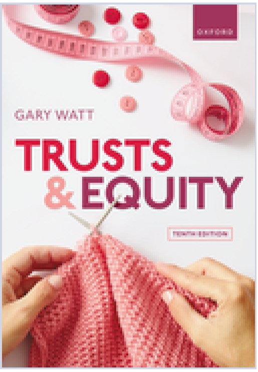

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14. Tracing and recovering trust property

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Abstract

There are situations where trust property passes into the hands of a third party 'stranger'—a person other than a trustee or beneficiary of the trust. Personal and proprietary remedies against strangers are particularly valuable where the claimant cannot be satisfied with actions against the original trustee. The claimant has to make choices not only in relation to the final remedy, but also when required to 'elect' between evidential alternatives. The tracing process, which supplies the evidence that a stranger has received trust property, may require the claimant to make such a choice. This chapter deals with tracing and 'remedies', focusing on how a claimant, typically a beneficiary of the trust, is able to trace trust property into the hands of a stranger and recover it by means of a proprietary remedy.

Keywords: tracing, remedies, trust property, strangers, trust, beneficiary, claimant, constructive notice

Context

In Chapter 13 we considered the extent of trustees' personal liability in actions for breach of trust. Now we ask, 'what should be done if the action proves worthless in practice because the trustees are impecunious or have been declared bankrupt, and are therefore unable to repay trust monies to the fund?' In such circumstances the beneficiaries may be able to trace the value of their trust property into bank accounts and into assets which have been bought with the trust property. This chapter is concerned with the process of tracing the value of trust property and the actions that can be brought to recover it.

14.1 Introduction

In Chapters 14 and 15, we are concerned with situations in which trust property has passed into the hands of a third party 'stranger'—a 'stranger' being someone other than a trustee or beneficiary of the trust. Our principal aim in the present chapter is to identify the circumstances in which a claimant, typically a beneficiary of the trust, is able to trace trust property into the hands of a stranger and recover it by means of a proprietary remedy. In the course of Chapters 14 and 15, we will also examine personal remedies against strangers, based on their receipt of trust property.

Although personal and proprietary remedies against strangers are particularly valuable where actions against the original trustee are inadequate to satisfy the claimant, in practice a beneficiary claimant will pursue every arguable proprietary and personal claim against trustees and strangers at the same time. This is because she is unlikely to know at the commencement of her action which remedy is likely to be most beneficial by the time judgment is finally entered. If, at the date of the final judgment, the defendant no longer holds the trust property or its traceable proceeds, the claimant will elect to take judgment against the defendant's personal funds. If, on the other hand, the defendant is still holding trust property or its traceable proceeds, the claimant may elect to assert her proprietary rights against the property in the defendant's hands. p. 478 ↵ A proprietary claim will be particularly valuable if, at the date of judgment, the defendant is personally insolvent and therefore unable to meet all of his personal liabilities in full. The claimant may even be awarded judgment on a combination of personal and proprietary remedies, as long as the remedies are logically consistent with each other and do not confer an unjust windfall on the claimant in the nature of a 'double recovery' or 'double satisfaction'.

It is not only in relation to the final remedy that the claimant must make choices. The tracing process, which supplies the evidence that a stranger has received trust property, may require the claimant to 'elect' between evidential alternatives. From the moment the trust property leaves the trustee's hands the claimant will attempt to follow or trace it into the hands of every subsequent holder. However, having been transferred, the trust property cannot, at one and the same time, be in the hands of the transferor and the transferee. Suppose that the trustee has given the trust property (a valuable vase) to stranger 'A', who then proceeds to exchange it, with 'stranger B', for a painting. If we assume that neither stranger can establish the defence of bona fide purchase without notice of the claimant's interest, the claimant has a choice. She is not permitted to follow the vase into the hands of 'stranger B' and, at the same time, to trace the proceeds of the vase into the painting held by 'stranger A'; she has to choose which of the two 'assets' (the vase or the painting) represents her trust property and, accordingly, which of the two defendants she will take judgment against. That choice must, like the 'election' between alternative remedies, be made before judgment. Naturally, the claimant will elect to trace the value of her property into whichever asset is worth more at the date of judgment. The choice will be an easy one if, say, the vase had been broken prior to judgment.

Of course, the claimant's choices in relation to the tracing process and her ultimate remedy are not entirely free choices. They are constrained at every turn by considerations of public policy, reflected in the legal presumptions or 'rules' that govern tracing and the recovery of property. Thus 'the policy of the Insolvency Acts', which requires the fair and final distribution of an insolvent's estate among his creditors, yields to the policy that a beneficiary should be permitted to recover her property from the hands of an insolvent trustee in priority to the claims of the trustee's personal creditors; the policy of protecting a beneficiary's proprietary interest in her assets yields, in turn, to the overriding policy that innocent persons who purchase legal title to those assets for valuable consideration and without notice of the beneficiary's interest must take free of the beneficiary's interest. In the absence of accounting evidence to explain the movement of money, there is a strong principle allowing the court to draw negative inferences of fact against a wrongdoer who is responsible for the lack of relevant evidence.[1]

The subject matter of this chapter is divided into two halves to reflect the procedures for 'tracing' assets and the remedies available for 'recovering' the assets or their value in substitute assets.

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14.2 Remedies for the recovery of trust property

The claimant's remedies for recovery of her trust property, or its value, may be awarded in equity or at law, and may be proprietary or personal.[2] Another significant distinction, although it is questionable that it should be so, is between remedies for the recovery of money and remedies for the recovery of other forms of property. This distinction is significant, because most of the cases with which we are concerned involve the misapplication of money and, although a claimant might be said to have a proprietary 'claim' to money at common law—in as much as he claims that the money in the defendant's hands '*belongs to him at law or represents profits made by the use of money which belonged to him at law*'[3]—there is no common law proprietary remedy for the recovery of money from the hands of a stranger. Only equity grants such a remedy. At another level of refinement, it may be helpful to think of beneficiaries' proprietary rights against third parties as being in a separate category from their rights against their trustees (indeed, that is why they are treated in different parts of this book). It has been suggested that the distinction lies in the fact that beneficiaries' rights against third parties do not yield a right to positive performance of duties, but merely yield a right to exclude third parties from the benefits of the trust assets.[4]

Having considered equitable and common law remedies, this section concludes with a brief examination of restitution, which, its proponents argue, transcends the distinction between law and equity.

14.2.1 Equitable proprietary remedies

Proprietary rights are vigorously protected in law: the criminal law, the law of tort, and human rights law[5] all play a part in vindicating ownership. Except in very exceptional circumstances,[6] ownership will only come to an end according to rules established institutionally by the law of property.

In Chapter 5, we observed that, when a purported transfer by the beneficial owner of an asset fails to transfer the entirety of the transferor's beneficial interest according to property law, equity will require the transferee to hold the undisposed of benefits on resulting trust for the transferor. In this chapter, we will see that, when a person, such as a trustee, who has power to dispose of property to which someone else is beneficially entitled misapplies that property, the first instinct of the law is again to vindicate or 'uphold' the proprietary rights of the beneficial owner. Lord Millett has confirmed that '*this branch of the law is concerned with vindicating rights of property*'.[7]

p. 480 The only valid defences to an equitable proprietary claim to recover property from the hands of a stranger are the traditional defences to ownership claims. The defendant must prove either that the claimant's property is not in his hands, or that the property in his hands now belongs to him because he purchased it in good faith for value and without notice of the claimant's interest:

> The tracing claim in equity gives rise to a proprietary remedy which depends on the continued existence of the trust property in the hands of the defendant. Unless he is a bona fide purchaser for value without notice, he must restore the trust property to its rightful owner if he still has it.[8]

The point must be made that a defendant is deemed to have 'constructive notice' of knowledge that would have been revealed by a reasonably prudent reading of the apparent facts. Thus in *Papadimitriou v. Crédit Agricole Corporation and Investment Bank*,[9] the Privy Council held that the recipient should have been suspicious of monies received via Liechtenstein and Panama. The expense of passing money through those jurisdictions could not be justified on commercial grounds and should have alerted the defendant to the illegal money laundering.[10]

It is no defence for the defendant to establish that he has substituted the claimant's property for other property. If the defendant still holds the substitute property, the claimant can assert his proprietary rights in the substitute. This is a straightforward case of 'clean substitution'. Neither is it a defence for the defendant to establish that he had contributed to the acquisition of the substitute asset and that '*the claimant's property has contributed in part only*'[11] towards it. This is a straightforward case of 'mixed substitution'. The claimant's proprietary entitlement to that part of the mixed substitute representing his original property must be vindicated. If the value of the mixed substitute has decreased, the value of the claimant's share will have decreased; if the value of the mixed asset has increased, the value of the claimant's share will increase: '*The primary rule in regard to a mixed fund, therefore, is that gains and losses are borne by the contributors rateably.*'[12]

Although this is the primary rule, the claimant has an alternative remedy where the defendant, knowing of the claimant's interest, wrongfully mixed the claimant's property with his own in the acquisition of the new, substitute asset. This alternative remedy is also available against persons deriving title from the wrongdoer 'otherwise than for value'. In such cases, the beneficiary may elect, instead of taking a proportionate proprietary share, to take an equitable charge (a 'lien') over the mixed substitute as security for a personal claim against the defendant for the full value of the claimant's property at the date it came into the defendant's hands. This secured personal claim for the 'receipt' value will be most useful where, due to a fall in the value of the mixed substitute, the claimant is unlikely to be satisfied by the award of a
p. 481 proportionate proprietary share in the mixed asset. It is arguable that where the value of the claimant's proportionate proprietary share of the mixed asset is greater than the value of his property at the date it was received by the defendant, the defendant may be able to insist that the claimant take a proportionate proprietary share instead of a lien, but it is hard to imagine a case in which he would want to.

In the following sections, we examine equity's two main proprietary remedies—the proportionate proprietary share and the lien—in greater detail.

14.2.1.1 Proportionate share of a mixed substitute

Where the claimant has successfully traced his property or its substitute into the defendant's hands, the claimant is entitled to recover it. If the claimant's property is still in its original form, the claimant will simply require specific restitution—the defendant will be required to return the property to the claimant. The same remedy will be awarded if the claimant's property has been directly substituted for another asset, by what is known as a 'clean substitution'. According to Lord Millett, there is no difficulty with '*the transmission of a claimant's property rights from one asset to its traceable proceeds*',[13] but that is not altogether true. There is invariably one theoretical difficulty lurking behind every case of substitution—the so-called problem of 'geometric multiplication'[14]—which arises when, for example, a trust-owned car is wrongfully exchanged for a vase, which, in turn, is wrongfully exchanged for a block of shares, which, in turn, is wrongfully exchanged for premium bonds. It is impossible for every one of the assets to belong to the trust, but the claimant nevertheless has a potential claim to each.

To these complications we can add a whole new layer of complexity in any case where the substitute asset was not acquired wholly with the claimant's asset, but, in part, by the defendant contributing some of his own money or property towards the acquisition of the substitute. Such cases are referred to as 'mixed substitutions'.

In the leading case, *Foskett v. McKeown*,[15] it was not immediately apparent whether the claimant had contributed to the acquisition of the asset in which the claimant claimed to have a proprietary interest, or whether the claimant had merely contributed to the improvement of the defendant's property. The facts of the case were unusual. A number of persons paid deposits to Mr Murphy for the sole purpose of purchasing land in Portugal and it was agreed that Mr Murphy would hold the deposits on trust until transfer of the land to the purchasers. In the event, the land was never developed and Mr Murphy, in breach of trust, paid their money into his own account and used the mixed monies to pay two premiums towards a life assurance policy, having previously paid two premiums with his own money. Later, having by deed divested the beneficial interest in the policy in favour of his three children, Mr Murphy committed suicide. The claimant, one of the prospective purchasers, brought an action against Mr Murphy's children. The action was brought on behalf of all of the purchasers with the aim of recovering the proceeds of the policy, which came to around £1m.

p. 482 ↵ The trial judge decided that the claimants were entitled to 53.46 per cent of the proceeds of the policy, which he calculated on the assumption that the proceeds of the insurance policy were the direct product of the four insurance premiums, two paid by Mr Murphy and two paid using trust money. The children appealed and the Court of Appeal held, by a majority, that, since Mr Murphy had not had any beneficial interest in the insurance policy at the time the misappropriated money was used to pay the premiums, no resulting or constructive trust could be imposed upon the proceeds of the policy in favour of the claimants. Accordingly, the claimants were only entitled to recover the money used to pay for the premiums plus interest.[16] In reaching this decision, the Court of Appeal stated that the authorities were against the conclusion that the payment of the premiums meant that the payer became part-owner of the policy and part-owner of the proceeds of the policy at 'pay-out'. Hobhouse LJ took the view that the payment of premiums on a policy held in someone else's name was analogous to expenditure on the improvement of another person's land. If the expenditure of £500 on the improvement of someone else's land happens to increase its value by £5,000 it does not follow that the contributor of the £500 should, in addition to the return of his £500, plus interest, be awarded a proportionate share of the £4,500 'profit' made by the landowner.

