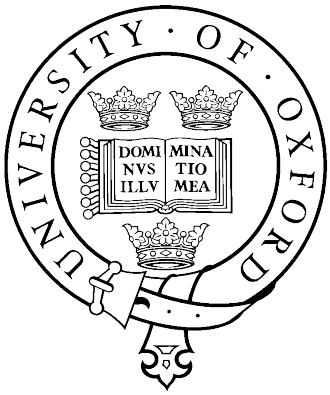
Justifying Claims Based on Unauthorised Substitution



Aruna Nair

Brasenose College

University of Oxford

Thesis submitted towards the degree of

Doctor of Philosophy in Law

Trinity Term 2015

97,414 words

Supervisor: Mr William Swadling

ABSTRACT

This thesis examines the doctrinal justification for the contingency of certain private law claims on tracing in English law. It argues that, contrary to the currently dominant model of tracing as an evidential process, aimed at resolving factual uncertainties, the tracing rules are best understood as normative in function. They strike a balance between preserving the autonomy of the defendant, while preventing her from exploiting the claimant's legally mandated vulnerability to the defendant's decisions to deprive him of rights. The rules distinguish among the different legal capacities of a person acquiring a right, and permit a stranger to the transaction to assert an entitlement to its product only in cases where the product is separable from the person of the defendant and where its acquisition involved the exercise of a legal power to deprive the claimant. On this basis, the thesis argues that claims contingent on tracing are better described as claims based on 'unauthorised substitution'. An unauthorised substitution occurs where A acquires a right in consideration for the valid exercise of a private legal power affecting B, in breach of a duty owed to B. Such an exercise of power can only take place in the context of a prior relationship of 'stewardship of assets', whereby A has a legal power to vary the legal rights of B with respect to some assignable right, owes B a duty in respect of the exercise of that power, and is able to validly exercise the legal power in breach of that duty. These relationships overlap with the categories of 'fiduciary duties' or 'property rights', but share additional and distinctive characteristics that justify the law's particular response to unauthorised substitution.

ACKNOWLEDGEMENTS

I am grateful to my supervisor, Bill Swadling, for his guidance throughout this project and for encouraging me to ask better questions about the law for over a decade. The thesis would not have been completed without his help, support, and patience. I am also grateful to Elizabeth Cooke and Charles Mitchell for their mentorship and encouragement.

I would also like to thank my friends, who have listened to me talk about tracing for hours at a time without complaint, who have offered me valuable insights into the topic from their own disciplines and fields of research, and who have also insisted that I occasionally talk about something else. I am especially grateful to Jonas-Sébastien Beaudry, Eugenia Kelbert, Sarah-Sophie Flemig, Eva Pils, Shalini Rani and Masatake Wasa.

Finally, I would like to thank my family. I am grateful to my parents and my sister for their unfailing support, advice, and tolerance, and to my grandparents for everything they have done to get me to this point.

CASES

STATUTES

INTRODUCTION

Suppose that a trustee, T, holds some shares on trust for a beneficiary, B. In breach of trust, T barters the shares to a third party, C, obtaining C's title to a painting in exchange. In such a case, it is a long-established rule of English law[1] that B will gain an entitlement to the trustee's title to the painting, obtained from C, on the basis that the title to the painting represents the traceable proceeds of the shares. The content of B's entitlement depends on his election; he may assert a beneficial interest under a trust, rendering T a trustee of his title to the painting, or an equitable lien, providing security for T's obligation to pay B the value of the shares transferred. This entitlement will be the outcome of the transaction between T and C even if C has never heard of B's existence, and intended to vest his title to the painting in T absolutely,[2] and if, at the time of the transaction, T had no intention of acquiring the title to the painting on trust for B but meant to appropriate it to his own use.[3]

The acquisition of an entitlement of this kind is a matter of practical importance not only to T and B as individuals but also, potentially, to others. For example, if T gives his title to the painting to his wife, X, and she keeps it, B will be entitled to demand that X transfer that title to him[4] or to a co-trustee of T.[5] Even if she

---

[1] Most recently affirmed by the House of Lords in *Foskett v McKeown* [2001] 1 AC 102.

[2] eg *R v Gale* (1876) 2 QBD 141.

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

[4] eg *Trench v Harrison* (1849) 17 Simons 111, 60 ER 1070; *Ex parte Oriental Bank* (1870) LR 5 Ch App 358; *Dyson Ltd v Curtis* [2010] EWHC 3289 (Ch).

[5] eg *Wilson v Foreman* (1782) Dickens 593, 21 ER 402; *Murray v Pinkett* (1846) 7 Cl & F 763, 8 ER 1612; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195.

has given away the title and no longer has it or any proceeds of it, she may[6] be obliged to pay him a money sum equivalent to its value. Further, in the event of T's bankruptcy, his title to the painting will not be among the assets that can be sold to satisfy his general creditors, but must first be used to satisfy B's claims.[7]

In order to show that he has an entitlement of this kind, B must prove that T's title to the painting is the traceable product of the shares previously held on trust for B. It is in this sense that his claim[8] is 'contingent on tracing'. A body of rules, conventionally known as the rules of tracing, determine whether this contingency is satisfied in cases where T's transactions are more complex than an outright sale or barter of the trust asset. We would turn to these rules to determine the consequences for B if, for example, T had sold the shares for cash, paid the cash into his current account, paid money embezzled from his employer into the same account, and then drawn on the account to pay off some of his debts.

---

[6] Her liability for knowing receipt of trust assets will depend on the state of her knowledge about the circumstances in which she received them and whether they are 'such as to make it unconscionable for her to retain the benefit of the receipts': *Templeton v Insurance Ltd v Brunswick* [2012] EWHC 1522 (Ch), per Simon Barker QC at [372], applying the test in *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437.

[7] If B elects to assert a beneficial interest under a trust, T's title to the painting will not vest in his trustee in bankruptcy at all but will remain vested in him subject to the terms of the trust: Insolvency Act 1985, s 283(3)(a), adopting an analysis first put forward by Willes LCJ in *Scott v Surman* (1742) Willes 400, 125 ER 1022. If B elects to assert an equitable lien, this will be binding on the trustee in bankruptcy as a successor in title to the bankrupt who has no defence: see *Re Wallis* [1902] 1 KB 719 (trustee in bankruptcy is not a purchaser) and *Ex parte Sayers* (1800) 5 Ves Jun 169, 31 ER 528 (lien over traceable proceeds enforced against assignees in bankruptcy).

[8] The word 'claim' is here used to mean the successful assertion of the existence of a right. Such an assertion may be relevant, in the context of litigation, either to assist the person making the claim (the 'claimant') to obtain a remedy from a court or to assist him in preventing some other party from obtaining a remedy. The term 'cause of action' will be used to refer to an assertion of all the facts (including, but not limited to, the existence of a right) that entitle a party to obtain a remedy from a court. For example, where A sues B in the tort of trespass, A must prove (among other facts) that he is in possession of the land affected by the trespass in order to obtain a remedy from a court. One route by which B may defend herself, and prevent A from obtaining his remedy, is by proving that she has an easement over the land affected that entitles her to commit the act that would otherwise constitute a trespass. In this situation, both A's cause of action and B's defence involve 'claims', in that both are asserting that they have an entitlement which English law recognises as a right worthy of protection from interference. Both, therefore, are 'claimants' in the sense here used.

Entitlements that share this characteristic of contingency on tracing – 'claims contingent on tracing' – arise in a variety of different fact situations. While they frequently arise in the context of transactions by express private trustees, and there is a plausible argument that this is their origin as a matter of legal history, their importance is by no means limited to this context in the modern law. A beneficiary under a trust may claim the traceable proceeds of transactions entered into by a recipient from her trustee,[9] as well those of the trustee himself. A principal may claim the proceeds of some transactions entered into by his agent,[10] a company may claim the proceeds of transactions entered into by a company director,[11] and a bailor may claim the proceeds of transactions entered into by her bailee.[12] Similar claims have succeeded against executors and administrators;[13] grantors of security;[14] recipients of assets under contracts that have been rescinded;[15] vendors under contracts for sale that include a title retention clause;[16] and vendors under specifically enforceable contracts for sale.[17] The courts have also acknowledged the existence of a doctrine of 'common

---

[9] eg *Lane v Dighton* (1762) Amb 409, 27 ER 274; *In Re Strachan* (1876) 4 Ch D 123; *Dudley v Champion* [1893] 1 Ch 101; *Re Diplock* [1948] Ch 465.

[10] eg *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149; *Burdett v Willett* (1708) 1 Eq Ca Ab 370, 23 ER 1017; and *Birt v Burt* (1877) 11 Ch D 773.

[11] eg *Ernest v Croysdill* (1860) 45 ER 589, *Clark v Cutland* [2003] 4 All ER 733.

[12] *Re Hallett's Estate* (1880) 13 Ch D 696.

[13] eg *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; *Nelson v Larholt* [1948] 1 KB 339.

[14] *Buhr v Barclay's Bank plc* [2001] EWCA Civ 1223, followed in *Dick v Harper* (Ch, 15 November 2001), reported [2006] BPIR 20.

[15] eg *Gladstone v Hadwen* (1813) 1 M & S 516, 128 ER 193*; Small v Attwood* (1831) 159 ER 1051*; El Ajou v Dollar Land Holdings* [1993] 3 All ER 717.

[16] *Aluminium Industrie Vassen BV v Romalpa Aluminium* [1976] 1 WLR 676.

[17] *Lake v Bayliss* [1974] 1 WLR 1073; *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1399.

law tracing',[18] which may be relevant where the traditional equitable doctrine is not, and they are still working out the precise range of situations in which this supposed variation on the tracing concept is relevant.[19]

The aim of this thesis is to identify the doctrinal justification for the existence of these claims in English law. Its focus is on the internal coherence of the rules that constitute the category of 'claims contingent on tracing' in this jurisdiction: it seeks to identify the principles, if any, which justify English law in treating some claims as contingent on 'tracing', despite the variety of fact situations in which the language of tracing is invoked to support a private law claim. The task of justification is approached from a doctrinal and analytical perspective: that is, by examining whether the outcomes in the cases can be explained on the basis of morally plausible principles, which are conceptually clear, logically consistent with one another, and consistent with the reasoning of the judges who decided the cases.

I. OVERVIEW OF THE ARGUMENT

The thesis argues that the various situations in which claims contingent on tracing arise can be shown to cohere with each other as instances of an event best described as the event of 'unauthorised substitution'. An event of this kind can only take place in the context of a pre-existing legal relationship between the parties, which it defines as a relationship of 'stewardship of assets'. This terminology is intended to capture the range of different relationships, recognised by English law, which share the core

---

[18] *Sinclair v Brougham* [1914] AC 398; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321; *Re Diplock* [1948] Ch 465 (CA, affirmed on another point by the House of Lords as *Ministry of Health v Simpson* [1950] AC 251); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[19] See, recently, *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) and *Twentieth Century Fox v Harris* [2013] EWHC 159 (Ch).

characteristics of such a relationship: ie, one person has a legal power to vary the existing rights of another by his voluntary decision, as well as a duty to exercise the relevant power with some degree of respect for the interests of that other.

Some scholars have considered a power-duty structure of this kind to be distinctively fiduciary in character, capturing and unifying all the cases of fiduciary relationship recognised in common law jurisdictions.[20] However, the language of 'stewardship' is preferred here because not every relationship that has this structure also entails the characteristic fiduciary duties of loyalty, as these are usually understood. In particular, a relationship of stewardship of assets may exist where the defendant's duty to take account of the interests of the claimant is a narrow one and does not, for example, preclude the making of a personal profit out of a transaction without the claimant's authorisation.[21] Further, unlike what is often thought to be the case in relation to fiduciary duties,[22] relationships of this kind are capable of arising without any voluntary undertaking by the duty-bearer, either by words or conduct, to make himself responsible to the beneficiary. They may arise out of the fraud of the duty-bearer, or out of the fraud of a third party from whom the duty-bearer has innocently received a right.

Thus, the distinctive feature of a duty of stewardship of assets is neither its content – in terms of the particular acts that the duty-bearer must undertake or avoid – nor its source, in the sense of the event that gives rise to it. Rather, its unifying

---

[20] See, for example, J C Shepard, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQR 51; P Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill LJ 969.

[21] Thus, for example, the category includes grantees of security interests who hold a power of sale capable of divesting the grantor of his vested rights. Such grantees owe duties, in respect of their exercise of powers, that are not fiduciary in character: *Cuckmere Brick Co Ltd v Mutual Finance Ltd.* [1971] Ch 949.

[22] For a recent account of the necessity of voluntary undertakings in constituting fiduciary relationships, see J Edelman, 'When do fiduciary relationships arise?' (2010)126 LQR 302.

characteristic is a structural feature of the relationship between claimant, defendant, and other subjects of the legal system. In each case, the defendant owes the claimant a duty with respect to a particular legal power that he holds, which enables him to alter the rights of the claimant vis-à-vis other subjects of the legal system. In each case, there is a lack of perfect overlap between the facts that would constitute compliance with the duty and the facts that would constitute a valid exercise of the power. In other words, the same act or transaction by the defendant can constitute both a breach of his duty to the claimant *and* a valid exercise of his legal power to vary the rights of the claimant.

It is this apparent clash of legal rules that creates the tension that is resolved by conferring an entitlement to the product on the claimant. The tension arises because the defendant's legal power to alter the legal situation of the claimant, by his voluntary act, is not conferred on him exclusively in order to serve his own ends. To the extent that he may exercise the power to serve his own ends, he must to do so in compliance with the duty he owes the claimant. To the extent that the power is exercisable in breach of that duty, it is because of the law's further interest in protecting third parties who might reasonably rely on the apparent status of the defendant as a bearer of marketable rights.

It is the fact that the defendant holds the relevant power for these reasons, rather than exclusively for his own ends, which justifies the radical subordination of the defendant to the claimant that exists in the context of transactions that fall within the scope of the tracing rules. In other words, it is the legally mandated vulnerability of the claimant to the defendant's decision-making power that justifies the law in providing the claimant with a correlative entitlement to the proceeds of the defendant's transactions, where those transactions are exploitative of the relevant

vulnerability. Within the context of this overarching goal of the law, the function of the tracing rules is to distinguish between those transactions that do exploit the particular vulnerability constituted by the power-duty relationship and those transactions that do not do so.

A. Implications of the argument

Given this account of the justification for the existence of claims based on unauthorised substitution, the thesis concludes that there are obstacles to the absorption of these claims into broader justificatory categories recognised by English private law. From the perspective of understanding the 'causative event' to which the law responds, it would be inappropriate to characterise the event of unauthorised substitution in terms that eliminate the normatively significant features of the relationship of stewardship of assets, in an effort to assimilate it to other events that give rise to legal rights in English law but that do not arise within a context that shares those features. From the perspective of understanding the right vindicated by the claim, it is misleading to characterise the relationship of stewardship of assets as constituting a 'property right', as there is a sharp distinction between the core common law property rights recognised in English law and the rights that are held by a person who is owed such a duty.

It follows that English law is, therefore, faced with three choices. It may confine claims based on unauthorised substitution to those situations where it is currently accepted that the defendant owes the claimant a duty of stewardship of assets. It may further extend the range of situations in which the defendant is to be treated as owing such a duty, which would lead to a concomitant expansion in the range of situations in which unauthorised substitution might be relevant. Or, finally, it

may eliminate the unauthorised substitution concept entirely and enable parties to make claims to rights acquired by other people on the basis of some other principle. The conclusion of the thesis is that it would be incoherent to expand the range of situations in which claims based on unauthorised substitution can arise, without either expanding the incidence of the other elements of a stewardship relationship or radically altering, or abandoning, the tracing rules as they currently stand.

B. Limited scope of the argument

As noted above, the conclusions of the thesis imply that there is a need for a degree of scepticism about the possibility of assimilating claims based on unauthorised substitution into any category of English law that does not take account of the distinctive character of the relationship of stewardship of assets. This does not mean, however, that claims based on unauthorised substitution are hermetically sealed off from other areas of the law, such that there is no scope for interaction between these claims and any other legal doctrine. On the contrary, there are many situations in which other doctrines are obviously relevant to the existence of these claims, as well as situations in which claims based on unauthorised substitution are likely to be relevant to the operation of other doctrines. The nature of the relationship depends in each case on how these other doctrines are to be understood, an issue beyond the scope of the thesis. Further, there are questions about the classification of claims based on unauthorised substitution that depend for their resolution on the interpretation of other rules of law that are also much-contested. These, too, are beyond the scope of the thesis.

First, on the argument of the thesis, an unauthorised substitution can take place only within the context of a particular and pre-existing set of relations between

persons. This set of relations may arise in response to a broad variety of events, including declarations of consent, breaches of duty, and other fact situations the appropriate characterisation of which is the subject of on-going academic dispute. They also vary by content, cutting across a broad range of different types of entitlement that are individually difficult to classify within the traditional dichotomy between 'property rights' and 'obligations'. The thesis argues that it is a mistake to suggest that the characteristics of claims based on unauthorised substitution can be explained, without more, by reference to the normatively significant event that gave rise to the original relationship between the parties. Nor is it possible to explain such claims by reference to the characteristics of the pre-existing relationship understood as a member of a broader class of 'rights *in rem*', 'property rights', or 'fiduciary duties'. Except to the extent necessary to make these arguments, the thesis does not address the many controversies regarding the circumstances in which such relations arise or the problem of their appropriate classification by reference to their content. Both these questions are outside the scope of the thesis, which argues only that relations of this kind must have arisen for the invocation of the concept of unauthorised substitution to make sense.

Secondly, once it is determined that a claim based on unauthorised substitution has arisen, the existence of this claim may then be relevant to a variety of different causes of action. These include actions for the knowing receipt of assets held on trust, dishonest assistance in a breach of trust, and money had and received to the use of the claimant. The thesis focuses on defining the nature of the unauthorised substitution as an event capable of generating a claim. It does not address the question of the proper characterisation of the different possible causes of action that depend on the existence of such a claim, and the relationship between those causes of action.

Finally, the question whether unauthorised substitution can be thought of as an instance of unjust enrichment depends on the model of unjust enrichment that one adopts. The thesis argues against the assimilation of claims based on unauthorised substitution to a model of unjust enrichment based on factual enrichment of the defendant at the expense of the claimant, where the tracing rules are understood as rules for the quantification of the defendant's enrichment. Claims based on unauthorised substitution would better cohere with alternative models of unjust enrichment, which treat the normative basis for liability for unjust enrichment as based on a principle of unjustified deprivation of legal rights. The question which of these models is more plausible as an account of the law of unjust enrichment generally is beyond the scope of the thesis.

II. STRUCTURE

The thesis is in three parts. Part I focuses on how, if at all, the law's use of the transactional concept of tracing can be justified. It consists of three chapters. The first (chapter 1) identifies particular justificatory questions that emerge from the English rules of tracing; it argues that a doctrinal justification of tracing can be evaluated by reference to whether it provides an adequate answer to these questions.

