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The Necessity of a Unitary Law of Tracing

PETER BIRKS

In an important recent judgment, Millett LJ urged that nothing be done to exacerbate the continuing duality of our tracing rules. Although there was in his view 'no merit in having distinct and differing tracing rules at law and in equity', he thought that it was probably inevitable that some differences would persist.[1] The best we could hope for, therefore, was that the differences be kept to an absolute minimum. This essay suggests, more optimistically, that we must recognize that there is only one tracing regime and that this can be done without much difficulty and without legislative intervention.

A. Introduction

History conditions us to accept duality, and it is true in this field that our legal system has come to take for granted the awkward co-existence of two sets of tracing rules, one at common law and one in equity. Equity's tracing rules are hailed as ingenious and resourceful, rarely defeated by evidential difficulties.[2] The common law, by contrast, is supposedly short-sighted and slow-footed, baffled by the least complication. In particular the common law is thought rarely to be able to trace money through a bank account, on the ground that it cannot cope with the evidential difficulties implied by any form of mixture. The *locus classicus* is the judgment of Lord Ellenborough CJ in *Taylor* v. *Plumer* and especially this passage:[3]

> [T]he product of or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of 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. The

[1] *Trustees of the Property of F. C. Jones & Sons* v. *Anne Jones*, [1996] 3 WLR 703, 712A–B. The facts are outlined in the text to n. 41 below.

[2] Conveniently reviewed by D. Hayton, 'Equity's Identification Rules' in P. B. H. Birks (ed.), *Laundering and Tracing* (Oxford, 1995), p. 1, esp. pp. 6–19.

[3] (1815) 3 M. & S. 562, 575. That this passage represents the modern orthodoxy as to tracing at common law can be most coveniently seen, subject only to the point made in the text to n. 45 below, from the *Agip* litigation: *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, aff'd [1991] Ch. 547.

difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way: i.e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property . . .

If it is right that, so far as the common law is concerned, the means of ascertainment fail when money is mixed, the practical consequence is that the common law can only trace through a chain of clean substitutions, as where I receive £10,000 and use precisely that £10,000 to buy shares in company A, which I then exchange for shares in company B, which I sell for £15,000, with which I buy a car. But such clean chains are very rare. Money is nearly always passed through a bank account, and the bank account will usually have received other credits too. That constitutes a 'mixture', albeit an incorporeal mixture of credits rather than a mixture of corporeal coins in a bucket. Even if cash is not put into a bank account, it will usually be mixed with other money, if only to bring it to the precise figure needed to make the next investment, as where I sell the shares for £15,000 in cash but need £15,999 to buy the car. The orthodox view accepts these restrictions. Common law can rarely trace. Whether it can or not is largely a matter of chance. A chain of clean substitutions can occur. You can win the lottery.

Not only, therefore, is duality accepted as an undisputed fact of legal life but, more worryingly, that unquestioning acceptance here includes continuing acquiescence in a situation in which a plaintiff who cannot invoke the resourceful equitable rules may be defeated for no reason at all. 'You cannot trace because you may not use equity's tracing rules' does not state any reason why the person addressed cannot trace. If the speaker wished to do more than restate the fact of the inherited duality, he would have to show that in some situations people should indeed only be allowed to trace through clean substitutions while on other facts, unerringly identified by equity, it was right that they be allowed to trace through bank accounts and other mixed substitutions. Nobody has ever attempted any such substantive defence of the different sets of tracing rules.[4] It could not be done.

[4] However, Professor Matthews has indicated that he believes that this kind of argument could indeed be made, but he has not attempted to make it: 'I content myself here by saying that, if tracing has different rules at law and in equity, that is because the rules were evolved to deal with different situations, and still do so . . . [I]t would make no more sense to fuse the two sets of rules so as to make the equitable rules the same as the common law rules, or vice versa, than it would (say) to abolish all torts other than negligence, on the basis that no-one should be liable in tort unless they were at least negligent': P. Matthews, 'The Moral and Legal Limits of Common Law Tracing' in P. B. H. Birks (ed.), *Laundering and Tracing* (Oxford, 1995), pp. 23, 32.

This inconvenient and indeed indefensible situation has to be overcome. The rest of this essay divides the argument into two parts. The first briefly sets out some essential background. The main aim of that part is to show that the way in which tracing is now understood makes complete nonsense of the idea that there can be two different versions of it. It should follow, without more, that we do have a unitary law of tracing. What makes no sense cannot be the law. However, the history cannot be ignored. There are three different ways of eliminating or overcoming the unwanted historical duality. All are well within interpretative reach. Of the three only one, the third, is really satisfactory. The final part therefore sets out the three paths to unification and the reasons for preferring the third.

B. Tracing as an Exercise in Identification

The nature of tracing has recently begun to be much better understood. Hindsight will credit this improvement, taking the longer view, to path-breaking work done by Professor Goode, who some 20 years ago drew the world's attention to the importance of tracing in commercial law,[5] and to the ubiquitous influence of Goff and Jones.[6] In the shorter term at least two others have played decisive roles. On the bench, and indeed also in the periodical literature, Lord Justice Millett has advocated and achieved important advances.[7] From the university law school, a series of articles by Dr. Lionel Smith, soon to be followed by a book, has raised the level of analysis to a point at which the subject at last begins to seem intellectually manageable.[8]

[5] R. M. Goode, 'The Right to Trace and its Impact on Commercial Transactions' (1976) 92 LQR 360 and 528.

[6] In successive editions *Goff and Jones* has cautiously encouraged the view that the limits of common law tracing have not been adequately explored and has subjected the line between legal and equitable tracing to criticism, especially of the rule requiring a fiduciary relationship as a precondition of tracing in equity. See now Lord Goff of Chieveley and G. H. Jones, *The Law of Restitution*, 4th edn., G. H. Jones (ed.) (London, 1993), pp. 75–102, esp. pp. 77–81, 83–4, 93–4.

