability have been determined not by specific instances of actual conflict between fiduciary and beneficiary but by the general rule that the fiduciary can never place himself in the position of exploiting his role in the performance of his duties to his own profit.

²⁵ Although it would seem to if the fiduciary was part of a partnership rather than a company director. See *Partnership Act 1980 s 30*.

²⁶ This example is based on *Bhullar v Bhullar* (2003) EWCA Civ 324.

²⁷ This is loosely based on *O'Donnell v Shanahan* (2008) EWHC 1973.

The Fiduciary Requirement.

Having established that the reason that equity allows claims with respect to substitute assets is essentially based on the nature of the fiduciary relationship, it would be expected that the existence of such a relationship is a *sine qua non* of making such a claim. This is, however, a matter of some considerable controversy. Much of this controversy has been caused by an over-reliance on the importance of Lionel Smith's "powerful insight"²⁸ concerning the dichotomy between tracing and claiming.²⁹ Once it is accepted that this dichotomy is merely a useful analytical tool, and cannot be utilised to make points about the nature of the substantive law, a large part of the argument opposing the fiduciary requirement falls away.

According to a well-respected textbook:³⁰

The present position of the English cases is that an initial fiduciary relationship is a prerequisite of the right to trace in equity. This was reaffirmed in *Westdeutsche Landesbank Giroentrale v Islington London Borough Council*. While the House of Lords overruled the earlier decision of *Sinclair v Brougham*, Lord Browne-Wilkinson was at pains to stress that this did not amount to a rejection of the requirement of a fiduciary relationship since the House of Lords was not wishing to cast any doubt on the principles of tracing established in the later case of *Re Diplock*.

Given the weight of authority behind it, this pre-requisite must be taken as currently representing the law. In *Shalson v Russow*,³¹ Rimer J

²⁸ E. O'Dell, 'Tracing' (1999) *Dublin University Law Journal*, 131.

²⁹ See Chapter 2 and the text following footnote 57.

³⁰ R. Pearce, J. Stevens & W. Barr, *The Law of Trusts and Equitable Obligations* (5th edn Oxford 2010).

³¹ (2003) EWHC 1637 (Ch).

rejected the notion that *Foskett v McKeown*,³² had effected any change in the law, and insisted that a fiduciary requirement remains a pre-requisite for setting equitable tracing in train. He pointed to the speeches of each of their Lordships in that case to show that they either had nothing to say on the question; had specifically rejected the idea that they were making any attempt to remove the pre-requisite; or agreed with the dicta of those of their Lordships who had rejected that idea.³³

Orthodox theorists reject the necessity for any such pre-requisite. Most attempts to deny its existence turn out to be merely assertions of its illogicality, and thus appeals for its removal, rather than as demonstrations that the law operates without it. Thus, Lord Millet argues that:

There is certainly no logical justification for allowing any distinction between them (i.e. between rules for tracing at common law and rules for tracing in equity) to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules.³⁴

This argument depends for its validity on the acceptance of the basic premise that there is a significant distinction to be drawn between tracing and claiming, and that tracing is merely a mechanical exercise in identification. But as was shown in Part 1 the utility of this basic premise is highly questionable.

The orthodox position cannot be promoted by showing that the courts have extended the notion of a fiduciary to breaking point in order

³² (2001) 1 AC 102.

³³ Ibid 103-104.

³⁴ Ibid.

to get around the pre-condition. Calnan (who is unquestionably not a member of the orthodox school but who supports their analysis in this instance) says that there are no examples of claims failing because of the lack of a fiduciary duty, since where a fiduciary duty is required it will always be found.³⁵ This may be true but it tells against his general point, that a fiduciary duty is unnecessary. Why would courts go to the bother of looking for unnecessary (and apparently artificial) relationships if they saw no need to do so?

The Argument from Authority.

In *The Law of Tracing*,³⁶ Lionel Smith, having pointed out what he considers to be the illogicality of any fiduciary pre-condition, goes on to argue that its existence is a misunderstanding of the relevant authorities. He commences with *In Re Hallett's Estate*.³⁷

It will be recalled that H was a deceased solicitor who, it was discovered during the administration of his estate, had mixed the proceeds of the sale of two sets of Russian bonds with his own money in his own personal bank account. The first set of bonds belonged to his marriage settlement trust (of which he was a trustee) and the second set belonged to C for whom he acted as a solicitor and for whom he kept the bonds in safe keeping. At first instance Fry J held that C could trace from her bonds into the proceeds of H's account. This was upheld on appeal but the court took the opportunity to dissent from certain dicta of Fry J in *Ex parte Dale & Co*,³⁸ where he held that he was bound by a

³⁵ R. Calnan *Proprietary Rights and Insolvency* (OUP 2010) 314.

³⁶ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 120-130.

³⁷ (1880) 13 Ch D 696.

³⁸ *Re West of England & South Wales District Bank; Ex parte Dale & Co* (1879) 11 Ch D 772.

line of authority to rule that the necessary relationship required, before a claimant could trace into the defendant's bank account, was that of trustee and beneficiary. Almost the entirety of Jessell MR's judgment was devoted to showing that this was incorrect and that any fiduciary relationship was sufficient to allow the tracing process to commence.

Jessell MR, said:

Has it ever been suggested, until very recently, that there is any distinction between an express trustee, or an agent, or a bailee or a collector of rents or anyone else in a fiduciary position?...it can have no foundation in principle, because the beneficial ownership is the same wherever the legal ownership may be. If you have goods bargained and sold to a man upon trust to sell and hand over the net proceeds to another; and that other is the beneficial owner; but if instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the hands of the beneficial owner, can it be supposed, in a Court of Equity, that the rights of the beneficial owner are different, he being entire beneficial owner in both cases?

I say in principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because the moment you get into a Court of Equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee no such distinction was ever suggested, as far as I am aware. Therefore the moment you establish a fiduciary relation, the modern rules of Equity, as regards following trust money apply.

Smith's analysis of this passage is that it:

Can be interpreted in two ways. The reference to "following trust money" is a compendious reference to the process of tracing and the establishment of equitable proprietary rights in the traceable proceeds. The relationship between the fiduciary relation and the ability "to follow trust money" is unclear. It appears to be a statement that the fiduciary relation is *sufficient* to invoke the "modern rules of equity". This is a different matter from a

statement that it is a *necessary* condition, or, the other alternative, that it is both necessary and sufficient.

It appears, however, that what Jessel MR was really driving at was not so much the process of tracing as the establishment of equitable proprietary rights in the traceable proceeds of an asset. In the first part of the quotation he stresses that a bailor is the beneficial owner of the thing bailed; like the beneficiary of a trust he holds proprietary right. He can therefore assert an equitable proprietary interest in its traceable proceeds.³⁹

It is difficult to accept Smith's reading of Jessell MR's dicta. All of the judgment leading up to the quoted passage quite clearly deals with the question of the circumstances in which a beneficiary can identify a substitute asset in the hands of his trustee, when trust monies have been mixed with the trustee's own money, and also how the proceeds of an asset purchased with mixed funds may be identified. It is concerned with tracing. The quoted passage simply says that it is not only the relationship of trustee and beneficiary which permits the commencement of the tracing process. Any fiduciary relationship will suffice. Contrary to what Smith says, it is actually extremely unlikely that Jessell MR had anything in mind other than tracing. Much of the judgment is devoted to showing that the following dicta of Fry J in *Ex parte Dale* were correct and that he should not have departed from them:

Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to me to be the logical result of *Pennell v Defell*.⁴⁰

³⁹ L. Smith, *The Law of Tracing*, (Clarendon Press 1997) 124-125.