The next chapter (chapter 2) evaluates the model of tracing dominant in the current literature – the 'value' model – from this perspective. It concludes that the contribution of this model to our understanding of tracing is primarily negative: it enables us to form a more accurate understanding of the law and to rule out explanations for its content that depend on vague metaphors and analogies. It does not, however, offer any positive answer to the justificatory questions defined in chapter 1, because the conception of 'value' on which it relies is empty of any

content.

The final chapter of Part II, chapter 3, examines alternative accounts of tracing, examining the metaphors and analogies employed by the judges to justify their decisions and analysing the content of the rules in their current form. It argues that the judicial explanations oscillate between ideas of ratification – the claimant is entitled to claim the benefit of the defendant's acts – and ideas of reification, where some rights held by the defendant are treated as separable from his person and capable of forming the distinct subject matter of a right vested in the claimant. An analysis of the tracing rules reveals that a transaction satisfies the conditions for such treatment where it involves the defendant's exercise of a legal power that is, first, distinguishable from his general legal capacities and, secondly, held subject to a duty owed to the claimant. The goal is to balance a concern for the vulnerability of the claimant, which arises as a correlative to the defendant's legal power, with an equal concern for preserving the autonomy of the defendant. Particular rules of tracing are justified within this framework.

Part III considers this power-duty structure in more detail, examining the extent to which it makes sense of the current law on the availability of claims contingent on tracing and the nature of those claims. It consists of two chapters. Chapter 4 focuses on the case law that determines when the parties' pre-existing legal relationship is such that the claimant can assert a private law claim to traceable proceeds. It considers the concepts of the 'proprietary base' and the 'fiduciary duty' relied on in some cases and by some scholars, arguing that the first is too broad and the second too narrow to account for the authorities. It suggests the terminology of 'stewardship of assets' to capture the set of legal relations that justify a claim to

traceable proceeds, which it defines by reference to the concept of a private power.

Chapter 5 examines the nature of such a relationship, examining the extent to which the legal response to unauthorised substitution can be justified by reference to distinctive features of that relationship. It argues that, in each situation where such a relationship exists, the defendant has a power to alter the legal position of the claimant which has been conferred on him for purely instrumental reasons, ie reasons that are not particular to the relationship between claimant and defendant but depend on a policy of protecting strangers to that relationship. Such relations may exist either at law or in equity.

Finally, Part IV considers the implications of the argument of the thesis and summarises the basis on which it explains the law of tracing and the availability of claims contingent on tracing. It consists of a single concluding chapter, chapter 6, which outlines the implications of the argument of the thesis for solving various practical disputes and then briefly comments on the implications of the argument of the thesis for classifying claims based on unauthorised substitution within broader categories in English private law.

PART I – TRACING

1. INTRODUCTION TO TRACING: QUESTIONS ARISING OUT OF THE LAW

As has been explained, the cases examined by this thesis are lent coherence, or at least surface coherence, by their dependence on the concept of tracing. In each case, one person asserts an entitlement to an asset acquired by another person on the grounds that it represents 'the traceable product' of some other asset to which she has or once had an entitlement. Argument in the cases is often directed to the question whether this assertion can be proved in the events that have happened, and a significant body of legal rules addressing this question has developed.

A particular theory of tracing now dominates much of the literature on the subject, as well as the judicial reasoning in some cases. It proposes that the function of tracing is to locate the value of an asset. So, for example, if X once had a title to a car and, following some transactions, wanted to know where the value of that asset had gone, he may look to the rules of tracing to supply that information. Proof that the value of his title to the car is now located in some other asset must be distinguished from proof that the other asset is physically derived from the car itself (as where the new asset has been produced by reducing the car to scrap metal), but there is nevertheless a significant analogy between the rules that govern proof of the first conclusion (the rules of tracing) and the rules that govern proof of the second (the rules of following). This is because both sets of rules are distinct from the rules that tell us whether or not a claimant is actually entitled to the substitute for the car (the rules of claiming). There is an important analytical distinction between the question whether a claimant is entitled to any product of an asset and the question whether, on particular facts, a given asset is in fact the product of the original. This distinction holds equally for the situation where one is physically produced by the use of the

other and the situation where the value of one has been used to acquire the other.[23]

Having been systematically developed by academic writers, notably Peter Birks[24] and Lionel Smith,[25] elements of this model were adopted by members of the House of Lords in *Foskett v McKeown*.[26] It has become the standard account of tracing adopted by the English courts,[27] as well as by many academic commentators[28] and authors of practitioners' textbooks.[29]

Despite the prevalence of the model, however, this chapter suggests an initial definition of tracing that does not take the distinctions between tracing and claiming and tracing and following to be axiomatic, but rather focuses on the core features of the rules as developed through the case-law. This is because the usefulness of the Birks/Smith model, for the project of this thesis, depends on whether or not it provides a good doctrinal explanation for the law as it currently stands; in order to evaluate the model in these terms, it is first necessary to identify the justificatory

---

[23]A more detailed explanation of the distinction between tracing and following, and the analogy between the two processes, is set out in chapter 2 below.

[24] P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 85, 359-401; 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69.

[25] L Smith, *The Law of Tracing* (Clarendon Press, 1997), hereafter cited as Smith, *The Law of Tracing*.

[26] [2001] 1 AC 102.

[27] eg *Boscawen v Bajwa* [1996] 1 WLR 328, per Millett LJ at 776; *Foskett v McKeown* [2001] 1 AC 102, per Lord Steyn at 113 and Lord Millett at 127; *Ultraframe v Fielding* [2005] EWHC 1638, per Lewison J at [1464]; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), per Stephen Morris QC at [65].

[28] eg B Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13 U Tas LR 116; S Evans, 'Rethinking tracing and restitution'(1999) 115 LQR 469; A Burrows, 'Proprietary restitution: unmasking unjust enrichment' [2001] LQR 412; M Stone and A McKeough, 'Tracing in the Age of Restitution' [2003] 26 University of South Wales Law Journal 377; G Virgo, *The Principles of the Law of Restitution* (2nd ed, OUP 2006) 636 to 655; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell 2011) paras 7-01 to 7-44.

[29] eg J Mowbray and others, *Lewin on Trusts* (18th edn, Sweet & Maxwell 2008) para 41-05; D Hayton and C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (18th edn, LexisNexis 2010) para 90.2; *Halsbury's Laws* (4th edn reissue, 2003) vol 16(2) para 401; *Halsbury's Laws* (4th edn reissue, 2007) vol 48 para 1134.

questions posed by the positive law. The aim of this chapter is to identify the relevant questions.

The chapter is in three parts. The first part introduces the concept of tracing, focusing on its distinctive transactional character and contrasting this with alternative methods of identifying the 'proceeds' of some asset or transaction. It draws on the distinction between confiscation orders and civil recovery under Proceeds of Crime Act 2002 to illustrate the distinction and to argue that the merits of the transactional model are not self-evident but require rational justification.

The second part offers a sketch of the rules of tracing that currently exist in English law. It draws attention to areas where the law is uncertain as a matter of authority, as well as to well-established rules that have been criticised by academics and by counsel in cases as arbitrary or unjust.

Finally, the third part sums up the questions identified in the chapter and relates them to the overall project of the thesis. It suggests that there are three key related questions posed by tracing in English law. First, what justifies the distinctive tracing concept? Why should the law focus, as it does, on the transactional history of an asset? Secondly, what justifies the particular rules of tracing, in terms of their generosity to particular claimants and the limits of that generosity? The so-called cherry-picking rule, and the limitation on its scope imposed by the lowest intermediate balance rule, is singled out as calling for explanation. Finally, how are doubts about the content of the tracing rules to be resolved? What rational arguments exist for either accepting or rejecting rules that are doubtful on the authorities, such as the possibility of tracing through mixtures of money at common law and the availability of so-called 'backwards tracing'? The importance of these questions to the

project of the thesis is that, unless a model of tracing that satisfactorily answers them can be found, the assertion of a claim contingent on tracing would depend on factors that seem either incoherent or arbitrary, defeating the possibility that such claims could be reasonably accommodated within a principled account of English private law.

I. THE CONCEPT OF TRACING: THE SIGNIFICANCE OF 'TRANSACTIONAL LINKS'

In *The Law of Tracing*,[30] the leading work on the subject, Smith offers the following definition of tracing:

> Tracing allows a status or claim to be transferred from one subject matter to another. The nexus between the original subject matter and the new subject matter is substitution: the one was acquired as a substitute for the other. This requires an exchange or an analogous transaction.[31]

This captures three important aspects of the concept. First, it describes the context in which tracing is relevant: that is, according to Smith, any situation where the law attributes a legal status to something, of a kind that is transmissible to other things. The status of a thing, or 'asset', as the object of a claim made by a private litigant is only one such status.[32] Other examples include the status of an asset as the proceeds of a crime,[33] or as the separate or community property of a spouse in a

---

[30] Smith, *The Law of Tracing* (n 25 above).

[31] Smith, *The Law of Tracing* (n 25 above) 18.

[32] The language of transmission of status in the context of private law claims implies that there will be some important commonality between the claim to the substitute asset and the claim that existed, prior to the substitution, in respect of the original asset. It does not imply that the entitlement to the substitute is or must be identical to the entitlement to the original asset. As Smith acknowledges, it will often be the case that the claimant asserts a right to a substitute which is of a different type to the right that he had to the original: Smith, *The Law of Tracing* (n 25 above) 320-351. These issues are discussed in Chapter 4 below.

[33] Smith, *The Law of Tracing* (n 25 above) 43-45.

jurisdiction that recognises a matrimonial property regime.[34]

Secondly, Smith's definition focuses on the method by which this transmission of status is achieved, ie 'substitution'. This highlights what he elsewhere refers to as the transactional character of tracing.[35] In the sense used in the context of tracing, one thing is the product of another if it has been acquired under a transaction of a particular kind. There is an important distinction between this sense of the term 'proceeds' and the causal sense in which the same term is also used. This can be illustrated by reference to the contrast between the confiscation and civil recovery provisions of the Proceeds of Crime Act 2002 and the different roles played by the concept of substitute assets in the context of these distinct regimes.

Part 2 of the Proceeds of Crime Act 2002 governs the circumstances in which a court may make a confiscation order against a defendant who has benefited from a criminal offence of which he has been convicted. As Lord Philips said in *Serious Organised Crime Agency v Perry*,[36] 'confiscation' is a misnomer in the context of this jurisdiction. Under the provisions of Part 5 of the Act, no order is ever made in relation to some specific asset held by the defendant; rather, a confiscation order takes the form of an order that the defendant pay a money sum, which is treated like any other judgment debt for the purposes of enforcement and the accrual of interest due.[37]

Under the provisions of Part 2 of the 2002 Act, a court that finds that the

---

[34] Smith, The Law of Tracing (n 25 above) 38-40.

[35] L Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281, 299. See also L Smith, 'Tracing' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 119, 136.

[36] [2012] UKSC 35, [31].

[37] Proceeds of Crime Act 2002, s 12(2).0

defendant has benefited from his criminal conduct[38] must calculate, and order him to pay, an amount referred to as the 'recoverable amount'. This is defined as an amount that is either 'equal to the defendant's benefit from the conduct concerned'[39] or, where this is lower, the 'available amount'. The available amount describes the value of all the 'free property'[40] held by the defendant at the date of trial, less the value of previous criminal fines due and of the debts he owes to preferential creditors[41], but including the value of any 'tainted gifts'[42] that he has made.

Thus, in deciding whether to make a confiscation order and, if so, in what amount, the court must consider whether the defendant has benefited from his criminal conduct, calculate the value of the benefit received and then decide if this sum is recoverable or, if not, how much is recoverable.[43] Section 76 of the Act provides that a person benefits from conduct if he obtains either property or a pecuniary advantage 'as a result of or in connection with' the conduct.[44] In order to show that a defendant has benefited from his crime, the prosecution must prove, on the balance of probabilities,[45] that there is a causal connection between his acquisition

---

[38] Proceeds of Crime Act 2002, s 6.

[39] Proceeds of Crime Act 2002, s 7(1).

[40] All property held by the defendant that is not already the subject of an order under various criminal statutes: Proceeds of Crime Act 2002, s 82. 'Property' is defined in section 84 of the Act as 'all property wherever situated' and specifically includes money, all forms of real and personal property, and 'things in action and other intangible and incorporeal property'.

[41] Proceeds of Crime Act 2002, s 9(1)(a).

[42] Proceeds of Crime Act 2002, s 9(1)(b). A tainted gift is any gift made by a defendant who has a criminal lifestyle after the relevant date or any gift of property obtained by particular criminal conduct at any date: Proceeds of Crime Act 2002, s 77.

[43] *R v May* [2008] UKHL 28.

[44] Proceeds of Crime Act 2002, s 76(4) and (5).

[45] Proceeds of Crime Act 2002, s 6(7). In cases where the court has decided that the defendant has a criminal lifestyle, the burden of proof shifts. In such cases, a court must assume that property transferred to or held by the defendant during a prescribed time period was obtained by him as a result

of the property or pecuniary advantage and the crime itself.[46]

Once this has been proved, the court must determine the value of the property obtained and decide whether the available amount – the value of the defendant's 'free property' – is less than this. 'Value' in the 2002 Act is defined as market value.[47] Since the market value of any asset may fluctuate with time, the question of quantification turns, in part, on the date at which the value falls to be assessed. This is calculated as the greater of two figures: either the value of the property on the date obtained or, where this is greater, the value of 'property found' in the hands of the defendant at the date of trial.[48] Section 80(3) of the Act provides that 'property found' may refer to the original property obtained as a result of the crime, part of that property, or 'property that directly or indirectly represents it.' In *R v Waya*,[49] it was said that this subsection operated by analogy to transactional tracing in the context of trusts, although this was not to say that the provision was 'intended to bring in the whole panoply of rules as to tracing in equity.'[50]

This modest evidentiary role for transactional links in the context of confiscation proceedings can be contrasted with the work they do in the context of the civil recovery provision of the same Act, found in Part 5. Section 243 entitles an

---

of his criminal conduct, unless he can positively prove otherwise or the court finds that the assumption would create a serious risk of injustice: Proceeds of Crime Act 2002, s 10.

[46] *R v Jennings* [2008] UKHL 29.

[47] Proceeds of Crime Act 2002, s 145.

[48] Proceeds of Crime Act 2002, s 80.

[49] [2012] UKSC 51.

[50] [2012] UKSC 51, [57] per Lord Walker SCJ.

enforcement authority[51] to bring proceedings in the High Court against any person[52] who holds 'recoverable property'. Recoverable property is property[53] obtained 'by or in return for' unlawful conduct.[54] Section 305(1) provides that property that 'represents' property obtained through unlawful conduct ('the original property') is also recoverable. Section 305(2) goes on to define property that represents the original property in the following terms

> If a person enters into a transaction by which—
>
> (a) he disposes of recoverable property, whether the original property or property which (by virtue of this Chapter) represents the original property, and
>
> (b) he obtains other property in place of it,
>
> the other property represents the original property.

In other words, the conclusion that one asset represents another depends on whether there has been a substitution: a transaction whereby the holder of the original asset disposes of it and obtains another right in place of it. It is necessary to show that such a transaction has taken place in order for a civil recovery action to succeed, since the person against whom such an action is brought must still hold either the original asset or an asset representing it. Differently to confiscation proceedings, it is not

---

[51] In England and Wales, this now means the Serious Organised Crime Agency (SOCA) the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office: Proceeds of Crime Act 2002, s 316(1)(a), as amended by the Serious Crime Act 2007, schedule 8, para 93.

[52] Other than persons who have obtained recoverable property under the circumstances defined in the Proceeds of Crime Act 2002, s 308, in whose hands the property ceases to be recoverable. These include recipients of the property in good faith, for value and without notice that it was recoverable property, or those who have recovered it in civil proceedings based on the defendant's unlawful conduct.

[53] As defined in the Act: see n 40 above.

[54] Proceeds of Crime Act 2002, s 304. Unlawful conduct is defined as conduct that is unlawful under the criminal law of the jurisdiction where it occurred and that, where it occurred outside the United Kingdom, would be criminal if it occurred in the United Kingdom: Proceeds of Crime Act 2002, s 241.

sufficient that he once obtained an asset as a result of a crime and that his overall wealth exceeds the value of that asset.

Contrasting the civil recovery provisions with the confiscation order provisions of the 2002 Act, Kennedy has noted that

> Proving the criminal origin of property is an expensive task [and] … may involve a forensic accounting exercise … Confiscation of criminal assets is, by comparison, a less expensive mechanism to operate.[55]

The complexity, and expense, of the tracing exercise derives in part from the complexity of the transactions that the holder of an asset can undertake using it. Even where no deliberate attempts to obscure the transactional history of some asset have been made, it will often be necessary for the law to cope with a long series of transactions, involving the use of the original asset, as well as with transactions that are more complex than a direct sale or barter of one asset for another.[56]

This brings us to the third element of Smith's definition, the characterisation of the substitution as an exchange 'or an analogous transaction'. In acknowledging the need to determine whether any particular transaction or set of transactions is analogous to an exchange, the definition provides a framework for understanding the work done by the specific rules of tracing that exist in English law. The necessity for rules of tracing flows from the fact that 'substitution' is not an intuitive concept with a

---

[55] A Kennedy, 'An evaluation of the recovery of criminal proceeds in the United Kingdom' (2007) 10 Journal of Money Laundering Control 33, 38.

[56] Some examples of such transactions are defined by the Proceeds of Crime Act 2002, s 306. Subsection (2) provides that, where recoverable property is mixed with other property, 'that portion of the mixed property which is attributable to the recoverable property represents the property obtained through unlawful conduct'. Subsection (3) provides 'mixture' in this context includes payment into an existing bank account, part-payment for the acquisition of an asset, payment for the improvement or restoration of land, and acquisition by a tenant of his landlord's estate in land.

common-sense sphere of application but a legal concept that requires detailed rules to work out its operation in different contexts.

As Kennedy has noted, the application of these rules is expensive. Identifying the 'proceeds' of some asset by establishing transactional links between it and subsequent acquisitions entails both factual and legal complexity. In the context of private litigation, the same point is made by the concerns over the impact of the tracing rules expressed by the administrators of Lehman Brothers International (Europe) after the collapse of that company. In the High Court, Briggs J said that the attempt by certain creditors to pursue claims to traceable proceeds were likely to involve a 'difficult, time consuming and contentious process'.[57] In their progress report of March 2011, the administrators of Lehman Brothers echoed the concern, stating:

> The legal tests to be applied in order to identify and trace Client Money are complex and the collapse of LBIE poses difficult questions in this context. If a Tracing exercise is ultimately required, the Administrators will likely require guidance from the UK High Court as to the correct legal principles to be applied.[58]

Obviously, the collapse of Lehman Brothers is not a typical event to which claims to traceable proceeds respond; much of the difficulty faced by the creditors in that case is likely to have followed from the scale of the collapse and the complexity of the company's transactions with various parties. However, as the administrator's report makes clear, the legal uncertainty and complexity when it comes to identifying

---

[57] *In Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch), at [193], overruled on the relevance of tracing on the facts by the Supreme Court at [2012] UKSC 6.