[7] Of special importance are his judgments in *Jones* (n. 1 above) and *Boscawen* v. *Bajwa* [1995] 4 All ER 769, also in *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, aff'd [1991] Ch. 547 and *El Ajou* v. *Dollar Land Holdings Plc.* [1993] 3 All ER 717, rev'd on a point unrelated to tracing [1994] 2 All ER 685. See also Sir Peter Millett, 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71 and 'Equity—The Road Ahead' (1995) *Trust Law International* 35, esp. 38–41.

[8] L. D. Smith, 'Tracing in *Taylor* v. *Plumer:* Equity in the Court of King's Bench' [1995] LMCLQ 240; 'The Stockbroker and the Solicitor-General: The Story behind *Taylor* v. *Plumer*' (1994) 15 JLH 1; 'Tracing, "Swollen Assets" and the Lowest Intermediate Balance' (1994) 8 *Trust Law Int.* 102; 'Tracing the Proceeds of Collateral under the Personal Property Security Act' (1995) 25 *Can. Bus. L.J.* 460; 'Tracing into the Payment of a Debt' (1995) 54 CLJ 290. At the time of writing, a book is also in the pipeline: *The Law of Tracing* (Oxford, forthcoming).

We now know that we should not think of tracing as a right or a remedy. It is no more than a process of identification which prepares the way for the assertion of rights and the grant of remedies.[9] People store wealth in different ways, in gold, in shares, in land, in bank accounts, as the case may be. And they turn their wealth over from one store to another, day by day substituting land for cash, cash for shares and so on. The work which tracing does, as and when necessary, is to track the passage of value through such substitutions.

It is often critical to a plaintiff's claim that he be able to identify the location of given units of value at a given moment of time, as for instance at the time when his action is brought or at the time when the defendant or some other person received or laid out money. For example, a plaintiff may wish to show that a defendant who earlier received value in the form of a sum of money, now, at the time of the action, holds those same units of value in the Rolls Royce in his garage. It is the rules of tracing which determine whether, through however many substitutions, the value initially represented by the money did in the eye of the law come to be invested in the car.

It is not rational to make such a process of identification depend upon a trigger which is unrelated to the actual business of identification. The notion that a plaintiff could not engage in a tracing exercise in equity unless his story started in a fiduciary relationship was rightly criticized as entailing an irrationality of just that kind.[10] It has now been swept away.[11] But the terms of the sweeping away still seem to assume that the rules of tracing are different at law and in equity and, more ominously, that nobody can invoke the equitable rules who cannot point to one of the traditional factors which serve to attract equity's attention.[12]

[9] *Boscawen* v. *Bajwa* [1995] 4 All ER 769, 776 (Millett LJ, Waite and Stuart-Smith LJJ conc.), noted C. Mitchell [1995] LMCLQ 451. Cf. *Trustees of the Property of F. C. Jones & Sons* v. *Anne Jones* [1996] 3 WLR 703, 712. Note, however, the hesitations of S. Moriarty, 'Tracing, Mixing and Laundering' in P. B. H. Birks (ed.), *Laundering and Tracing* (Oxford, 1995), pp. 73, 75–88; cf. Birks, ibid. pp. 290–5.

[10] Goff and Jones (n. 6 above), pp. 83–6; D. Hayton, *Underhill and Hayton's Law of Trusts and Trustees*, 15th edn. (London, 1995), pp. 863–7, esp. p. 867.

[11] In view of the background of criticism, it is most unlikely to survive the assertion by Lord Browne-Wilkinson, in a speech commanding majority support, that one may trace in equity against a thief: *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] 2 WLR 802, 838H–839A. It is important to appreciate that in the sentences which run up to the crucial statement that one may trace in equity against a thief, Lord Browne-Wilkinson is rehearsing an argument which he rejects. Otherwise he can be understood as requiring at least lip-service to the requirement of a fiduciary relationship: see Hayton (n. 10 above).

[12] Lord Browne-Wilkinson (n. 11 above), still seems to insist that there be some traditional peg, for he does not say simply that the victim of a theft can trace in equity but that fraud always catches equity's eye and that a thief is sufficiently a fraudster to justify the intervention under that head. This issue has previously been avoided by characterizing the thief as a fiduciary: *Black* v. *S. Freedman & Co.* (1910) 12 CLR 105; *Spedding* v. *Spedding* (1913) 30 WN (NSW) 81.

If that is right, the removal of the requirement of a fiduciary relationship will not in itself do much to improve the rationality of this area of law. For it will be no less difficult to defend a situation in which the process of identification can be vigorously and resourcefully conducted only by a plaintiff who has some traditionally acceptable entitlement to wear an equitable hat. An exercise of identification either can or cannot be conducted. It would be absurd to suppose that it could be conducted vigorously and resourcefully only on Mondays and Thursdays, and it is *prima facie* no less absurd to assert that it can be so conducted only by a plaintiff who has managed to attract the attention of equity. 'Equity' is not a reason. The *prima facie* absurdity can only be displaced by finding a convincing reason why some plaintiffs, but not others, should be allowed to overcome routine evidential difficulties.

So far as there is resistance to this point of view it derives from past failures to distinguish tracing, the exercise of identification, from claiming, the assertion of rights in respect of assets into which value has been successfully traced. It may indeed be that some species of claim are recognized only in equity. For example, the common law appears never to have recognized a non-possessory lien, and it does not recognize a tenancy in common of land. But tracing and claiming are distinct matters. If a tracing exercise is successful, a question has to be asked as to the nature of the rights, if any, which the plaintiff can assert in relation to the assets into which he has successfully traced. Those rights may be legal or equitable, personal or proprietary. Their availability will vary according to the nature of the facts, not in the sense that the facts give rise to a discretionary response but, quite to the contrary, that different facts give rise to different rights and, sometimes, to no rights at all. However, the tracing exercise itself is essentially mechanical, neutral as to rights. There is nothing to be said, or nothing has hitherto been convincingly said, for the view that this exercise of identification must be conducted according to different rules at law and in equity.