The decision of the Court of Appeal was appealed to the House of Lords, where Lord Browne-Wilkinson identified the central issue to be whether the payment of insurance premiums should be regarded as:

> analogous to the expenditure of cash on the physical property of another or as analogous to the mixture of moneys in a bank account. If the former analogy is to be preferred, the maximum amount recoverable by the purchasers will be the amount of the … premiums [paid using trust money] plus interest: if the latter analogy is preferred the children and the other purchasers will share the policy moneys pro rata.[17]

His Lordship held that the proper analogy is to the mixture of monies in a bank account:

> Where a trustee in breach of trust mixes money in his own bank account with trust moneys, the moneys in the account belong to the trustee personally and to the beneficiaries under the trust rateably according to the amounts respectively provided. On a proper analysis, there are 'no moneys in the account' in the sense of physical cash. Immediately before the improper mixture, the trustee had a chose in action being his right against the bank to demand a payment of the credit balance on his account. Immediately after the mixture, the trustee had the same chose in action (i.e. the right of action against the bank) but its value reflected in part the amount of the beneficiaries' moneys wrongly paid in. There is no doubt that in such a case of moneys mixed in a bank account the credit balance on the account belongs to the trustee and the beneficiaries rateably according to their respective contributions.[18]

Lord Millett agreed that '[t]here is no analogy with the case where trust money is used to maintain or improve property of a third party' and held that '[t]he nearest analogy is with an instalment purchase'.[19]

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14.2.1.2 Lien

A 'lien', or equitable charge, is a form of proprietary security interest. The fact that it is a *security* interest means that it does not give the claimant a proportionate share of property in the defendant's hands; it merely confers on the claimant the right to be satisfied out of the proceeds of sale of that property, and to be satisfied ahead of the defendant and ahead of any of the defendant's unsecured creditors. The fact that it is *proprietary* means that the lien will continue to bind the defendant's property even in the event of the defendant's insolvency. It therefore takes effect in priority to all personal claims, whether secured or unsecured, against the insolvent defendant.

No lien over a mixed substitute in the hands of an innocent defendant

Where the mixing is carried out by an innocent party, the claimant cannot elect to take a lien—he is limited to a proprietary share. Although election normally gives the claimant the option to wait and see which remedy will be most beneficial to him, the law will not permit a claimant to 'gamble' at the expense of an innocent defendant.

Where the claimant's original property was in the form of security

Where the claimant's original property was in the form of security (such as a debenture or mortgage), as opposed to a beneficial ownership interest (such as absolute ownership or a share under a trust), the claimant will be restricted to a lien, itself a security interest, against the defendant. Only if the claimant had a beneficial proprietary interest in the original property will the claimant be able to elect to take a proprietary share of the property in the defendant's hands.[20]

14.2.1.3 Election between a proprietary share and a lien

Election has at least one feature in common with ratification, in that '*it cannot be relied upon so as to render an innocent recipient a wrongdoer*',[21] but it is important that the claimant's election is not mistaken for ratification or approval of the defendant's actions:

> The fact that he does not … complain of the acquisition of the asset but seeks to take advantage of it does not mean that he adopts or ratifies it—he will almost certainly plead that it was a breach of trust—it means only that he does not seek a remedy in respect of it.[22]

The major advantage of a lien is that the whole of an asset acquired with a mixture of trust money and the defendant's own money is subject to a charge that can only be removed when the defendant repays, in full, the trust money he wrongfully misapplied. A lien over the defendant's asset will tend to be more advantageous than a proprietary share in the asset in any case in which the asset has decreased in value since the defendant received the trust money used to acquire it. Suppose that £10,000 of trust money is wrongfully mixed with £10,000 of the defendant's own monies and a car is purchased for £20,000 for the
p. 484 defendant's own use. The current second-hand value of the car is ↵ £14,000. A personal claim for the original £10,000 will be more than adequately secured by a lien over the £14,000 asset, whereas a proportionate half share in the acquisition value of the asset will now be worth only £7,000. Conversely, the major disadvantage of a lien compared to a proportionate share in the mixed asset is that a lien is security for a claim fixed at the value of the claimant's misapplied money; the claimant is not entitled to share in any increase in the value of the defendant's asset. In practice, this means that a claimant will almost invariably elect to take a proportionate share in any case in which the mixed asset has increased in value since the defendant acquired it and will elect to take a lien in any case in which the mixed asset has decreased in value since the defendant acquired it. There is no objection to the claimant choosing the best of both worlds when making his election, because:

> the trustee cannot be allowed to make a profit from the use of the trust money, and if the property which he wrongfully purchased were held subject only to a lien for the amount invested, any appreciation in value would go to the trustee.[23]

14.2.2 Merits of equitable proprietary remedies

Proprietary remedies, which are awarded because the claimant has a right in the trust asset, have several advantages over personal remedies, which are awarded when the claimant has a mere right against the defendant personally. We have already referred to some of these advantages. They can be summarized as the 'four I's' plus a fifth factor, which concerns limitation of actions due to passage of time. If you remember to 'keep your eyes on the time', you should remember all five factors!

- Insolvency
- Increases
- Interest
- Injunctions
- Limitation of actions

14.2.2.1 Insolvency is no bar to recovery

A proprietary claim is a claim to recover property from the defendant that never belonged to the defendant personally. It follows that a proprietary claim is not defeated or diminished by the defendant's personal insolvency.

14.2.2.2 Increases in value are recoverable

When a claimant successfully recovers his property (whether in the form of an entire asset or as a proportionate proprietary share of a mixed asset) from the defendant's hands, the claimant will recover
p. 485 his property regardless of any increase or decrease in ↲ its value. This is so even if the defendant had contributed his own time and labour to an increase in the value of the claimant's property, although, in such a case, the defendant may have a legitimate counterclaim to prevent the claimant from being unjustly enriched at the defendant's expense.[24]

14.2.2.3 Interest accrues from the date that the defendant acquired the property

In a proprietary claim, interest accrues from the date that the defendant acquired the property. In contrast, the claimant in a personal action may usually claim the interest only from the date that the defendant's personal liability is established, i.e. the date of the court's judgment. Not infrequently the judgment will backdate the account for interest to the date of the writ, but no earlier.

14.2.2.4 Injunctions are available to protect property rights

The success of a proprietary claim depends upon the continued existence of the property in the defendant's hands, so it follows that a claimant requires some legal means to prevent the defendant from disposing of 'target' assets prior to the court hearing. The most effective legal device is a freezing injunction, which, as its name suggests, has the effect of freezing the defendant's assets so as to prevent their disposal.[25] One reason why an injunction is so effective is because breach of its terms is contempt of court punishable by a fine, or even by imprisonment for a term of up to two years.[26] Another reason for the effectiveness of the injunction is that it operates *in personam*—that is, it binds a defendant to proceedings in a domestic court personally, even if his assets are held in a foreign jurisdiction. However, a freezing injunction will not be granted in support of an action under way in a foreign court against a foreign-resident defendant,[27] and it will only be granted against a foreign-resident defendant if the injunction against the foreign-resident is incidental to, and dependent upon, a substantive claim against a defendant within the domestic jurisdiction.[28] In *Cardille v. LED Builders Pty Ltd*,[29] a freezing injunction was granted on this basis against a husband resident abroad whose wife, the defendant to a substantive claim within the English jurisdiction, held certain assets in the English jurisdiction on trust for her husband.

14.2.2.5 Statutory time periods do not apply

Whereas personal actions may be time-barred under the Limitation Act 1980, or by analogy to it, the Act will usually have no application to a claim to recover property from a trustee. However, the doctrine of laches may still apply to bar such a claim.[30]

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14.2.3 Limitations on equitable proprietary remedies

The limitations on equitable proprietary rights, as set out in this section, usefully spell out a memorable acronym:

> F (Fiduciary required)
>
> I (Innocent volunteer recipients)
>
> D (Destruction or dissipation of the claimant's property)
>
> E ('Equity's darling')

14.2.3.1 Fiduciary required

Proprietary rights generally depend on equity and therefore, as things presently stand, they depend upon equitable tracing, which, in turn, depends upon proof of a prior fiduciary relationship.[31] This requirement has been widely criticized, as we shall see when we come to consider equitable tracing later in this chapter.

14.2.3.2 Innocent volunteer recipients

When the claimant's property has passed into the hands of an innocent volunteer (a recipient who did not give valuable legal consideration—'payment'—for the property), he is entitled to recover it in the usual way. However, where the claimant's property has become mixed with the defendant's property and has been used to acquire a mixed asset or is sitting in a mixed bank account, the innocent volunteer, whose conscience is clear in the eyes of equity, is under no obligation to prefer the claimant's proprietary claims to his own. Accordingly, the presumption is that defendant and claimant are entitled to the mixed asset in shares proportionate to their respective contributions to its acquisition.

The facts of *Re Diplock*[32] demonstrate how these issues can arise in practice. The executors of an estate had mistakenly paid money to certain charities. The claimants were the persons who had a legitimate entitlement to those monies under the will. Equity had a dilemma: the claimants and the defendants were both innocent, and there was nothing to choose between them in terms of conscience, apart from the fact that, by the date of the court hearing, the charities had discovered that they had benefited from a mistake at the claimants' expense. The court held that the claimants were permitted to trace their property into the defendants' hands, but that the innocent volunteers (the charities) were not obliged to prefer the claimants' rights. Lord Greene MR held that:

> if the volunteer innocently mixes the money with money of his own, or receives it mixed with his own money from a fiduciary agent, he must admit the claim of the true owner, but is not precluded from setting up his own claim in respect of the moneys which he has contributed to the mixed fund, the result being that they share *pari passu*, neither being entitled to priority.[33]

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14.2.3.3 Destruction or dissipation of the claimant's property

Any proprietary claim against a defendant depends for its success on the defendant having the claimant's property (or its 'substitute' or 'value') in his hands at the date of judgment. It follows that the physical destruction of property destroys the claimant's proprietary claim. The point was made in *Re Diplock*:[34]

> The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing.[35]

Of course, even when property is destroyed or consumed, it very often leaves a by-product, such as ashes, and, in theory, the claimant ought to be able to assert a claim to the physical product of the destruction process where it can be shown to be the substitute for the claimant's original asset. The fact is, of course, that few claimants would wish to expend time and money in pursuing a claim to ashes.[36]

In other cases, the claimant's asset might have been subjected to a chemical or physical process leading to the production of an asset to which the claimant may desire to be entitled, but which is so different from his original asset that his original asset is deemed to have been destroyed.[37] In such cases, equitable tracing is still possible, but tracing at common law (which depends upon the traced assets remaining in an identifiable form) is not.