[58] PriceWaterhouseCooper, Lehman Brothers International (Europe) – In Administration, Joint Administrators' progress report for the period 15 March 2011 to 14 September 2011 (13 October 2011) p 25. The report is available at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie-6th-progress-report.pdf, last accessed on 12 August 2015.

and applying the relevant rules of tracing were also an issue.

Given that the law enables some claimants to assert claims to traceable proceeds, the question that arises is why the tracing concept imposes these burdens on such claimants. How is the sheer complexity of the exercise demanded by the transactional model to be accounted for, on any justification of the existence of claims to traceable proceeds? In *Re Lehman Brothers* itself, Briggs J offered such a justification. Although the use of the tracing rules was often 'prohibitively slow and expensive', he said, he rejected the suggestion that this meant that they were:

> old-fashioned, unduly restrictive and therefore inappropriate for the protection of investors in the modern world. On the contrary, they represent the fruits of equity judges' and lawyers' endeavours over very many years to find and refine techniques of identifying and recovering trust property …[The] techniques are only constrained by the unavoidable requirement to identify property to which it is appropriate to attach a proprietary claim.[59]

On this view, the function of tracing is to identify 'property to which it is appropriate to attach a proprietary claim'; it is the only mechanism suited to this task and its costly complexities are, therefore, unavoidable. The implication is that there is some necessary connection between the transactional concept of tracing and the work of identifying an asset to which a claimant can assert an entitlement that has third-party consequences.

Some authors[60] have criticised this approach, arguing that there are more rational approaches to identifying the property to which a proprietary claim is to be

---

[59] *In Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch), at [198].

[60] Notably D Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172, and S Evans, 'Rethinking tracing and restitution' (1999) 115 LQR 469.

attached than a method that requires proof of transactional links. Two alternatives have been proposed: a causal approach,[61] and, relatedly, a 'swollen assets' approach.[62] Both have been firmly rejected by the English courts, suggesting that the transactional character of tracing is a core characteristic of the doctrine that must be explained by any justificatory account of the law.

Under a straightforwardly causal approach to identifying the subject-matter of a claimant's entitlement to traceable proceeds, an asset would count as the traceable product of the claimant's asset if, and only if, the defendant would not have acquired it but for his misappropriation of the claimant's asset. Oesterle suggests that the following example to illustrate what he considers an irrationality in the transactional model that would be overcome by adopting a causal approach instead:

> [I]magine a thief who must spend $100 on food to sustain himself, and who has $100 in gold coins. Instead of spending the coins on food, he steals bearer bonds worth $100 and exchanges them for food that he consumes. In this situation the victim cannot trace into the gold coins, *even though the thief has retained the coins only because he stole the bonds*.[63]

On a causal analysis, the gold coins should be treated as the traceable product of the stolen bonds in this scenario, because the thief would have used the coins if he had not stolen the bonds; but for the theft, he would no longer still have coins. Conversely, Oesterle argues that it should not be possible to trace through a transactional connection that is not a causal connection:

---

[61] D Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172.

[62]S Evans, 'Rethinking tracing and restitution' (1999) 115 LQR 469.

[63]D Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172, 175.

> Tracing…should be rejected as a measure of benefit in those cases in which the Wrongdoer's financial condition renders plausible his claim that he would have bought the traceable asset absent the misappropriation.[64]

For example, consider the case of a defendant who habitually buys a £1 lottery ticket every Friday. If such a defendant, with £100 of his own cash in his pocket, were to misappropriate £1 from the claimant and use that particular coin to buy a lottery ticket the next day, the tracing concept would require the defendant's title to the ticket to be seen as the product of the claimant's title to his £1. On Oesterle's causal approach, since the defendant would have had the means and the motivation to buy the lottery ticket whether or not the misappropriation had taken place, the claimant would not be able to treat the ticket as the product of his money in this scenario.

In *Foskett v McKeown*,[65] the majority of the House of Lords categorically rejected the argument that causation was relevant to tracing. That case concerned the consequences of a series of transactions undertaken by a Mr Timothy Murphy, one of the directors of a property development company called Anglo European Land plc ('AEL').

In 1989, the 220 claimants, who were represented in the litigation by Mr Foskett,[66] had entered into a series of contracts with AEL, under which each of the claimants agreed to pay money into bank accounts in the name of Mr Murphy and his business partner to be held on trust for them. The terms of the trust provided that the money would either be used to purchase plots of land in Portugal within the next two

---

[64]D Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172, 199.

[65] [2001] 1 AC 102.

[66] Laddie J had appointed him to represent the claimants under RSC Ord 15, r 13. See now CPR 19.7.

years or paid back to the claimants with interest. The total amount paid by all the claimants was over £2.6m.

Although some land in Portugal was purchased by AEL's subsidiary company, it was never developed and none of the money was repaid to the claimants. Although it was not clear what had become of most of the money, the claimants could show what Mr Murphy had done with £20,440 of it: he had used it to pay some of the insurance premiums due on a policy of insurance on his own life. The question was whether this meant that, on his suicide, the claimants could identify the death benefit paid by the insurer to his wife, on trust for his mother and children, as the traceable proceeds of the trust money. The argument on this issue turned, in part, on the relevance of causation.

Mr Murphy had entered into the relevant life insurance contract with Barclays Life Assurance Ltd in November 1986, two years before he became a director of AEL or had any dealings with the claimants. The contract provided that Mr Murphy would pay Barclays a £10,220 premium on the 6th of November each month for the rest of his life, and that Barclays would pay a death benefit to the policyholder nominated by Mr Murphy on his death. If he failed to pay the first two premiums, the policy would lapse after a one-month grace period, ie on the 6th of December of the relevant year. However, failure to pay later premiums would not have the same immediate effect. Instead, the primary relevance of the later premiums was the calculation of the death benefit due. Under the terms of the contract, each premium paid, after the first, would be used to allocate units linked to the value of an investment fund to the policy. The second premium would 'buy' units in the fund worth £8,687, while each subsequent premium would buy £10,220 worth.

These were not genuine rights in the fund in question but merely units of account measuring the amount potentially due under the policy. In the event that, at the date of Mr Murphy's death, the aggregate value of the units notionally purchased exceeded £1m, this higher amount would constitute the death benefit payable. However, if the later premiums were not paid, the immediate effect would be to convert the policy to a paid-up one, entitling the policyholder to a lump sum of £1m on Mr Murphy's death. The units so far acquired would be cancelled as needed to 'pay the cost of life assurance', calculated in accordance with what Sir Richard Scott V-C in the Court of Appeal called 'a fairly complex formula'.[67] The policy would lapse only after there were no longer enough units allocated to the policy to match the cost.

Mr Murphy's rights under this contract were, at his request, granted to him to hold on trust for a nominated beneficiary. This was initially his mother, but he was also granted a general power of appointment, entitling him to appoint to anyone including himself. In 1986 and 1987, he paid the first two premiums due on the policy out of his own funds. There was an unresolved evidential dispute about the 1988 premium,[68] but it was established as a fact that Mr Murphy drew on the trust bank accounts to pay the 1989 and 1990 premiums, misappropriating at least £20,440 of the trust money for this purpose. In March 1989, he appointed his wife and his solicitor,

---

[67] [1998] Ch 265, 275.

[68] Laddie J found, at first instance, that only £594.76 of this premium was paid out of the trust money, while the remainder was paid out of Mr Murphy's personal bank account. In the Court of Appeal, it was argued that the personal account had been overdrawn at the time and the overdraft was paid off using the trust money, making it at least arguable that the claimants could trace 'backwards' into the payment of the entirety of the 1988 premium: [1998] Ch 265, per Richard Scott V-C at 283-284. However, it was not proved that the money that had been used to pay off the overdraft was in fact trust money. The dispute was unresolved because the claimant had succeeded in an application for summary judgment based on the undisputed facts, and no full trial was ever conducted.

the first and second defendants, to be co-trustees of the policy and granted himself a special power to appoint among a class of his relatives, excluding himself. In December of the same year, he exercised this power to settle the policy on trust for his mother and his three children, the third to fifth defendants.

On 6 March 1991, Mr Murphy committed suicide. A few months later, Barclays paid the death benefit due on the insurance policy into a bank account in the name of the first and second defendants, who held it on trust for the third to fifth defendants.[69] At the date of Mr Murphy's death, the units allocated to the policy did not exceed £1m in value, so this was the amount of the death benefit paid. It was agreed as a fact by both parties[70] that the same amount would have been payable even if Mr Murphy had not paid the final two premiums. This was because the payment of the first three premiums had led to enough units being allocated to the policy to prevent it from lapsing before March 1991, and because the payment of the additional premiums did not increase the value of the units allocated to above £1m.

The claimants argued that they were entitled to a share of the death benefit paid to the trustees, on the basis that it represented the traceable proceeds of the money held on trust for them. The defendants denied that the use of the trust money to pay the insurance premiums meant that the claimants could trace into the death benefit. In the House of Lords, Roger Kaye QC argued on their behalf that:

> Those premiums were not made in *exchange* for anything

---

[69] As noted above, the policy was held on trust for Mr Murphy's mother as well as his children, but she had been paid her one-tenth share of the death benefit prior to the litigation and had since died. The dispute in the case concerned the money still held by the first and second defendants, which was held on trust only for the three children.

[70] See the statement to this effect by Lord Steyn in the House of Lords: [2001] 1 AC 102, 114.

> since they did not increase the value of the policy or policy moneys. The same sum would have been paid out on M's death whether or not those premiums had been paid.[71]

The majority of the House of Lords, Lord Millett, Lord Browne-Wilkinson, and Lord Hope, rejected this argument and held that the claimants were entitled to a share of the death benefit proportionate to their contribution to the payment of insurance premiums. Lord Millett, denying the suggested connection between the idea of exchange and that of but-for causation, said that:

> [T]he question is one of attribution not causation. The question is not whether the same death benefit would have been payable if the last premium or last few premiums had not been paid. It is whether the death benefit is attributable to all the premiums or only to some of them. The answer is that death benefit is attributable to all of them because it represents the proceeds of realising the policy, and the policy in turn represents the product of all the premiums.[72]

Thus, the *ratio* of *Foskett v McKeown* commits English law to the negative proposition that tracing is not about but-for causation: identifying the traceable proceeds of an asset means something other than identifying an asset that the holder would not have acquired if not for his wrongful use of the original asset. Lord Millett describes the alternative to causation as 'attribution'; one asset is the traceable product of another if its acquisition is attributable to that other. It follows that any doctrinal justification of tracing must explain the meaning of this concept of attribution in terms that do not refer to causation.

'Swollen assets' approaches to the identification of the subject-matter of the claimant's entitlement are also reliant on causation, but go one step further in

---

[71] [2001] 1 AC 102, 105 (emphasis in the original).

[72] [2001] 1 AC 102, 137.

eliminating the need for a link, whether causal or transactional, between the misappropriated asset and any particular asset held by the defendant. On the augmentation version of that approach,[73] favoured by Evans, it is sufficient to prove that the defendant has been enriched by the misappropriation – for example, because it has enabled him to discharge a debt – and that he has not 'dissipated the enrichment',[74] in the sense of being no better off than he would have been if he had not received it.

In *Space Investments Ltd v Canadian Imperial Bank of Trust Co (Bahamas) Ltd*, Lord Templeman appeared to adopt a version of this theory of tracing.[75] He suggested, obiter,[76] that where a bank trustee had made an unauthorised use of trust assets for its own purposes, the beneficiaries under the trust would be entitled to trace into all the assets of the bank, which would be the subject matter of an equitable charge in their favour. A similar approach is found in the judgment of Hobhouse J in his first instance decision in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[77] However, later cases have made clear that English law does not recognise any such principle, but requires a clear transactional link between the original asset and another particular asset in order for tracing to be possible.[78] A mere increase in the

---

[73]As opposed to the 'weak' version of swollen assets tracing, which simply involves a shift in the burden of proof, so that a defendant must show, on the orthodox application of tracing rules, that he does *not* retain the traceable proceeds of the original assets. For the distinction between weak, strong and 'augmentation' versions of the swollen assets model, see Smith, *The Law of Tracing* (n 25) above) 270-274.

[74]S Evans, 'Rethinking tracing and restitution' (1999) 115 LQR 469, 503.

[75][1986] 3 All ER 75, 77.

[76]The suggestion was obiter because, on the facts of *Space Investments*, it was held that the transaction carried out by the bank trustee was an authorised one: [1986] 3 All ER 75, 78.

[77][1994] 4 All ER 890, overruled by the House of Lords on another point at [1996] AC 669.

[78]*Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211; *Moriarty v Atkinson* [2008] EWCA Civ 1604; *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443.

overall wealth of the defendant is insufficient.

A recent articulation of the basis for this requirement is found in *Serious Fraud Office v Lexi Holdings plc*.[79] In that case, the Director of the Serious Fraud Office had obtained a restraint order against the second defendant under section 41 of the Proceeds of Crime Act 2002, which prohibited him from dealing with any of his assets, including bank accounts at two banks and his matrimonial home. The first defendant made an application to vary this order on the basis that the second defendant had received payments from its director, which were made in breach of fiduciary duty. It was clear on the facts that some of this money had been paid into the two bank accounts, but the first defendant failed to disclose what he had done with the rest of it. The second defendant argued that, in the light of this failure to explain what he done with the money despite a judicial order for disclosure, the court ought to find that it could trace into all his existing assets, and assert an equitable charge over them in the amount due. The Court of Appeal rejected this argument. Keene LJ, delivering the judgment of the court, said:

> For the equitable charge to attach it must attach to assets in existence which derive from the misappropriated trust funds. There must be a nexus. Were it otherwise the principles of following and tracing could become otiose. On the contrary, tracing in this area is a vital process: just because it is by that process that the necessary nexus is established and the proprietary remedy, be it by way of constructive trust or equitable charge, made effectual.[80]

He pointed out that the first defendant's receipt of the misappropriated money had occurred in 2006, while he had purchased the matrimonial home in 1998. On the

---

[79][2008] EWCA Crim 1443.

[80][2008] EWCA Crim 1443, at [50].

conventional approach to tracing, it was not feasible to argue that there was any transactional link between the purchase of the house and the receipt of the misappropriated money from the first defendant. The argument that a charge might nevertheless be imposed upon the house went 'against the whole rationale of tracing.'[81]

Again, this suggests that the rationale of tracing is tightly associated with the idea of specific transactional links from one particular asset to another: it is necessary both that the link is transactional, as demonstrated in *Foskett*, and that it points to a particular asset rather than to an overall augmentation in wealth. Like Lord Millett and Briggs J, Keene LJ emphasises the importance of tracing, in its current transactional form, for establishing the nexus between assets that makes a claim to the substitute asset possible. In the light of these emphatic statements, it seems reasonable to treat the transactional and particular character of tracing as a core feature of the law, for which any doctrinal explanation of the function of tracing must account.

II. THE RULES OF TRACING

As argued above, the concept of a substitution or transactional link is basic to the operation of the tracing concept in English law. The characteristics of such a transaction can be illustrated[82] by a series of simple examples. Consider a case where a trustee, T, sells shares held on trust for B to X and obtains title to £10,000 in banknotes from X in consideration for the transfer of the trust shares. Here, T's title to the banknotes represents the traceable product of the shares and the applicable rule

---

[81][2008] EWCA Crim 1443, at [53].

[82]The problem of actually defining a substitution – ie the features of the typical 'simple' exchange transaction that render it significant for the purposes of the tracing rules – is a difficult one, considered in chapter 3 below.

seems simple: where one person transfers an asset ('asset *x*') to someone else, and receives a different asset ('asset *y*') in exchange, English law will consider *y* to be the substitute for, or product of, *x*.

Further, the law will treat an asset acquired under a subsequent transaction of the same kind as the product of the original asset. That is, where asset *x* is exchanged for asset *y*, and then *y* is exchanged for asset *z*, either *y* or *z* can be characterised as the product of *x*. So, in the example above, suppose that T opens a new bank account with Bank C and paid the £10,000 into that account. The effect of this transaction would be to transfer T's title to the banknotes to Bank C, in consideration for the bank granting T a personal right to be paid the credit balance of the account in accordance with the terms of the banking contract.[83] English law recognises this transaction as a substitution – an exchange of T's title to the cash for the right under the banking contract – and therefore identifies T's right to be paid the credit balance of the account as the traceable product of the shares.[84] In theory, it does not matter how long the chain of 'clean substitutions'[85] of this type is; B could trace from the bank account to cash paid out of the account, to T's title to a painting purchased with the cash, and so on ad infinitum.

The application of the tracing concept in various fact situations is delineated by a set of legal rules conventionally referred to as the rules of tracing. They can be

---

[83]*Foley v Hill* (1848) 2 HL Cas 28, 9 ER 1002.

[84]See *Burdett v Willett* (1708) 1 Eq Ca Ab 370, 23 ER 1017 for an early example of tracing into a right correlative to a debt.

[85]The terminology of clean rather than mixed substitutions is that used by Peter Birks and Lionel Smith: see P Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69, 84 and Smith, *The Law of Tracing* (n 25 above), chapter 3. It was judicially adopted by the House of Lords in *Foskett v McKeown* [2001] 1 AC 102 (per Lord Hoffmann at 115, Lord Hope at 119, and Lord Millett at 126 and at 129 to 132).

classified as answering three questions.

First, there are rules that determine what sort of right, thing, or benefit is capable of being a 'substitute' received under an exchange transaction: what is an asset for these purposes? Early cases have addressed doubts regarding the effect of exchange of an asset for money and for titles to land; there are modern questions about the effect of an exchange of assets for information, services, or the improvement of an asset already held by the defendant.

Secondly, there are rules that determine what happens when assets to which different parties are entitled are used to acquire a single new asset or are merged into a pool of indistinguishable assets. Can all the different parties trace into the new asset or pool of assets? If so, what happens when further assets are acquired using it? How are these later acquisitions to be attributed as between the contributors to the pool? In this context, it has been suggested that the rules are not the same throughout the law, but that the answers to these questions differ depending on whether the claimant is tracing at law or in equity.

Thirdly, there are rules that deal with situations where the particular method by which a new asset has been acquired is not a direct exchange of one right for another but some more complex transaction, involving the use of pre-existing assets of the claimant. *Foskett v McKeown*[86] is a leading example of such complexity.

A. What is an asset?

In the example above, two rights are characterised as 'assets' that have been

---

[86] [2001] 1 AC 102.

exchanged under the initial transaction: the shares, transferred by T to X, and the title to the cash, received by T from X. There is case law both on whether some right or benefit transferred by a defendant is an asset capable of being substituted, and on whether some right or benefit received by a defendant is an asset capable of being a substitute.