'Suppose that a thief steals money from its legal owner and that that money happens to be trust money held by the legal owner for another. The thief then passes the money through a bank account in which it is mixed with other money. After he has operated the account for a few months, it is evident that he has bought from it a number of durable and valuable assets. It would be a curious system which concluded that the question whether the stolen money could be traced to those durable assets, and, if so, to which, must be answered quite differently depending on whether the exercise was attempted by the legal or the equitable victim of the theft—that is, by the trustee or by the beneficiary. Or suppose that the thief stole from the trustee both trust money and other money which was entirely the trustee's own. It would be difficult to defend the application of different rules for tracing the two different parcels.

The removal of the threshold requirement of a fiduciary relationship appears to contain within it an assurance that this nonsense will not be allowed to happen so long as there is some other factor sufficient to attract the attention of equity. In the case of the thief, that factor is said to be fraud.[13] The examples in the previous paragraph may therefore be secure. Nevertheless, the risk of a similar nonsense will persist in other fact-situations so long as it is supposed that common law and equity do have different tracing rules.

The only sensible position for the modern law is to have a unitary regime for identifying the location of value at whatever moments of time are relevant. That unitary regime must be consistently seen as absolutely neutral as to rights. That is to say, there must be no relapse to a situation in which tracing was thought to imply rights and had to be controlled as though it did imply rights. As for the question, 'When can a person trace?' the only possible answer, on that assumption, is, 'Always', or, 'Whenever he likes'. If tracing is neutral as to rights, there is no point in selecting people who may and may not trace. Selection comes at the next stage. When it comes to asserting rights, it will of course appear that people with different facts have different rights, and that some people who have successfully traced have no rights at all.

This is obvious in the related business of following from hand to hand, but it has not yet become obvious in tracing through substitutions. By diligent research I might show through whose hands our family silver passed and in what hands it can now be found. The successful research would not in itself entail any rights, no more than genealogy can confer a noble title. Similarly, I might show that it was by selling 'our' silver candlesticks that you acquired the Hockney drawing which hangs on your wall. But successfully tracing through that substitution again entails no rights. My following and tracing may satisfy curiosity, but they are compatible with a thousand different stories. Perhaps in a hard hour we had to sell our silver in order to keep the wolf from the door.

C. Three Unifying Techniques

The principal argument for a unitary law of tracing is the inherent absurdity of conducting a process of identification according to different rules in different cases and thus allowing the rules of the process to influence the nature and availability of rights. That has been the theme of the previous part. If history really commits us to that incongruity, either a very bold judge must draw a line across its continuing influence or the Law Commis-

[13] See n. 12 above.

sion and the legislature must intervene. However, the past is not in fact so peremptory. It does not dictate the continued existence of two different tracing regimes.

As we shall see, the history has, anyhow, been badly misunderstood. One way to eliminate the legacy of duality would be to correct that error and assert, as a matter of historical truth, that common law tracing is an illusion. The common law never intended to accept the idea of tracing through substitutions. This historical argument urges the conclusion that, properly understood, tracing is and always has been exclusively equitable. Common law tracing should therefore simply retire from view.

The second possibility is so to interpret the operation of the equitable rules as totally to eclipse the common law rules, so that in practice only the equitable rules are ever seen.[14] Whether or not conceived in error, common law tracing does on this view exist, but it is in effect merged in equitable tracing because equity will automatically come to the assistance of any plaintiff who, attempting to trace at common law, encounters a mixed substitution through which the common law cannot pass.

The first approach thus leads to the conclusion that common law tracing does not exist, while the second accepts its existence but supposes it in practice totally eclipsed. The third path is quite different. It concludes that common law can already trace in exactly the same way as can equity. On this argument, the rules of tracing are merely rules for resolving evidential difficulties. When they are viewed in that light, they turn out to belong equally to both law and equity. It then follows that, whether or not the common law originally intended to engage in any form of tracing through substitutions, if it does now trace it can do so every bit as resourcefully as equity.

These three ways of overcoming the legacy of duality may be identified as (1) the historical truth about tracing, (2) automatic supplementation, and (3) common approaches to evidential difficulties. The reader may reasonably react against the suggestion that interpretative truth can be represented in one area by any one of three quite different propositions. This partly reflects the untended condition of the case law. But it can also be attributed to genuine uncertainty as to how to handle a long-standing error in the interpretation of a leading case. If the error is recognized and reversed, common law tracing ceases to exist, and both (2) and (3) become redundant. If the error is not recognized or, though recognized, is not

[14] This line appears to be favoured by Millett LJ; cf. Sir Peter Millett, 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71, 85: 'A unified and comprehensive restitutionary remedy should be developed based on equitable principles, and attempts to rationalise and develop the common law action for money had and received should be abandoned'. It may be that it was to encourage the eclipse that he took a highly restrictive attitude to common law tracing in *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, insisting not merely on clean substitutions but clean physical substitutions.

reversed, common law tracing might be frozen exactly in the terms in which the error was made, in which case (2) becomes the only way of transcending the duality. Alternatively, common law tracing might nonetheless prove to be susceptible of further consideration and rationalization, in which case (3) is the natural outcome.

1. The historical truth about tracing

The truth appears to be that tracing was exclusively the creature of equity. Common law never traced at all, and would perhaps never have done so but for a mistaken understanding of an important case. Dr. Lionel Smith, following up a line originally taken by Khurshid and Matthews,[15] has recently demonstrated that the leading case on tracing at common law does not in fact support the existence of the practice of tracing in the common law courts.[16] *Taylor* v. *Plumer*[17] was indeed decided in the King's Bench, but, so far as the court engaged in tracing, it was applying the rules of equity and, so far as those rules were expressed more restrictively than we have come to expect of the rules of equitable tracing, it was not because the common law was less resourceful but because the resourceful modern tracing rules of equity had not yet been fully worked out.[18]

Under Plumer's instructions to apply the money for a particular purpose, Walsh, Plumer's stockbroker, withdrew a very large sum from Plumer's bank account. Walsh had already conceived the plan of absconding to America. He used the money drawn from Plumer's account to buy gold and American securities. He then set off to take a ship from Falmouth. Plumer's men caught up with him and took possession of the gold and securities. Later, Taylor, acting as Walsh's assignee in bankruptcy, maintained that the creditors' fund was entitled to those assets, tortiously taken and withheld by Plumer. He sued Plumer for conversion. In order to win that action he had to show that he had a legal right to possession.