In some cases it may be practically impossible to determine whether or not the claimant's property remains in the defendant's hands. In *Space Investments Ltd v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd*,[38] for example, the defendant trustee bank had deposited trust monies with itself, as it had been authorized to do. The Privy Council held that beneficiaries cannot claim trust monies lawfully deposited by a trustee bank with itself as banker in priority to other depositors and unsecured creditors of the trustee bank. As Lord Templeman explained:

> A bank in fact uses all deposit moneys for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank.[39]

p. 488 ↵ However, his Lordship went on to state, obiter, that beneficiaries might be awarded a charge over all of the assets of the bank in any case in which a trustee bank had *unlawfully* deposited trust monies with itself:

> But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank.[40]

These observations have been supported by some commentators,[41] but Professor Goode[42] suggests that they are inconsistent with dicta of the Court of Appeal in *Re Diplock* (considered in the preceding section). It is the present author's submission that everything turns upon Lord Templeman's distinction between an authorized deposit of trust monies and an unauthorized deposit of trust monies. Where a trustee has authority to deposit trust monies within its general holdings, the trustee is under no immediate binding obligation, as a trustee, to separate the trust monies from the monies of other depositors. That situation must be contrasted with the situation where the trustee deposits trust property with itself in breach of trust. Here, the trustee is under an immediate binding obligation to separate the trust monies again.[43] It may be that the identity of the trust monies within the general funds is uncertain, but the trustee in breach has the power (and the duty) to separate the trust monies from the mass of deposited funds and thereby to ascertain which money belongs to the trust. 'Equity imputes an intention to fulfil an obligation',[44] so the trustee cannot be heard to say that he is unable to identify the trust property, when it is within his power to identify it. If the trustee is under a personal obligation to keep the trust money separate from his general funds, the next question would be whether such an obligation would bind the trustee's successors in the event of the trustee becoming insolvent. In answer to that, it is submitted that if the successor ought to have had knowledge of the trustee's obligation to keep certain funds separate from general funds, there is no good reason why the obligation to separate the trust assets should not bind the successor.

14.2.3.4 'Equity's darling'

An equitable proprietary remedy is available against a recipient to whom a trustee has made a gift of trust property in breach of trust and against a recipient who buys trust property with knowledge of the breach, but it will not be awarded against a bona fide purchaser for value of a legal estate without notice of the claimant's interest. Such a defendant is sometimes referred to as 'equity's darling', because he is said to have an unanswerable defence to any person claiming to have had an equitable interest in, or equitable claim against, the property before it came into the defendant's hands.[45]

p. 489 ↵ Where a defendant wrongfully uses trust monies to pay off a private debt, the payee (the former creditor) is equity's darling if he had no notice that the repayment monies had been misappropriated from a trust. Analytically, the payee is said to have purchased legal title to the repayment monies in return for the value of his loan. The claimant will therefore have no proprietary claim against the defendant, because the trust monies are no longer in his hands, and no proprietary claim against the payee, because he is equity's darling. However, the outcome is quite different where a defendant pays away trust monies in order to redeem a secured loan. In such a case, the claimant will be able to claim that the value of her trust property has been transferred to the defendant's assets against which the defendant's loan had been secured: the defendant cannot be permitted to redeem his property at the claimant's expense. So if the defendant had borrowed £10,000 secured by a mortgage on his home and he used £10,000 of the claimant's monies to pay off the loan, the claimant would be entitled to a proprietary remedy in the form of a charge for £10,000 secured over the defendant's home. Another way of explaining the same facts is to say that the claimant has stepped into the shoes of the lender and has been 'subrogated' to the lender's security over the land. This has been described as 'reviving subrogation',[46] because it has the effect of reviving the claimant's proprietary interest.

14.3 Personal remedies in equity

In Chapter 15, we will consider remedies that may be awarded in equity against defendants personally on account of their knowing receipt of trust property or dishonest assistance in breaches of trust. For the purposes of the present chapter, we will restrict ourselves to consideration of the personal remedy that arises in equity whenever the executors of a deceased person's estate distribute the estate incorrectly under some mistake of fact or law, with the result that some beneficiaries of the estate, or even non-beneficiaries, are overpaid at the expense of the intended beneficiaries. The facts of *Re Diplock*[47] typify the circumstances in which the remedy arises. It will be recalled that, in that case, the executors had mistakenly distributed the deceased's estate to certain charities. Although the charities had been entirely innocent beneficiaries of the mistake, it was held that they were personally liable to account to the true intended beneficiaries. This personal action in equity is available to an unpaid or underpaid creditor, legatee, or next of kin, but is not available to the beneficiaries under an *inter vivos* trust. The equitable action arises because the conscience of the defendant is affected by the fact that he has received some share of the estate to which he was not entitled.

It should be noted, however, that the personal claim in equity is enforceable against the overpaid defendant only to the extent that the monies are irrecoverable from the executor whose error was p. 490 responsible for the mistaken payment in the first place. ↵ It should also be noted that the personal action in equity to recover an overpayment is analogous to the common law action for money had and received, which is considered next.

14.4 Common law remedies

It is important to be aware from the outset that common law remedies differ according to whether the claimant's property is a sum of money or a chattel.[48] There are limited proprietary remedies for the recovery of a chattel at common law, but the common law recognizes no proprietary remedy for the recovery of money.

A claimant who makes a valid transfer of his chattel to another is precluded by the rule against 'derogation from grant' from reasserting his title at a later date, but if the claimant's chattel is misapplied by some other party, the claimant can trace his legal title into the recipient's hands because, in accordance with the maxim *nemo dat non quod habet*, a recipient cannot acquire good title from a person who was incapable of granting good title. Money is a significant exception to the maxim *nemo dat non quod habet*.[49]

14.4.1 Common law claim to recover money

A claimant might be said to have a proprietary *claim* to money at common law—in as much as he claims that the money in the defendant's hands '*belongs to him at law or represents profits made by the use of money which belonged to him at law*'[50]—but there is no common law proprietary *remedy* for the recovery of money. To recover misapplied money, a claimant must resort to a personal action for money had and received. According to Millett J (as he then was) in *Agip v. Africa*:[51]

> The cause of action for money had and received is complete when the plaintiff's money is received by the defendant. It does not depend on the continued retention of the money by the defendant. Save in strictly limited circumstances it is no defence that he has parted with it. A fortiori it can be no defence for him to show that he has so mixed it with his own money that he cannot tell whether he still has it or not.[52]

Just as receipt of the claimant's money is the basis for liability, the amount received establishes the measure of liability.[53] So the action for money had and received is genuinely restitutionary in that it reverses the process by which the defendant was enriched at the claimant's expense. Lionel Smith has advanced an unorthodox analysis which, if accepted, would greatly simplify our conceptual understanding p. 491 of the action for money ↵ had and received. Smith notes that, because the action for money had and received is a common law action, courts usually seek to explain it without relying on the (equitable) law of trusts. This, he says, is a '*misunderstanding*', for '*all of the cases in which the action for money had and received is deployed in relation to the surviving proceeds of an unauthorised disposition can be understood as allowing a common law claim in respect of a determined sum of money held in trust for the claimant, being the traceable proceeds of an unauthorised disposition of trust property or of the claimant's legal property*'. Hence, '*the only kinds of rights held in the proceeds of an unauthorised disposition are equitable rights arising under a trust*'. In short, '*the law in these cases follows equity … by allowing claimants to use common law claims to vindicate equitable interests under a trust*'.[54]

The remaining personal remedies in this section are compensatory, rather than restitutionary; they are not established or quantified on the basis of the defendant's enrichment, but on the basis of the claimant's loss.

14.4.2 Common law claims in relation to chattels

The following remedies are considered in greater depth in books on the common law (or laws) of torts.[55]

14.4.2.1 Compensation

The usual remedy against a defendant who has directly interfered with the claimant's *possession* of a chattel is compensatory damages for 'wrongful interference',[56] which term covers 'conversion of goods',[57] trespass to goods, and negligence resulting in damage to goods or to an interest in goods.[58]

An award of compensatory damages is the usual remedy against a defendant who has *dealt with* the claimant's chattel in a manner inconsistent with the claimant's rights in or over it and therefore has committed 'conversion'. The claimant's right may be absolute ownership, bare legal title, equitable ownership under a trust, an equitable charge (lien), mere possession, or even the mere right to immediate possession. As between mere possessors, the first to possess is able to bring an action in conversion against the subsequent possessor. In one case, a boy found a jewel and took it to a jeweller for valuation. When the jeweller attempted to keep the jewel for himself, the boy successfully sued the jeweller in conversion.[59] Any deliberate dealing with the claimant's property, in a manner inconsistent with the defendant's title, will be an actionable conversion even if the defendant believed the chattel to be his own, or otherwise had an innocent state of mind.

The appropriate claimant in an action for trespass to goods will be the person with an immediate right to p. 492 possession of the chattel. Where the chattel is trust property, the ↵ trustees are deemed to have an immediate right to possession of it, and so it is they who are entitled to bring the action in trespass.

One difference between the action for trespass and conversion is that trespass is only ever concerned with interference with the claimant's possession, whereas conversion is concerned to protect a much greater range of the claimant's property rights, possession included. However, the key difference is that conversion is concerned with dealings with the claimant's chattel, whereas trespass is concerned merely with interference with the claimant's property. So, subject to very limited exceptions,[60] mere receipt of the claimant's chattel will give rise to liability in trespass, but not conversion. Simply returning a chattel to the person who gave it to the defendant will not render an innocent defendant liable in conversion, for such an act does not amount to 'a dealing' with the claimant's chattel.[61]

The award of damages for trespass or conversion is quantified according to the relevant diminution in the market value of the chattel *plus* any additional special loss that the claimant can demonstrate.[62] So loss of one of a matching pair of antique vases will be compensated at the market value of the lost vase *plus* the amount by which the value of the matching pair exceeded the value of the two vases valued separately. Where the chattel is a cheque or some other negotiable instrument, the value of the chattel is its monetary value, not the value of the paper.

14.4.2.2 Delivery up of chattels

This statutory remedy is awarded in response to the tort of conversion or trespass to goods.[63] It is analogous to the equitable remedy of specific 'restitution', in that it tends to be applied only to unique goods, because, in such cases, the usual remedy of compensation in damages will be inadequate.

14.5 Restitution

Restitution has been considered at several points throughout this book. It is descriptive of all remedies that reverse the unjust enrichment of a defendant when that enrichment was made at the claimant's expense. The idea that unjust enrichment should be a basis for a restitutionary remedy independent of proof that any orthodox legal or equitable right has been infringed is not a new one to English law. As long ago as 1914, in the case of *Sinclair v. Brougham*,[64] Lord Dunedin appeared to advocate an autonomous remedy based on the reversal of unjust enrichment. Several years later, the Court of Appeal[65] acknowledged that p. 493 this approach would offer a way around the orthodox rule ↵ that equitable proprietary rights must be restricted to cases in which the claimant's property had, at some stage, been held in a fiduciary capacity, but '*apart from the possible case of Lord Dunedin's speech*' their Lordships could not find '*any principle so wide in its operation … enunciated in English law*'.[66]

However, the House of Lords, in the case of *Lipkin Gorman v. Karpnale*,[67] has now accepted the existence of an independent restitutionary remedy for unjust enrichment. The facts of the case were that a partner in a firm of solicitors had used monies from his firm's client account in order to gamble at the 'Playboy Club' casino in London. The casino was the defendant to the action. Lord Templeman identified the relevant issue in restitutionary terms: '*The question is whether the club which was enriched by £154,695 at the date when the solicitors sought restitution was unjustly enriched.*'[68]

The casino argued that it should not be required to make restitution to the claimant, because it had provided consideration for the monies it had received—namely, the provision of gambling services. The House of Lords accepted that the giving of legal consideration could be a valid defence to a claim based in unjust enrichment, but held that the defence was not available to the casino, because a contract for gambling services was not a legally enforceable contract at the time, so consideration given under such a contract was not 'legal' consideration of the type capable of supplying the necessary defence.[69] The casino was held to have been unjustly enriched. However, the casino argued further, that even if it were liable to make restitution, it should only be liable to make restitution *net* of winnings that it had paid out to the rogue solicitor. It would be unjust, it argued, to require it to repay all the money that it had received without taking account of the money that it had paid out in good faith. This time the House of Lords accepted the casino's argument.

14.5.1 Defences to a restitutionary claim

A defendant's liability to account to a claimant for unjust enrichment is strict, in so far as liability does not depend upon proof that the defendant was at fault. The only requirement is to prove that the defendant was in fact enriched at the claimant's expense, and unjustly. Accordingly, liability to make restitution on the basis of unjust enrichment is accompanied by generous defences.

14.5.1.1 Bona fide purchaser defence

One important defence is the bona fide purchaser defence that we considered earlier. Although this defence is referred to as the defence of 'equity's darling', the bona fide purchaser defence is in truth based on a fundamental policy of protecting purchasers that transcends the distinction between law, equity, and restitution. Another significant defence is the 'innocent change of position defence', which reduces the defendant's liability to account to the extent that he has innocently altered his financial and other affairs due to receipt of the claimant's property.