⁴⁰ *Re West of England & South Wales District Bank; Ex parte Dale & Co* (1879) 11 Ch D 772, 779.

This is clearly about tracing.

Smith is correct to say that nowhere does Jessell MR state that a fiduciary relationship is both a sufficient *and* a necessary pre-condition for commencing the tracing process. However, even if he does not do so explicitly, it can surely be inferred from the judgment. The question that Jessell MR was addressing was whether tracing could only be commenced by a trust beneficiary against his trustee or whether it could be commenced by the principal of any fiduciary relationship against the fiduciary. If a fiduciary relationship was not necessary at all, the question could not have arisen: if tracing could be commenced by any claimant against any defendant, the exact nature of the fiduciary relationship in *Re Hallett's Estate* would have been irrelevant.

It is suggested, therefore, that *Hallett's Estate* does stand for the principle that a fiduciary relationship is a necessary pre-condition for equitable tracing to take place.

Smith suggests that *Sinclair v Brougham*,⁴¹ which has also been regarded as establishing the need for a fiduciary relationship as a pre-condition for equitable tracing, is also really about the pre-conditions for claiming, not tracing.

A building society commenced operating as a bank, an action which was made ultra vires by legislation. On the society's insolvency the question arose as to whether those depositors who had deposited money with the society in its banking capacity could make a claim dependent upon tracing their deposits into the assets of the society. The personal claim in money had and received was rejected on the grounds that such a claim was based on an implied contract to repay and that

⁴¹ (1914) AC 398.

since an actual contract to repay would not have been possible, being ultra vires, it followed that an implied contract would also have been impossible. The court appeared unwilling to countenance the natural result of this finding, which was that the shareholders would have received a very considerable windfall at the expense of the depositors. It was held that the depositors had an equitable proprietary claim to the traceable proceeds of their deposits. The decision has always been controversial,⁴² not least because of the difficulties in reconciling the individual judgments. In *Westdeutsche*,⁴³ considerable doubt was cast on the correctness of much of what was said in the case.

However, a full reading of the judgment of Lord Parker of *Sinclair v Brougham*, undoubtedly leads to the conclusion that he went out of his way to find a fiduciary relationship between the society and the depositors. There are difficulties with the one that he found. A depositor of money with a bank is in a debtor/creditor relationship with that bank not in a fiduciary relationship with it. The point is, however, that the reason why such a relationship was being sought after by his Lordship was because he recognised that, in its absence, the depositors would be unable to trace at all, this being an inevitable consequence of the judgment in *Hallett*.

Smith applied the same analysis with respect to the case of *In Re Diplock*.⁴⁴ The executors of a will made distributions, in what they thought was accordance with the terms of the will, to a series of charitable bodies. It was subsequently held that the will was void for

⁴²E. O'Dell, 'Sinclair v Brougham' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution*, (Hart 2006).

⁴³ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, (1996) AC 669 (HL).

⁴⁴ (1948) Ch. 465.

uncertainty,⁴⁵ and the next of kin of the testator commenced proceedings against the unlawfully paid beneficiaries for the return of the monies paid to them. Claims were made both *in personam* and *in rem*. The substance of the claims *in rem* was that the claimants could trace from the proceeds paid to the beneficiaries into whatever assets had subsequently been acquired with those proceeds.

The Court of Appeal relied heavily on *In Re Hallett's Estate* and the interpretation of that case in *Sinclair v Brougham* for its answer.

According to Smith,⁴⁶ the Court had nothing to say about the pre-conditions for equitable tracing and merely emphasised the need for a proprietary base before an equitable proprietary claim could succeed in a substitute asset. This is a doubtful proposition.

During the course of his judgment Lord Greene MR said:

First of all it appears to us to be wrong to treat the principle which underlies *Hallett's case* as coming into operation only where the person who does the mixing is not only in a fiduciary position but is also *a party to the tracing action*...suppose that the sole trustee of (say) five separate trusts draws 100l out of each of the trust banking accounts, pays the resulting 500l into an account which he opens in his own name, draws a cheque for 500l on that account and gives it as a present to his son. A claim by the five beneficiaries to follow the money of their respective trusts would be a claim against the son. He would stand in no fiduciary relationship to any of them. We recoil from the conclusion that all five beneficiaries would be dismissed empty handed by the court.

Unquestionably there are difficulties with this passage. In the example that Lord Greene gives there is no tracing that takes place with respect to any non-fiduciary at all. The only tracing involved would be to show

⁴⁵ In *Chichester Diocesan Fund and Board of Finance (Inc) v Simpson* (1944) AC 341.

⁴⁶ L.Smith *The Law of Tracing*, (Clarendon Press 1997), 127-128.

that the money received by the son was trust money. But that would be tracing through the bank account of the trustee, who was a fiduciary. As explained below, the son in this instance would be liable to return the money that he received to the trust, but this has nothing to do with tracing.

The second difficulty, also discussed in more detail below, is that the general principle outlined by Lord Greene, that it is possible to trace through the hands of a non-fiduciary provided that the asset being traced was originally the subject of a fiduciary relationship, makes little sense.

What is certain, however, is that Lord Greene is saying that a fiduciary relationship is necessary before the tracing process can be commenced. The court did not accept the overly wide principle submitted for the depositors in *Hallett's Estate* that "if the property of B is found in the hands of A prima facie A is in a wide sense in a fiduciary relationship towards B",⁴⁷ but it is clear from the judgment that they regarded a fiduciary relationship as a fundamental starting point for the tracing exercise. According to Smith:

The case is supposed to show that while the plaintiff must show a fiduciary relationship to trace in equity it need not be a fiduciary relationship between the plaintiff and defendant. In *Agip (Africa) Ltd V Jackson* the plaintiff was held to be able to trace in equity the value of the money which it had been defrauded. It was sufficient that the plaintiffs accountant who had been instrumental in the fraud but who had received none of the money owed fiduciary obligations to the plaintiff. The artificiality of the reasoning is manifest and is manifest and is manifestly unnecessary. so long as it is thought that a fiduciary relationship must be established to permit the

⁴⁷ *In Re Diplock*, (1948) Ch 465, 527.

plaintiff to commence the exercise of tracing in a court of equity the inevitable result will be increasingly fictitious attempts to locate fiduciary relationships in facts which do not support them.⁴⁸

This appears to be conflating two separate arguments. Whatever the rights and wrongs of *Agip*,⁴⁹ and whether or not the requirement of a fiduciary relationship leads the courts to find more and more such relationships where such relationships do not truly exist, has nothing to do with whether *Diplock* does, or does not, demonstrate the need for such a relationship. The argument that the rule is absurd is not the same as demonstrating that it does not exist. The court in *Agip* clearly thought that it did.

Interestingly Smith's language has changed somewhat since the publication of *The Law of Tracing*. Commenting on dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,⁵⁰ to the effect that it would be possible to trace in equity against a thief he says that they represent "the death knell for the misguided prerequisite which *arguably*⁵¹ was always based on a misunderstanding."⁵² In fact they do not represent such a death-knell at all. The basis of Lord Browne-Wilkinson's analysis was that a thief becomes a constructive trustee of the stolen asset for the benefit of the victim. This analysis has been subsequently doubted.⁵³

⁴⁸ Ibid 128.