Taylor, the assignee in bankruptcy, lost the action because the court found that he had no such right to possession. The reason was that assets which a bankrupt held upon trust did not vest, even at law, in his trustee.[19] The common law court had to ask itself whether Walsh held the gold and the securities obtained with money from Plumer's account upon trust for Plumer. It was in answering that question that it had to use the equitable

[15] S. Khurshid and P. Matthews, 'Tracing Confusion' (1979) 95 LQR 78.

[16] L. D. Smith, 'Tracing in *Taylor* v. *Plumer*: Equity in the King's Bench' [1995] LMCLQ 240–68.

[17] (1815) 3 M. & S. 562.

[18] Or, less charitably, in the words of Sir George Jessel, MR, 'because Lord Ellenborough's knowledge of the rules of Equity was not commensurate with his knowledge of the rules of Common Law': *Re Hallett's Estate* (1879) 13 Ch. 896, 717.

[19] L. D. Smith (n. 16 above), pp. 241–8.

process of tracing. Taylor had obtained no legal right to those assets because the absconding fiduciary held them on trust for Plumer as the traceable proceeds of the money which had been entrusted to him. There was never any attempt to argue that Plumer became the owner at law of the gold and the securities.[20] The only question at issue was whether the legal right to possession had vested in Taylor; and it had not.

There is no real doubt that Dr. Smith's analysis is right. It means in effect that tracing at common law has no foundation. It does not follow that the common law cannot or does not trace but only that the case which has long been the authority for the proposition that it can and does trace has been knocked out. That poses a problem and provides an opportunity. It would be possible for the courts to say, very firmly, that common law tracing was always an illusion.

However, in *Trustees of the Property of F. C. Jones & Sons* v. *Anne Jones*, which is the only case which has so far taken note of Dr. Smith's research, the Court of Appeal felt unable to accept that invitation.[21] To have done so would have involved a delicate explanation of important modern cases which have treated the common law as being able to trace, including *Lipkin Gorman* v. *Karpnale Ltd.*[22] It would also have obliged the court to confront the question whether equitable tracing could be invoked in the absence of any special trigger, simply on the ground that a common law claimant needed to trace.[23]

In *Jones*, Millett LJ, giving the judgment of the Court of Appeal, said that Dr. Smith had convincingly demonstrated that *Taylor* v. *Plumer* had in fact applied the rules of equitable tracing. But he went on to hold that common law tracing nonetheless remained intact:

> But this is no reason for concluding that the common law does not recognize claims to substitute assets. Such claims were upheld by this court in *Banque Belge* v. *Hambrouck*[24] and by the House of Lords in *Lipkin Gorman* v. *Karpnale Ltd.*[25] It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor* v. *Plumer*, but that is not how the English doctrine of *stare decisis* operates. It would be more consistent with that doctrine to say that in recognizing claims to substituted assets, equity must be taken to have followed the law, even though the law was not declared until later. Lord Ellenborough, C. J., gave no indication that, in following assets into their exchange products, equity

[20] Ibid. at pp. 258–60.
[21] [1996] 3 WLR 703, 712.
[22] [1991] 2 AC 548.
[23] In *Jones* (n. 21 above), which was decided before the House of Lords indicated that a fiduciary relationship was no longer an exclusive precondition for the use of equitable tracing, as to which see nn. 11 and 12 above and text thereto, the fiduciary character of the defendant's receipt was expressly negatived, and nothing is said of any other factor sufficient to attract the attention of equity.
[24] [1921] 1 KB 321. [25] [1991] 2 AC 548.

had adopted a rule which was peculiar to itself or which went further than the common law.[26]

Not without some reluctance, because it entails shutting a door which might be thought to have opened most conveniently, this must be judged to be the right approach. It would attribute too much weight to one authority to say that its misinterpretation necessarily invalidated every decision that subsequently proceeded on the erroneous basis. It would be difficult, as well as inconvenient, to argue that *Lipkin Gorman* was wrong simply because it proceeded upon a view of *Taylor* v. *Plumer* which has now been destroyed.

Professor Paul Matthews, co-author of the article which preceded Dr. Smith's recent work, also does not treat the destruction of *Taylor* v. *Plumer*[27] as requiring the common law to withdraw, so as to leave equity in undisputed command of this field. However, his reason is different, at least in part. He accepts that modern authorities have to be left standing, but he also takes the view that the law relating to mixtures of all kinds—*commixtio*, *confusio*, *accessio* and *specificatio*—forms part of the regime of tracing and claiming at common law.[28] Hence, there is lots of tracing going on at common law which has nothing to do with the suspect case. However, with the greatest respect, this is not correct. Tracing has to do with the single fact of substitution, so that one asset is put in the place of another. The 'exchange product theory' (otherwise, substitution), which he regards with such suspicion, is thus synonymous with, or at least the very essence of, tracing.[29] Physical mixtures are quite different.

When my thing is mixed with yours (*commixtio*, *confusio*) or fixed to yours (*accessio*) or turned by you into something new (*specificatio*), there is no substitution. The physical matter with which the story starts is still there, although it has lost its independent identity. When you employ the value of an asset of mine to acquire another from someone else, there is no physical continuity between the first asset and the substitute. All systems have to solve the problems raised by different kinds of mixture, but it is perfectly possible for a legal system to refuse to go in for any kind of tracing and to allow no claims in respect of assets which have been substituted for those originally received. It is indeed rather remarkable to allow one asset to stand in the place of another, a kind of 'real subrogation', a phenomenon very rare in civil law systems—understandably enough, since it gives rise to remarkable complications. This is not the point to chase any comparative hares. The purpose is only to underline the fact that the process of identifying assets as having been substituted for others (tracing) and allowing rights to be asserted in relation to substitutes thus identified (allowing claims

[26] [1996] 3 WLR 703, 711–12. [27] (1815) 3 M. & S. 562.
[28] Matthews (n. 4 above), pp. 53–5, 64–5. [29] Ibid. esp. at p. 58.

contingent on successful tracing) is *sui generis*, not to be confused with the law relating to physical mixtures.