On the first question, suppose that T's breach of trust had consisted in passing confidential information obtained in her capacity as trustee to X, in exchange for the title to £10,000 in cash. Two distinct routes, based on different characterisations of the transaction, could lead to the conclusion that T holds this title on trust for X. First, there is a rule that a trust arises whenever a fiduciary has made an unauthorised profit for which he must account to his principal.[87] This rule does not depend for its application on tracing;[88] an asset can represent a profit made in breach of fiduciary duty regardless of whether the connection between the asset and the breach of duty is transactional or causal.

Secondly, however, there is the question whether, prior to the breach of duty, T could have held confidential information itself on trust for B,[89] such that B could trace into its traceable proceeds. Is information the kind of thing that has traceable

---

[87] This point has recently been settled in English law, after some controversy, in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, overruling the Court of Appeal decisions in *Lister v Stubbs* (1890) 45 Ch D 1 and *Sinclair Versailles Trade Finance Ltd* [2011] EWCA Civ 347 and adopting the reasoning in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 .

[88] In the sense that the connection between the profit due and the wrong need not be transactional in the distinctive sense required by tracing: see, for example, the facts of *Sinclair Versailles Trade Finance Ltd* [2011] EWCA Civ 347.

[89] In *Boardman v Phipps*, Lord Hodson and Lord Guest indicated, obiter, that confidential information could be potentially treated as a trust asset: *Boardman v Phipps* [1967] 2 AC 46, 107 (per Lord Hodson) and 111 (Lord Guest). The other members of the majority in *Boardman* rejected this analysis of the facts: [1967] 2 AC 46, 90 (per Viscount Dilhourne) and 103 (Lord Cohen).

proceeds? Cases[90] on this question can be understood as setting the boundaries of what is meant by an exchange of assets, and thus as establishing boundaries of the tracing concept. They are more plausibly characterised, however, as defining the kind of entitlement to an asset that entitles the holder to the traceable proceeds of that asset: in other words, they concern the requirement of a 'proprietary base', addressed in Part II of the thesis.

In other situations, the benefit transferred is undoubtedly an asset capable of being substituted, but it is questionable whether the benefit received under the relevant transaction is appropriately characterised as an asset. For example, suppose T had sold the shares, obtained title to the cash from X, and then used the notes to pay for the services of a planning consultant who helped her to obtain planning permission to develop land to which she was already entitled. As a result of the grant of planning permission, the market value of T's land rises. Can it be said that the services of the consultant, the planning permission and the increased market value of the land each constituted an 'asset', permitting B to trace through T's acquisition of each and thus to assert that T's title to the land itself now represents, in part, the product of the shares?

Early cases doubted the possibility of tracing into a trustee's purchase of land[91] or a factor's sale of his principal's goods for money.[92] In modern times, one

---

[90] The argument was made, and rejected, in *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 All ER 652, and a comparable argument was considered in *IDA Ltd v University of Southampton* [2006] EWCA Civ 145. See also *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), per Lewison J at [1470]-[1475].

[91] *Kirk v Webb* (1698) 24 ER 41; *Halcott v Markant* (1689-1722) Prec Ch 167, (1701) 24 ER 80; *Kender v Milward* (1702) 2 Vern 440, 23 ER 882, also reported as *Kinder v Miller* (1701) Prec Ch 171, 24 ER 83; *Deg v Deg* (1727) 2 P Wms 412, 24 ER 791; *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; and *Lane v Dighton* (1762) Amb 409, 27 ER 274.

aspect of *Re Diplock*[93] that has been criticised is the decision that the expenditure of money in improving land already held by a defendant is not the kind of transaction that enables a claimant to trace into the defendant's title to the land.[94] Thus, a doctrinal account of tracing can be evaluated by the resources it offers in justifying the choices made by the English courts in extending the tracing concept to money and to land, as well as by the resources it offers for resolving the question raised by *Re Diplock*.

B. The effect of a 'mixed substitution'

Suppose that, in the example above, after T had paid the cash obtained from X into the account with Bank C, her employer paid an additional £10,000 representing her wages into the same account. Alternatively, suppose that T was a professional trustee who held a title to a car on trust for B2 as well as holding the shares on trust for B. In breach of the terms of this second trust, she sold her title to the car and paid the cash obtained – again, £10,000 – into the existing account with Bank C. In both cases, the result would be that, following the second payment, the bank would owe T £20,000 rather than the £10,000 owed immediately after the first breach of trust.

Two questions arise. First, can B still argue that T's right to the credit balance of the bank account is the traceable product of the cash obtained from X, even though the cash is no longer the sole consideration that has been provided for that right? Secondly, if so, what happens if T begins to acquire new assets by making fresh

---

[92] *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149; *Scott v Surman* (1742-3) Willes 400, 125 ER 1235; *Ryall v Rolle* (1749) 1 Atk 165, 26 ER 107; *Lord Chedworth v Edwards* (1802) 8 Ves Jun 47, 32 ER 268; *Ex parte Dumas* (1754) 1 Atk 232, 26 ER 149; *Taylor v Plumer*; ; *Ex parte Dale* (1879) LR 11 Ch D 772; *Re Hallett's Estate* (1880) 13 Ch D 696.

[93] [1948] Ch 465, at 545 to 548.

[94] The decision is criticised by L Smith, *The Law of Tracing* (n 25) above) 239-242.

payments out of the bank account? How are such payments to be attributed as between the different right-holders in the same account?

1. Tracing into the mixed account: divergence between common law and equity

As a matter of legal history, it is clear that some courts have held that English law recognises two distinct sets of 'rules of tracing': one that is applicable in equity and available only to claimants who are principals in a fiduciary relationship, and one that is applicable at common law and available to other types of claimant.[95] The key characteristic of common law tracing, according to this account, is that it is defeated when 'the subject is turned into money and mixed and confounded in a general mass of same description',[96] rather than being earmarked separately and kept in a bag. This has been translated, in modern cases, to mean that the common law can trace into the acquisition of a new asset but cannot trace through a mixed substitution, while equity can do both.[97]

On this approach, B, as a beneficiary under a trust, would be entitled to invoke the equitable rules of tracing and therefore to assert that, of the £20,000 debt now owed by the bank to T, £10,000 is the traceable product of the title to the car held on trust for him. If, on the other hand, he were not a beneficiary under a trust, but were

---

[95] Cases acknowledging such a distinction include *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, per Scrutton LJ at 330 and Bankes LJ at 329; *Re Diplock* [1948] Ch 465; *Trustee of FC Jones v Jones* [1997] Ch 159; *Agip (Africa) Ltd v Jackson* [1991] Ch 547; and *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[96] *Taylor v Plumer* (1815) 3 M & S 562, 575; 105 ER 721.

[97] *Agip (Africa) Ltd v Jackson* [1990] Ch 265, per Millett J at 285, affirmed on this point by the Court of Appeal in [1991] Ch 547, 566.

instead a person entitled to the traceable proceeds of the car at common law,[98] this would not be the case. He would be able to trace into the acquisition of the cash, and the initial acquisition of the bank account, but the payment into the account of money from other sources would defeat his ability to trace beyond that point.

As a matter of authority, the position on whether there are special rules of tracing for common law claimants is doubtful. In *Foskett v McKeown*,[99] Lord Steyn and Lord Millett emphatically rejected the idea that there was any justification for maintaining separate rules of tracing at law and in equity. However, these statements were *obiter dicta*, and subsequent cases can be found that both affirm[100] and reject[101] the distinction. Further, there are *dicta* in favour of the distinction as well as against it. In *Re Diplock*,[102] the Court of Appeal took the view that there is a genuine principled difference between common law and equitable tracing, which rests on a difference in the underlying justification for the recognition of claims to traceable proceeds in the two jurisdictions. Lord Greene MR, delivering the judgment of the court, said that the common law

> did not base itself on any known theory of tracing such as that adopted in equity. It proceeded on the basis that the unauthorized act of purchasing was one capable of ratification

---

[98] On the premise that there is such a thing as a common law claim to traceable proceeds. If, following some authors like Khurshid and Matthews, 'Tracing Confusion' (1979) 95 LQR 78, it is correct as a matter of authority that English law does not recognise such claims, the distinction examined in the text becomes irrelevant.

[99] [2001] 1 AC 102.

[100] Eg *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, per Rimer J at [103]-[104]; *LAH v Lee* [2007] EWHC 2061 (Ch), per Etherton J at [256]-[257].

[101] Eg *Bracken Partners Ltd v Gutteridge* [2003] EWCH 1064 (Ch), per Peter Leaver QC at [31]; *Barros Mattos Junior v MacDaniels Ltd* [2005] EWHC 1323, per Lawrence Collins QC at [135].

[102] [1948] Ch 465, affirmed by the House of Lords as *Ministry of Health v Simpson* [1951] AC 251 on a different point.

by the owner of the money.[103]

He contrasted this with the position in equity, which he described as dependent on the device of a declaration of a charge, enabling a court of equity to perceive:

> 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. … It was the metaphysical approach of equity coupled with and encouraged by the far-reaching remedy of a declaration of charge that enabled equity to identify money in a mixed fund.[104]

This reasoning depends on the view that transactions that are 'capable of ratification' in some sense,[105] for the purposes of common law tracing, are different from transactions that establish a fund for the purposes of equitable tracing. The common law rules identify the first kind of transaction and are silent about the second.

In *Foskett v McKeown*, rejecting this distinction, Lord Millett said:

> Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. … There is certainly no logical justification for allowing any distinction between them to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules. The existence of such a relationship may be relevant to the nature of the claim which the plaintiff can

---

[103] [1948] Ch 465, 519.

[104] [1948] Ch 465, 520.

[105] They are not capable of ratification in the normal sense because of the rule that an undisclosed principal cannot ratify an unauthorised transaction: *Keighley, Maxsted & Co v Durant* [1901] AC 240. The proposition that claims to traceable proceeds arise by virtue of the ratification of the unauthorised transaction by the claimant was expressly rejected by Lord Ellenborough CJ in *Taylor v Plumer* (1815) 3 M & S 562 at 580 (105 ER 721, 727), doubted by Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 574, and criticised by Millett LJ in *Boscawen v Bajwa* [1996] 1 WLR 328, at 783.

> maintain, whether personal or proprietary, but that is a different matter.[106]

The difference between Lord Millett's view and that of the Court of Appeal in *Re Diplock* depends on their differing views as to the nature of tracing. The resolution of this debate turns on the validity and scope of the distinction between tracing and claiming, and the validity of the argument that tracing is about some conception of ratification, or about identifying a fund, or about ratification at common law and about identification of a fund in equity. The difference between common law and equitable tracing is, therefore, one of the issues on which it can be said that the current law is unclear and that a doctrinal account of tracing might be expected to resolve.

2. Attribution of payments out of a mixed pool of assets

On the facts of the example immediately above, it has been explained that B would be able to trace into the bank account even if money to which T was absolutely entitled, or money held on trust for B2, were paid into the same account. The effect would be that, of the £20,000 debt owed by Bank C to T, £10,000 would be considered the traceable product of the shares held on trust for B.[107] T's right to recover the remaining £10,000 would either be held by her for her own benefit, as in the case where the source of the money was her employer, or for B2's benefit in the case where the source of the money was the sale of an asset held on trust for B2.[108]

---

[106] [2001] 1 AC 102, 128.

[107] Although some authorities suggest that the burden of proof would be on T to show that some of the money paid into the account was not attributable to the trust: *Lupton v White* (1808) 15 Ves Jun 432, 33 ER 817; *Lord Chedworth v Edwards* (1802) 8 Ves Jun 47, 32 ER 268; *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443.

[108] *Pennell v Deffell* (1853) 4 De G M & G 372, 43 ER 551.

Thus, a person may hold a single asset, or an indivisible pool of assets,[109] for the benefit of multiple parties, including herself. The law then has to determine what happens when such an indivisible pool is drawn upon to acquire a new asset. For example, suppose that, after T's employer had paid the money into her account with Bank C, T had withdrawn £10,000 in cash and used it to buy a title to a painting. In this scenario, would the money used to buy this asset represent the traceable product of B's interest in the bank account or would it represent T's interest in the same account?[110] The choice may make a considerable practical difference to B if, for example, the painting has appreciated in market value to be worth more than £10,000, while T has spent the rest of the money in the account on food and drink or on a holiday.

After some hesitation,[111] English law has adopted what Rimer J in *Shalson v Russo* called a 'cherry picking'[112] approach to this question. If the painting has appreciated in value, while the bank account has become worthless, B is entitled to say that the money used to buy them represented the traceable proceeds of his interest in the bank account.[113] On the other hand, if the painting has depreciated in value,

---

[109] As, for example, in *Pinkett v Wright* (1842) 2 Hare 120, 67 ER 50, affirmed by the House of Lords as *Murray v Pinkett* (1846) 12 Cl & F 764, 8 ER 1612. In that case, the trustee had held a quantity of shares in a company on trust for the various claimants as well as himself His shareholding constituted an indivisible pool in the sense that particular shares were not numbered and sales took place simply by altering the number of shares that the trustee was registered as holding.

[110] Some cases that answer this question include *Pennell v Deffell* (1853) 4 De G M & G 372, 43 ER 551, *Re Hallett's Estate* (1880) 13 Ch D 696, *Re Oatway* [1903] 2 Ch 356, and *Re Tilley's Will Trusts* [1967] Ch 1179.

[111] eg *Pennell v Deffell* (1853) 4 De G M & G 372, 43 ER 551, where the Master applied the 'cherry-picking' approach to payments out of a bank account but the Court of Appeal overturned this approach and applied the 'first in, first out' approach instead. See, also, *Brown v Adams* (1869) LR 4 Ch App 764.

[112] [2003] EWHC 1637 (Ch), at [144].

[113] *Re Oatway* [1903] 2 Ch 356.

while the money in the bank remains intact, B is entitled to say, instead, that the money withdrawn represented the traceable proceeds of T's own interest in the bank account, leaving his interest in the bank account unaffected.[114] In *Re Hallett's Estate*,[115] Jessel MR articulated the principled basis for the rule in the following terms:

> [N]othing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. … When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, 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.[116]

There are limits, however, to this 'cherry picking'. If T withdraws £19,000 of the money in the account to spend on a very expensive dinner, leaving a credit balance of only £1000, this £1000 will be the traceable product of the shares originally held on trust for B. If T then credits the account with £19,000 from another source, this money will be held for her own benefit,[117] not B's. Thus, if the total credit balance of the account has fallen to a certain amount, that amount represents the maximum interest that B can have in the account, regardless of any later fluctuations in the balance.[118] Despite attempts to argue that the logic of cherry picking should

---

[114] *Re Hallett's Estate* (1880) 13 Ch D 696.

[115] (1880) 13 Ch D 696.

[116] (1880) 13 Ch D 696, 727.

[117] That is, although her breach of trust may mean that she personally owes B a debt of £10,000, she is not obliged to pay him more than £1000 out of this particular bank account. This will normally matter where she is insolvent and, therefore, unable to pay all her debts out of the total pool of her assets.

[118] This is the so-called 'lowest intermediate balance rule', affirmed in *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 465. B would be able to assert a right to the account once in credit if he could show that, at the time that she made the payments that put the account back in credit, T positively intended the account should henceforth be held on the terms of the original trust. An example of a case

extend to this situation, entitling B to assert that the £19,000 dissipated on dinner belonged to T and the £19,000 later paid in belongs to him, the courts have refused to accept the argument.[119]

In *James Roscoe (Bolton) Ltd v Winder*,[120] the claimant company had sold its business to a Mr William Wigham for £900. The agreement for sale provided that the purchaser would collect the book debts of the company and pay over to the claimants all moneys received by him on account of the debts that were due before the 1st of March, 1913. Wigham began to collect money from the company's creditors and paid a total of £455, 18s and 11d of this money into his personal bank account. On the 21st of May 1913, as a result of his various drawings on the account, the credit balance had fallen to £25, 18s. However, he then paid in and drew out more money; at the time of his death, insolvent, on the 20th of June 20 1913, the account was in credit to the tune of £358, 5s and 5d.

The liquidator of the claimant company brought a claim against the defendant trustee in bankruptcy, claiming a lien or charge over the bank account, as security for the debt of £455, 18s and 11d owed to them. Without admitting liability, the defendant paid £25, 18s into court and contended that it did not owe the company any additional sum. Sargant J agreed. Although he held that the agreement between the

---

where this argument succeeded is *ex parte Kingston* (1871) LR 6 Ch App 632. However, this is not an exception to the proposition in the text: in such a case, the right in respect of the newly-credited account is responsive to the intention of the trustee, rather than the substituting transaction, and would arise if the trustee made a similar declaration in relation to another account into which he had never paid trust money. It would, therefore, be inaccurate to call the rule that an express declaration of intention will displace the 'lowest intermediate balance rule' a rule of tracing See Smith *The Law of Tracing* (n 25 above), 136 to 139.

[119] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211.

[120] [1915] 1 Ch 62.

parties had created a trust of the book debts, entitling the claimant company to their traceable proceeds, he held that the company could not trace into the whole credit balance of the account at the date of Wigham's death, but could only recover the £25, 18 s, that represented the lowest balance to which the account had fallen after the company's money had been paid into that account. *Re Hallett* did not mean that Wigham's subsequent payments into the account were to be attributed to the claimant company, in the absence of any evidence that he positively intended such an attribution.

It has been suggested that there is a tension between the *Re Hallett* rule that the wrongdoer 'cannot be heard to say' that he has spent the claimant's money rather than his own, and the lowest intermediate balance rule. In an article published in the *Virginia Law Review* in 1922, one HLW criticised the rule on the basis that it stops 'short of the necessary conclusion to which its own logic must inevitably carry it.' If *Re Hallett's Estate* depends on the idea that a wrongdoer, in withdrawing money from the bank account, is deemed to act honestly, why does this principle not apply equally to Wigham paying money into the account?

> If honesty requires that [the trustee] do not encroach on the trust fund, does it not as well require that, having encroached, he restore as soon as possible? Will the law presume that he does not intend to act wrongfully, as long as this is possible, but after the wrong is done refuse to presume an intention to make amends?[121]

Smith answers this point by arguing that the rule in *Re Hallett* is not really about the intention of the wrongdoer, presumed or otherwise, but about the rule that

---

[121] HLW, 'Following Trust Funds Mingled in One Deposit with Funds of the Trustee' (1922) 8 Virginia LR 356, 358.

evidential uncertainties will be resolved against the person who is responsible for them. It is not a rule that the court will close its eyes to the proven facts, where this would favour the claimant against the wrongdoer or his successor in title. In *James Roscoe* itself, Sargant J distinguished *Re Hallett's Estate* in the following, slightly different terms

> You must, for the purpose of tracing, which was the process adopted in *In re Hallett's Estate*, put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing, and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l* 18*s*.[122]

Again, this invites us to ask what is the function of tracing. What does it mean to say that the court is trying to identify 'some definite fund', and that such a fund will exist where has been a chain of clean substitutions, however long, but it will not exist on the facts of *James Roscoe*? What is a 'fund' in this context? Since the lowest intermediate balance rule is undoubtedly an established rule of English law, a justification for the rule and the limitation it imposes on 'cherry picking' must be offered by any doctrinal account of tracing.