⁴⁹ *Agip (Africa) Ltd v Jackson* (1991) Ch 547.

⁵⁰ (1996) AC 669 (HL).

⁵¹ My Italics. This is a rather less uncompromising position than the analysis set out in *The Law of Tracing* which does not seem to find the counter position arguable at all.

⁵² L. Smith, 'Tracing' in P. Birks and F. Rose (eds), *Lessons of the SWAPS Litigation* (Mansfield Press 2000) 234.

⁵³ *Shalson v Russow* (2005) Ch D 281.

The Argument from Principle.

Third Party Liability

The best view on the current state of the authorities is therefore that a fiduciary requirement is a necessary pre-condition of the commencement of the tracing process. It will be argued in this section that it is also the best view taken as a matter of principle alone. The underlying basis of the argument that any such pre-condition is unprincipled, is the assertion that tracing and claiming are two entirely distinct processes, and that the former is solely devoted to the question of the identification of an asset which is to be regarded as a substitute for an original asset. This line of reasoning was rejected in part 1 of this work. This rejection does much to undermine the notion that the fiduciary pre-condition is illogical.

There is, however, a further argument that goes to demonstrate that the fiduciary requirement is not only logical, but is also a natural consequence of the availability of claims to substitute assets. It will be recalled that a central reason that this work rejects the idea that it is possible to trace at common law is that the common law allows no claims in respect of substitute assets. Thus, it was argued, the identification of substitute assets at common law would be a pointless exercise. A parallel argument will be advanced here. This states that, since the only claims allowable in equity in respect of substitute assets are against fiduciaries,⁵⁴ it makes as little sense to allow equitable tracing against non-fiduciaries, as it does to permit common law tracing at all.

⁵⁴ As was shown in the first part of this Chapter.

The simplest example with which to commence the analysis is as follows. Suppose that A is a trustee of a £10 note for B. In breach of trust A purchases a bottle of wine with that £10 and gives it to X. A has acquired the rights to the bottle of wine in the course of his fiduciary duty. B has a claim to the right against A and also against anyone in whose hands the subject matter of the claim happens to reside except for a bona-fide purchaser of the right for value. It is thus unquestionably the case that A can claim the bottle of wine in X's hands. The reason for this was explained by Lord Millett:

A beneficiary of a trust is entitled to a continued beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds everyone who takes the property or its traceable proceeds except a bona-fide purchaser without notice.⁵⁵

A beneficiary is entitled to require any person into whose hands trust assets come, to transfer those assets back to the trust.⁵⁶ It can be said that the beneficiary's equitable right persists into the hands of any person who has those rights in his possession and who is not a bona-fide purchaser of those rights for value.

In our example the bottle of wine is undoubtedly the traceable proceeds of the original £10 note. Moreover, the claim to the bottle of wine is not against A, the trustee, but X. However, the tracing process itself did not involve X. The bottle of wine was established as the substitute for the £10 before it came into X's possession. This is because B is entitled to adopt A's unauthorised substitution of the £10 note for the bottle of wine. Having done so the bottle of wine became impressed

⁵⁵ *Foskett v McKeown* (2001) 1 AC 102.

⁵⁶ *Pilcher v Rawlins* (1871-72) LR 7 Ch App 259.

with an equitable interest under the original trust.⁵⁷ X is not liable to return the bottle of wine to the trust because it is the traceable proceeds of the original £10 note. He is liable to return it because the bottle of wine in his possession is itself a trust asset. The wine has been followed into X's hands, not traced into them.

This analysis makes good sense where X knows that the bottle of wine is a trust asset. It is less certain that it makes such good sense where X is an innocent recipient. X is in no sense a fiduciary and has no reason to put B's interests above his own. Moreover, there is a stark contrast to the situation where X is the innocent recipient of goods that A has stolen from B where no trust exists. In such circumstances X cannot be compelled to give up the property. B has a personal claim only. It is difficult to justify this dichotomy.

This simple example can be made rather more complicated however. Suppose that X gives the bottle of wine to Y. Much now depends on whether X was an innocent recipient or not. If he was, no claim will lie against him. There is no proprietary claim available because he is no longer in possession of any trust asset. Equally there is no personal claim because the claim in knowing receipt requires that the recipient knows that he received trust assets in breach of trust.⁵⁸ If, on the other hand, X did know that the bottle of wine was a trust asset he is personally liable to B in knowing receipt. The basis of this liability has never been properly articulated, but what it is has ramifications for the tracing argument being conducted here.

⁵⁷ C. Mitchell & S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts*, (Hart 2010) 115, 116.

⁵⁸ *El Ajou v Dollar Land Holdings plc*, (1995) 69 P 7 CR D25

Despite much ink having been spilt in devising arguments to the contrary⁵⁹ the best explanation of the liability of the knowing recipient is that he holds trust assets on the basis that he is personally liable to account as a constructive trustee.⁶⁰ One argument in favour of this conclusion is that it is supported by a long line of authority showing that equity fixes knowing recipients with some of the duties that are voluntarily assumed by express trustees.⁶¹ Perhaps the clearest statement to this effect came from Lord Westbury LC:

The wrongful receipt and conversion of trust property place the receiver in the same situation as the trustee from whom he received it, and by the principles of this court he becomes subject in a Court of Equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself.⁶²

The conclusion that a knowing recipient receives trust property as a constructive trustee also makes sense as a matter of principle. His core

⁵⁹ P. Birks, *An Introduction to the Law of Restitution*, (Clarendon Press 1985) 80-82; P. Birks, 'Persistent Problems in Misdirected Money: A Quintet' (1993) LMCLQ 218, 236; P. Millett, 'Restitution and Constructive Trusts' in W.R. Cornish, R. Nolan, J. O'Sullivan & G. Virgo (eds), *Restitution Past, Present and Future* (Hart 1998) 199; Lord Nicholls of Birkenhead, 'Knowing Receipt: The Need for a New Landmark' in W.R. Cornish, R. Nolan, J. O'Sullivan & G. Virgo (eds), *Restitution Past, Present and Future* (Hart 1998) 231; C. Rickett, 'The Classification of Trusts' (1999) 18 New Zealand Universities Law Review 305, 321-324; A. Burrows, *The Law of Restitution* (3rd edn OUP 2011) 418; *Selangor United Rubber Estates Ltd v Cradock (No 3)* (1968) 1 WLR 1555, *Paragon Finance plc v D B Thakerar & Co (a firm)* (1999) 1 All ER 400 (CA) 409.

⁶⁰ C. Mitchell & S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts*, (Hart 2009) 115.

⁶¹ For example *John v Dodwell & Co Ltd* (1918) AC 563; *Agip (Africa) Ltd v Jackson* (1990) Ch 265; *Morgan v Stephens* (1861) 3 Giff 226, 39 ER 629; *Wilson v Moore* (1834) 1 My & K 126, 39 ER 629; *Barnes v Addy* (1874) LR 9 Ch App 244; *Charter Party plc v City Index Ltd* (2006) EWHC 2508 (Ch); *Rolfe v Gregory* (1865) 4 De G J & S 576, 46 ER 1042.