The one connection between substitutions and mixtures is that substitutions often raise the same kind of evidential problems as mixtures, so much so that the language of mixture seems perfectly appropriate even though it is now being used metaphorically. If I put money into a bank account, that is a substitution. I give in the cash and take instead a personal claim against the bank for a like sum. If the account has been fed with other money, there will be no natural way of telling which withdrawal represents which input, no more than one can tell when any particular input to a barrel of madeira is drawn off. The fact that the common law can deal with physical mixtures is not irrelevant to its position and potential in relation to tracing, but that is because we see in that context how it deals with evidential difficulties of the kind which are also encountered in tracing.[30] It is not right, however, to defend the very existence of common law tracing by invoking the law relating to physical mixtures.

In summary, it is probably true that we have to accept that common law tracing both owes its existence to an error and does nevertheless exist. If we were to say that there is only one tracing regime and that that regime is equitable, we would run into a series of very awkward problems, both prospective and retrospective. In *Lipkin Gorman*, or a case of the same kind yet to come, we would have to withhold the strict restitutionary claim at law and, failing any generalization of the equally strict *Diplock* claim in equity,[31] allow only equity's fault-based restitutionary claim for 'knowing receipt'.[32] In *Lipkin Gorman* itself, on the facts upon which the House of Lords proceeded, such a claim in equity could not have succeeded. The recipient casino was wholly unaware that the gambling solicitor was gambling with money which was not his own.[33]

[30] Text from n. 45 below.

[31] *Re Diplock* [1948] Ch. 465 allowed next of kin a strict personal claim to recover from the payees money which had been paid out by executors under a legacy which proved to be void. This same strict claim has occasionally escaped the context of the administration of estates, as in *G. L. Baker* v. *Medway Building and Supplies Ltd* [1958] 1 WLR 1216. However, *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] 2 WLR 802 strongly favours the fault-based approach and thus discourages any generalization of the *Diplock* claim.

[32] The best discussions are S. Gardner, 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 LQR. 56; C. Harpum, 'Knowing Assistance and Knowing Receipt: The Basis of Equitable Liability' in P. B. H. Birks, (ed.), *The Frontiers of Liability*, Vol. 1 (Oxford, 1994) 9. Cf. P. Birks, 'Persistent Problems in Misdirected Money: A Quintet' [1993] LMCLQ 218.

[33] [1991] 2 AC 548, 574. There was an unchallenged finding of fact by Alliott J, at first instance that the casino had taken in good faith and without wilfully or recklesly shutting its eyes: [1987] 1 WLR 987, 1007–8; *aliter* in respect of bankers' drafts which the gambler prevailed on them to cash, where they held their breath and hoped that they would go through (at 995).

2. Automatic supplementation

If common law tracing does remain in existence, it may also remain subject to the unhelpful limitations unwittingly fixed by Lord Ellenborough in *Taylor* v. *Plumer*. This will not be a very pretty conclusion. Lord Ellenborough was not talking about the common law but about equity, and in equity his restrictive conditions, far from being the last word, have been the subject of the most severe criticism.[34] There is little sense in holding that the common law, which he never had in mind, is subject to restrictions which equity, which he did have in mind, has cast away. If common law tracing were frozen in Lord Ellenborough CJ's terms, we would simply have to say that, like it or not, the erroneous interpretation of that case had been received by authority as defining the limits of common law tracing. It is necessary to emphasize the hypothetical nature of this statement, for the truth is, as will appear immediately below, that, although it is often assumed that it has been so frozen, the question whether or not that is so has never been properly asked.

However, supposing for the moment that Lord Ellenborough's views do represent the limits of common law tracing, it may nevertheless be possible to move to a position in which, whenever a plaintiff wants to trace at common law and cannot complete the exercise because of an evidential impasse which equity could overcome, equity will automatically supplement the law. In other words, a common law plaintiff who gets stuck will switch to the equitable tracing rules without having to satisfy any special conditions. The mere fact that the common law rules are defeated by an evidential difficulty will become the trigger for calling on equity's auxiliary jurisdiction. In this way the common law rules will be eclipsed.

In *Trustees of the Property of F. C. Jones & Sons* v. *Anne Jones*, Millett LJ deplored the fact that this was not yet the law:[35]

> The fact that there are different tracing rules is unfortunate though probably inevitable, but unnecessary differences should not be created where they are not required by the differing nature of legal and equitable doctrines and remedies. There is in my view even less merit in the present rule which precludes the invocation of the equitable tracing rules to support a common law claim; until that rule is swept away unnecessary obstacles to the development of a rational and coherent law of restitution will remain.

It may be that all obstacles to automatic supplementation can now be swept away. Two elements favour such a development. First, as we have seen in the first part of this essay, the recognition that tracing is a process, neutral as to rights, carries with it a logical argument to the effect that no

[34] *Re Hallett's Estate* (1879) 13 Ch. D. 696, 717 per Sir George Jessel, MR.

[35] [1996] 3 WLR 703, 712, reflecting the position taken by Goff and Jones (n. 6 above), pp. 83–6.

conditions should be attached which are not directly relevant to the actual business of identifying the location of value at whatever moment is in question. If the tracing exercise is neutral as to rights, no harm can be done by giving it full rein. Secondly, the largest and most inconvenient precondition has indeed been removed. It was suggested above that the requirement of a fiduciary relationship has now been eliminated by the House of Lords as a prerequisite of tracing, while no doubt remaining a relevant fact in determining the claims claimable in respect of assets into which the plaintiff has successfully traced.[36] If that is right, that change both encourages the argument for automatic supplementation and provides a model for transferring preconditions from tracing to claiming, that is, from the exercise of identification to the making of claims in respect of assets successfully identified.