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14.5.1.2 Innocent change of position

Unjust enrichment gives rise to an entitlement to restitution unless it would be inequitable in all the circumstances to require the recipient of the benefit to make restitution in full or in part.[70] It is clear that mere negligence on the part of the recipient is not sufficient to deprive him of the defence of change of position.[71] The defence will only be denied to a party who fails to satisfy the requirement of 'innocence'. As for the requirement that there should be proof of 'change of position', according to the speech of Lord Goff in *Lipkin Gorman*:[72]

> [W]here an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.[73]

Suppose that a chronically arthritic person had always wished to own a swimming pool to provide pain-free exercise, but had been unable to afford one until he received £20,000 from a wealthy friend. He genuinely believed the £20,000 to be a gift, but his 'friend' had, in fact, misappropriated the monies from a company of which he was a director. If the recipient proceeded to use the entire £20,000 on the installation of a swimming pool in his garden, it would surely be unjust to require him to account to the company for the £20,000 he had received, especially as this would probably necessitate the sale of his house or taking out a loan secured on the house. This is the sort of scenario in which the defence of innocent change of position would succeed.

Lord Templeman suggested other examples in *Lipkin Gorman*, including that of a donee who spends the gift on a trip around the world '*which he would not have undertaken without the gift*', and '*the purchase of a motor car which he would not have purchased but for the gift*'. In the latter case, the donee '*has only been unjustly enriched to the extent of the second hand value of the motor car at the date when the victim of the theft seeks restitution*'.[74] It could be argued that our swimming pool owner should also be required to sell the swimming pool and account for its second-hand value, but the swimming pool, assuming that it is a fairly substantial installation, will probably be considered to have been irreversibly incorporated into the defendant's land.[75]

Applying the innocent change of position defence to the facts of *Lipkin Gorman* itself proved to be far from straightforward. The casino had no doubt acted innocently, but, at first sight, it is hard to see that the casino had changed its position due to the receipt of the monies gambled by the solicitor. The facts of *Lipkin Gorman* could hardly be further from the swimming pool example set out earlier. The actions of the casino with regard to the bets placed by the rogue solicitor were precisely the same as its actions with regard to the bets placed by every other gambler. (No doubt that very fact was evidence of the casino's innocence.) In what sense, then, did the casino 'change' its position? Lord Goff admitted that the result
p. 495 may not have been 'entirely logical', but any reservation ↵ was seemingly overborne by his Lordship's desire to introduce the change of position defence into English law: '*The principle is widely recognised throughout the common law world … The time for its recognition in this country is, in my opinion, long overdue.*'[76] And, of course, by his Lordship's assessment of the justice of the case:

> it would be inequitable to require the casino to repay in full without bringing into account winnings paid by it to the gambler on any one or more of the bets so placed with it.[77]

14.5.2 The property law—restitution debate

There is a danger, inherent in the redescription of traditional equitable and common law remedies in terms of the reversal of unjust enrichment, that the orthodox remedies will be inappropriately distorted. Lord Browne-Wilkinson was alert to this danger in *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[78] when he expressed his opinion that '*the search for a perceived need to strengthen the remedies of a plaintiff claiming in restitution involves … a distortion of trust principles*'.[79] Lord Millett has also confirmed, in *Foskett*,[80] that tracing and recovering trust property '*is concerned with vindicating rights of property and not with reversing unjust enrichment*'.[81]

Lord Millett's speech is implicitly critical of the 'unjust' element in 'unjust enrichment':[82]

> 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 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.[83]

If the law concerned with the reversal of unjust enrichment is to develop along lines consistent with long-established principles and doctrines of common law and equity, it is essential that the 'unjust' element of the unjust enrichment is an element that would be considered unjust according to established principles. As Lord Goff stated in *Lipkin Gorman*:

> A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.[84]

In cases decided shortly after *Lipkin Gorman*, one can identify the same desire to maintain a connection between the unjust element of the enrichment, and established legal and equitable principles. One such case is *South Tyneside MBC v. Svenska International plc.*[85] p. 496 ↵ The claimant local authority had entered into an interest swap agreement with the defendant bank. (Under such an agreement, one party pays a fixed rate of interest on a sum of money, while the other party pays a variable rate of interest on the same sum.) Shortly after the claimant local authority had entered into the interest swap agreement, it was established (in another case)[86] that such an arrangement was ultra vires the powers of local authorities. Accordingly, the bank refused to fulfil the agreement, even though it owed the authority nearly £700,000 under the agreement.[87] The local authority brought the present action in restitution to recover money had and received, on the basis of the defendant's unjust enrichment. The defendant sought to show that it had changed its position in good faith due to the receipt of the monies. Clarke J held that the bank had been unjustly enriched and could not rely upon the defence of change of position.

Crucially, his Lordship held that the bank had been unjustly enriched because it had received money that in equity belonged to the council and which both law and equity said should be repaid to the payer. That word 'belong' shows that his Lordship had in mind an idea of 'unjust enrichment' based on notions of traditional property law. Some academic proponents of the law of restitution have argued instead for a free-standing law of restitution in which the unjust element of the enrichment is established by reference to autonomous factors which have no necessary connection with orthodox principles of law and equity.[88] Professor Birks' argument is that a free-standing law of restitution based on the reversal of unjust enrichment is sometimes more appropriate than orthodox property law and the law of obligations to deal with problems arising from the misapplication of trust money, because property law and obligations law construct general responses to sets of facts, whereas unjust enrichment is a basic fact: '*Property and obligations are co-ordinate categories of response to events, while unjust enrichment is an event.*'[89] That argument is, with respect, unconvincing: 'enrichment' might be an event, but 'unjust enrichment' is a secondary construction. In fact, it is arguable that the misappropriation of B's property by A is a more fundamental 'event', given political commitment to the idea of proprietary entitlement, than the complex compound idea of 'unjust enrichment' of A on the same facts. In other words, to use Professor Birks' terminology, unjust enrichment is a 'co-ordinate category of response' to the fundamental event of misapplied property, since A can only be said to have been 'unjustly' enriched *because* he has B's property.[90]

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14.6 Tracing

As one reads through the cases and academic commentaries on this area of law, one occasionally sees references to the 'tracing remedy'. It is a description that is nowadays considered to be unhelpful, because it tends to confuse the process of tracing property into the hands of various recipients with the remedies that might ultimately be available against them. Tracing is nothing more than the process which supplies the evidence that a defendant has received trust property. It is detective work carried out according to a set of legal (including equitable) rules and principles. The rules establish a number of presumptions that determine whether the claimant's property, or its substitute (its value represented in a new form), has ever passed through the defendant's hands. Because tracing is an evidential matter, most of the tracing presumptions are rebuttable by clear evidence in the form of written accounts, memoranda, and similar documentary statements. Of course, in the typical case of misapplication of trust property, such documentary evidence (if there is any at all) is unlikely to produce a comprehensive and true picture of what has happened.

14.6.1 Tracing and following contrasted

> 'Just ... follow the money'
>
> *All the President's Men* (Warner Bros., 1976)[91]

At its most simple, tracing merely involves following a particular trust asset, such as an antique vase, as it passes from the trustee to 'stranger A' to 'stranger B' to 'stranger C', and so on. In fact, this simple process is usually referred to as 'following' in order to distinguish it from the more sophisticated process of 'tracing' the value of an asset into substitute assets for which the original asset has been exchanged.[92]

If a trustee sells a trust-owned antique vase to an innocent purchaser, the beneficiaries will, as a simple matter of factual evidence, be able to 'follow' the vase into the purchaser's hands, but they will be unable to recover it. It will therefore be more profitable to them to 'trace' the value of the vase into the sale proceeds in the trustee's hands. They can even trace the value of their vase *into* the trustee's bank account, despite the fact that his account may also contain the trustee's own money. Furthermore, they are (in equity, but not at common law) able to trace *through* the bank account into assets purchased with monies from the account, even if those assets have been acquired with a mixture of trust monies and the trustee's own money. The claimant can trace the money ↵ p. 498 '*not because it is the claimant's, but because it is derived from a fund which is treated as if it were subject to a charge in the claimant's favour*'.[93]

One way of understanding the tracing process is to regard it as the process by which a claimant establishes a transactional or factual connection between his original assets and its 'exchange products', or 'substitutes'. As Lord Millett observed in *Foskett v. McKeown*:[94]

> We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked.[95] We also speak of tracing one asset into another, but this too is inaccurate. The original asset still exists in the hands of the new owner, or it may have become untraceable. The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it.[96]

Foskett v. McKeown is, in Lord Millett's words, '*a textbook example of tracing through mixed substitutions*'.[97] His Lordship analysed the facts in that case[98] as a simple sequence of substitutions:

> The claimants were '*beneficially entitled under an express trust to a sum standing in the name of Mr. Murphy in a bank account*'.[99] When these monies were placed in Mr Murphy's personal bank account the balance of that account, could be treated as a substitute asset, because a credit balance in a bank account is a debt owed by the bank to its customer and a debt is an asset.[100] When monies were drawn to acquire life insurance, the debt owed by the bank was substituted by another asset—namely, '*the debt prospectively and contingently due from an insurance company to its policyholders*'.[101] The debt owed by the insurance company was (as a result of Mr Murphy's death) substituted by insurance proceeds paid into the bank account of Mr Murphy's trustees—that is, the debt owed by the insurance company was substituted by a debt owed to the trustees (the defendants in this case) by their bank.

p. 499 ↵ Hence the claimants were able to trace the value of their trust property from the original account into each of the substitute assets and, ultimately, into the trustees' bank account, against which they were then able successfully to assert their proprietary rights.[102]

14.6.2 'Following' fails when property is destroyed

The process of following a particular trust asset will fail if the asset is physically destroyed or if, having been subjected to some physical or chemical process, the asset is deemed to have lost its identity. So, for example, it is impossible to follow a moveable item of trust property, such as a statue or a tapestry, if it has been fixed to land. (A chattel is said to become a 'fixture' when it is annexed to the land with a sufficient degree of physical permanence and with the intention that it should enhance the land as part of the land.)[103] The rule relating to fixtures on land is derived from the maxim *quicquid plantatur solo, solo cedit* ('that which is fixed to the soil accedes to the soil'). It is a particular application of the ancient doctrine of accession, which provides that, when an inferior asset has, for practical purposes, been irreversibly co-joined with a superior asset, the identity of the inferior asset is destroyed and the identity of the superior asset survives. The doctrine of *accessio* was created in Roman law, where it applied to such basic problems as the application of A's thread, by embroidery, to B's garment (in which case, the owner of the garment was considered to be the owner of the whole). According to Professor Roy Goode, whichever of the constituents '*predominates as a distinct entity*' is that which survives.[104] Professor Lionel Smith[105] illustrates this point with some modern examples: an engine accedes to a truck,[106] a meter accedes to a taxi,[107] and spare parts accede to a vehicle.[108]

Distinct from the doctrine of accession is the doctrine of specification, derived from the Roman law doctrine of *specificatio*.[109] Whereas, in a case of accession, the character of the superior asset survives joinder with the inferior asset (diamonds incorporated in a diamond tiara are still diamonds) and it is usually possible to reduce the co-joined asset into its constituent parts, a case of specification joinder produces an entirely new species of asset in which the character of its constituent parts is lost and cannot be separated. *Borden (UK) Ltd v. Scottish Timber Products*[110] is a classic case of specification, p. 500 for there the claimant's resin had been incorporated with other ingredients to create a product (chipboard) which bore no resemblance to any of the ingredients that had gone to make it. It has been suggested that the doctrine of specification has no application to English law.[111] It is submitted, however, that specification does defeat the process of following a particular asset, even if it does not defeat the process of tracing its value.