⁶² *Rolfe v Gregory* (1865) 4 De G J & S 576,578, 46 ER 1042, 1043.

duty is to restore the misapplied trust property.⁶³ If he has disposed of it he must account to the trustees for the current monetary value of the property.⁶⁴ The trust beneficiary need not allege any wrongdoing on the part of the knowing recipient when seeking relief. All that he needs to show is that the recipient received the property. The primary obligation to restore the property operates irrespective of any wrongdoing on the recipient's behalf.⁶⁵

It is true that the lack of any need for the claimant to demonstrate that the recipient has committed any form of wrong still permits of the possibility that the basis of the claim is one in unjust enrichment. There are, however, substantial difficulties facing an argument that a knowing recipient is unjustly enriched at the expense of a trust beneficiary.⁶⁶ First, what the knowing recipient in our example acquired was legal title to the bottle of wine. This was something that the beneficiary never had. Legal title rested previously with the trustee. Second, an unjust enrichment analysis would not require a defendant to receive trust property at all. It is a requirement of liability in knowing receipt that a defendant does actually receive the property,⁶⁷ but if the only purpose of that requirement were to demonstrate enrichment it would be unnecessary, because enrichment can, in certain circumstances, be identified without it. Suppose that A is a trustee of a £10 note for B and

⁶³ C. Mitchell & S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts*, (Hart 2009) 115, 132.

⁶⁴ Ibid 135.

⁶⁵ *Green v Weatherill* (1929) 2 Ch 213.

⁶⁶ For a detailed survey of these difficulties see L. Smith, 'Unjust Enrichment, Property and the Structure of Trusts,' (2000) 116 LQR 412.

⁶⁷ *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* (1999) 1 BCLC 385 (CA); *Goose v Wilson Sandford & Co (a firm)* (2000) EWCA Civ 73; *Trustor AB v Smallbone (No 2)* (2001) 1 WLR 1177.

uses that money to pay a debt that X owes to Y. Doubtless it can be shown that X has been enriched at B's expense, because B's property has been used to discharge his debt, but X is not liable in knowing receipt in such circumstances.⁶⁸ The requirement that the defendant actually receives trust property only makes sense in the context of him owing custodial duties as a trustee of the property.⁶⁹

The reason that it is important for the tracing discussion to establish that a knowing recipient receives trust assets as a constructive trustee is that it opens the door to the argument that tracing against a knowing recipient involves tracing in circumstances where the defendant is a fiduciary. To say that a person is a constructive trustee is not necessarily to say that he is a fiduciary. The connection between the two was drawn in *Ultraframe (UK) Ltd v Fielding*,⁷⁰ where Lewison J attributed the liability of a knowing recipient to account for profits that he made from trust assets to the "fundamental rule that a fiduciary must not make any unauthorised profit from his position."⁷¹

However, many writers have stressed the inapplicability of notions such as fiduciary liability in respect of trusts created by operation of law.⁷² This is because, in their view, trusts can arise where the constructive trustee knows nothing of the trust. But even if this is

⁶⁸ *OJSC Oil Co Yugraneft (in liq) v Abramovich* (2009) EWHC 161 (Ch).

⁶⁹ C. Mitchell & S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts*, (Hart 2009) 115, 158.

⁷⁰ (2005) EWHC 1638 (Ch).

⁷¹ *Ibid* (1587).

⁷² See P. Millett, 'Restitution and Constructive Trusts' in W.R. Cornish, R. Nolan, J. O'Sullivan & G. Virgo (eds), *Restitution Past, Present and Future* (Hart 1998) 199, L. Smith, 'Transfers' in P. Birks and A. Pretto (eds), *Breach of Trust* (Hart 2002) 95.

possible in certain circumstances,⁷³ the case of the knowing recipient is not one of them. The knowing recipient receives trust assets knowing that they are exactly that. None of the arguments that could be employed to argue that fiduciary duties should not be imposed on unknowing actors can be employed here.

It is certainly the case that consent is usually regarded as being central to fiduciary responsibility. Thus, according to Millett LJ:⁷⁴

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty...a fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. *They are the defining characteristics of a fiduciary.*⁷⁵

However, this is not a universally accepted view, and Lord Browne-Wilkinson has warned us against making too many generalisations with respect to fiduciary responsibilities:

The phrase “fiduciary duties” is a dangerous one giving rise to the mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case. Although so far as I am aware every fiduciary is under a duty not to make a profit from his position...the fiduciary duties owed by, for example, an express trustee, are not the same as those owed by an agent.⁷⁶

⁷³ Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) AC 669 appears to have closed off the possibility by rejecting the notion that a trust exists whenever legal and equitable titles are separated.

⁷⁴ In *Bristol and West Building Society v Mothew* (1998) Ch 1.

⁷⁵ My Italics.

⁷⁶ *Henderson v Merrett Syndicates Ltd* (1995) 2 AC 145.

Even if it could be said that the essence of fiduciary responsibility is that the fiduciary volunteers for that responsibility, it could be argued that the acceptance of trust assets knowing that the receipt makes him a constructive trustee is the moral equivalent of accepting fiduciary responsibility by volunteering to do so.

This, therefore, is the response to the argument that tracing through the hands of a knowing recipient demonstrates that the fiduciary pre-condition for tracing is incorrect. The knowing recipient *is* a fiduciary. To return to our example, A is a trustee of a £10 note for B. In breach of trust A purchases a bottle of wine with that £10 and gives it to X. If X knows of the breach of trust and subsequently sells the bottle of wine to Y then B can trace from the bottle of wine into the proceeds received by X. The reason for this is that X has acquired a right during the course of the performance of the fiduciary duty that he owes to B.

None of this analysis, however, can be applied to the situation where X receives property not knowing that it is trust property, and then sells it to Y. Here X cannot be deemed a fiduciary, but it would seem that B can nonetheless trace from the bottle of wine into the proceeds of the sale. The difficulty is understanding why this should be the case. In an otherwise detailed examination of persistent equitable rights Mitchell and Watterson relegate the matter to a footnote which says:

This does not explain why the beneficiaries should acquire an equitable proprietary interest in new property which has been acquired with misdirected trust property by a recipient other than a bona fide purchaser. In this case, if the recipient has knowledge of the breach, then it might be said that he acts unconscionably if he uses the trust property to acquire the new property and that he holds the new property on constructive trust for that reason; alternatively (and necessarily in cases where he has no knowledge of

the breach) the source of the beneficiaries equitable interest in the new property is the law of unjust enrichment.⁷⁷

But we saw in Part 2 of this work, and in the discussion above, that it *cannot* be the law of unjust enrichment that explains the defendant's liability. The use of the word "necessarily" in the quotation above is strongly suggestive of the fact that no alternative explanation exists if unjust enrichment is excluded.

There are almost no cases that directly address this issue. It is simply regarded as a given that, in our example, B can make a proprietary claim to the proceeds of the sale of the wine in X's hands.⁷⁸ In the absence of any feasible explanation as to why this should be so, it is suggested that this is incorrect. It cannot be enough to merely cite the notion of a persistent equitable interest, as if all of the consequences that follow from that notion speak for themselves. We saw above why the trust asset itself remains in the beneficial ownership of the beneficiary wherever it may be sited, and we also saw why a knowing recipient who has disposed of the trust asset may be subject to tracing in order to make a proprietary claim in respect of the proceeds of the sale of the trust asset. None of this has any relevance to the case of an innocent recipient who disposes of trust assets. Unless and until we have a case where the court considers facts that are on all fours with our example the better view is that it has not been established that it is possible to bring a proprietary claim against an innocent recipient for

⁷⁷ C. Mitchell & S. Watterson, 'Remedies for Knowing Receipt, in C. Mitchell (ed), *Constructive and Resulting Trusts*, (Hart 2009) 115, 116.