Some further support for automatic supplementation can be gleaned from the remarkably difficult case of *Banque Belge* v. *Hambrouck*,[37] the spirit of which was that one way or another plaintiffs must not be impeded by a primitive conception of common law tracing. That spirit is mediated in different ways in the different judgments, but the judgment of Scrutton LJ favours automatic supplementation.

In that case the Court of Appeal held that, where a fraudster had obtained the bank's money and passed it through bank accounts to his mistress, the money in her bank account, if traceable, belonged to the plaintiff bank. It also held that on the facts the money was traceable. Bankes LJ, whose judgment was the most conservative of the three, seems to have preferred to treat it as traceable at common law, evidently thinking it crucial that no other money had been in the relevant accounts. However, Scrutton LJ was 'inclined to think' that the use of bank accounts was itself a bar to common law tracing but that, without any fuss about satisfying different preconditions, equitable tracing would supplement the defeated common law: 'But it is clear that the equitable extension of the doctrine . . . enables money to be recovered, if it can be traced'.[38] Atkin LJ, was also prepared to think of equity as automatically supplementing the common law: 'The question always was, Had the means of ascertainment failed? But if in 1815 the common law halted outside the bankers' door, by 1879 equity had the courage to lift the latch, walk in and examine the books . . . I see no reason why the means of ascertainment so provided should not now be available for both common law and equity proceedings'.[39] The only difference between Atkin LJ, and Scrutton LJ, is that the latter thought of the plaintiff as having to switch into equity, while the former took the view that the equity cases could be used directly to extend the common law. In effect Atkin LJ's internal supplementation

[36] See nn. 11 and 12 above, and text thereto. [37] [1921] 1 KB 321.
[38] [1921] 1 KB 321, 330. [39] [1921] 1 KB 321, 335.

tends more to the position advocated immediately below, under the third head, according to which common law and equity have the same capacity to trace.

Automatic supplementation on Scrutton LJ's model, is, however, a less than perfect solution, because it cannot bring about an absolutely total eclipse of the common law rules. It would be a great improvement on the situation which has obtained hitherto. In the great majority of cases the tracing exercise would be conducted under equitable rules, and there would be no cases in which a plaintiff would have to retire from a tracing exercise for want of a fiduciary relationship or other equitable trigger. However, irrationalities derived from the history of this subject would be bound to survive.

They would survive in the form of secondary advantages and disadvantages entailed by the historically determined boundary between legal and equitable tracing, something all the less defensible when the history has been a comedy of errors. For example, there is the difference between the nature of a recipient's restitutionary liability at law and in equity. The question whether a recipient incurs only a fault-based restitutionary liability for knowing receipt in equity or a strict *Lipkin Gorman* restitutionary liability at law should not depend on the fortuitous fact of his being caught by narrow tracing rules laid down in *Taylor* v. *Plumer*. Admittedly, that anomaly could be avoided if both equity and common law were to recognize the same kind of restitutionary liability, though for the moment that seems somewhat unlikely.[40]

A similar secondary problem was narrowly averted in *Trustees of the Property of F. C. Jones & Sons* v. *Anne Jones*.[41] The defendant had opened a bank account into which she paid only the profits which she made by speculating with money which her husband gave her. She speculated, very successfully, on the market in potato futures. The money which her husband gave her was money which he had withdrawn from an account which subsequently vested, retrospectively, in the plaintiffs. In effect therefore he took the money from their bank account. The plaintiffs were able to trace at common law from their bank account to the account into which the defendant had paid her profits. There was a difficult question whether it was possible, on that purely common law basis, to give the plaintiffs any remedy which matched the entitlement which the Court of Appeal was in principle willing to acknowledge. If the defendant was not a fiduciary and not a constructive trustee, as she was not, could the court nonetheless declare that the plaintiffs were entitled to all the money which had been paid into that account? Millett LJ decided that the court could indeed make that declaration.

It is not wholly clear what the Court of Appeal would have done had the

[40] Cf. n. 32 above and text thereto. [41] [1996] 3 WLR 703.

money in the account been mixed with other money. According to the orthodox account of common law tracing, it would then have been necessary to invoke equity. However, Millett LJ's admission that automatic supplementation had not yet been accepted[42] would have made that difficult.

This only underlines the unsatisfactory nature of the present situation. The question whether the plaintiffs were entitled to all that the defendant made by speculating with money from their account obviously ought never to have been affected by the fortuitous fact that the defendant had paid her profits into an otherwise empty bank account. If they could find it, with or without equitable assistance, then, if they were in principle entitled to it, they ought to have been able to recover it. Automatic equitable supplementation of the common law would go far towards ensuring that result, but it would leave difficult questions in the situation in which, as in *Jones*, a plaintiff had never needed to go outside the common law. There is little doubt that all these loose ends could be effectively tucked in, but the fact remains that an imperfectly total eclipse leaves problems which will not be encountered by a genuinely unitary regime, common to law and equity or, if one were to prefer a different image, outside both.

3. Common approaches to evidential difficulties

This third technique accepts that the common law does engage in tracing through substitutions but does not accept that common law tracing is handicapped in the ways in which the misinterpretation of *Taylor* v. *Plumer*[43] leads people to suppose. It does not matter for this purpose whether the fact that the common law traces through substitutions is or is not due to a misinterpretation of that case. Even if the revision of *Taylor* v. *Plumer* is rejected, and the case is taken to be a true statement of common law tracing in the early years of the nineteenth century, it remains true that the restrictions which the case has seemed to imply have never been properly tested.