When the issue of attribution of payments arises between B and B2, in the scenario where T has used money to which both are entitled to acquire a single asset or pool of assets, the position is different.[123] As innocent parties, B and B2 are not entitled to cherry pick against each other. The attribution of payments between them appears to depend on the nature of the relevant asset or pool of assets.

---

[122] [1915] 1 Ch 62, 68-69.

[123] Also considered in *Re Hallett's Estate* (1880) 13 Ch D 696. Other relevant authorities include *Re Stenning* [1895] 2 Ch 433, *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, *Re Lewis's of Leicester Ltd* [1995] BCC 514 and *Shalson v Russo* [2003] EWHC 1637.

If the asset in question is a bank account, as in the example above, the nineteenth century courts held that payments out of the account should be attributed on a 'first in, first out' basis,[124] as they would be as between the account-holder and the bank.[125] So, if T paid the £10,000 held on trust for B into the account on Monday and the £10,000 held for B2 on Tuesday, this approach would dictate that the first £10,000 paid out of the account should be attributed to B alone. If T were to withdraw £10,000 in cash to buy a title to a painting on Wednesday and then to withdraw £9,000 to buy a meal or pay for a holiday on Thursday, B would be better off than B2. The title to the painting would be the traceable product of the shares held on trust for her, while £1000 credit balance of the bank account would be the sole traceable product of the title to the car held on trust for B2.

However, unlike the attribution of payments as between him and T, this favourable outcome for B would depend on luck rather than the law preferring the interests of the person whose asset was first misappropriated. B would only be better off if it so happened that T's earliest investments were the better ones. If, instead, T had first spent £9,000 on the expensive dinner and had only later spent £10,000 on the painting, it would be B2 who would be better off. The application of this rule has been criticised by modern courts,[126] and it has been held that it will be applied only where it is not unjust or impracticable to do so.[127] In cases where it is unjust or impracticable, withdrawals from bank accounts in these situations will be treated in

---

[124] Dicta of Baggallay LJ in *Re Hallett's Estate* (1880) 13 Ch D 696, 732, affirming *Pennell v Deffell* (1853) 4 De G M & G 372, 43 ER 551 on this point, and followed by North J in *Re Stenning* [1895] 2 Ch 433 and the Court of Appeal in *Re Diplock* [1948] Ch 465.

[125] *Clayton's Case* (1816) 1 Mer 572, 35 ER 781.

[126] *Barlow Clowes International Ltd v Vaughan* [1992] All ER 22

[127] *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478; *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564.

the same way as withdrawals from any other type of mixed pool of assets.

In relation to such assets, the rule appears to be that withdrawals from the pool will be attributed to innocent third parties in proportion to their contribution.[128] This could mean one of two things. It could mean that each individual payment out of such a pool is to be attributed to all the right-holders in the pool, in shares proportionate to their contribution at the time of the transaction. This is the so-called North American or 'rolling charge' solution.[129] Alternatively, it could mean that, at the date when the issue arises for determination, all assets acquired using the pool, or left in the pool, will be attributed to the parties in proportion to their total contribution to the original pool. The distinction would make a difference in a case where the contributions made by B and B2 to the pool had varied over time, so that each party's proportionate share at the time of a particular transaction might differ from their proportionate share of the overall pool. In this jurisdiction, the North American solution has not yet been applied, but Woolf LJ suggested in *Barlow Clowes v Vaughan* that it might be the most just approach,[130] in a case where it would not be too impracticable to apply.

C. Acquisition of assets by the exercise of pre-existing rights

Finally, it is not always the case that assets are acquired by sale or by barter. A person may acquire an asset by some transaction that does not involve the claimant's asset being supplied as consideration for the outright transfer of the new asset but that does, in some sense, involve the use of the claimant's asset. The application of the tracing

---

[128] *Pinkett v Wright* (1842) 2 Hare 120, 67 ER 50, affirmed by the House of Lords as *Murray v Pinkett* (1846) 12 Cl & F 764, 8 ER 1612; *Re Diplock* [1948] Ch 465.

[129] So referred to by the judges in *Barlow Clowes International v Vaughan* [1992] All ER 22, per Dillon LJ at 27 and by Woolf LJ at 29.

[130] [1992] 4 All ER 22, 35.

rules in this area is uncertain.

One set of cases is concerned with what happens where an asset is initially used to reduce the amount of an existing debt. For example, suppose that T, having sold the shares and received cash from X, had paid the cash to Bank C in exchange for a reduction on her overdraft on an existing account, rather than using it to create a new account. This will not give B any interest in the bank account, once T has used further payments to put it back in credit again. The link between the reduction of the amount payable by T to Bank C and the subsequent increase in the amount payable by Bank C to T is not of the kind that renders the second the 'traceable product' of the first.

On the other hand, suppose that, before she had committed any breach of trust, T had drawn on her overdraft with Bank C to buy a title to a computer. She then committed the breach of trust, obtained the cash from X, and, as above, used the money to pay off the overdraft. Does this change the situation, so that B can trace 'backwards' in time and assert that title to the computer is the traceable product of the title to the cash? English law is currently unclear on the point, since there are a number of authorities that can be interpreted as permitting or rejecting the possibility.[131]

Foskett v McKeown[132] is a key illustration of the questions that arise in circumstances that go beyond the apparently simple case of a swap of one thing for another. There were different levels of disagreement between the judges who were

---

[131] The authorities have recently been surveyed by M Conaglen, 'Difficulties with tracing backwards' (2011) 127 LQR 432. See also L Smith, 'Tracing into the payment of a debt' (1995) 54 CLJ 290.

[132] [1998] Ch 265 (CA), overruled [2001] 1 AC 102 (HL).

confronted with the facts of that case.[133]

At first instance, Laddie J had held that the claimants were entitled to a 52% share of the death benefit, reflecting the share of the notional units purchased with the final two premiums (£20,440 out of £39,347). In the Court of Appeal, Sir Richard Scott V-C and Hobhouse LJ in the majority overturned this decision, holding that the claimants were only entitled to recover £20,440 with interest from the defendants. Morritt LJ, dissenting, thought the claimants were entitled to 40% of the death benefit, representing the proportion of the insurance premiums that had been paid with their money (two out of five). As noted above, the majority of the House of Lords[134] rejected the argument that the claimants were confined to the amount of £20,440 with interest. They agreed that the claimants were entitled to a proportionate share of the death benefit. Lord Steyn and Lord Hope, in the minority, dissented. There was also a subsidiary disagreement between Lord Millett and the other majority judges as to the calculation of this share. Lord Millett thought that the units allocated to the policy on the receipt of each premium should be taken into account in calculating the share of death benefit due to the person who had contributed the relevant premium. Lord Browne-Wilkinson and Lord Hoffmann agreed with Morritt LJ that it was not necessary to take the units into account at all; the share of the death benefit should reflect the proportion of the five premiums that had been paid using the trust money, ie 40%.

Three elements of the fact situation in *Foskett* weighed differently with the judges who, therefore, reached different conclusions. First, there was the fact that the

---

[133] See 37-41 above for an account of the facts.

[134] Lord Millett, Lord Hoffmann and Lord Browne-Wilkinson.

contract between Barclays and Mr Murphy, and the trust of the rights under that contract, preceded the misappropriation of the money held on trust for the claimants. Secondly, as discussed above, there was the concession that, in the events that had happened, the same amount would have been paid to the children as death benefit even if Mr Murphy had not breached his trust. Finally, there was the fact that, under the terms of the insurance contract, Barclays responded to the receipt of each premium by notionally allocating units of an investment fund to the policy.

In deciding whether these facts mattered to the outcome of the litigation, the different judges relied, expressly or implicitly, on different accounts of what it meant to say that, in Roger Kaye QC's terminology in argument, the final two premiums had been *exchanged* for something and, if so, what. A doctrinal account of tracing can be assessed by whether it provides a rational framework for these arguments, telling us what question of fact or law the judges disagreed on.

III. Conclusions

This chapter has shown that some of the tracing rules are contentious as a matter of authority. It is unclear, for example, whether common law tracing has a principled basis; whether it is possible to trace into information or the improvement of a subsisting asset; whether the rule in *Clayton's Case* has any continued application in the context of tracing; and whether 'backwards tracing' is possible. Other aspects of the rules are clear as a matter of authority, but the principled justification for those rules is obscure. Concepts of property, value, ratification, and the boundaries of a fund have been drawn on by judges to explain their decisions but it is not clear how these concepts relate to one another or to the underlying requirement of a 'transactional link' that forms the core of the tracing idea.

One answer to these questions is the skeptical response of the legal realist. Rotherham, for example, argues that the transactional model of tracing, and the rules that work out the details of that model, constitute an abstract fiction designed to conceal the underlying normative aim of the law, which is the redistribution of property rights on policy grounds. He says:

> The conceptualization of tracing employed to suppress the conflict between the function of the remedy and sacred axioms of property has had the effect of burying key normative issues. We are enslaved by concepts whose primary function is to obscure. As a result, tracing has never been based upon sound normative foundations.[135]

It is true that the concepts that govern the operation of tracing, as described above, are somewhat obscure: the distinction between attribution and causation, the idea of a fund with definite boundaries, and the idea of cherry-picking all call for clearer definition and rational explanation. From the perspective of doctrinal analysis, the question is whether these concepts nevertheless have a function that justifies their controlling role in the area of claims to traceable proceeds or whether, as Rotherham suggests, they are simply incoherent or meaningless. The next chapter examines the argument that a sufficient justification can be found in the model of tracing that was developed by Peter Birks and Lionel Smith and has since been adopted, to some extent, into the standard vocabulary surrounding claims to traceable proceeds.

---

[135] 'The Metaphysics of Tracing: Substituted Title and Property Rhetoric' (1996) 34 Osgoode Hall LJ 321, 353-354.

2. THE EXPLANATORY LIMITS OF 'VALUE'

This chapter examines the explanatory force of the central distinctions between tracing, claiming, and following that are now entrenched in the vocabulary of English law. It argues that the distinction between tracing and following must be retained, and its implications clarified, because of the analytical function it serves: it enables the justificatory questions posed by the existence of claims to traceable proceeds to be more clearly defined. However, the distinction is only an analytical tool and does not offer a substantive answer to the justificatory questions posed by the positive law. To the extent that the dominant model does supply an answer to those questions, it must be found in the distinction between tracing and claiming, and the concept of value that is said to underlie it.

Value, however, is a contested concept, and the senses in which it is used by different authors to describe the operation of tracing appear to be mutually inconsistent, leading to mutually inconsistent accounts of the distinction between tracing and claiming. The chapter identifies two rival conceptions of value that might plausibly ground an account of tracing, and argues that neither offers a doctrinal justification for what the English courts are doing when they define and elaborate on 'rules of tracing'. On this basis, the chapter concludes that the concept of 'tracing value' is unhelpful and should be discarded.[136]

The argument is made in four parts. The first offers an overview of the dominant model of tracing, as developed in the work of Peter Birks and Lionel Smith and accepted by the judiciary since its adoption by members of the House of Lords in

---

[136] A similar critique of the relevance of value in the context of tracing has recently been offered by T Cutts, 'There is no law of tracing and this is why it matters' (Obligations VII conference, Hong Kong, 2014). I am grateful to the author for her permission to cite this unpublished paper.

Foskett v McKeown.[137] It sets out the context of the scholarship of Birks and Smith, and describes the two key distinctions on which their model depends. It makes two arguments. First, it argues that, while the judges have adopted the distinction between tracing and following, they have also, ironically, adopted a view on the nature of claims to traceable proceeds that falls into the analytical confusion criticised by the authors who emphasise the distinction. Secondly, it argues that the tracing / claiming distinction is deeply ambiguous in its meaning and that the judges in *Foskett v McKeown*, in adopting the distinction, have not resolved that ambiguity. It identifies the source of the problem in the obscurity of the underlying concept, which is supposed to explain the distinction: that is, the concept of value.

The second part aims to identify the plausible senses in which it could be said that the aim of the tracing rules is to 'locate value'. It argues that there are two mutually inconsistent conceptions of value that could plausibly be said to be relevant to the work done by the tracing concept, and identifies these as the market conception and the entitlement conception.

The third part considers the extent to which these different conceptions of value can account for the features of the tracing concept and of the rules identified in the previous chapter. It argues that only the entitlement conception is even consistent with the current law of tracing, since the market conception points to conclusions that are inconsistent with core features of the current law. However, this doctrinal consistency cannot constitute a doctrinal justification, since the explanation of the rules supplied by the entitlement conception is too vague to be fully descriptive. It

---

[137] [2001] 1 AC 102.

follows that 'the identification of value' cannot, in itself, offer a doctrinal justification for the tracing concept and the tracing rules, and therefore that these questions remains unresolved, despite the widespread acceptance of the dominant model.

Finally, the fourth part summarises the conclusions of the argument so far. It notes that the distinction between tracing and following, now entrenched in the vocabulary of English law, can and should be upheld without any reference to the concept of value. However, the failure of the value model also suggests that the metaphor of 'tracing' can be misleading if taken seriously. To avoid this, it is preferable to be cautious about the traditional language of 'tracing, claiming and following' and instead distinguish between substitution and transformation, and between claims to traceable proceeds and the event of substitution itself. The meaning of the latter distinction, which has been adopted by the judges in many of the cases, is itself one of the aspects of the law that calls for doctrinal explanation.

I. Elements of the dominant model: tracing, following, claiming, and value

The current edition of *Lewin on Trusts* introduces the section on tracing as follows:

> The process by which a new asset is identified as the substitute for the old is the process of tracing. … Tracing is … concerned with the same person but different assets, while following is concerned with the same asset but different persons. … Tracing, like following, is in itself neither a remedy or a claim, just a process which needs to be gone through if a claim is to succeed.[138]

Similar passages can be found in other practitioners' and student texts,[139] and

---

[138] J Mowbray and others, *Lewin on Trusts* (18th edn, Sweet & Maxwell 2008) 41-05 and 41-06.

[139] eg J McGhee and others, *Snell's Equity* (32nd edn, Sweet & Maxwell 2010) para 30-51; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) 90.2; G Thomas and A Hudson, *The Law of Trusts* (OUP 2010) para 33.06 and

in judicial dicta.[140] The description of tracing as a process, distinct both from the process of following and from the substantive task of determining the existence of a claim or a remedy ('claiming') has thus become part of the standard legal discourse that surrounds claims to traceable proceeds.

It is necessary, therefore, to engage with this terminology and to arrive at some definition of terms: what is 'following', as opposed to 'tracing', and what is the distinction supposed to tell us about tracing? How do both relate to the concept of 'claiming'? This part examines the meaning of these distinctions, and attempts to identify the claims about the substantive law that underpin the view that they should be adopted.

In order to address these questions, it is necessary to look to the scholarship that originated the terminology in the context of the older vocabulary to which it reacts. There are two authors whose work strongly advocates the analytical importance of the distinctions between tracing, claiming and following, Peter Birks[141]

33.14; A Hudson, *Equity and Trusts* (7th edn, Routledge 2013) 891 to 897; and P Davies and G Virgo, *Maudsley & Burn's Equity & Trusts: Texts, Cases and Materials* (OUP 2013) 817.

[140] eg *Ultraframe (UK) Ltd v Fielding (no 2)* [2005] EWHC 1638 (Ch), per Lewison J at [1461] to [1464]; *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613, per Clarke J at [347] to [349]; *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), per Mr Stephen Morris QC at [65] to [69].

[141] *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 358-401; 'Mixing and Tracing: Property and Restitution' (1992) 45 3CLP 69; *Restitution – The Future* (The Federation Press 1992) 106-122; Trusts in the Recovery of Misapplied Assets: Tracing, Trusts, and Restitution' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press 1992) 149; 'Overview: Tracing, Claiming and Defences' in P Birks (eds) *Laundering and Tracing* (Clarendon Press 1995) 289; 'Tracing, Subrogation and Change of Position (*Boscawen* v *Bajwa, Abbey National plc* v *Boscawen*)' (1995) 9 Trust Law International 124; 'Tracing Misused (*Bank Tejarat* v *Hong Kong and Shanghai Banking Corp*)' (1995) 9 Trust Law International 91; 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623, 659-665; 'On taking seriously the difference between tracing and claiming' (1997) 11 Trust Law International 2; 'Mixtures' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998) 227; 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1999) 239; 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231.

and Lionel Smith.[142] This part draws primarily on the views expressed in Smith's full-length monograph, *The Law of Tracing*, since this is the most developed account of the dominant model available and since it avowedly[143] converges with the earlier work of Birks in its adoption of the distinctions between tracing, claiming and following. Views expressed by Birks, and in the other work of Smith, will be drawn on only in those contexts where they diverge from, or elaborate on, those expressed in *The Law of Tracing*.

A. Background: 'changes of form', mixtures of fungible goods and the cherry-picking rule

One of the commonest ways of describing the operation of claims to traceable proceeds, particularly in the older cases, is by reference to the idea of a right in a thing persisting despite changes in the form of the thing. The *locus classicus* of this idea is the following passage from Lord Ellenborough CJ's judgment in *Taylor v Plumer*:

> if the property in its original state and form was covered with a trust … no change of that state and form can divest it of such trust…It makes no difference in reason or law into what other form, different from the original, the change may have been made … for 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[.][144]

Similar metaphors of transformation are ubiquitous in the case law, particularly where money is concerned. In *Re Diplock,* for example, the Court of Appeal said that equity could identify money in a mixed fund but that its forms of

---

[142] 'Tracing into the Payment of a Debt' [1995] 54 CLJ 290; Smith, *The Law of Tracing* (n 25) above); 'Tracing' in A Burrows and Lord Rodger of Earlsferry (ed), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 119; 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281.

[143] Smith, *The Law of Tracing* (n 25) above) 6.

[144] (1815) 3 M & S 562, 574-575; 105 ER 721, 725-726.

relief 'pre-suppose the continued existence of the money either as a separate fund or … as latent in the property acquired by means of such a fund.'[145] In *Nelson v Larholt*, Denning J, as he then was, said that money 'may exist in various forms, such as coins, treasury notes, cash at bank or cheques', but is protected by law 'whatever its form';[146] he expressed a similar view in his extra-judicial writing.[147] In *Banque Belge pour l'Etranger v Hambrouck,*[148] Scrutton LJ cited *Taylor v Plumer* as authority that an owner of property was entitled to recover it in the common law courts provided that 'the property was capable of being traced, whether in its original form or in some substituted form.'[149] In *Boscawen v Bajwa*,[150] Millett LJ drew on the same metaphor, describing the remedies of a claimant who 'succeeds in tracing his property, whether in its original or in some changed form.'[151]

All this can be taken to mean that the rules of tracing are a sub-category of those legal rules that respond to the transformation of the thing that constitutes the subject matter of a right. More specifically, some cases have associated the rules of tracing with the rules that respond to the physical mixture of fungible goods belonging to different parties. For example, in *Frith v Cartland*, Page Wood V-C described claims to traceable proceeds as governed by two general principles:

---

[145] [1948] Ch 465, 520.