⁷⁸ *Re Diplock* (1951) AC 251; *Agip (Africa) Ltd v Jackson* (1990) Ch, 265; *Foskett v McKeown* (2001) 1 AC 102.

the proceeds of the disposal of trust assets. Given that such a claim is not possible it follows as a matter of practicality that tracing is also not possible in such circumstances. To repeat the question that has been asked before in this work, what is the point of allowing the identification of a substitute asset in circumstances where no claim can be made in respect of that asset?

There is an intermediate argument, supposedly attributable to dicta in *Diplock*,⁷⁹ cited above,⁸⁰ to the effect that it is necessary to identify a fiduciary relationship with respect to the original asset before equitable tracing can commence, but the resultant claim need not be against the fiduciary himself. But even more than in the examples we have just looked at, this calls for a proper explanation telling us why this should be the case, and none has been forthcoming. It entails accepting the proposition that, in our initial example, because A has a fiduciary relationship to B in respect of the £10 note, B can make a claim against X in respect of the proceeds of the sale of the bottle of wine, which X was given by A, without knowledge of its provenance. This is not supportable. How can the fiduciary relationship between A and B in any way affect X? That fiduciary relationship tells us nothing about why B can make his claim against an innocent third party. A fiduciary relationship is a peculiarly personal relationship whereby one party agrees to make his own interests subsidiary to that of his beneficiary for the purposes of dealing with the assets that form the basis of the relationship. The fiduciary relationship *by itself* is sufficient to explain why a fiduciary must return rights, *in specie*, that he has acquired during

⁷⁹ *Re Diplock* (1951) AC 251.

⁸⁰ See text accompanying footnote 46 above.

the course of his fiduciary endeavour. This argument is unavailable against an innocent third-party recipient, and it cannot be somehow transmitted to him merely because the original asset was subject to such a relationship. In the absence of any explanatory justification, to the contrary, it is best to confine the liability of innocent recipients of trust assets to the proprietary liability to return the trust asset if it is still in their possession.

We can therefore conclude that with respect to third party recipients of trust assets, the only tracing that is permitted is that against a knowing recipient who no longer has possession of the asset. The reason that tracing is permitted is that the recipient is not only a constructive trustee with respect to that asset, he is also a fiduciary.

Theft.

The only other area of any significance where it might be thought that a fiduciary relationship is not necessary before equitable tracing can commence is that of theft. Thus, if A steals B's bicycle and sells it to C for £10, it has been suggested that B has an equitable claim to the £10 in A's hands, which can be established by showing that the £10 is the traceable proceeds of the bicycle. This suggestion appears to have the backing of Lord Browne-Wilkinson. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,⁸¹ his Lordship said that:

Moneys can only be traced in equity if at some stage there has been a breach of fiduciary duty, i.e. if either before the theft there was an equitable proprietary interest or such interest arises under a resulting trust arising at the time of the theft...I agree that the stolen monies are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive not a resulting trust...although it is difficult to find

⁸¹ (1996) AC 669.

clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient; the property is recoverable and traceable in equity.⁸²

Despite the authority of the source of these dicta they cannot be correct. In our example B has retained legal title to the bicycle throughout. As Lord Browne-Wilkinson himself pointed out in the same case a person who holds the unencumbered legal title to property does not hold both the legal and the equitable title to it. There is no equitable title to hold. All of that person's rights with respect to the property are attributable to his ownership of the legal title alone. It is, of course, true that A has acquired a possessory title to the bicycle that is good against the whole world except B, but that cannot be the trust right in question because A does not hold it for the benefit of B. B already has that right independently of A.

As far as the few authorities cited by Lord Browne-Wilkinson in support of his proposition are concerned there is considerable doubt as to their utility. In *Shalson v Russow*,⁸³ Rimer J said:

As to Lord Browne-Wilkinson's more general proposition in the second paragraph that property obtained by fraud is automatically held by the recipient on a constructive trust for the person defrauded, I respectfully regard the authorities he cites as providing less than full support for it.⁸⁴

Critically for the argument put forward here, the judge also said, speaking of the common law's inability to trace into a mixed bank account:

Equity has traditionally been regarded as similarly incompetent unless it could first identify a fiduciary relationship, but in many cases of theft there

⁸² Ibid 716.

⁸³ (2005) Ch D 281.

⁸⁴ Ibid 317.

will be none. The fact that, traditionally, equity can only trace into a mixed bank account if that precondition is first satisfied provides an unsatisfactory justification for any conclusion that the stolen money must be trust money so as to enable the precondition to be satisfied. It is either trust money or it is not; if it is not it is not justified to supposedly change its character so as to supposedly bring it within equity's power to trace.⁸⁵

We learn from *Shalson v Russow*, therefore, that the stolen bicycle in our example is not held in trust for B by A, that A is not a fiduciary for B, and that therefore B cannot trace from the bicycle into the £10 received by A as proceeds for the sale of the bicycle.

The Expansion of Fiduciary Liability.

The main argument of this chapter has been that it is the nature of the fiduciary relationship itself that explains why a principal may demand the transfer, *in specie*, of any right that a fiduciary acquires in the course of the performance of his fiduciary duty. It is the clear message of *Keech v Sandford*,⁸⁶ and the line of cases derived from it, that the purpose of this rule has nothing to do with the stripping of ill-gotten gains, or the reinforcement of duties of loyalty. Its purpose is to prevent a fiduciary from ever coming into conflict with his principal, by ensuring that any rights acquired by the fiduciary during the course of performing his fiduciary duty are acquired for the benefit of the principal. The reason for this, is that this is exactly what the fiduciary has undertaken to do. Tracing is a mechanism developed by courts of equity to ensure that the fiduciary cannot defeat this purpose by saying that, since he is no longer in possession of the right in question, or that the right in question cannot be precisely identified in his hands, the principal can make no

⁸⁵ Ibid.

⁸⁶ (1726) Sel Cas Ch 61, 25 ER 223.

claim to it. From this basis, the courts have developed a series of normative rules (which we refer to as the rules of tracing) to assist them in this regard. Provided that we understand that these rules are indeed normative, and are not the natural outcomes of following value as it moves from one asset to another, nor are designed in order to prevent some ill-defined conception of unjust enrichment, this is a perfectly satisfactory development.

Because this is the essential purpose of the tracing process, we have seen that, unsurprisingly, tracing can only take place where the defendant stands in a fiduciary relationship to the claimant, in respect of the original right being traced. This is no accident. It is fundamental to the tracing process. Nor can this rule be reduced to the principle that equitable tracing may be utilised by any claimant who can show an equitable interest in the original asset. We have already seen that there is no foundation for such a right outside the ambit of the fiduciary relationship. Demonstrating that the claimant had an equitable interest in the original asset cannot explain why he should have any interest in a substitute asset in the hands of a non-fiduciary. Neither the law of property nor the law of unjust enrichment can supply that explanation.