One restriction has been removed. The extreme view was taken that common law tracing required, not merely a chain of clean substitutions, but a chain of clean corporeal substitutions, so that the intervention of an incorporeal chose in action would terminate the tracing exercise.[44] After *Lipkin Gorman* v. *Karpnale Ltd.* that must be regarded as wrong.[45] However, no challenge has yet been made to the notion that the common law is stymied by mixtures, above all by the mixed substitution which happens

[42] See the quotation from his judgment in the text to n. 35 above.
[43] (1815) 3 M. & S. 562.
[44] *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, 286 per Millett J.
[45] [1991] 2 AC 548, 574, where Lord Goff says that a chose in action, incorporeal by definition, is to be treated for this purpose in the same way as any other property. It is evident that Bankes and Atkin LJJ took the same view in *Banque Belge* v. *Hambrouck* [1921] 1 KB 321, discussed in the text from n. 37 above.

when money is paid into an account into which other money has already been paid or is subsequently paid. However, that challenge must be made, and when it is made it will be found that law and equity have the same capacity to trace because they have the same capacity to cope with evidential difficulties.

Tracing is basically a matter of proving a particular fact or, very often, a chain of such facts. The relevant fact is that the value of one asset was used in whole or part to acquire another. It is on the basis of that fact that the second asset is put into the place of the first. The substitution can be proved in the ordinary way, by evidence on the balance of probabilities. If that were all there were to it, it would be completely impossible to say that there were different tracing rules at law and in equity.

However, that is not all there is to it. The proof of a substitution or a chain of substitutions almost invariably encounters difficulties with which ordinary proof by evidence cannot cope. When money has been paid into an account (or, for that matter, into a bucket, if money were often so kept) and there are subsequent drawings out, it is usually not possible to show by evidence exactly when those particular units of value were withdrawn. A bank account which receives multiple credits is, metaphorically, an incorporeal mixture. A payment into such an account is a substitution by which money or a claim to money is given up to the bank in exchange for personal rights against the bank which are measured by the enhancement of that incorporeal mixture. One may later be able to see that from that account, by a further substitution, money was withdrawn which was used to buy a luxury yacht. But there is very unlikely to be any natural answer to the question whether one particular payment into the account ultimately went towards paying the price of the yacht. There are rare counter-examples, as where, after the payment in, the account was immediately emptied and the entire balance was used to buy the yacht.

It follows that either the tracing exercise must be regarded as generally foiled by payment into a bank account or it must be supported by artificial presumptions. It has been found possible to support it by presumptions. The single probandum is that the units of value in question, stored at one moment in a given asset, were in whole or part used to acquire another asset. That probandum is sometimes satisfied by evidence but more often by the application of artificial presumptions. The crucial question thus becomes whether equity has a monopoly upon the presumptions which are used to overcome the various evidential difficulties. The answer is that it manifestly does not.

Wrongdoers

The most powerful presumption, or family of presumptions, is used against a wrongdoer. In this matter common law and equity behave in exactly the

same way. The presumption used in *Re Hallett's Estate*[46] and *Re Oatway*[47] is of this kind, but its true nature is somewhat obscured by the words in which Sir George Jessel MR originally formulated it. He spoke in terms adapted to the specific facts before him in *Re Hallett's Estate*. Hallett had sold out his client's Russian bonds and had paid the proceeds into his own bank account. He had then dissipated much of the money in the account. If the presumption 'first in, first out' had applied, the trust money would have to have been regarded as almost completely exhausted. The question was whether what was left could nonetheless be said to belong to the client. The answer was yes, on the ground that a trustee must be deemed to use his own money first: '. . . it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money'.[48] However, that formulation, suitable for the facts of that particular case, had to be sharply modified when, in *Re Oatway*, it encountered a situation in which the misbehaving fiduciary had invested the first tranche of the mixed fund and dissipated the rest. It then became necessary to say, in effect, that the *Hallett* presumption was that the trustee intended at all events to preserve the trust money.[49]

In fact the truth lies deeper still. The underlying idea, in more general terms, is that where a wrongdoer creates an evidential difficulty, that difficulty will be resolved against his interest, save so far as he can himself discharge the onus of proving the contrary. Where a wrongdoer mixes, thus creating the evidential difficulty which consists in the impossibility of identifying the quantum and subsequent fate of the contributions to the mixture, the facts will be presumed against the wrongdoer. When the doubt is as to quantum, the whole will be assumed to belong to the other save so far as the wrongdoer can prove that some part belongs to him. When the evidential difficulty relates to the disappearance of part of the mixture, the presumption will be that the part which survives is attributable to the contribution of the other. In *Lupton* v. *White*, where lead ore from different mines had been mixed together, Lord Eldon LC, citing both common law and equity cases, rightly described this approach as a principle common to both.[50]

This presumption is not only shared by both law and equity. It also reaches beyond the specific context of mixtures to other situations in which a wrongdoer has created an evidential difficulty burdensome to the victim of the wrong. Among the authorities relied upon by Lord Eldon LC in *Lupton* v. *White* was *Armory* v. *Delamirie*.[51] In that famous case a chimney-sweep's boy who had found a ring took it to a goldsmith to be valued and

[46] [1879] 13 Ch. D. 696. [47] [1903] 2 Ch. 356. [48] (1879) 13 Ch. D. 696, 727.
[49] [1903] 2 Ch. 356, esp. 360 per Joyce J.
[50] (1808) 15 Ves. 432, 436, 439–41; cf. the discussion of the common law rules by Staughton J in *Indian Oil Corporation* v. *Greenstone Shipping Company SA, The Ypatianna* [1987] 3 All ER 893, noted by P. Stein (1987) 46 CLJ 269, I. Brown [1988] LMCLQ 286.
[51] (1722) 1 Str. 505.

the goldsmith's apprentice prized out the stone before handing it back. The boy brought an action for conversion. The court held that since the goldsmith had wrongfully caused the evidential difficulty the jury must presume the stone to have been of the first water:

> And [Pratt] C. J. directed the jury that, unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages: which they accordingly did.[52]

First in, first out

It is the same with the rule in *Clayton's Case*.[53] Much criticized[54] but not easily dispensable, this provides the basic presumption in relation to bank accounts. The presumption is that money goes out in the chronological order in which it comes in: 'first in, first out'. This presumption cannot be appropriated by common law or equity, no more than can the presumption against wrongdoers. It originated as a supplement to the bundle of common law rules for the appropropriation of payments of debts.[55] If I owe you two debts, one of £100 and another of £200, and I pay you £100, it is up to me to say whether I am paying the one or partly paying the other. If, as is very likely, I make no appropriation, you as creditor have the right to allot the payment to the one or the other. If you in your turn make no appropriation, there was originally no allocation by default. But *Clayton's Case* introduced the rule of chronology, which allocates the payment to the earliest debt.