14.6.3 Tracing at common law and in equity

At the time of writing, the law still makes a distinction between tracing at common law and tracing in equity. A claimant wishing to subject a defendant to a common law claim must establish that his property can be traced *at common law* into the defendant's hands. Conversely, a claimant wishing to subject a defendant to a proprietary or personal claim *in equity* must establish that the trust property can be traced *in equity* into the defendant's hands. Our study of tracing will be set out under orthodox headings of tracing at common law and equity, because it remains a useful way of organizing existing law—but it should be borne in mind that the House of Lords might well remove the distinction between common and equitable tracing at the first opportunity. The distinction has already been expressly disapproved of by Lords Millett and Steyn in the House of Lords in *Foskett v. McKeown*, but that case did not present an appropriate occasion to remove the distinction entirely, because, as Lord Millett acknowledged, the claimants in *Foskett* were successful even according to the traditional equitable tracing rules. Lords Millett and Steyn referred with approval to Professor Birks's essay on 'The necessity of a unitary law of tracing',[112] which Lord Steyn described as a 'crystalline' analysis of the issues.[113] Birks's argument, as summarized by Lord Steyn, is that '*tracing is a process of identifying assets: it belongs to the realm of evidence. It tells us nothing about legal or equitable rights to the assets traced.*'[114]

However, even if the House of Lords were unanimously resolved to abolish the distinction between legal and equitable tracing at the earliest opportunity, it will be no straightforward matter to do away with it entirely. The legal and equitable nature of the ultimate remedies inevitably has a reflex effect upon the nature of the evidence relied upon to support them. Every evidential question begs the incidental question: evidence of 'what'? So if the tracing process is, at its most basic, the evidential question, 'Where has the value of my property gone?', it is hard to avoid such incidental questions as: 'What is "property"?'; 'What is "my" property?'; 'What do we mean by "value"?'; even, as seen most starkly in the context of resulting trusts, 'What do we mean by "gone"?' The answer provided by the common law to each of these questions differs, to a greater or lesser extent, from the answer provided by equity. Even Lord Millett, an advocate of

p. 501 unitary tracing, once acknowledged that the existence of different tracing rules at law ↵ and in equity is '*unfortunate though probably inevitable*', because sometimes differences may be '*required by the different nature of legal and equitable doctrines and remedies*'.[115] It may be particularly hard to sever the theoretical connection between the process and the remedy where a claimant wishes to employ common law rules of tracing as a precursor to an equitable claim, because the common law rules are inevitably more formal than their equitable counterparts. There is however '*less merit in the present rule which precludes the invocation of the equitable tracing rules to support a common law claim*',[116] because it is entirely consistent with equity's traditional role of supplementing common law remedies for equitable tracing to be available to ensure that a substantially meritorious common law claim does not fail due to non-compliance with the common law rules of tracing.[117]

14.6.4 Tracing at common law

The most straightforward way to understand the nature of common law tracing is to appreciate its limitations. Subject to its limitations, tracing at common law is a simple process of following an original asset into new hands or tracing the value of an original asset into substitute assets.

14.6.4.1 The limits to tracing at common law

There are limits to tracing at common law.[118] In *Lipkin Gorman v. Karpnale Ltd*,[119] a firm of solicitors[120] opted to use the common law rules to trace clients' monies into the hands of a casino, the casino having acquired the monies from a rogue partner in the claimant firm who had gambled there. Lord Goff held that common law tracing had been successful. Originally, the firm had a 'chose of action' against its bank to recover the monies held in its client account. This chose in action could be traced at common law into its 'substitute' or 'exchange product', namely the monies withdrawn by the rogue solicitor. As Lord Goff put it:

> '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 his original property.[121]

Trust beneficiaries cannot trace at common law. Trust beneficiaries are able to rely on equity's generous
p. 502 tracing rules and it is therefore unlikely in practice that they would ↵ prefer to trace at common law. This is perhaps just as well because, according to orthodoxy, the common law rules of tracing are not available to trace equitable property, such property being recognizable in equity, but not at common law. There are, however, circumstances in which beneficiaries can take advantage of common law rights indirectly.[122]

14.6.4.2 Common law tracing through 'clean' and 'mixed' substitutions

The common law is said to allow a claimant to *trace* the value of his original property through 'clean substitutions',[123] but not through 'mixed substitutions'.[124] To put it another way, property may be traced at common law only so long as it remains in an identifiable form, so that the claimant could, at every stage of the process, point to his property and say 'that is mine'. It is important to note that, although the property must remain in an *identifiable* form, it does not matter that its legal or factual form has changed, say from coins to notes, or from cash to cheque, or from cash paid into a bank account to the chose in action (debt) enforceable against the bank to recover the balance of the account. In the 1815 case of *Taylor v. Plumer*,[125] Lord Ellenborough stated that:

> the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.[126]

Although this suggests that common law tracing into a mixed account is impossible, we will see later that the rule is not that clear-cut. What is clear, however, is that equity has no such limitations. In the 1879 case *Re Hallett's Estate*,[127] the Court of Appeal upheld the decision of Fry J to allow a trust beneficiary to trace its money into an account where it had been mixed with the trustee's own money. In *Banque Belge pour l'Etranger v. Hambrouck*,[128] Lord Atkin LJ observed that '*if in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books*'.[129] It should be noted, however, that where a fiduciary pays trust money into one account and its own money into another account held at the same bank, the funds are not considered to be 'mixed'.[130]

Banque Belge is a textbook example of tracing through clean substitutions. A cashier stole money from his employer, paid it into a new bank account, and later made certain withdrawals. He paid some of the money to his mistress by way of gift, who, in turn, paid the money into her own deposit account. She later spent the majority of the money, so that only £315 remained in her account at the date of the court hearing. It was held that the bank was entitled to trace its money, at common law. The £315 could be identified as the product of, or substitute for, the original money, because the misapplied monies were identifiable at every
p. 503 stage. A crucial factor in the decision was that the ↵ only money in the accounts of the cashier and the mistress was money misappropriated from the claimant.

The case of *Jones & Sons (a firm) v. Jones*[131] provides another good example of tracing at common law through clean substitutions. In 1984, a firm of potato growers got into financial difficulties, and the partners committed an act of bankruptcy and were adjudicated bankrupt. After the act of bankruptcy, but before the adjudication, the defendant (the wife of one of the partners) opened an account with commodity brokers in order to deal in potato futures and paid in the proceeds of cheques totalling £11,700 drawn by her husband on a joint bank account held in his name and that of one of the other partners. The defendant received £50,760 from her dealings, which was then paid into a deposit account with R plc. The Official Receiver informed R plc of its claim to the money in the account, whereupon the defendant immediately demanded its release to her. R plc interpleaded and the money was paid into court. The proceedings were transferred to the Chancery Division, with the trustee in bankruptcy as claimant. The judge ordered the money to be paid out to the trustee in bankruptcy. The Court of Appeal dismissed the defendant's appeal on the ground that, from the date of the act of bankruptcy, the money in the bankrupts' joint bank account had belonged to the trustee in bankruptcy, so the defendant's husband had no title, whether at law or in equity, to the £11,700 he had paid to the defendant and therefore he could confer no title on her.

According to Millett LJ, as he then was, the deposit of the money under the terms of the contract between the defendant and the commodity brokers was substituted for a chose of action against the brokers, which, although vested in the defendant's name, in reality belonged to the trustee in bankruptcy. The chose in action conferred on the trustee in bankruptcy the right to claim the balance, whether greater or less than the amounted deposited. Accordingly, the trustee was entitled both to the £11,700 and to the profits made by the defendant's use of that sum.

Tracing through clean substitutions is straightforward enough, but '*tracing runs into problems when it encounters mixing*'.[132] A claimant is permitted to trace at common law *into* a mixed substitute if the defendant carried out the mixing, but the claimant is not permitted to trace at common law *through* that mixed substitute and into the hands of another defendant. Suppose that a trustee paid trust money into his own private bank account, so that, immediately upon receiving the trust money for his own use, it was mixed with his own money and rendered indistinguishable from it. If the common law literally '*stopped at the door of the bank*',[133] a fraudster could (by the simple expedient of paying misappropriated monies into his own current account) escape personal liability at common law for the tort of money had and received. In *Agip (Africa) Ltd v. Jackson*, Millett J put it this way:

> Mixing by the defendant himself must … be distinguished from mixing by a prior recipient. The former is irrelevant, but the latter will destroy the claim, for it will prevent proof that the money received by the defendant was the money paid by the plaintiff.[134]

p. 504 ↵ In *Agip (Africa) Ltd v. Jackson*, a senior officer of A Ltd innocently signed a payment order for around US$500,000, which a fraudulent employee of the company then altered in favour of Baker Oil Ltd, a company created and controlled by the defendants (the defendants were accountants who had been instructed throughout by their fraudulent clients). The employee took the order to A Ltd's Tunisian bank and the Tunisian bank executed it, by debiting the claimant's account and telexing instructions to Lloyds in London to pay the US$500,000 into the account of Baker Oil, which was an account holder with Lloyds. At the same time, the Tunisian bank telexed instructions to its correspondent bank in New York to reimburse Lloyds through the New York clearing system. Lloyds made the payment, believing that it would be reimbursed by the Tunisian bank's partner bank in New York, but, in so doing, it took a delivery risk, because the New York bank had not yet opened for business. By the time that Lloyds had discovered the fraud, the payment had already left Baker Oil's account and passed to various accounts held in the name of the defendants. The defendants refused Lloyds' request to have the monies returned and, in accordance with the instructions of its clients (the fraudsters), the defendants paid all of the money away apart from US$43,000 that remained in the defendants' accounts at the date of the action. The defendants claimed that they had acted innocently throughout.

The claimant's action to recover the US$500,000 from the defendants was successful at first instance, where the judge was Millett J.[135] That judgment was upheld on appeal.[136] Common law tracing failed, but tracing in equity was successful. The defendants were, in addition, personally liable as accessories to the fraud. We will consider the defendants' accessory liability in Chapter 15 and we will consider equitable tracing later in this. Here, we are interested in the reasons why common law tracing failed.

At least three reasons were given by their Lordships, either at first instance or on appeal. The most significant reason for failure of common law tracing was that Lloyds had paid its own monies into the Baker Oil account and the money by which it was reimbursed could not be identified except through the New York clearing system, where it was mixed with other money. Tracing at common law therefore failed, because it depended upon tracing through a mixed substitution. A second, related, reason for the failure of common law tracing was that the value of the claimant's money could not be followed directly from the Tunisian bank to Lloyds, because Lloyds had credited the Baker Oil account *before* the Tunisian monies had actually arrived from New York—Lloyds had taken a delivery risk. If one sees tracing as following actual property or its 'value', this reasoning must be right, but if tracing is more accurately regarded as following property through substitutes that are transactionally linked, it is hard to see how Lloyds' delivery risk can be an adequate ground for the failure of common law tracing. Lloyds' advance payment into the Baker Oil account was clearly 'transactionally linked' to the later receipt from the New York bank. Even less convincing is the third reason given in *Agip* for the failure of common law tracing—namely, that, because of the use of telegraphic transfer (telex), '*nothing passed between Tunisia and London but a stream of*
p. 505 ↵ *electrons*',[137] with the result that the claimant's property could not be identified at every stage, as is required for successful tracing at common law. It is hard to see why the common law should suffer a Luddite inability to deal with the technological realities of the commercial world.

14.6.5 Tracing in equity

Equity follows the law, so it is possible to trace in equity through clean substitutions. However, whereas, at common law, it is possible to trace into mixed funds in the defendant's hands if the defendant carried out the mixing, only in equity is it possible to trace *through* mixed substitutions into the hands of third-party recipients from the defendant.[138] This is the great advantage of equitable tracing over common law tracing. According to Lord Greene MR in *Re Diplock*:

> Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds each of which could be regarded as having, for certain purposes, a continued separate existence. Putting it in another way, equity regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts.[139]

Another major advantage of equitable tracing over common law tracing, which will remain so long as the type of remedy depends upon the tracing process used to support it, is that equitable tracing is the only way to provide the evidence necessary to support an equitable proprietary claim.

Nevertheless, for all its obvious advantages, tracing in equity is subject to one significant limitation: equitable tracing depends upon proof that the claimant's property has, at some point in the tracing process, been held by someone subject to a fiduciary duty.