It has been argued by orthodox theorists that the fundamental link between the fiduciary relationship and equity has been weakened by the seeming willingness of courts to extend the boundaries of fiduciary relationships, when they wish to allow the tracing exercise, in cases where the existence of such a relationship looks doubtful. Thus, Calnan says that:

It is difficult to find an example of a case in which an equitable tracing claim has failed solely on the basis that there was no fiduciary relationship between the parties.⁸⁷

This is not a particularly compelling statement, and unfortunately the only case that Calnan cites going the other way, that is confirming his belief that courts will always find a fiduciary relationship if they need one, is *Chase Manhattan*,⁸⁸ which, as will be shown below, is not promising ground for the development of such an argument. This is not to say that Calnan must be wrong. It is perfectly possible that faced with the alternatives of identifying marginal fiduciary relationships, or of refusing what they consider to be otherwise meritorious claims, courts might sometimes adopt the former approach. But the number of times that this has occurred should not be overstated, and the fate of some of the more well-known examples of such an approach suggests that, in reality, it does not represent a challenge to the argument put forward here, that tracing is an exercise dedicated to the preservation of the integrity of the fiduciary relationship. Indeed, Calnan can do little better than cite two Australian cases on theft, and some dicta of La Forest J in the Canadian case of *Lac Minerals v International Corona Resources*,⁸⁹ as authorities for his argument. By contrast, it was made clear by Rimer J in *Shalson v Russo*,⁹⁰ that the process of finding fiduciary relationships where none exist is illegitimate. Speaking of the common law's inability to trace into a mixed fund his Lordship said:

Equity has traditionally been regarded as similarly incompetent unless it first could identify a relevant fiduciary relationship, but in many cases of theft

⁸⁷ R. Calnan, *Proprietary Rights and Insolvency* (OUP 2010) 8.77.

⁸⁸ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* (1981) Ch 105.

⁸⁹ [1990] FSR 441.

⁹⁰ (2005) Ch 281.

there will be none. The fact that, traditionally equity can only trace into a mixed bank account if that precondition is first satisfied provides an unsatisfactory justification for any conclusion that the stolen money must necessarily be trust money so as to enable the precondition to be satisfied. It is either trust money or it is not. If it is not it is not legitimate to artificially change its character so as to bring it within the supposed limits of equity's power to trace: the answer is to develop those powers so as to meet the special problems raised by stolen money.⁹¹

Perhaps the best-known example of a court "creating" a fiduciary relationship in order to, as it saw it, do justice, is *Sinclair v Brougham*.⁹² But, even in that case, the court did not find a fiduciary relationship out of thin air. It believed that the reasoning in *Hallett's Estate*,⁹³ backed up its conclusion that a bank which borrowed money from depositors when such borrowings were *ultra vires* the power of the bank, took the monies as resulting trustees for those depositors. It was not a big step to go from there to saying that the bank was a fiduciary of the depositors in respect of those monies. *Sinclair v Brougham* did not survive its re-examination in *Westdeutsche*,⁹⁴ on this point, although a judge as eminent as Lord Goff disagreed strongly with its overruling, and it is now accepted that it had nothing to do with tracing anyway, but it cannot be utilised to demonstrate the court's disregard for the relationship between fiduciary relationships and claims to substitute assets.

More difficult to explain is *Chase Manhattan*.⁹⁵ Here a fiduciary relationship was deemed to exist between banker and customer on the

⁹¹ *Ibid* 110.

⁹² (1914) AC 198.

⁹³ *Re Hallett's Estate* (1878 H 147), (1880) 13 Ch D 696.

⁹⁴ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) AC 669.

⁹⁵ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* (1981) Ch 105.

basis of a mistaken payment made to the bank by the customer (as it happened, a different bank). The banker/customer relationship is clearly one of debtor and creditor but the court found that, the very fact that the payment by the customer constituted an operative mistake sufficient to found a claim in unjust enrichment, was sufficient to change that relationship to that of trustee and beneficiary. This finding also failed to survive *Westdeutsche* but, irrespective of that, it entirely lacks credibility with respect to any fiduciary relationship. To say that a fiduciary relationship can be created when the supposed fiduciary has no knowledge whatsoever of his role, or even of the circumstances which created it, is not to extend the boundaries of the fiduciary relationship but to reinvent it entirely. Moreover, although there was much discussion of tracing in *Chase Manhattan*, it is hard to see its relevance. Once it was decided that the claimant had an equitable interest in the monies deposited with the defendant then it simply had to argue that monies to that value did not form part of the defendant's insolvent estate. Tracing did not need to come into the discussion at all.

It is undoubtedly true that fraud, and especially large-scale cross border fraud, is a substantial problem in the modern world, but it is suggested that the way to deal with such issues is not to adopt, or adapt, a doctrine designed for far different purposes, but to develop specialised, modern, procedures for a specialised, modern, problem. Creating new fiduciary relationships where they clearly do not exist is not the solution, and, as *Shalson v Russo* demonstrates, is not in any case a legitimate process.

Moreover, the fact that tracing may not be available to a claimant need not mean that he is left without any form of remedy. For example,

we saw in Chapter 2, that, In the context of monies transferred without authority from company bank accounts, in circumstances which meant that the claimant could not avail himself of the tracing exercise, it is possible to reconceptualise the issues to obviate the need for any tracing. So, it was shown that, in cases such as *Relfo v Varsani*,⁹⁶ it is possible to use the notion of a transaccional link to demonstrate that, what appears to be a series of transactions going through mixed bank accounts, can be reduced to a single one between the claimant and defendant. This process enables claims to be brought by the claimant based on a direct transfer, and removes issues of tracing entirely from the case. By developing and extending this type of analysis it should be possible to come to terms with the problems of 21st century fraud without artificially treating the cases involved as being dependent on tracing.

Conclusion.

The purpose of this chapter was to explain why tracing is, under some circumstances, available to a claimant in equity when it can never be utilised in order to make a common law claim. The reason is the nature of those circumstances themselves. The only claims that are available to a claimant in respect of a substitute asset are where the claim is an equitable one against a defendant who was a fiduciary of the claimant. This also explains why a fiduciary relationship is a necessary precondition to the tracing process. Since no claims are available to where the defendant is not a fiduciary it makes no sense to say that tracing can take place where such a relationship does not exist.

⁹⁶ (2014) EWCA Civ 360.

Fortunately, the precondition remains part of the substantive law and no attempts to utilise the supposed dichotomy between tracing and claiming should be allowed to change this.

Chapter 8. Conclusion.

It was said in the introduction to this thesis that, in order to answer the question “is it possible to trace into substitute assets at common law”, it would be necessary to question the entire basis of what was described as the orthodox theory of tracing. What has emerged from this work is that the answer to the question is no. Moreover, we have also seen that there is very little in the orthodox theory that it is possible to support.

In Part 1 the critical underpinnings of the orthodox theory were shown to be without foundation. It was shown that following is not, in all but its simplest manifestations, a simple process of tracking an asset as it moves from person to person. In particular, following assets that have become mixed with other assets was shown to be a normative process. Who is entitled to what under such circumstances depends upon considerations which have little to do with determining the exact physical make-up of the resultant mixture. Importantly, for the argument in the remainder of the work, it was also argued that following money as it passes through bank accounts cannot be treated as being the same process as following physical assets into mixtures. Money in a bank account is not a mixture at all. A bank account is a debtor/creditor relationship. The account holder has rights against his bank to the value of the balance held in his account. If he withdraws money from that account his existing right is expunged, and a new right arises to the value of his new balance. Any money placed into the account becomes the property of the bank. Bank accounts are thus entirely different to physical mixtures.