This has nothing specially to do with bank accounts, but, applied to bank accounts, it produces the result summed up in the phrase 'first in, first out'. The bank is the debtor. Every time it pays out on its customer's instruction, it is repaying money which it owes to its customer. It is deemed to be repaying the money which was earliest lent. It would be absurd to suggest that this default rule is or was the peculiar property of the court of Chancery. It is simply a rule of convenience used in the world of banking and finance. In *The Mecca* it was expressly recognized as being in use 'on both sides of Westminster Hall'.[56] Lord Halsbury LC there supported that observation by citing Park J in *Field* v. *Carr*, where he said, 'The rule in *Clayton's Case* has been adopted by all the courts in Westminster Hall, and the only question is whether the facts here come within it'.[57]

[52] (1722) 1 str. 505. [53] (1815) 1 Mer. 572.

[54] Cf. *Barlow Clowes International Ltd.* v. *Vaughan* [1992] 4 All ER 22, which shows that the courts will sometimes struggle to avoid the abruptness of the chronological presumption.

[55] *The Mecca* [1897] AC 286; *Deeley* v. *Lloyds Bank Ltd.* [1912] AC 756. D. A. McConville, 'Tracing and the Rule in Clayton's Case' (1963) 79 LQR 388, 389–91; E. P. Ellinger and E. Lomnicka, *Modern Banking Law* (Oxford, 1994), pp. 586–9.

[56] [1897] AC 286, 290. [57] (1829) 5 Bing. 13, 17.

Pari passu

The third great presumption provides the ground rule for all mixed funds other than active bank accounts which, *prima facie*, are governed by *Clayton's Case*. As between innocent volunteers a mixed fund other than such an account will abate *pari passu* for each contributor or all contributors. That is to say, any loss will be borne by the contributors in proportion to the size of their contributions. The substance of *Sinclair* v. *Brougham*[58] is no longer good law,[59] but it remains the leading example of the use of the *pari passu* rule to distribute a mixed fund between innocent contributors. However, equity can claim no monopoly of the *pari passu* rule. It is the plainest common sense as well as common law. The common law uses the same rule when there is a physical mixture of indistinguishable goods belonging to innocent contributors. That is, if such a mixture is partly lost or destroyed, as for example if bales of cotton are mixed together and some are lost at sea, the common law shares the losses between the contributors in proportion to their contributions.[60]

In the light of these shared approaches to the evidential problems which are encountered in identifying the location of value, it seems to be both wrong and pointless to argue that the tracing process is differently conducted in law and equity. It is false to assert that common law is handicapped. It can make presumptions against a wrongdoer who has created an evidential impasse, it can apply 'first in, first out' to mixtures, real and metaphorical, which are constantly drawn off and topped up, and it is as well able as equity to say that, as between innocent contributors, an undifferentiated mass must abate in proportion to the size of their contributions. The truth therefore is that tracing, regarded as the process of locating value by the application of evidence supplemented by presumptions, is neither equity nor law. It is a process which both equity and law conduct in the same way or, more shortly, it is a process which the modern law can conduct without regard to the historical division between law and equity.

D. Conclusion

The great advantage of this third way of underpinning a unified regime for tracing is that it allows tracing to be cleanly separated from the business of asserting rights in or in relation to assets successfully traced. It thus accords with the second line of argument, to the effect that the process of

[58] [1914] AC 398.

[59] *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] 2 WLR 802, 833–7, 841, 859.

[60] *Spence* v. *Union Marine Insurance Company Ltd.* (1868) LR 3 CP 427.

identification ought not in any way to determine or distort rights in the matter successfully identified. The first way, accepting the historical truth that common law tracing came into the world by error and accident and simply reversing the error so as to eliminate its progeny, turns out to be inadvisable, if not impossible. There would be too much explaining and adjusting to do. Besides, that approach assumes a species of truth which accords too high a status to the interpretation of a particular authority. It cannot follow that, simply because an authority has been wrongly interpreted, the resulting rule or institution was unwanted or would not, but for the mistake, have been received into the law. The maxim that a shared error creates law—*communis error facit ius*—is more than a cover-up. It tells us that the validity of a rule is not entirely dependent on the purity of its interpretative pedigree.

第一種方法，接受普通法追蹤透過錯誤和意外進入世界的歷史真理，並簡單地扭轉錯誤以消除其後代，事實證明，如果不是不可能的話，也是不可取的

The second possible unification was through automatic equitable supplementation of crude rules of common law tracing, using the notion of supplementation in Scrutton LJ's sense, according to which the common law would not be expanded but a plaintiff would be allowed to switch to equity as soon as the common law exercise got stuck.[61] This would work well in most cases, but it would, if anything, exacerbate the historical nonsense. More importantly, it would not entirely break the connection between the process of identification and the rights, if any, exigible after the exercise has been completed. There would remain the danger, in the few cases in which the equitable supplement was not invoked, that a common law exercise of identification would entail substantive advantages and disadvantages of a kind which no exercise of identification ought to dictate.

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By contrast the third route simply leads to the conclusion that the modern law is equipped with various means of coping with the evidential difficulties which a tracing exercise is bound to encounter. The process of identification thus ceases to be either legal or equitable and becomes, as is fitting, genuinely neutral as to the rights exigible in respect of the assets into which the value in question is traced. The tracing exercise once successfully completed, it can then be asked what rights, if any, the plaintiff can, on his particular facts, assert. It is at that point that it becomes relevant to recall that on some facts those rights will be personal, on others proprietary, on some legal, and on others equitable.

簡要得出的結論是，現代法律配備了各種手段來應對追蹤活動必然會遇到的證據困難

[61] Text to n. 38 above.