[146] [1948] 1 KB 339, 342.

[147] 'The Recovery of Money' (1949) 65 LQR 37, 39: '[Money] might change its form from coins to cash at bank, or from cheques to notes, or in any way whatsoever … Nevertheless so long as it could be traced, then whatever its form and into whomsoever hands it came, the plaintiff to whom it belonged had [the action for money had and received] to recover it back[.]'

[148] [1921] 1 KB 321.

[149] [1921] 1 KB 321, 330.

[150] [1995] 4 All ER 769.

[151] [1995] 4 All ER 769, 777.

> The guiding principle is that a trustee cannot assert a title of his own to trust property. … [S]o long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.[152]

Here, there is a move from the metaphor of a change or conversion of the trust property to the invocation of the particular rules governing mixture. Although, in the context of the case, the reference is to the mixture of 'trust funds', Page Wood V-C describes the governing principle in terminology that is familiar from the law applicable to physical mixtures. For example, in the leading case of *Lupton v White*,[153] Lord Eldon referred, in very similar language, to:

> the great principle, familiar both at law and in equity, that, if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture upon his part.[154]

In *Lupton v White* itself, Lord Eldon was dealing with the legal consequences of a physical mixture. The claimant, Lupton, held a lease of a lead mine in Yorkshire, known as 'The Little Ing', while the first defendant, White, was entitled to several adjoining mines, including one known as the 'Prosperous Mine'. The claimant had previously obtained an injunction that prevented the defendants from mining The Little Ing while his title was being determined, but this was lifted after the defendants, White and his agents, made an undertaking to the court that they would keep the ore mined from The Little Ing separate from that mined from the others and account to

---

[152] (1865) 2 H & M 417, 420; 71 ER 525, 527.

[153] (1802) 15 Ves Jun 432, 33 ER 817.

[154] (1802) 15 Ves Jun 432, 435-436; 33 ER 817, 819.

the claimant for its proceeds of sale.

However, White's agents did not comply with this undertaking. The Master found as a fact that they had deliberately caused ore from The Little Ing to be mixed with ore from the Prosperous Mine, had ensured that ore from both mines was 'smelted together at the same hearth, and marked with the same mark and letter'[155] and:

> in order to prevent a proper examination of the workings under Little Ing, the defendants permitted some of the workings to fall in; wilfully filled up other parts with rubbish ; and drowned the lower part : so that no true estimate could be formed of the quantity of ore, got by the Defendants … from or under Little Ing.[156]

On these facts, the Master had held that it was impossible for him to take an account with any accuracy. On an application for further directions, Lord Eldon ordered the defendants to account to the claimant for the proceeds of sale of all the ore from the Prosperous Mine and The Little Ing that they had sold over the relevant period, unless they could specifically prove which of the ore sold had been mined from the Prosperous. He said the case was governed by the overarching evidential principle, established in *Armory v Delamirie*,[157] that a fact should be presumed against a person who had by his own breach of duty made it impossible to prove whether or not it was true.[158] He held that the applicable principle had been settled in *Panton v*

---

[155] (1808) 15 Ves Jun 432, 434; 33 ER 817, 819.

[156] ibid.

[157] (1722) 1 Stra 505, 93 ER 664, cited by Lord Eldon at (1802) 15 Ves Jun 432, 439; 33 ER 817, 820.

[158] See eg *Keefe v The Isle of Man Steam Packet Co* [2010] EWCA Civ 683 for the application of this principle in a different context (found as a fact, for the purposes of a claim in negligence, that the claimant had been exposed to an excessive amount of noise in a situation where the actual levels of exposure were unknown and the defendant had a duty to record noise levels and had not done so).

Panton[159] and *Lord Chedworth v Edwards*:[160] where a man had 'confused' the property of another with his own, the burden of distinguishing the two lay with him and 'if he could not distinguish what was his own, the whole must be considered as belonging to the other.'[161]

In both the cases cited by Lord Eldon, the confusion occasioned by the defendant had not resulted from any physical mixture. *Panton v Panton* was not concerned with physical things at all, but with securities, and *Lord Chedworth v Edwards* was a case where the defendant had used the rents of the claimant's land, and the proceeds of sale of his timber, to buy stocks and pay money into a bank account. According to Lord Eldon, the evidential problem in both cases was that the defendant had not kept a proper record of the relevant transactions, so that it was unclear which assets had been obtained by the sale of the claimant's assets and which by the sale of the defendant's. Unlike *Lupton v White*, there is no suggestion that this failure to keep proper accounts was preceded by any actual mixture of physical things. The steward in *Lord Chedworth v Edwards* had sold his employer's timber, just as the defendants had sold Lupton's lead, but there was no suggestion that, like them, he had previously mingled it with logs of his own timber.

Having cited these authorities, Lord Eldon said:

> What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity: but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the

---

[159] Unreported elsewhere.

[160] (1802) 8 Ves Jun 47, 32 ER 268.

[161] (1802) 15 Ves Jun 432, 440; 33 ER 817, 820.

> fault of the person, mixing them, the other party cannot tell, what was the original value of his property, he must have the whole and the principle goes to the full extent of what is now contended.[162]

One of the old cases that might be authority for this proposition is the decision of the Court of King's Bench in *Warde v Aeyre*.[163] The reported facts of that case are that the claimant and defendant 'being at play, the [claimant] thrust his money into the defendant's heap and so intermingled them together', whereupon 'the defendant kept all'. As a result of their 'striving together for the money', the claimant brought an action for trespass to the person as well as an action to recover his five marks. Coke CJ held that, having wrongfully mingled his money with the defendant's, he could not recover it, stating the operative principle in terms that are clearly echoed by both Lord Eldon in *Lupton v White* and Page-Wood V-C in *Frith v Cartland:*

> [I]f I.S. have a heap of corn, and I.D. will intermingle his corn with the corn of I.S. he shall here have all the corn, because this was so done by I.D. of his own wrong … and so it is in case of money … for that his own proper money, or corn cannot now be known, and therefore by this his intermingling, being his own act, and of his own wrong, by the law he shall lose all.[164]

In Blackstone, the case is cited as authority for a rule that:

> 'If one willfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or casts gold in a like manner into another man's melting-pot or crucible … our law, to guard against fraud, … gives the entire property, without any account, to him, whose original dominion is invaded and endeavored to be rendered uncertain

---

[162] (1808) 15 Ves Jun 432, 442; 33 ER 817, 821.

[163] (1615) 2 Bulst 323. See *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1987] 1 QB 345, at 361-362.

[164] (1615) 2 Bulst 323, 324.

without his own consent.[165]

In *Re Oatway*,[166] Joyce J cited both *Lupton v White* and this passage from Blackstone as authority for the principle applicable to the facts of that case. The facts were as follows. The deceased, Oatway, had been one of the trustees under the will of one Charles Skipper; the other trustee was the settlor's son, Maxwell. In breach of trust, Oatway loaned £3000 out of the trust estate to his co-trustee, who mortgaged his reversionary interest in some land to Oatway to secure the debt. In his capacity as mortgagee and as the donee of a power of attorney granted to him by Maxwell Skipper, Oatway sold the reversion and obtained £7000 as its price, which he paid into his personal bank account, then in credit to the tune of £77, 13s and 4d. Of the £7000, it was held that he was personally entitled to £4000, while he ought to have restored £3000 to the Skipper trust.[167]

As a result of a few subsequent withdrawals and payments, the credit balance of the account was reduced to £6635, 6s and 4d by 24 August 1901. On this date, Oatway drew a cheque in the amount of £2,137, 12s and 3d on this account and used it to buy 1000 shares in a company called the Oceana Company, which were still standing in his name at his death, insolvent, in 1902. At the date of his death, the credit balance of the personal bank account had been reduced to nil.

In an action for the administration of Oatway's estate, Maxwell Skipper and

---

[165] 2 Bl Comm 405. The case is inaccurately cited at (1615) 2 Bulst 325, rather than 323, but it is clearly *Ward v Aeyre* that is intended.

[166] [1903] 2 Ch 356.

[167] There was some argument over whether, qua mortgagee and/or donee of the power of attorney, Oatway had an obligation to account to Maxwell Skipper for this surplus, in the light of other debts owed to him by Skipper. However, as a trustee, and a party to the original breach of trust, Skipper could not and did not oppose the beneficiaries' claim to the proceeds of sale of the shares on his own account, so the case was decided on the footing that Oatway was personally entitled to the balance: [1903] 2 Ch 356, 359.

the beneficiaries under the Skipper trust argued that the proceeds of sale of the Oceana shares should not go to the general creditors but should be paid over to Maxwell Skipper, to hold on the terms of the original trust. The question before Joyce J was whether *Re Hallett's Estate*[168] should be interpreted to mean that a trustee must be treated as first withdrawing his own money from a mixed bank account, resorting to the beneficiaries' money only when his own had been exhausted. On the facts of *Re Oatway*, such a reading of *Re Hallett's Estate* would have meant that the shares were acquired by Oatway using his own money and that the money that had been untraceably spent in the period leading up to his death was the trust money.

In framing the issues raised by this question, Joyce J began with Blackstone and *Lupton v White*, saying:

> It is a principle settled as far back as the time of the Year Books that, whatever 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: see Blackstone, vol ii, p 405 and *Lupton v White*. But this rule is carried no farther than necessity requires, and is applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties. … Trust money may be followed into land or any other property in which it has been invested.[169]

Here, the investment of trust money in land is presented as an instance of a change in the form of the money, where a change in form is to be understood as Blackstone understands it, ie the intermixture of coins in a box, or of gold in a melting-pot or crucible. It is in the context of this model that Joyce J went on to address the situation where a trustee had paid trust money into his personal bank

---

[168] (1880) 13 Ch D 696, discussed at 55 above.

[169] [1903] 2 Ch 356, 359-360.

account, and held that *Re Hallett's Estate* had not simply decided that a trustee should be treated as withdrawing his own money first and the beneficiaries' money only when his own had been exhausted, but rather represented a general principle of cherry-picking in favour of beneficiaries. Implicit in this reasoning is the suggestion that the cherry-picking rule is simply an application, in the particular context of mixed bank accounts, of the rule applicable to all mixtures enunciated by Lord Eldon in *Lupton v White*.

It is important to note that this is a development beyond the view expressed by Lord Eldon in *Lupton v White* itself, with reference to the claims to traceable proceeds that succeeded in *Lord Chedworth v Edwards*. In that case, the evidential obstacle, overcome with the aid of the principle in *Armory v Delamirie*, was caused by a failure of the defendant steward to keep a record of all the transactions he had entered into. No transactional link between the particular stocks acquired by the defendant and the assets sold by him could be affirmatively proved.[170] In the *Re Oatway* scenario, by contrast, there were clear and adequate records of all the payments out of the bank account. The problem was in determining how to attribute those transactions as between the parties. In characterising this problem as an evidential one, to be overcome by the application of the rule in *Lupton v White*,[171] Joyce J thus draws a stronger analogy between mixed bank accounts and mixtures of fungible goods than can be found in *Lupton* itself.

---

[170] (1802) 8 Ves Jun 47, 50; 32 ER 268, 269.

[171] The view that Blackstone's formulation is confined in its application to cases where there is genuine evidential uncertainty, as Lord Eldon suggested in *Lupton v White*, was accepted by Staughton J in the leading case of *Indian Oil Co v Greenstone SA Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1987] 1 QB 345.

B. The analytical objection: the distinction between tracing and following

Against this background, Smith and Birks argue that the language of 'changes of form' is misleading when applied to tracing, and that the law's response to physical mixtures must be distinguished from its response to substitutions. The objection, in both cases, is that this language elides the important distinction between tracing and what Smith calls following.

Following, as Smith defines it, is about the physical location of a tangible thing.[172] For example, suppose that B once had possession of a car, has lost possession, and would like to discover its current physical location. B's efforts to discover this fact can be described as the exercise of following the car itself. Similarly, if A takes B's £1 coin and puts it in a drawer, B's efforts to identify the coin in the drawer as the very one taken from him involve following the coin in exactly the same sense. He is trying to find out a fact about the physical universe, which does not require the invocation of any legal rules.

There are situations where B may be trying not only to discover this fact but to prove it in the context of litigation, eg he may be suing A in the tort of conversion and therefore attempting to prove, to the satisfaction of a court, that the coin in A's possession is the very one taken from him. If so, he will in a sense need to invoke legal rules but these will be the ordinary rules of evidence; he will need to prove the relevant fact (that the coin in the drawer is the one A took from him) to the civil standard of proof. Nevertheless, the activity of trying to discover the current location of the car may occur outside the context of litigation, and is perfectly intelligible

---

[172] Smith, *The Law of Tracing* (n 25) above) 6.

without reference to any legal rules.[173]

Sometimes, however, this 'simple matter'[174] of following is complicated by the occurrence of problems of a kind that require the invocation of substantive legal rules in order to resolve them. For example, A may have applied paint to B's car or he may have placed B's £1 coin in a wallet that contains many other coins of the same denomination.

In the first case, the problem is that the subject-matter of A's property right (the paint) may have become attached to the subject-matter of B's right (the car) such that it is no longer possible, as a matter of fact, for both parties to enjoy their rights exactly as before: the rights of one, or both, of them will have to be extinguished or modified as a result of the change in the practical situation. If the law concludes that the application of A's paint has caused such a transformation that the car can no longer be treated as the very one to which B had a title, following comes to an end;[175] B can no longer point to something in A's possession and show that it is 'his car'. If the law concludes that the application of paint does not cause such a transformation, but that the car remains identifiable despite the change, then following remains possible. In this sense, therefore, according to Smith's analysis, the rules that respond to the physical transformation of things are 'rules of following'; they mark the limits within which a claimant can follow his physical thing despite changes to its

---

[173] Smith, *The Law of Tracing* (n 25) above), 69.

[174] ibid.

[175] Smith, *The Law of Tracing* (n 25) above) 104.

appearance or physical structure.[176]

In the second situation, nothing has happened to the physical appearance or structure of the coin; only its location has changed. However, the effect of this change in location – physical mixture with other coins of identical appearance – creates an evidential problem for B. If he can identify his coin as the one taken by A, prior to mixture, the fact that he can no longer identify it among the coins now in A's possession is irrelevant to A's liability in conversion, since the tort will have occurred as soon as A assumed possession.[177] However, the mixture makes it very difficult, if not impossible, to follow that coin beyond this stage, ie to tell whether or not a payment to C out of the wallet is made using B's coin or one of the others, which may be relevant to C's liability to B. Again, rules of law become necessary to determine the effect of such a mixture on the pre-existing rights of the contributors to it and, assuming that the contributors retain some rights in respect of the mixture, to attribute payments out of it as between them. This is the scenario arising on the facts of cases like *Lupton v White*, and *Ward v Aeyre*, discussed above.

The starting-point for Smith's analysis of tracing is that, contra the language of some of the cases, it is a mistake to characterise claims to traceable proceeds as responses to a 'change in the form' of a thing, equivalent to the painting of a car or the mixture of a coin with other identical coins. Changes of form, in this sense, are the concern of rules of following, rather than tracing, and the two are importantly different:

---

[176] ibid, pp 104-115, which discusses the accession of chattels to other chattels and to land (fixtures) and the creation of new things by specification under the heading of 'The end of following through the destruction of the subject matter'.

[177] See S Green and J Randall, *The Tort of Conversion* (Hart 2009) 66.

> The analogy between changes of form (which do not necessarily obstruct following) and tracing into substitutes is based on the idea that a substitution is like a change in form. The idea … is that paying cash into a bank account is only a change in form; it should affect the legal position no more than painting a car. The analogy is false and the idea that a substitution is like a change in form will not stand up to scrutiny.[178]

Smith points out the literal inaccuracy of Lord Denning's claim that payment of cash into a bank account is merely a change in the 'form' of the cash,[179] since the effect of such payment is not to alter the physical identity of the cash but to vary the rights of the parties to the transaction. The effect is that the account-holder's pre-existing title to the cash vests in the bank, while a right to the credit balance of the account vests in the account-holder. Meanwhile, nothing happens to the cash itself: it goes into a drawer at the bank.[180]

One possible response to this line of argument is that, in the passage criticised, Lord Denning is using the language of changes of form metaphorically, not literally. That is, his claim is not that a bank account is literally a receptacle into which cash is paid, but that there is an important similarity between the two, expressed by the metaphor. However, Smith's larger point is that even the metaphor of change of form is to be discouraged, because the use of that metaphor obscures the quite different justificatory questions posed by the law's response to the two situations:

> A claim in relation to the bank account … cannot be justified on the same basis that permits a claim in relation to a car even when it has been painted. The claim to the bank account must be justified by principles governing the transmission of rights

---

[178] Smith, *The Law of Tracing* (n 25) above) 7.

[179] ibid, responding to the passage quoted above at text to n 147.

[180] ibid.

from one asset into another.[181]

This point becomes clearer if we return to Lord Ellenborough CJ's dictum, in *Taylor v Plumer*, that a change of form 'makes no difference in reason or law'[182] to the claimant's original entitlement. In the case of the painted car, this might be literally true. B's title to the car – perhaps arising from the consent of his predecessor in title or from a previous act of taking possession – would necessarily[183] have existed before the later event of the car being painted. When he sues A, he is relying on the legal consequence of this past event, which originates his title. He will succeed if the law decides that the intervening event – the application of paint to the car, which constitutes the relevant change in form – has simply 'made no difference' to his legal position, ie that his ability to follow the car has not been terminated by the operation of some legal doctrine (such as accession or specification).

In the case of the cash paid into the bank account, however, this analysis cannot hold in the same straightforward sense. As in the case of the painted car, a claimant must show that he had a pre-existing entitlement to cash paid into a bank account in order to assert an entitlement in respect of that bank account. However, prior to the exchange transaction, such a claimant would not have had any entitlement to the bank account. But for the exchange, there would no possible basis for the claimant's assertion of such an entitlement. It is not true, therefore, that the exchange transaction has literally made no difference to the claimant's rights: it is the fact of exchange that enables the claimant to point to the bank account as the subject-matter

---

[181] Smith, *The Law of Tracing* (n 25) above) 8.

[182] See text to n 144 above.

[183] In that, if he did not have some entitlement to the car before the thief's taking of it, the taking of it would not constitute a legal wrong against him.

of a right vested in him.

The point can be illustrated by reference to the facts of *Re Oatway*. In that case, the Skipper beneficiaries could show that the trust in their favour, arising by the will of Charles Skipper, pre-dated the exchange transactions undertaken by Oatway. However, at this stage, they could have had no rights in respect of Oatway's personal bank account or the Oceana shares. It is only as a result of Oatway's dealings with Maxwell Skipper, and his drawings on his bank account, that they acquired rights first in respect of the bank account and then in respect of the shares. Exchange, therefore, 'makes a difference' to the rights of a claimant in a sense that a mere change of form, like the painting of a car, does not.