According to the orthodox theory we trace value from asset to asset. Tracing is thus, like following, merely a process of identification.

The only difference is that following concerns identifying the same asset as it moves from one person to another whereas tracing is about identifying a new asset (by following the same value) in the hands of one individual, which can be said to represent an original asset in which a claimant had rights.

We have seen that the idea that tracing is a simple process of identification in which value is followed from one asset to another cannot be sustained. Value is too imprecise a notion to permit the idea of it being followed. When we trace we do not, in fact, pursue anything continuous. Tracing is a metaphor for the normative process of deciding which claims the law should permit with respect to substitute assets. This has consequences for the orthodox position that there is a rigid distinction to be drawn between the processes of tracing and claiming. Since tracing is not a neutral process of identification, but is a normative exercise in the allocation of claims, it makes no sense to say that tracing can be available to a claimant in circumstances in which it is impossible for him to make a claim. Tracing and claiming are all part of a single process. What has emerged over the course of the work is that the law only permits claims to substitute assets to be made against fiduciaries by those entitled to the benefit of the fiduciary's loyalty. Since this is the case it follows that tracing can only ever take place where the defendant is a fiduciary and the claimant is a person who is entitled to the benefit of that relationship.

It is against this background that the discussion of common law tracing, which occupies Part 2 of this work, should be understood. The central argument of Part 2 is that the common law allows no claims to substitute assets. Since such claims can never be sustained it would

make no sense, given what has just been said, for the law to engage in a process of identifying a substitute asset where a claim in respect of that asset is necessarily unavailable.

For many years, *Taylor v Plumer*,¹ was cited as the central authority for the right to trace at common law. It is now universally accepted that that it is a case decided entirely on equitable considerations, and says nothing about the availability of common law rights and claims. This fact, however, has had little effect on the assumption that such claims are possible. This thesis shows that this is entirely the wrong approach. In *Taylor v Plumer* a common law court recognised an already existing equitable right. It had been established in *Scott v Surman*,² that common law courts could recognise such rights in order to prevent a claimant's action failing in a common law court when it would inevitably succeed in a court of equity. But this is not the same as saying that any common law rights were recognised in *Taylor v Plumer*. But there is no authority for the existence of the common law right that is not, in one way or another, dependent on *Taylor v Plumer*. Even those cases that do not cite it directly rely on other cases, which are themselves reliant on it. Such little independent judicial reasoning as there has been has almost exclusively concentrated on explaining the nature of the right, without ever asking whether it exists at all. The lack of any proper judicial support would be less critical were it not for the absence of any normative support for such claims. Neither the law of property nor the law of unjust enrichment can explain why it is possible to make the claim.

¹ (1815) 3 M & S 562.

² (1742) Wiles 400.

In general, those who support the notion of common law tracing do so by default. They seldom seek to justify its existence. It is regarded as a given fact that it is permitted. The most that one gets is some discussion concerning the limits of that tracing – for example whether it is possible to trace at law into a mixed bank account. Even those who have contributed to demonstrating the lack of supporting material for the existence of common law tracing have been prepared to concede its existence. This thesis demonstrates that such concessions are illogical and unnecessary.

One of the few direct justificatory supporting analyses for the existence of common law tracing comes from Millett LJ

In *Jones v Jones*,³ he stated that:

In *Agip (Africa) Ltd v Jackson* I said that the ability of the common law to trace an asset into a changed form in the same hands was established in *Taylor v Plumer*...In this it appears that I fell into a common error, for it has since been convincingly demonstrated that, although *Taylor v Plumer* was decided by a common law court, the court was in fact applying the rules of equity...but this is no reason for concluding that the common law does not recognise claims to substitute assets or their products. Such claims were upheld by this court in *Banque Belge Pour l'Etranger v Hambrouck* and by the House of Lords in *Lipkin Gorman v Karpnale Ltd*. It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor v Plumer* but that is not how the English doctrine of *stare decisis* operates. It would be more consistent with that doctrine to say that, in recognising claims to substituted assets, equity must be taken to have followed the law even though the law was not declared until later. Lord Ellenborough C.J. gave no indication that, in following assets into their exchange products, equity had

³ *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159.

adopted a rule which was peculiar to itself or which went further than the common law.⁴

These dicta are not easy to understand. They appear to be saying that, despite the previously accepted leading case on common law tracing being revealed as having nothing to do with that doctrine, subsequent cases have confirmed the existence of such a right. This is notwithstanding the fact that those cases depend upon *Taylor v Plumer* for a large part of their reasoning. It is hard to see how the doctrine of *stare decisis* could justify such a notion. *Banque Belge*,⁵ relied heavily on *Taylor v Plumer*,⁶ and *Lipkin Gorman*,⁷ relied on *Banque Belge* as well as on *Marsh v Keating*,⁸ which has also been shown to have had nothing to do with tracing at common law. It is difficult to see how these cases can form the basis of any worthwhile precedent.

The argument about whether judges do, or do not, make law is outside the scope of this work. But, even allowing that they do, that is not what the judges in *Banque Belge* or in *Lipkin Gorman* thought that they were doing. They thought that they were merely applying precedent; yet they were not. That surely cannot be how Millett LJ envisages that the “English doctrine of *stare decisis*” works. Nowhere in either case do any of the judges suggest that the common law is defective in having no doctrine of tracing, and that it ought to mirror equity by having one. They just assume that it has one.

By arguing that in *Taylor v Plumer* the court, in applying equitable principles, was merely following the common law, Millett LJ is taking the

⁴ Ibid 169.

⁵ *Banque Belge Pour L'Etranger v Hambrouck* (1921) 1 KB 321.

⁶ *Taylor v Plumer* (1815) 3 M & S 562.

⁷ *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

⁸ *Marsh v Keating* (1834) 1 Bing (NC) 198.

principle of the declaratory theory of law⁹ to the stage where that particular doctrine ceases to do the law any service. He appears to be saying that Lord Ellenborough, in *Taylor v Plumer* was adopting a principle in equity and that, in doing so he was recognising a principle of the common law that was undiscovered until 100 years later. This may be thought to be considerably overworking a principle that has already been described as a “childish fiction”¹⁰. There is a substantial difference between adopting a theory designed to explain the apparent democratic deficit in allowing unelected judges to make the law, and extending that theory to pretend that, once the law has been declared, not only has that been the law all along, but that all of the judges have all the time been aware of that fact. The whole point of the explanation of *Taylor v Plumer* as being a case based in equity, is that all of the arguments in that case were concerned with equitable principles. To describe Lord Ellenborough as merely following the common law is to replace a fiction with a fabrication. Millett LJ is saying, in the dicta quoted above, that Lord Ellenborough CJ adopted equitable principles in order to follow a law that he did not know existed, and which would probably never even have been thought to have existed if his dicta had not been subsequently misunderstood. Moreover, there would obviously be no reason for Lord Ellenborough CJ to indicate that equity was in this instance adopting a rule that was peculiar to itself, or went further than the common law, because the question of whether the common law did or did not possess such a rule was wholly outside the issue with which

⁹ For an exposition of the declaratory theory of law see R.W. Cross & J. W. Harris, *Precedent in English Law* 4th Edition (Clarendon Law 1991) 27-34, and N.Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 39-45.