14.6.5.1 The fiduciary requirement for tracing in equity

A claimant is not permitted to take advantage of equity's tracing rules unless he can show that the property he is tracing had '*been the subject of fiduciary obligations before it got into the wrong hands*'.[140] Millett J referred to this as the '*only restriction on the ability of equity to follow assets*',[141] which is true in as much as it is the only restriction which has no counterpart in common law tracing. His Lordship suggested that the requirement '*depends on authority rather than principle*',[142] and here his Lordship expressly had in mind the authority of the Court of Appeal in *Re Diplock*.[143]

However, the *Diplock* case does reveal an attempt to provide a principled justification for the fiduciary requirement. Lord Greene MR took the view that a fiduciary ↵ obligation was required *in order to establish a proprietary basis* for the claimant's ultimate proprietary claim:

p. 506

> [E]quity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers provided that as a result of what has gone before some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer.[144]

His Lordship purported to follow the reasoning of Lord Parker and Lord Haldane who, in *Sinclair v. Brougham*,[145] had held that a right of property recognized by equity '*depends upon there having existed at some stage a fiduciary relationship of some kind (though not necessarily a positive duty of trusteeship) sufficient to give rise to the equitable right of property*'.[146]

The requirement that a claimant should establish a proprietary base or 'history' before he can be awarded a proprietary remedy is logical enough;[147] less logical is the way in which the courts in *Diplock* and *Sinclair v. Brougham* intimate (it is never made explicit)[148] that an equitable proprietary right cannot be established without a prior fiduciary relationship. It seems strange that an absolute owner should be less able to take advantage of equity's tracing rules, leading as they do to proprietary remedies, than an owner whose property has, at some point, been held in trust or otherwise held subject to fiduciary obligations. Why, for instance, should an absolute owner whose property has been stolen be unable to trace in equity into the hands of the thief merely on account of a fiduciary relationship being absent?[149] In *Re Hallett's Settlement Trusts*,[150] Jessel MR observed that there is no '*distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position*'[151] as regards the right to trace in equity, on the ground that '*the beneficial ownership is the same, wherever the legal ownership may be*'.[152] Why, then, should equitable tracing be denied simply because legal ownership happened, at first, to be in an absolute owner and was never held by a fiduciary? The answer, surely, is that it should not be denied. Further support for this view can be found later in the judgment of Sir George Jessel MR, where he stated that it should make no difference '*in a Court of Equity*'[153] whether a man vests legal title to goods in someone else as his trustee or simply deposits the goods with him as bailee or agent '*so that the legal ownership remains in the beneficial owner … he being entire beneficial owner in both cases*'.[154]

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↵ In cases in which the claimant is the beneficiary of an express trust, whether traditional or commercial, he will *ipso facto* be able to show that his property had been held subject to fiduciary obligations before it came into the defendant's hands. Yet, even in cases that do not involve express trusts, claimants will very often be able to establish that the property had, at some stage, been held by someone who owed the claimant duties of a fiduciary nature. Consider the facts of *Agip* itself, where the fraudster was an employee of the claimant who, having been entrusted with possession of the signed payment order, must have been subject to a fiduciary duty not to use the payment order for his own purposes.

The judge in *Chase Manhattan Bank v. Israel-British Bank (London) Ltd*[155] would doubtless have abandoned the fiduciary requirement entirely had the requirement not been settled by numerous decisions of superior courts. Instead, he chose to relax the requirement in the interests of the justice of that case, by discovering a fiduciary relationship in circumstances that surely did not warrant such a finding. The facts concerned a mistaken overpayment of US$2m made by the claimant bank to the defendant bank. The money overpaid had not previously been subject to any trust or fiduciary obligation, but Goulding J held that the conscience of the defendant bank became subject to a fiduciary duty to respect the claimant's proprietary right *upon receipt* of the plaintiff's monies. Accordingly, *Chase Manhattan* is authority for the proposition that equitable tracing is permissible even when the fiduciary obligation does not arise until the moment at which the claimant's property passes into the defendant's hands.[156] However, since *Chase Manhattan* was decided, Lord Mustill has urged greater restraint in the discovery of fiduciary relationships.[157]

14.6.5.2 Equitable tracing through mixed substitutions

The process of tracing in equity varies according to whether the substitution was carried out by a wrongdoer or by an innocent party. Professor Smith has observed that the rules of tracing '*subordinate the interests of wrongdoers, and attempt to deal equitably with everyone else*';[158] thus innocent claimants to a mixed fund will be satisfied ahead of the claims of the person who wrongfully carried out the mixing.

14.6.5.3 Substitution carried out by a defendant who is an innocent volunteer

In *Re Diplock*,[159] Lord Greene MR held that a claimant is entitled to trace into mixed funds and assets acquired with mixed funds, even where an innocent volunteer had effected the mixing. He disagreed with the view, adopted by the judge at first instance, that tracing should only be permitted where the mixing takes place in breach of trust, actual or constructive, or in breach of some other fiduciary relationship.
p. 508 However, as ↵ we saw when we considered remedies, his Lordship stated that a volunteer recipient of property belonging in equity to another:

> is under no greater duty of conscience to recognise the interest of the equitable owner than that which lies upon a person having an equitable interest in one of two trust funds of 'money' which have become mixed towards the equitable owner of the other. Such a person is not in conscience bound to give precedence to the equitable owner of the other of the two funds[160] … Equity will not restrain a defendant from asserting a claim save to the extent that it would be unconscionable for him to do so.[161]

Lord Millett has since confirmed that:

> [w]here the beneficiary's claim is in competition with the claims of other innocent contributors, there is no basis upon which any of the claims can be subordinated to any of the others.[162]

14.6.5.4 Substitution carried out by a defendant who is a trustee or other wrongdoer

In *Boscawen v. Bajwa*,[163] the registered proprietor of certain land charged it to a building society and contracted to sell the land to a purchaser who had obtained a mortgage offer from a bank. The bank transferred cash to the purchaser's solicitors for the sole purpose of completing the purchase. The purchaser's solicitors transferred the money to the vendor's solicitors, who then paid it on to the building society in repayment of the vendor's mortgage debt. The building society duly discharged the vendor's mortgage and forwarded the title deeds to the property to the vendor's solicitors. However, the vendor subsequently became insolvent and the sale was never completed. The claimant (who was an ordinary judgment creditor of the vendor) obtained a charging order absolute against the property. The question was whether the claimant's charge had priority over the bank's equitable claim.

The Court of Appeal held that, because the bank's money could be traced into the payment to the building society and had been used towards the discharge of the latter's charge, the bank was entitled to a charge on the property by way of subrogation to the rights of the building society, to the extent that the money had been used to redeem the charge and in priority to any interest of the claimant. Millett LJ rejected the claimant's argument (based upon *Re Diplock*) that the vendor and the bank had both contributed to the discharge of the building society's charge, and should therefore be entitled to the property in proportion to their contributions, thus allowing the plaintiff to assert its charge against the vendor's part. His Lordship considered the present case to be very different to *Re Diplock*. In *Re Diplock*, volunteers had innocently mixed trust monies with their own monies; in the present case, the vendor and his solicitors were not innocent volunteers, although it was true that their actions fell short of dishonesty (because the vendor
p. 509 had relied upon the solicitors and the solicitors had honestly believed that ↵ completion was imminent). The vendor must have known that any monies received by his solicitors would only be available to the vendor *on completion* of the sale of the property and after discharge of the vendor's mortgage. He cannot have believed in good faith that he could, at one and the same time, retain possession of the property and use and enjoyment of the proceeds of sale. The vendor's behaviour had not been wholly innocent, so it followed that the more favourable tracing rules that are available to an innocent volunteer could not be relied upon by the vendor or by his successor, the claimant.

In such a case, we know that a claimant is entitled to elect between a proportionate share in the mixed fund and a lien over it. We can now add that this election is available whether the trustee mixed the trust money with his own in a single fund before using it to acquire the mixed substitute or made separate (simultaneous or sequential) payments out of differently owned funds at the moment of acquisition of the mixed substitute.[164] We should also note that, according to the doctrine in *Lupton v. White*,[165]

> if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole.[166]

In *Re Hallett's*,[167] a trustee died leaving sufficient money in his bank account to satisfy the beneficiaries, but the trustee's general creditors argued that the money in the bank account had been the trustee's own money, not trust money, and claimed that they should therefore be entitled to be satisfied out of the balance ahead of the beneficiaries. It was held that the balance in the account must be treated as belonging to the beneficiaries, because the trustee should be presumed to have withdrawn his own money first rather than to have withdrawn the trust money in breach of trust. A trustee cannot assert that he has done an act improperly which it is open on the facts to find that he has done properly.[168] This rule against 'improper assertion' appears to share the rationale of the maxim 'equity imputes an intention to fulfil an obligation'. However, Professor Smith has argued[169] that there is no need to resort to the subtle equitable 'fiction' of a righteous wrongdoer, when the competition between the claimant and the wrongdoer's creditors can be resolved by following the simple rule that the interests of the wrongdoer (and his personal creditors) should be subordinated to the interests of an innocent claimant.[170]

By extension of *Re Hallett's*, a beneficiary will only be entitled to trace into the '*lowest intermediate balance*' of a mixed bank account.[171] In other words, the beneficiaries p. 510 ↵ will not be entitled to recover the entire value of their claim from the final balance of a mixed account, if, at some time between their monies being paid in and the date of the final balance, the balance of the account dropped below the value of the amount they are claiming. The simple logic to this restriction is that the claimant's property cannot possibly have remained in the account throughout the entire intermediate period if, at some point, withdrawals from the account had reduced the balance to below the sum claimed.

Where there is an insufficient intermediate balance, but a sufficient final balance, the claimant will only be entitled to complete satisfaction of his claim if he can demonstrate that the payments which returned the balance to sufficiency were specifically credited to him. So if a trustee placed £10,000 of trust monies in his private account and then withdrew the entire balance of that account, but later paid a different £10,000 into the account, the beneficiaries will only be entitled to the £10,000 if the payment in had been accompanied by some memorandum or other evidence that the deposit was intended to be to the credit of the beneficiaries. This appears to be an overly formal rule when applied to facts, such as these, which seem to indicate that the trustee *must* have intended to fulfil his obligation to the trust. However, the 'lowest intermediate balance' rule has frequently been reaffirmed. It was even applied in one of the cases arising out of the Robert Maxwell scandal,[172] in which a pension account ended up in credit, but the liquidators were unable to trace into those monies on behalf of defrauded pensioners because there had previously been a nil balance in the account (in fact, the account had been overdrawn).[173]

However, the 'lowest intermediate balance' rule does not mean that trust monies will always be deemed to have been the last monies withdrawn from a mixed account. The principle underlying the decision in *Re Hallett's* was, as we have seen, that the rights of an innocent claimant should be preferred to those of the wrongdoer. This will occasionally lead to a finding that the trustee withdrew trust money first and left his own money in the bank account. Such a finding will be most appropriate where money was withdrawn to acquire a valuable asset that still exists, while the money remaining in the account after the withdrawal has since been expended on assets that have been destroyed, dissipated, or lost. Consider *Re Oatway*:[174] the trustee bought shares with monies from a mixed account, comprising his own monies and those of the trust. At the time of the purchase of the shares, enough money remained in the account to meet the claims of the trust beneficiaries, but, later, the balance in the account was dissipated. Holding that the claimant beneficiaries were able to trace their part of the mixed fund into the shares, Joyce J stated that:

> [w]hatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material.[175]

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14.6.5.5 Backward tracing

The 'lowest intermediate balance' rule suggests that it would be highly unorthodox to allow 'backward tracing' into an asset which the defendant acquired before the claimant's money had been misappropriated.[176] And yet, where a debt is incurred to acquire an asset (such as a loan to acquire a car), and the debt is incurred with the intention of repaying it with misapplied trust money and the debt is actually repaid in whole or in part with misapplied trust money, the beneficiaries of the trust are permitted[177] to trace their money into the asset, to the extent that it has been redeemed (from the debt) by their money.[178] This is because chronology can be ignored when the debits and the credits were coordinated elements within a planned single transaction. The court in *Serious Fraud Office v. Hotel Portfolio II UK Ltd*,[179] confirmed that 'backward tracing' is also exceptionally permitted where money is paid through the banking network to effect a payment from A to B and credits occur before debits; and also where an asset is acquired on the basis of an undertaking that the trust property would be exchanged for it (so-called 'anticipatory substitution', see *Relfo Ltd (In Liquidation) v. Varsani*);[180] and also in conventional bilateral exchange transactions where the respective transfers were not simultaneous. The more straightforward remedy where trust monies are used to discharge a creditor's secured debt is to place the beneficiaries into the position of the creditor by subrogating them to the creditor's security rights over the assets against which the debt was secured.[181] James Penner contends that *Foskett* was itself a case of backwards tracing because the life assurance was already acquired before the beneficiaries monies were wrongly used to pay off the premiums.[182] This may be to take too static a view of the temporal moment at which the chose in action under the life assurance policy comes into existence. Although it starts its life when the policy is purchased, it can only reach full maturity if the terms and conditions of the policy (including the requirement to pay periodic premiums when they fall due) are discharged. Accordingly, premiums paid long after the policy was first taken out are every bit as vital to the present life and value of the policy as premiums paid at commencement. In this area theoretical rigour often gives way to practical experience. It also gives way to considerations of policy. In *Federal Republic of Brazil v. Durant International Corpn*, the Privy Council expressed willingness to disapply the lowest intermediate balance rule and to adopt something like 'backwards tracing' where an overall scheme is established for p. 512 ↵ some dishonest purpose such as hiding a bribe by money laundering (which occurred in this case). In such cases, equity's view should be holistic: the 'availability of equitable remedies ought to depend on the substance of the transaction in question and not upon the strict order in which associated events occur'.[183]