Thus, an important aspect of the tracing/following distinction is that it focuses attention on the difference between the persistence of a right to a thing despite changes in its form and, in Smith's terminology, the transmission of that right from one thing to another. Put differently, it sharpens our awareness of the causative event that gives rise to the claimant's entitlement to the substitute, which is obscured by characterising the exchange transaction as a mere change of form that makes no difference to the rights of the claimant. This is particularly important, according to Birks, because of a significant normative difference between the event of physical changes to the subject matter of a pre-existing right, like a physical mixture, and the event of substitution:

> A legal system must answer the questions raised by physical mixtures, for the contributors must know how their pre-existing property rights are affected. But a system might without disaster turn its back on substitutions. It might

> absolutely refuse to acknowledge that the contributor of value could acquire any rights in the substitute asset.[184]

In other words, one reason why it is important to avoid characterising substitutions as 'changes of form' is because this language obscures the reality that new rights are being brought into being by substitutions, which call for positive justification.[185] By contrast, cases of physical transformation are about the effect, if any, of subsequent events on rights that already exist. The two must be distinguished so that the question of justification, raised by the existence of claims to substitutes, can be properly defined rather than being obscured by the more obvious justification for the law's response to a quite different kind of event.

There is, therefore, an irony in Lord Millett's adoption of the conclusions of this scholarship in the context of his majority speech in *Foskett v McKeown*. Birks and others have criticised the reasoning of Lord Millett, Lord Hoffmann and Lord Brown-Wilkinson in *Foskett* precisely because their approach, in various ways, 'averts its eyes from the substitution'[186] as an independent causative event. Lord Hoffmann, in *Foskett,* does not invoke the tracing / following distinction at all, but instead follows the older tradition and describes the case as an instance of 'what the Roman lawyers, if they had an economy which required tracing through bank accounts, would have called *confusio*.'[187] While Lord Millett's analysis implicitly

---

[184] 'Mixing and Tracing: Property and Restitution' (1992) 45 3CLP 69, 86.

[185] See P Birks, 'Establishing a Proprietary Base (*Re Goldcorp*) [1995] RLR 83, 92: 'No amount of talk about tracing things, as though tracing were a hunt for the original asset, should be allowed to conceal the metaphor. Tracing is not a hunt for the original asset but an attempt to discover in which new asset the value of the original asset has been invested and is now located. The new asset implies a new right … The new right has to be referred to a causative event. … The metaphor of hunting for things has concealed even the need for that explanation.'

[186] P Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231, 243.

[187] [2001] 1 AC 102, 115, criticised by Birks at (2001) 54 CLP 231, 243.

rejects this metaphor, noting the difference between tracing and following and between physical mixture and mixed substitutions, his approach is also criticised by Birks on the grounds that it evades the problem of identifying the causative event and therefore falls into the same analytical error that is criticised with reference to the older authorities.

C. Limits of the objection: the analogy between rules of tracing and rules of following

On the face of it, the analysis offered by Birks and Smith seems to contain an implicit criticism of the model of tracing relied on by the judges in some of the old cases, who drew on metaphors of physical transformation and physical mixture to explain their response to the particular problems posed by the payment of trust money into an active bank account. In this vein, Birks criticises a passage from the 1990 edition of *Snell's Equity* that described tracing as responding to situations when 'money is mixed with other moneys in a bank account or other blended fund.'[188] This, he says, is a 'dangerous' metaphor because it:

> encourages us to think of an account as a container, like a money-box. Moreover, a 'blended fund' might be either of two very different stores of money, a physical mixture of cash or a claim against a bank acquired in substitution for money from different sources.[189]

A vivid illustration of the approach that Birks seems to be criticising in this passage can be found in the judgment of Knight-Bruce LJ in *Pennell v Deffell*.[190] In that case, the deceased trustee, Mr Green, had paid money given to him on various

---

[188] P V Baker and P St J Langan, *Snell's Equity* (29th edn, Sweet & Maxwell 1990) 299.

[189] P Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 3CLP 69, 86.

[190] (1853) 4 De G M & G 372; 43 ER 551.

different trusts into two personal bank accounts, into which he also paid his own money. The Court of Appeal had to decide whether the beneficiaries under the different trusts had any interest in the rights correlative to the debts represented by these accounts and, if so, how the payments out of the various accounts should be attributed between the parties. Knight-Bruce LJ framed the question that arose on those facts as follows:

> [L]et me suppose the very coins and the very notes received by [the trustee] on account of the trusts ... had been placed by him together in a separate repository – such as a chest – mixed confusedly together among themselves. ... Suppose ... that in the same chest with these coins and notes Mr Green had placed money of his own ... [and] so mixed and blended it with the rest of the contents of the chest that the particular coins or notes of which this money of his own consisted could not be pointed out ... Let it be imagined that, in the second case supposed, Mr Green … had taken from the repository a sum for his own private purposes … what would be the consequence?[191]

It might be thought that, in treating the payment of money into a bank account as analogous to putting it, literally, in a box full of money, Knight-Bruce LJ is here invoking the precise metaphor that is criticised as 'dangerous' by Birks in the passage quoted above.[192] In fact, however, this ignores an important refinement of the argument made by Birks and Smith. Although they insist on the necessity of distinguishing between tracing and following, for the purposes of analytical clarity, they also argue that the rules governing physical mixture are exactly analogous to the rules governing mixed substitutions. Thus, Smith says:

> [W]here there is a mixed substitution, one person's value is

---

[191] (1853) 4 De G M & G 372, 381-383; 43 ER 551, 555-556.

[192] The metaphor of the box of money is also relied upon by Page Wood V-C in *Frith v Cartland* (1865) 2 H & M 417, 421; 71 ER 525, 528.

> indistinguishably mixed with another's in the new asset. Tracing in this situation is therefore best conducted by analogy with the established rules for *following* through physical mixtures of indistinguishable things.[193]

The argument is that, although tracing and following are different and should not be treated as analogous, the *rules* of tracing are nevertheless directly analogous to the rules of following because both are concerned with resolving difficulties of the kind that arise from indistinguishable mixture. On this view, it is reasonable, in the particular context of mixed substitutions, to invoke the image of physical mixtures of fungibles because the rules applicable to the two situations are analogous. From this perspective, the approach of Knight-Bruce LJ to framing the question – ie asking what he would do in the event of a physical mixture, and applying the same approach to a mixed substitution – is perfectly appropriate.[194] Thus, Birks himself treats a bank account as the metaphorical equivalent of a repository of physical cash for the purposes of describing the rules applicable to mixed substitutions:

> 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, 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.[195]

The *Re Oatway* analysis of the cherry-picking rule is, therefore, unaffected by the distinction between tracing and following emphasised by Birks and Smith. That

---

[193] Smith, *The Law of Tracing* (n 25) above) 160 (emphasis in the original).

[194] Although the answer he supplied, in applying the 'first in, first out' rule not only as between the beneficiaries of the different trusts but also as between them and the defaulting trustee, was subsequently overturned by the Court of Appeal in *Re Hallett's Estate*: (1880) 13 Ch 696, per Jessel MR at 729.

[195] P Birks, 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1999) 239, 254 (emphasis added).

rule, according to both authors,[196] is simply an application of the principle in *Armory v Delamirie* that evidential difficulties are to be resolved against the person responsible for them.

The lowest intermediate balance rule, which imposes a limitation on cherry-picking,[197] is also explained by reference to the intrinsic limitations of the principle in *Armory v Delamirie*, ie that the principle only enables the resolution of evidential uncertainties, it does not produce results that are contrary to the facts when the facts are known. So, for example, on the well-known facts of *Armory v Delamirie* itself, the direction to the jury was 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 damages'[198] owed by the defendant to the claimant. If the defendant had actually produced the jewel he had wrongfully taken, and shown that it was worth a specific amount that was lower than the value of a jewel 'of the finest water', the fact that he was a wrongdoer would have been irrelevant to the question of valuation; he would have been ordered to pay the lower amount. Smith describes the lowest intermediate balance rule as resting on a similar basis:

> If £100 of the plaintiff's value were paid into the account, and at some subsequent time the balance was £60, then the plaintiff cannot assert that more than £60 of her value remains in the account. Regarding the £60, it is impossible to say whether or not it came from the plaintiff …but this impossibility is resolved in her favour against a wrongdoer. But regarding the other £40, there is no impossibility; we

---

[196] Smith, *The Law of Tracing* (n 25) above) 177; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 201.

[197] Described at 55 above.

[198] (1722) 1 Stra 505, 93 ER 664, per Pratt CJ.

> know it was withdrawn, since the balance was only £60. It cannot be in the account any longer. The law allows evidentiary difficulties, and thus impossibilities, to be resolved against the wrongdoer; but it does not allow findings contrary to the evidence.[199]

Thus, according to Birks and Smith, the distinction between tracing and following is important in framing the justificatory question raised by the existence of claims to traceable proceeds, but has no bearing on the content of the tracing rules applicable to mixed substitutions, including the cherry-picking rule and the lowest intermediate balance rule. These rules do not require independent justification, but can be justified on the same basis as the relevant rules of following, which are themselves justified by reference to the overarching evidential principle in *Armory v Delamirie*.

D. Tracing and claiming

It is clear that this argument depends on the premise that the dispute in a case like *Re Oatway* is a dispute over how to resolve an evidential uncertainty. It shades, therefore, into the larger argument that grounds the distinction between tracing and claiming: that is, the view that, although tracing and following are importantly different, they nevertheless share the significant negative characteristic of not being rules of 'claiming'.

Smith makes the argument that there is a distinction between tracing and claiming, and that the distinction has implications for how we should think about the tracing rules, in three stages.[200] First, the distinction between following and claiming is explained and elaborated. Secondly, the category of following is shown to include

---

[199] Smith, *The Law of Tracing* (n 25) above) 202.

[200] Smith, *The Law of Tracing* (n 25) above)10-17.

certain legal rules that respond to events and which are also to be distinguished from rules of claiming. Finally, it is argued that, for the purposes of the distinction between tracing and claiming, tracing and following are analogous; the rules of tracing are distinct from the rules of claiming and the distinction can be understood by comparing tracing to following.

1. Following and claiming

As noted above, Smith's account of following presents it as a matter of investigating the facts relevant to one's situation, which sometimes, but not always, involves the invocation of legal rules and is in any case intelligible without reference to any legal rules. The distinction between claiming and following, on this analysis, can be illustrated by the facts of *Car and Universal Finance v Caldwell*.[201]

In January 1960, Mr Caldwell had sold his title to a Jaguar car to a man going by the name of Mr Norris, who had given him a cheque in exchange and then taken possession of the car. The cheque bounced, and Mr Caldwell immediately contacted the police and the Automobile Association, who sent out a call to all their patrols to try and find the car. Meanwhile, Norris delivered the car to a company called Motobella Co Ltd, whose director, Mr Allen, took possession of it. Caldwell sued Motobella, who were ordered to deliver the car up in February 1962. Since they did not do so, the Sheriff of Hampshire seized the car in June 1962, and was in possession of it at the date of the pleadings.

In the two years between Mr Caldwell's loss of the car and its seizure by the Sheriff, Motobella Co Ltd had purportedly entered into a series of transactions

[201] [1965] 1 QB 525.

involving the car, having sold their title to it to another company, who authorised them to sell it to a car dealer in Brighton, who eventually sold it to Car and Universal Finance Ltd. The proceedings in the case were interpleader proceedings, with Car and Universal Finance and Mr Caldwell each alleging that they had a better title to the Jaguar.

The legal issue in the case turned on whether or not Mr Caldwell had successfully rescinded the contract of sale of the car before it was sold to Car and Universal Finance, so that his title to the car had re-vested in him before that sale. In Smith's terminology, this is the 'claiming' issue in the case. The 'following' issue had to do with the process of finding out where the car had gone, ie locating it in the hands of Mr Allen, the director of Motobella Ltd. It was necessary for Mr Caldwell to do this in order to show that it was Motobella Ltd, rather than some other holder of a Jaguar car, that he was entitled to sue. He could only get an order for delivery up of the car by proving to the satisfaction of the court that the Jaguar in Mr Allen's possession was the very Jaguar that had been taken by Mr Norris under the fraudulent transaction. Proof that this is the case, in the context of litigation,

> is neither a right nor a remedy. It is an exercise or process which litigants are at liberty to undertake. In some cases, it is an exercise which must be undertaken successfully in order to establish a claim.[202]

In these circumstances, the rules of following – ie the rules that determine whether Mr Caldwell could convince a court that the Jaguar driven by Mr Allen was the very Jaguar that was once in his possession – are the ordinary rules of evidence. Mr Caldwell would have needed to introduce evidence, such as the registration

---

[202] Smith, *The Law of Tracing* (n 25) above) 11.

number of the car, which proved this proposition to the court on the balance of probabilities. The rules that govern his ability to do this are the same rules that determine whether or not Mr Caldwell could convince the court of any other fact, such as whether he had spoken to a policeman about the loss of the car and whether the cheque given to him by Mr Norris had really bounced. No special rules are needed. Finding out where the car has gone is, as Smith says, 'more a question of practical investigation than of legal rules.'[203]

2. Rules of following and the claiming rules

However, as noted above, sometimes following requires the invocation of legal rules to solve the problems that are thrown up by the complexity of real-world events. Suppose, for example, that Motobella Ltd had removed the licence plates from Mr Caldwell's car and placed it in a garage with another Jaguar car, also lacking licence plates and identical in all other respects to the Caldwell car. Suppose, further, that Mr Allen had then taken one of these cars out on a joyride and badly damaged it, drastically lowering its value. In this situation, it would have been in Mr Caldwell's interests to argue that the car that was left in the garage, intact, was the one that was taken from him by Mr Norris. Car and Universal Finance, on the other hand, would benefit from the argument that the car that was destroyed was the one that had been acquired from Mr Norris and subsequently transferred to it.

In this sort of situation, it may be impossible for a court to know, with certainty, which of the two identical cars was the one that was destroyed. Rules are needed to overcome an evidential difficulty of this type, which flows from a mixture

---

[203] Smith, *The Law of Tracing* (n 25) above) 69.

of fungible things. As explained above, the rules that respond to physical mixtures, by establishing presumptions as to the effect of withdrawal from such a mixture, are, in Smith's terminology, rules of following. They are still to be distinguished from rules of claiming – ie the rules that determine whether or not Mr Caldwell had any title to the Jaguar car taken from him by Mr Norris – because they are to do with solving evidential impasses, not altering rights. As such, they are about determining whether or not facts have occurred, not prescribing the legal system's response to such facts as have occurred. If we were to ask about the causative event to which Mr Caldwell's rights respond in this scenario, we would not describe the mixture of cars as the causative event: that would remain the fact giving rise to the rescission of the contract of sale between Mr Caldwell and Mr Norris and either the subsequent destruction of the car by a third party or retention of it by a third party.

Thus, on Smith's analysis, the legal rules that address the effect of a physical mixture play a subsidiary role:[204] they determine whether a court will find that the car has been destroyed or retained, but they have no bearing on the distinct question whether Mr Caldwell had a title to that car. The rules of claiming, as distinct from the rules of following, can be defined as the rules that determine whether or not a person in Mr Caldwell's position would be entitled to a remedy *if* he could follow the car up to the point of the interpleader proceedings. These include the rules that determine whether or not rescission has taken place, what the legal consequences of rescission are, and the availability of any defences to Car and Universal Finance.

---

[204] Smith, *The Law of Tracing* (n 25) above) 71: '[I]f some wheat goes into a mixture, there may be effects on proprietary rights; but the 'following' inquiry is as to whether any wheat can later be said, for legal purposes, to be *the same wheat* that went into the mixture. This inquiry, although it is generally conducted to allow the assertion of proprietary rights, is independent of them. It is an inquiry about identity.'

3. Tracing and claiming: two conceptions of the distinction

Having established this distinction between rules of following and rules of claiming, the third move in the argument is to show that, although there are differences between tracing and following, the two are analogous in their distinctness from claiming. Smith puts this analysis in the following terms:

> The most salient difference between the exercise of tracing and the exercise of following is that the latter can be exclusively factual. Following can involve no more than the proof that a particular tangible thing was in a certain place at a certain time. Tracing, on the other hand, always involves the application of legal rules. … But even though legal rules are inevitably involved, the exercise of tracing is nonetheless just that: an exercise or process that is preliminary to the making of a claim.[205]

In the case of following, the argument is that every question as to legal entitlements is to be distinguished from the factual question whether following is possible. Such questions include whether the claimant has a title to the thing he is following, whether that title entitles him in principle to a particular remedy, or choice of remedies, in the events that have happened, and whether the particular defendant has the benefit of some defence that prevents the claimant from getting his remedy (such as limitation). The analogy between tracing and following indicates that the question answered by the tracing rules is similarly independent of any question as to rights. Whether a claimant can trace through a given set of transactions is a freestanding question, distinct from whether the claimant has any right in respect of the original asset,[206] the nature of his right to the product, and whether that right

---

[205] Smith, *The Law of Tracing* (n 25) above) 11.

[206] Smith, *The Law of Tracing* (n 25) above) pp 12-14.

entitles him to any remedies against a particular defendant in a given situation.[207]

Smith points to two aspects of the law to support the view that this distinction exists. First, there is the fact that the judges in many of the cases proceed in a two-step fashion, distinguishing the tracing inquiry from the question whether any claims to traceable proceeds are available.[208] Secondly, tracing can be invoked in a number of disparate contexts, where the underlying 'claim' or 'status' transmitted is very different, and yet the rules of tracing are uniform across these contexts; Smith suggests this indicates that the work done by the rules must be understood without reference to the nature of the claim.[209]

Unlike his account of the distinction between following and claiming, however, Smith's account of this distinction is complicated by his insistence that tracing always and inevitably involves the application of legal rules. It will be recalled that following, on his analysis, involves the application of legal rules only in certain situations, where an evidential difficulty has arisen, or where the application of some other doctrine has destroyed the possibility of following. In any case, following is always an exercise the meaning of which is intelligible by reference to ordinary concepts, and in the absence of any legal frame of reference. It is possible to follow a car or a coin for a reason that has no legal purpose, merely to indulge curiosity for example.[210] However, according to Smith, tracing *always* involves legal rules. This

---

[207] Smith, *The Law of Tracing* (n 25) above) 121-122.

[208] Smith, *The Law of Tracing* (n 25) above) 12, citing dicta from *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721; *Sinclair v Brougham* [1914] AC 398; *Re Diplock* [1948] Ch 465; and *Boscawen v Bajwa* [1996] 1 WLR 328.

[209] Smith, *The Law of Tracing* (n 25 above) 14.

[210] Birks suggests the example of a person who has sold the family silver and, knowing that he is no longer entitled to assert any rights to it, still wishes to know what has become of it, a desire compatible

raises the question whether, on his account, the process of tracing is intelligible outside the frame of reference supplied by these rules.