¹⁰ J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 2 Vols 5th Edition, ed R. Campbell (Murray 1885) II 634.

he was dealing. In addition, Millett LJ misses the point that the reason that:

Such claims were upheld by this court in *Banque Belge Pour l'Etranger v Hambrouck* and by the House of Lords in *Lipkin Gorman v Karpnale Ltd*¹¹

is that those courts made exactly the same mistake with regard to *Taylor v Plumer* as Millett LJ himself did in *Agip (Africa) Ltd*,¹²

The correct position was stated in a short article by Lionel Smith published in 2009. He said that:

In fact, the law in these cases follows equity, as it has done since the beginning of the 19th century if not before by allowing claimants to use common law claims to vindicate equitable interests under a trust. There is no room, and no need, for proprietary common law claims to assets that are the traceable proceeds of an unauthorised substitution.¹³

This reflects the impossibility of justifying these cases in terms of any common law rights to make claims to substitute assets that do not simply enforce already existing equitable rights. The common law offers no justification for these rights. It merely, in the interests of expediency, upholds them.

This acknowledgment, by such an important figure in the development of our understanding of tracing, makes the position of those authors who were initially sceptical about the existence of a right to make common law claims to substitute assets, but subsequently changed their minds, all the more curious.

Writing jointly with Salman Kurshid in 1979 Paul Matthews said that:

¹¹ *Trustee of the Property of F.C. Jones & Sons (A Firm) v Jones* (1997) Ch 159, 169.

¹² *Agip (Africa) Ltd v Jackson* (1990) Ch, 265.

¹³ L.Smith, 'Simplifying Claims to Traceable Proceeds' (2009) LQR 338.

Contrary to the generally held view the right to trace, at law, subsists only so long as the goods remain in their original form, whether mixed or not, unless the form of the transaction is such as to vest title to the exchange product in the original owner (e.g. agent acting within his authority).¹⁴

By 1995 Matthews seemed very much more resigned:

The decisions (*Banque Belge* and *Lipkin Gorman*) can be attacked as based on misunderstandings of earlier cases but it is not easy to treat them for that reason as *per incuriam* and not of authority. They are inconsistent with the results of Privy Council cases (expressly approved by Lord Goff!)...however reluctant I may be to do so I must accept that in practical terms these decisions now represent the applicable English law.¹⁵

Richard Calnan, having effectively demonstrated that none of the cases regarded as authority provide such authority either by virtue of precedent or reasoning concludes that:

There are dicta of eminent judges which support the proposition that a wrongful disposal of A's assets by B can result in A becoming the legal owner of the substitute asset.

The key case which is always cited as authority for the proposition – *Taylor v Plumer* – is not in fact anything of the sort and the proposition is contrary to principle.

What is needed is an authoritative decision of the Supreme Court which considers the issue in the light of all the cases and of the underlying common law principles. Only then can it clearly be established whether there really is a rule of tracing at common law which is an exception from the basic principle that title passes as a result of intention.¹⁶

Having struck the appropriate note of scepticism, however, Calnan goes on to say that:

¹⁴ S. Kurshid & P. Matthews, 'Tracing Confusion' (1979) 95 LQR 78, 98.

¹⁵ P. Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 23, 65.

¹⁶ R. Calnan, *Proprietary Rights and Insolvency*, (OUP 2010) 293.

In the meantime it would seem from the decision of the House of Lords in *Lipkin Gorman* that the principle of common law tracing is as follows:

If B wrongfully disposes of A's asset in return for a substitute asset A will become the legal owner of that substitute asset if the substitute asset is chattel money and, possibly, other tangible moveable assets and the substitute asset is clearly identifiable as being the proceeds of A's original asset without being mixed with other assets¹⁷.

The only explanation for the change in Matthews's position would seem to be *Lipkin Gorman*. Nothing else of any importance occurred between the writing of the two articles except the decision in *Jones v Jones*, and it can hardly be that the doubtful judgment in that case has caused such a fundamental change of mind. Similarly, Calnan, having rejected the reasoning in all of the cases that he examined, seems to regard *Lipkin Gorman* as the tipping point between complete opposition and reluctant acceptance.

This cannot be right. Admittedly *Lipkin Gorman* is a decision of the House of Lords, but we saw in Chapter 6 that it is an unconvincing precedent. Moreover, it is one that has never been fully understood, and has as "many theories...as there are writers on the subject."¹⁸ It has subsequently been relied upon only in *Jones v Jones*, where some of its fundamental premises were overlooked,¹⁹ and in *Armstrong v Winnington Networks*,²⁰ where it appears to have been largely misunderstood.²¹ Apart from that it has been cited only as authority for the existence of an English law of autonomous unjust enrichment, and the establishment of a defence within that law of change of position.

¹⁷ *Ibid* 294.

¹⁸ L.Smith, 'Simplifying Claims to Traceable Proceeds' (2009) LQR 338.

¹⁹ See chapter 4 above.

²⁰ *Armstrong DLW v Winnington Networks Ltd* (2012) EWCH 10 (ch).

²¹ See Chapters 5 and 6.

Peter Birks summed up the position of the advocates of the existence of a right to trace at common law:

The main proposition...has been that the principles governing tracing are common to law and equity. The proposition is not touched by the revelation that it is only very recently, and then only by mistake, that common law began to recognise claims to substitute assets. Notwithstanding the gravity of this revelation...the best course will be to accept that there is a common law contribution *however unsound its deeper foundations*²² and rather than demolish one to press on with unifying both contributions to this area of law.²³

This unsatisfactory statement is probably the best that can be said for common law tracing. But not only is the statement unsatisfactory, it sits in strange contrast to the far more principled comment of the same author to the effect that:

The more plural that society becomes the more important it is that judges should respect the most basic of interpretive disciplines, namely the obligation to demonstrate from the authorities that their conclusion is already the law.²⁴

The existence of a right to trace at common law cannot be demonstrated in the way that Birks demands. It is time to stop pretending that it can. This thesis is a contribution to the process of moving beyond that pretence.

It is recognised, of course, that claims to substitute assets are permitted at law. Part 3 shows that such claims are entirely equitable in nature. Unlike common law claims they do have a normative basis. The

²² Italics not in the original.

²³ P. Birks, 'Overview: Tracing, Claiming and Defences' in P. Birks (ed), *Laundering and Tracing* (Clarendon Press 1995) 289, 300.

²⁴ P. Birks, 'Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (a book review)' (2003) LQR 156.

basis is the rule that a fiduciary may not retain a right acquired in the performance of his fiduciary duty. Nor may he retain a right acquired by exploiting an opportunity that has arisen as a result of his fiduciary position. If he does so he is required to return that right *in specie* to his principal. Tracing is a process which assists the courts in enforcing this principle. But this is all that it is. It has no other role. It can only take place within the confines of the fiduciary relationship.

If the argument of this thesis is accepted, tracing plays a substantially different role from that which the orthodox theory would have us believe. In engaging in this process of re-conceptualisation, we need to concentrate on explaining the true nature of various claims which are currently regarded as being dependent on tracing, but fall outside the properly understood scope of that process. Claims that are not against fiduciaries are one example. Claims that involve the following of money through bank accounts are another. Our understanding of personal property law can only be enhanced by our so doing.

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