14.6.5.6 The so-called 'rule in Clayton's Case'

If a trustee places £10,000 belonging to trust A into a current account that already holds £10,000 belonging to trust B, which trust is entitled to the £10,000 balance of the account if the trustee withdraws the other £10,000 and spends it on a luxury cruise? Here is equity's traditional dilemma: which of two innocent parties is to bear the loss? The usual rule for the convenient determination of priority between two innocent equitable claimants is to prefer whichever claim arose first. This is in accordance with the maxim 'where equities are equal, the first in time prevails'.[184] However, a different rule of convenience applies to determine entitlement to the balance of a simple current bank account. The rule, which does not apply in any other context,[185] is called the rule in *Clayton's Case*.[186] It provides that the first payment into the account is presumed to have been withdrawn first, that the second payment is presumed to have been withdrawn second, and so on. Ironically, then, this rule of convenience achieves the opposite result to the maxim. The balance of a bank account will belong to the persons who made the most recent payments into it, so the last in time becomes the first in right.

Applying the rule in *Clayton's Case* to the dispute between trust A and trust B, A will be entitled to the entire balance in the account. This result does not seem at all fair. A rule that was designed to achieve a convenient solution to the complex accounting problems arising where there are numerous and frequent payments into and out of simple bank accounts produces a palpably inequitable result in the context of the dispute between the beneficiaries of trust A and the beneficiaries of trust B. Sir George Jessel MR described the rule in *Clayton's Case* as:

> a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed.[187]

In the dispute between trusts A and B, it must surely be presumed that the beneficiaries of the two trusts would have intended some other outcome than the 'all or nothing' solution produced by the rule in *Clayton's Case*. A fairer result would have been for A and B to share the balance in the account in proportion to (*pari passu*) their contributions. Having made equal contributions, they ought to share the balance equally.

This approach was adopted in *Sinclair v. Brougham*.[188] In that case, a building society had been wound up
p. 513 and the question of priority arose between outside creditors, ↵ shareholders, and depositors. The assets remaining to be distributed could not satisfy all the claims in full, so the assets were divided *pari passu* between the claimants, according to the amounts credited to them in the books of the society at the commencement of the winding up.[189] It was confirmed in *El Ajou v. Dollar Land Holdings plc*[190] that the rule in *Clayton's Case* must yield to the contrary intentions of the parties involved. Neither will it apply if it would produce unjust results, provided a practical, alternative method of distribution presents itself. In *Barlow Clowes International Ltd (in liquidation) v. Vaughan*,[191] an investment company went into liquidation, leaving insufficient funds to satisfy the claims of all of its investors. The judge at first instance held that investors should be able to trace into the funds on a 'first in, first out' basis, following the rule in *Clayton's Case*. This was reversed on appeal, where it was held that '[b]*ecause of their shared misfortune, the investors*

will be presumed to have intended the rule not to apply';[192] instead, the investors were entitled to claim shares in the final fund in proportion to the size of their original investment. The *Barlow Clowes* approach to the rule in *Clayton's Case* was confirmed in *Commerzbank AG v. IMB Morgan plc*,[193] where it was also held that the rule would not be applied, irrespective of the parties' intentions, if it would produce an unjust result. In *Charity Commission v. Framjee*, Henderson J stated that *Clayton's Case* is 'probably still the default rule',[194] but like most modern judges he decided that on the particular facts before him he would, instead, adopt the *pari passu* approach. The so-called 'rule' in *Clayton's Case* is nowadays so often disapplied in the interests of justice that one judge has renamed it the 'exception' in *Clayton's Case*, observing that in practice it is displaced by even a 'slight counterweight'.[195] It has also been displaced where the rule is practically inconvenient and too expensive to apply.[196] In summary, the rule might still be the default rule in theory, but that does not mean that it is the rule of first recourse. In practice it is applied in the absence of evidence that something more nuanced was intended, which is to say that it is applied as a last resort. A suitable note, perhaps, on which to end this chapter.

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14.7 Further reading

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Notes

[1] The authority for this principle is the historical landmark case of *Armory v. Delamirie* [1722] EWHC J94, (1722) 1 Strange 505, in which an apprentice goldsmith was ordered to compensate a chimney sweep's boy for jewels taken from a ring that the boy had found. In the absence of evidence of the actual value of the jewels, valuation was assessed at the highest possible level for a jewel of that sort.

[2] *El Ajou v. Dollar Land Holdings* [1993] 3 All ER 717.

[3] In *Jones & Sons (a firm) v. Jones* [1997] Ch 159, CA at 168.

[4] R. C. Nolan, 'Equitable property' (2006) 122 LQR 232.

[5] European Convention on Human Rights (Rome: 1950) Protocol 1.

[6] Such as compulsory purchase, criminal confiscation, forfeiture on special grounds of public policy, and cases of *bona vacantia*.

[7] *Foskett v. McKeown* [2001] 1 AC 102 at 132. (Noted J Stevens, 'Vindicating the proprietary nature of tracing' [2001] Conv 94.)

[8] Millett J in *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch 265 at 290G (affirmed [1991] Ch 547, CA).

[9] [2015] UKPC 13; [2015] WLR (D) 161.

[10] *Papadimitriou v. Crédit Agricole Corporation and Investment Bank* [2015] UKPC 13; [2015] WLR (D) 161, applying the analysis of Lord Neuberger of Abbotsbury MR in *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Ltd* [2012] Ch 453.

[11] Lord Millett in *Foskett v. McKeown* [2001] 1 AC 102.

[12] Ibid. at 132.

[13] Ibid. at 127.

[14] L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) at 322.

[15] [2001] 1 AC 102, HL.

[16] *Foskett v. McKeown* [1998] Ch 265, CA.

[17] [2001] 1 AC 102 at 110.

[18] [2001] 1 AC 102 at 110.

[19] Ibid. at 137.

[20] See L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) at 348–9.

[21] *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, *per* Lord Goff of Chieveley at 573.

[22] *Per* Millett LJ in *Boscawen v. Bajwa* [1996] 1 WLR 328 at 342B.

[23] S. Williston, 'The right to follow trust property when confused with other property' (1880) 2 Harv LR 28 at 29.

[24] L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) at 350, citing *Brooks v. Conston*, 364 Pa. 256, 72 A2d 75 (1950).

[25] The 'freezing injunction' was formerly known as the 'Mareva' injunction (CA, in *Mareva Compania Naviera SA v. International Bulkcarriers SA (1975)* [1980] 1 All ER 213).

[26] Contempt of Court Act 1981, s. 14. On injunctions, generally, see Chapter 16.

[27] *Mercedes-Benz AG v. Leiduck* [1996] 1 AC 210.

[28] *Cardille v. LED Builders Pty Ltd* (1999) ALR 294.

[29] Ibid.

[30] See Chapter 13.

[31] See later in this chapter, where this is discussed in the context of the equitable tracing process.

[32] [1948] Ch 465, CA.

[33] Ibid. at 539.

[34] [1948] Ch 465, CA.

[35] Ibid. at 521.

[36] One exception is a regrettable case in which divorced parents attempted to assert rights (probably 'possessory' rather than 'property' rights) in the ashes of their cremated child (*Fessi v. Whitmore* [1991] 1 FLR 767).

[37] See the discussion of *accessio* and *specificatio* later in this chapter.

[38] [1986] 1 WLR 1072.

[39] [1986] 1 WLR 1072 at 1074.

[40] Ibid. at 1074C–D.

[41] P. Birks, in *An Introduction to the Law of Restitution* (1989) at 370 (ff. 472–3), and R. Goff and G. H. Jones, *The Law of Restitution*, 4th edn (London: Sweet & Maxwell, 1993) esp. at pp. 73–5.

[42] R. M. Goode, 'Ownership and obligation in Commercial Transactions' (1987) 103 LQR 433, 445–7.

[43] *Re Hallett's Estate* (1980) LR 13 ChD 696, CA.

[44] Chapter 16.

[45] *Pilcher v. Rawlins* (1872) LR 7 Ch Ap. 259, CA.

[46] C. Mitchell, *The Law of Subrogation* (Oxford: Clarendon Press, 1994) at ch. 5.

[47] [1948] 1 Ch 465.

[48] Chattel is used in distinction to money, although money (in the form of coins and notes) is a type of chattel.

[49] There are other exceptions that lie outside the scope of this book. See R. Goode, *Commercial Law*, 2nd edn (London: Butterworths, 1995) 451–82.

[50] In *Jones & Sons (a firm) v. Jones* [1996] 3 WLR 703, CA at 710F.

[51] [1990] 1 Ch 265.

[52] Ibid. at 285C.

[53] Ibid.

[54] L. Smith, 'Simplifying claims to traceable proceeds' (2009) 125 LQR 338 at 346–7.

[55] See B. S. Markesinis and S. F. Deakin, *Tort Law* (Oxford: Oxford University Press, 1999), and P. Cane, *Tort Law and Economic Interests*, 2nd edn (Oxford: Clarendon Press, 1996).

[56] Torts (Interference with Goods) Act 1977.

[57] Also called trover (traditional) and replevin (US).

[58] Torts (Interference with Goods) Act 1977, s. 1.

[59] *Armory v. Delamirie* (1721) 1 Stra 505.

[60] According to the Torts (Interference with Goods) Act 1977, s. 11(2), '[r]*eceipt of goods by way of pledge is conversion if the delivery of the goods is conversion*'. So pawn brokers (who receive goods by way of pledge) must be astute to check that the person delivering the pledged goods is entitled to do so.

[61] *Hollins v. Fowler* (1875) LR 7 HL 757.

[62] See, generally, A. M. Tettenborn, 'Damages in conversion: exception or anomaly' [1993] Cam LJ 128.

[63] Torts (Interference with Goods) Act 1977, s. 3(3)(a).

[64] [1914] AC 398.

[65] *Re Diplock* [1948] Ch 465.

[66] Ibid. at 420–1.

[67] [1991] 2 AC 548.

[68] Ibid. at 560E.

[69] Gaming Act 1845, s. 18. Since repealed by the Gaming Act 2005, ss. 334–335.

[70] *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, followed in *Niru Battery Manufacturing Co v. Milestone Trading Ltd* [2002] All ER (D) 206, *per* Moore-Bick J.

[71] *Dextra Bank & Trust Co Ltd v. Bank of Jamaica* [2002] 1 All ER (Comm) 193, PC.

[72] [1991] 2 AC 548.

[73] Ibid. at 579E–F.

[74] [1991] 2 AC 548 at 560C.

[75] Under the rule relating to fixtures, see later.

[76] [1991] 2 AC 548 at 580.

[77] Ibid. at 582–3.

[78] [1996] AC 669.

[79] Ibid. at 709.

[80] [2001] 1 AC 102.

[81] Ibid. at 132.

[82] Compare the observations made on restitution in Chapter 2.

[83] [2001] 1 AC 102 at 127.

[84] [1991] 2 AC 548 at 578.

[85] [1995] 1 All ER 545.

[86] *Hazell v. Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, HL, restoring the decision of the Divisional Court ([1990] 2 QB 697).

[87] Similar facts gave rise to the important case of *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, HL, except the bank claimed the overpayment in *Westdeutsche*.

[88] See, for example, A. Burrows, *The Law of Restitution*, 2nd edn (London: Butterworths, 2002) at 41–5, where he lists as examples such factors as 'mistake', 'exploitation', and 'duress'.

[89] Ibid. at 220.

[90] See, further, Chapter 2 where 'restitution' is discussed.

[91] The quote is from William Goldman's script of the film that starred Robert Redford and Dustin Hoffman as the *Washington Post* reporters Carl Bernstein and Bob Woodward. The script was based on Bernstein and Woodward's eponymous novel about the famous 'Watergate' affair, which they had helped to disclose and which led to the resignation of President Nixon. '*Follow the money*' was the advice of William Mark Felt Sr, the deputy director of the FBI, who secretly leaked information to the reporters. He was referred to in the novel and the film by the pseudonym 'Deep Throat'.

[92] Lord Millett in *Foskett*: '*Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old*' ([2001] 1 AC 102 at 127).

[93] *London Allied Holdings Ltd v. Lee* [2007] EWHC 2061 (Ch), *per* Etherton J at para. [257], citing *El Ajou v. Dollar Land Holdings* [1993] 3 All ER 717, *per* Millett J at 735j–736a. *London Allied Holdings Ltd v. Lee* involved a fake sale of London's Ritz Hotel—the definitive 'putting on the Ritz'.

[94] [2001] 1 AC 102.

[95] There is, in a sense, a 'money transfer without money movement'. This is the description used by Interpol to describe the '*hawala*' system of banking, which for hundreds of years, has been a favoured method of international cash transfer between Muslims (P. M. Jost and H. S. Sandhu, *The* Hawala *Alternative Remittance System and its Role in Money Laundering* (Interpol: Lyon, 2000) at 5). The *hawala* system works on the basis of personal trust between sending and receiving brokers, who do not actually send and receive the sum transferred, but keep accounts and settle balances. The problem is that no permanent records are kept and this produces potential for illegal money laundering. On money laundering, generally, see the Money Laundering Regulations 2007 (SI 2007, No. 2157) as amended (SI 2007, No. 3299).

[96] [2001] 1 AC 102 at 128.

[97] Ibid. at 126.

[98] *Foskett v. McKeown* [2001] 1 AC 102.

[99] Ibid. at 126.

[100] Technically speaking, a chose in action (chose means 'thing').

[101] [2001] 1 AC 102 at 126.

[102] The requirement to show that the claimant's property is in the defendant's hands, and that it can be traced from the claimant to the defendant by an unbroken chain of connections, applies just as rigorously in the context of claims against criminal assets 'frozen' under the Proceeds of Crime Act 2002 (see *The Serious Fraud Office v. Lexi Holdings plc (in administration)* [2008] EWCA Crim 1443; [2009] QB 376).

[103] *Berkeley v. Poulett* (1976) EG 911, *per* Scarman LJ. In *Elitestone Ltd v. Morris* [1997] 1 WLR 687, a wooden bungalow was held to be a fixture. It was resting on concrete pillars embedded in the ground and could only be removed by demolition.

[104] In *Hire-Purchase Law and Practice*, 2nd edn (London: Butterworths, 1970). Referred to in L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) at 105.

[105] Ibid.

[106] *Lincoln Bank & Trust Co v. Netter*, 253 SW2d 260 (Ky. 1952).

[107] *Schofield & Co v. Amer* (1931), 26 MCR 164 (NZ Mag. Ct).

[108] *Andrew v. The New Jersey Steamboat Co*, 11 Hun's SCR 490 (NY 1877).

[109] R. B. Slater, '*Accessio, Specificatio* and *Confusio*: three skeletons in the closet' (1959) 37 Can BR 597.

[110] [1981] Ch 25.

[111] P. Matthews, '*Specificatio*' in the common law' (1981) 10 Anglo-American LR 121.

[112] In *Making Commercial Law: Essays in Honour of Roy Goode* (R. Cranston, ed.) (Oxford: Clarendon Press, 1997) 239 at 258.

[113] Lord Steyn in *Foskett* [2001] 1 AC 102 at 113.

[114] Ibid.

[115] *Trustee of the Property of F. C. Jones and sons (a firm) v. Jones* [1996] 3 WLR 703, CA, at 702, *per* Millett LJ.

[116] Ibid. at 712B.

[117] See Atkin LJ's obiter dicta in *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 KB 321 at 335–6. Note that in *Federal Republic of Brazil v. Durant International Corp* [2013] JCA 071, Jersey's Court of Appeal confirmed the approach taken by The Royal Court of Jersey, which had held that tracing is an evidential process in which the challenge is the pragmatic one of demonstrating that current assets may be considered to be the substitutes of original assets. The process, in contrast to the tracing process in England, is not concerned to distinguish tracing in law from tracing in equity.

[118] See P. Matthews, 'The legal and moral limits of common law tracing' in P. B. H. Birks, *Laundering and Tracing* (Oxford: Clarendon Press, 1995) at 23–71.

[119] [1991] 2 AC 548.

[120] For the facts, see earlier.

[121] [1991] 2 AC 548 at 573F–G.

[122] See Chapter 2.

[123] See 'Equitable proprietary remedies' at the beginning of this chapter.

[124] Ibid.

[125] (1815) 3 M & S 562.

[126] Ibid. at 575.

[127] (1879) LR 13 Ch D 696.

[128] [1921] 1 KB 321.

[129] Ibid. at 335–6.

[130] In such a case, the tracing principle in *Re Hallett's Estate* (1880) 13 Ch D 696 should apply rather than that in *Re Oatway* [1903] 2 Ch 356 (as discussed earlier in this chapter).

[131] [1996] 3 WLR 703, CA.

[132] P. Birks, 'Mixing and tracing: property and restitution' (1992) 45 CLP 69–98.

[133] [1921] 1 KB 321 at 335–6.

[134] Millett in *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch 265 at 285G–H.

[135] *Agip (Africa) Ltd v. Jackson* [1990] 1 Ch 265.

[136] *Agip (Africa) Ltd v. Jackson* [1991] Ch 547.

[137] Millett J [1990] 1 Ch 265 at 286C.

[138] '[W]*hat the Roman lawyers, if they had had an economy which required tracing through bank accounts, would have called* confusio', *per* Lord Hoffmann in *Foskett* [2001] 1 AC 102 at 115.

[139] *Re Diplock* [1948] 1 Ch 465, Ch D at 520.

[140] *Agip (Africa) Ltd v. Jackson* [1990] Ch 265, *per* Millett J at 290B.

[141] Ibid. at 290A.

[142] Ibid.

[143] [1948] Ch 465.

[144] Ibid. at 530.

[145] [1914] AC 398.

[146] Lord Greene's summary of *Sinclair* in *Re Diplock* [1948] Ch 465 at 540.

[147] Birks suggests that a 'proprietary base' is needed ('Mixing and tracing: property and restitution' (1992) 45 CLP 69–98 and *An Introduction to the Law of Restitution*, revd edn (Oxford: Clarendon Press, 1989) at 378).

[148] A. J. Oakley, *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) at 252, argues that it is 'questionable' whether *Diplock* and *Sinclair* really are authority for the proposition that one has to have '*an initial fiduciary relationship*' (see *Chase Manhattan Bank v. Israel-British Bank (London) Ltd* [1981] 1 Ch 105) as a foundation for equitable tracing.

[149] C. Band, 'The development of the tracing rules in commercial cases' [1997] LMCLQ 65.

[150] (1880) LR 13 Ch D 696.

[151] Ibid. at 709.

[152] Ibid. at 710.

[153] Ibid.

[154] Ibid.

[155] [1981] 1 Ch 105.

[156] Ibid. *per* Goulding J at 119B–C; *Neste Oy v. Lloyds Bank plc* [1983] 2 Lloyd's Rep 658 at 666.

[157] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98.

[158] L. Smith, *The Law of Tracing* (Oxford: Oxford University Press, 1997) at 278. See, also, Lord Millett in *Foskett* [2001] 1 AC 102 at 132.

[159] [1948] Ch 465, CA.

[160] Ibid. at 524.

[161] Ibid. at 532.

[162] *Foskett v. McKeown* [2001] 1 AC 102 at 132.

[163] *Boscawen v. Bajwa* [1996] 1 WLR 328.

[164] *Foskett v. McKeown* [2001] 1 AC 102 at 131, *per* Lord Millett.

[165] (1808) 15 Ves 432, *per* Lord Eldon.

[166] As expounded by Sir John Stuart VC in *Cook v. Addison* (1869) LR 7 Eq 466 at 470. See the arguments of counsel in *Re Tilley's Will Trusts* [1967] Ch 1179 at 1183.

[167] (1880) LR 13 Ch D 696.

[168] Jessel MR in *Re Hallett's* (1880) LR 13 Ch D 696 at 727.

[169] L. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997).

[170] Simon Gardner has also suggested that the presumption that the trustee has withdrawn his or her own monies first is made on the basis that the trustee has been culpable in mixing the fund in the first place and therefore should be the one who suffers the loss: *An Introduction to the Law of Trusts* (Oxford: Clarendon Press, 1990) at 201–2.

[171] *Roscoe v. Winder* [1915] 1 Ch 62, Ch D.

[172] *Bishopsgate v. Homan* [1994] 3 WLR 1270.

[173] *Barlow Clowes International Ltd (in liquidation) & Ors v. Vaughan & Ors* [1992] 4 All ER 22, CA, *per* Woolf LJ.

[174] [1903] 2 Ch 356.

[175] Ibid. at 359. See, also, *Re Tilley's Will Trusts* [1967] Ch 1179, *per* Ungoed-Thomas J at 1183–4.

[176] *Bishopsgate Investment Management Ltd (in liquidation) v. Homan* [1995] Ch 211, *per* Leggatt LJ at 221. See, generally, M. Conaglen, 'Difficulties with tracing backwards' (2011) 127 LQR 432.

[177] L. Smith, 'Tracing into the payment of a debt' (1995) 54 CLJ 290.

[178] *Bishopsgate Investment Management Ltd (in liquidation) v. Homan* [1995] Ch 211, CA, *per* Dillon LJ at 216. Backward tracing was also approved by a majority of the Court of Appeal in *Foskett v. McKeown* [1998] Ch 265, although that decision was subsequently overturned by the House of Lords on other grounds.

[179] [2021] EWHC 1273 Queen's Bench Division (Commercial Court).

[180] [2014] EWCA Civ 360.

[181] See *Boscawen v. Bajwa* discussed earlier.

[182] James Penner, '"Sort of" Backwards Tracing' in *Equity, Trusts and Commerce* (Paul S. Davies and James Penner, eds) (Oxford: Hart Publishing, 2017) 123–50. J. C. Campbell makes the even more radical claim that the notion of 'backwards tracing' adds nothing valuable or necessary to the law of tracing ('*Republic of Brazil v. Durant* and the equities justifying tracing' (2016) 42 Australian Bar Review 3).

[183] [2015] UKPC 35; [2015] WLR (D) 358 at para. [38].

[184] Which we will consider further in Chapter 16.

[185] *Per* Lord Halsbury LC in *Cory Bros & Co Ltd v. Turkish Steamship Mecca (owners), The Mecca* [1897] AC 286 at 290–1. See, also, *Re Diplock* [1948] 1 Ch 465, Ch D.

[186] (1816) 1 Mer 572, *per* Sir William Grant MR at 608–9.

[187] *Re Hallett's Estate* [1880] LR 13 Ch D 696 at 728.

[188] [1914] AC 398.

[189] *Sinclair v. Brougham* was considered by the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669. Their Lordships declined to follow *Sinclair v. Brougham*, but in relation to a different point.

[190] [1993] 3 All ER 717.

[191] *Sub nom. Vaughan v. Barlow Clowes International Ltd* [1992] 4 All ER 22, CA.

[192] Woolf LJ at 42G–H.

[193] [2005] 1 Lloyd's Rep 298.

[194] [2014] EWHC 2507 (Ch); [2014] WLR (D) 340 at para. [49].

[195] *Russell-Cooke Trust Co v. Prentis* [2003] 2 All ER 478, *per* Lindsay J at para. [55].

[196] *Re Eastern Capital Futures Ltd (in liquidation)* [1989] BCLC 371.

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