On this point, there is a significant tension between two definitions of tracing offered by Smith in *The Law of Tracing*. First, it is a process that allows one asset to stand in the place of another, 'for certain legal purposes.'[211] Secondly, it is a process that enables a litigant 'to prove that the value which used to inhere in one asset has passed into and now inheres in another asset.'[212]

It is not obvious that the two definitions are synonymous. If we accept the first definition, and say that the aim of the rules is to discover whether, 'for certain legal purposes', one asset can stand in the place of another, it seems reasonable to infer that their content will only be intelligible by reference to the relevant legal purposes. If we accept the second, on the other hand, we can say that the content of the rules will be intelligible by reference to the idea of value being transmitted from one asset to another. If that idea, as Smith's use of the word 'prove' suggests, refers to a fact susceptible to proof by ordinary empirical evidence, then the exercise of tracing will be like following, intelligible without reference to any particular legal purpose. While it might be relevant to various different kinds of litigation, it might equally well be conducted outside the context of litigation, for purposes that are not legal.

The corollary of these two accounts of tracing is that that there are also two possible, and logically distinct, versions of the distinction between tracing and

---

'with a thousand different stories' that have nothing to do with litigation: 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1999) 239, 244.

[211] Smith, *The Law of Tracing* (n 25) above) 3 and 17.

[212] Smith, *The Law of Tracing* (n 25) above) 24.

claiming. First, there is the argument that all the legal purposes served by the transmission of a status from one asset to another can be achieved by the application of the set of legal rules known as the rules of tracing. If this were accepted, it would follow that the rules of tracing could be understood independently of the particular differences between the legal purposes that the person tracing was trying to achieve. The principles that enable the transmission of 'proceeds of crime' status would be the same as the principles that enable the transmission of 'subject-matter of a beneficial interest under a trust' status. The reason why they are the same across the board would then call for explanation; it would be a positive choice made by the legal system, standing in need of justification in doctrinal terms, by reference to the purposes achieved by the application of the rules in different contexts.

On the other hand, the argument could be that the distinction between tracing and claiming, like that between following and claiming, maps to the distinction between law and fact. Proof that a factual assertion is true is to be distinguished, as a matter of logic, from the legal response to that fact if proved. If the rules of tracing are genuinely rules of evidence, which enable a fact to be proved to the satisfaction of a court, the distinction between tracing and claiming would not therefore call for doctrinal justification. It would merely reflect the reality that the question whether an event has taken place is different from the question how the legal system ought to respond to that event.

The reliance on the analogy between tracing and following seems to indicate that both Birks and Smith intend to make the second of these two arguments, although, as has been noted, there is some ambivalence on this point in *The Law of Tracing*. The issue then becomes the nature of the fact that a claimant who traces is

trying to discover. Both authors explain this by reference to the concept of value. Thus, Smith says:

> Following is, intuitively, a natural exercise for a plaintiff to pursue. The plaintiff seeks a thing, in order to assert some claim in relation to it. The grammatical object of 'to follow' is 'thing'. …The grammatical object of 'to trace' is value. When a person makes a substitution through which we trace, value is the only constant that is held by that person before, through, and after the substitution.[213]

On this analysis, a claimant must show that a substitution has taken place if he wishes to trace, because the substitution is evidence that the value of the asset substituted is still held by the defendant in the form of the substitute. In Birks' terminology, what he is trying to do is to locate the value of the original asset:

> Tracing is no more than the means of finding out where at any relevant moment value is located. There are two quite separate questions. One is whether the value in question can be located. The other is whether, once it has been located, a right of some kind may be exigible in respect of it.[214]

This fits into Birks' definition of the causative event to which claims to traceable proceeds respond: that is, is the acquisition of an asset 'by a person through his application to that end of the value of an asset in which [another] had a proprietary interest (the original asset), and without that other's consent[.]'[215] While he calls this the event of non-consensual substitution, he notes elsewhere that the word substitution is simply a shorthand expression[216] for the event of value moving from one asset to another. The rules of tracing, like the rules of following, break the

---

[213] Smith, *The Law of Tracing* (n 25) above) 16.

[214] P Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 Current Legal Problems 69, 86.

[215] P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 Current Legal Problems 231, 245.

[216] P Birks, 'On taking seriously the difference between tracing and claiming' (1997) 11 Trust Law International 2, 4.

evidential impasse that certain types of substitution create, by making it difficult to identify where the value of the original asset is now located.

This line of argument in favour of the distinction between tracing and claiming depends on the idea that identifying the current location of the 'value' of an asset is a similar task to identifying the current location of the family silver:

> 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 … Similarly, I might show that it was by selling 'our' silver candlesticks that you acquired the Hockney drawing which hangs on your wall. But successful tracing through that substitution again entails no rights. My following and tracing may satisfy curiosity, but they are compatible with a thousand different stories.[217]

The distinction between looking for the silver candlesticks and arguing that one has a title to them can be justified by an appeal to common sense. It is clear what it means to discover the physical location of a thing, and the concept of doing so is obviously different from the concept of asserting a right to that thing, once found. On the other hand, the distinction between looking for the value of the candlestick, and asserting a right to that value is less obvious. This is because 'looking for value' is not a concept with a clear, common sense sphere of application, like looking for candlesticks. It calls for definition.

E. Two conceptions of value in the context of tracing

In *The Law of Tracing*, Smith offers the following definition of the value that is 'traced' through successive transactions:

---

[217] Birks (n 216 above).

> The idea of 'value' in this context does not refer to a fixed monetary account; it simply reifies that which inheres in an asset and which can be seen as passing into another form when that asset is exchanged for another asset. … There are good and bad bargains, and the invocation of 'value' as the object of the verb 'to trace' does not entail that an asset must have the same market value as the asset used to acquire it.[218]

Thus, he distinguishes between two available senses of the word 'value': there is market value, the fixed monetary amount that a given asset might be worth, and then there is another conception of value, which refers to 'that which inheres in an asset and can be seen as passing into another form when that asset is exchanged for another asset'. In other words, there is market value and there is value that is traced and the two are not related to each other.

In his later work on tracing, Smith focuses on the distinctiveness of this second conception of value, illustrating it by reference to Birks' distinction between abstract and particular conceptions of wealth. In *Unjust Enrichment*, Birks describes the difference between the two as follows:

> There are two ways of contemplating a person's wealth. … The first sees the person's wealth as a list of particular assets, some corporeal, some incorporeal. This can be called the discrete conception of wealth, wealth as an inventory of distinct items such as a house, car, jewels, money, bank accounts, bonds, shares, and so on. The other conception envisages an individual's wealth as a single fund with a money value. When a celebrity is said to be worth millions, the speaker is thinking in terms of an abstract fund. This can be called the abstract conception of wealth.[219]

He goes on to note that, although the law of unjust enrichment is in general committed to the abstract conception of wealth, there are particular areas of that body

---

[218] Smith, *The Law of Tracing* (n 25) above) 16-17.

[219] P Birks, *Unjust Enrichment* (OUP 2005) 70.

of law that exhibit a 'contrary commitment'. Among these, he counts claims to traceable proceeds:

> The law relating to traceable substitutes of assets received … supposes that enrichment survives, not in the level of the abstract fund, but in particular assets in which the value of the original is re-invested.[220]

Commenting on this passage, Smith argues that the rejection of an abstract fund model of value, in favour of value 'surviving in particular assets', is basic to the law of tracing as it currently is. The transactional character of the tracing rules is a reflection of the 'particular, and not the abstract, conception of wealth';[221] tracing depends on the idea of value as inhering in particular assets, rather than as an abstract statement about the sum total of a defendant's assets. Smith argues that it is this choice between the abstract and the particular conceptions of value that explains the division between the majority and the minority in *Foskett v McKeown*:

> The dissenters thought that the misappropriated trust money could not be traced into the life assurance payout because it was not a but-for cause of that payout. The majority, following the approach in the whole corpus of decisions across the common law world, applied a transactional approach.[222]

This comment on *Foskett v McKeown* identifies the crucial link between causation and the abstract conception of wealth. To ask whether a defendant still has the 'value' of the title to the candlesticks that he has sold in exchange for some banknotes, in the abstract sense, is to ask whether he is as well off as he was before he sold that title: that is, it is to ask a question about the consequences of the sale, as a

---

[220] ibid.

[221] L Smith, 'Tracing' in A Burrows and Lord Rodger of Earlsferry (ed), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 119, 136.

[222] ibid (footnote 64 to the text).

matter of causation. But for the sale, would the abstract fund of the defendant's wealth be greater, or smaller, or the same? Do the banknotes accurately measure the market value of the defendant's title to the candlesticks, at the date he sold them, or has he made a bad bargain or an exceptionally good one? Smith's analysis insists that tracing, as it currently exists in English law, is *not* about this question, but is instead about whether the value inherent in the defendant's title to the candlesticks is now inherent in the title to the banknotes received, which depends on the nature of the transaction that enabled the acquisition of title to the banknotes.

This conception of value poses difficulties, however, for the account of the distinction between tracing and claiming that builds on an analogy between tracing and following and thus maps to the distinction to that between law and fact. The answer to the first question – is the defendant better off, and by how much? – is clearly an answer to a question of fact, which can be proved by the introduction of evidence. On the other hand, the second question is more mysterious. What does it mean to say that 'that which inhered' in the defendant's title to the candlesticks now inheres in the bank notes? Since this 'value that inheres in assets' can only be defined by reference to the tracing rules – as Smith indicates, it is a label that simply reifies the response of the law to exchange transactions – its adoption indicates that the distinction between tracing and claiming does not mirror the distinction between questions of law and questions of fact, but rather constitutes a distinction between one set of legal questions and another.

By contrast, Birks' earlier work draws a distinction between value surviving and value received, which does not present the two conceptions of value as so fundamentally different in character. In his *An Introduction to the Law of Restitution*,

he argues that the function of the tracing rules is to determine how much of the value that was received by the defendant 'survives' in his hands.[223] The difference is one of timing:

> The crucial difference between the two measures is that a plaintiff who claims the value received is not interested in what happened after the receipt. The defendant may have spent, lost, eaten or destroyed the enrichment. Or he may have invested it with huge success or otherwise caused it to increase.[224]

On this analysis, the tracing rules simply press the question of causation further than the other measure of value. They ask not only whether the defendant was better off at the moment of receipt, but whether his situation has changed in an important respect: whether he is still better off to the same degree, or to a lesser degree, or not at all. If this is correct, then Birks seems to be saying that 'value' in the context of tracing is synonymous with 'enrichment' in the context of his account of unjust enrichment.[225] The purpose of the rules is to discover how much of the enrichment received by the defendant has been diminished, or increased, by events subsequent to receipt. This, like the quantification of the enrichment received in the first place, is a question of fact. It supports the view of the distinction between tracing and claiming that depends on the distinction between law and fact. The rules of tracing determine whether the defendant remains better off as the result of some transaction and, if so, how much by; that answer to that question does not commit us

---

[223] (OUP 1985, revised edn 1989) 83.

[224] ibid, 76.

[225] Reflected in the fact that, in the index to *An Introduction to the Law of Restitution*, the entry for 'value' says 'see enrichment'. Recent scholars have argued that enrichment in the law of unjust enrichment is not synonymous with value in the sense used by Birks, but that value is only one kind of enrichment, with legal enrichments (such as the acquisition of legal rights or the release of legal obligations) being the other: see R Chambers, 'Two Kinds of Enrichment' in R Chambers, J Penner and C Mitchell, *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 242 and A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012).

to any view on whether the claimant is entitled to any remedy as a result of the continuing enrichment of the defendant.

In *Foskett v McKeown*, two judges offered a detailed account of the distinction between tracing and claiming: Lord Millett, in the majority, and Lord Steyn, in the minority. As Smith has explained, the difference between majority and minority in the case can be explained as a difference in the underlying conception of 'value' adopted by the Law Lords. Lord Steyn argued that the defendants were no better off as a result of Mr Murphy's use of the trust money to pay the premiums on the insurance policy; Lord Millett said that this made no difference, because tracing is about attribution, not causation.[226]

As has been explained, this leaves us with a question mark over the distinction between tracing and claiming. If tracing is not about causation, it is difficult to see how it can be about any question of fact; if it is not about any question of fact, the nature of the distinction between tracing and claiming stands in need of explanation. On the other hand, if Lord Steyn is right and tracing is about some question of fact – 'belongs to the realm of evidence'[227] – how is that analysis to be squared with the decision of the majority on the irrelevance of causation? Although Lord Millett expressed his agreement with Lord Steyn on the neutrality of the tracing rules, and the distinction between tracing and claiming,[228] the case offers no guidance on the meaning of the distinction because the judges differed so fundamentally on the underlying concept of value as it related to the outcome of the case. It is necessary,

---

[226] See text to n 72 above.

[227] [2001] 1 AC 102, 113.

[228] [2001] 1 AC 102, 129-130.

therefore, to focus on the concept of value as such, in order to determine the implications of these two conceptions of value and to evaluate the extent to which either one can make sense of the content of the tracing rules.

II. WHAT IS VALUE?

The concept of value has attracted a large philosophical and economic literature, the concerns of which are beyond the scope of the thesis. The aim of this part is only to consider those conceptions of value that could plausibly be relevant to our understanding of the function of the tracing rules. The starting-point for analysis, therefore, is the exchange transaction, and the senses in which that transaction could be understood as a movement of value.

It will be recalled that the core examples of exchange transactions, in the sense relevant to the law of tracing, involve one person transferring a right to another person, in consideration for the transfer to him of a different right by that other. So, for example, T transfers his title to a car to a third party, X; in exchange, X transfers his title to £1000 in banknotes to T. The dominant model of tracing tells us that what has happened in this scenario is that the value of T's title to the car is now to be found in T's title to the banknotes. If T held his title to the car on trust for B, it follows that, in Birks' terminology, T has applied the value of the asset he held on trust for B to the acquisition of the banknotes. The question examined in this part of the chapter is what, if anything, this characterisation of the exchange transaction might mean.

In order to understand what it means for T to 'apply' the value of one asset to the acquisition of another, it is necessary to begin by asking what the reference to the

value of the original asset means. One possibility is that it refers to the intrinsic worth of the asset in question, understood in itself.[229] This idea of intrinsic worth may be understood objectively, within the framework of some moral philosophy that attributes such value to rights or objects, or subjectively, from the perspective of a particular person in whose valuation of the right or object we are interested.[230] Lodder calls this sense of the word 'idiosyncratic' value and defines it as a conception of value that:

> does not abstract either from the particular right or benefit or the particular individual in question; rather, it is inherently bound up in that individuals idiosyncratic measure of what a particular right or benefit is worth to them.[231]

Under this definition, however, it would be nonsensical to talk about value being *transmitted* from T's title to the car to his title to the notes, since a quality that is intrinsic to an object is, by definition, not transferable away from that object. If an apple is to be valued, in Chesterton's terminology,[232] because of its intrinsic qualities as a thing that is good to eat, that quality is peculiar to the very apple in question; it cannot possibly be transmissible from the apple to a coin obtained in exchange for it, or even to a pear for which the apple is bartered. Similarly, if we think of the value of T's title to the car *to* B personally, in the sense of his subjective pleasure in his rights

---

[229] For an example of this usage of 'value', which opposes it to 'price' (what is here described as market value) see G K Chesterton, 'Reflections on a Rotten Apple' in *The Well and the Shallows* (Ignatius Press, San Francisco 2006) 163, 170, borrowing Oscar Wilde's distinction between the price of a thing and its value: 'Price is a crazy and incalculable thing, while Value is an intrinsic and indestructible thing.'

[230] See, generally, E Anderson, *Value in Ethics and Economics* (2nd edn, Harvard University Press 1995) 1-17 and 117-140 for an overview of the available senses of 'value' in the context of moral philosophy.

[231] A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012) 15.

[232] G K Chesterton (n 229 above).

under the trust – say, if the terms of the trust require T to permit B to drive the car whenever he has need of it, which he enjoys – that kind of value cannot be transmitted to T's title to the banknotes. The sale may have the effect of depriving B of the value of the trust asset, in the sense that he may no longer have access to the pleasure obtained by exercising his rights under the trust, but it is meaningless to say that he may obtain an identical pleasure from the banknotes instead.

Any sense of the word 'value' that refers to the particular qualities of whatever is valued can be disregarded in this context, therefore, since value in this sense is incapable of being 'transmitted' through an exchange transaction, even in a metaphorical sense. If we move away from the notion of intrinsic qualities, the available conceptions of value are ones that measure the worth of T's title to the car relative to other objects that also have value in the relevant sense. This is what Lodder calls 'relational value', which he defines as 'an abstract standard for the comparison and exchange of qualitatively heterogeneous things in quantitatively comparable terms.'[233] To speak of value in this sense is, by definition, to abstract from the particularity of a given object – the bundle of rights, powers, duties and privileges comprised by T's title to the car, and the qualities of the car itself looked at in isolation (eg its colour or its fuel efficiency) – and to bring to bear a standard that relates it to other objects, either for the purposes of comparison or for the purposes of exchange. It is important that this standard is quantitative: to say that two cars are blue, or fuel efficient, is not to make a claim about the value of either car, whereas to say that one car is a deeper blue than the other, or more fuel efficient, is to treat these characteristics as a standard of valuation.

---

[233] A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012) 16.

As this example suggests, we might abstract from the particularity of a given object at different levels, for different purposes. The evaluative standard supplied by 'blueness', or fuel efficiency, is limited to the class of objects that can meaningfully be described as possessing these characteristics in different degrees. For the purposes of comparison, it is possible to devise innumerable such standards, at different levels of abstraction. If T had bartered her title to the car for a title to a motorbike, we might say that the motorbike is worth less than the car from the aesthetic perspective but worth more in terms of fuel efficiency. This is not the kind of comparison that can meaningfully be made in respect of the banknotes, at least so far as the fuel efficiency is concerned. On the other hand, if we treat weight or size as our evaluative standard, then the car can be compared to the banknotes (which are smaller and lighter), while stocks and shares would be excluded from the category of objects capable of being valued in these terms because they have no physical subject matter.

For the purposes of exchange, as opposed to comparison, it is necessary to introduce an evaluative standard that not only allows one object to be related to another but that allows them to be related in a particular sense: that is, in the sense that allows us to say 'that an *amount* of *x* is worth the same as another *amount* of *y*, irrespective of the particularities of *x* and *y*.'[234] If we wish not only to compare *x* and *y*, but to introduce a standard by which they can be treated as interchangeable, in other words, we will need to express our evaluative standards in the language of units of account. As Lodder suggests, we might invent particular units of account that serve this function in particular contexts: thus, for example, the rules of a game may

[234] ibid (emphasis added).

stipulate that one black marble is worth three white marbles and seven gold ones.[235] However, if we set aside such artificially self-contained systems of valuation, the real-world value of an object in a given society can always be expressed in terms of money. This is because money is a universal denominator of value within a given society: since, by the very definition of 'money', all commodities can be exchanged for it, the indirect exchange ratios between all commodities in the economic system can be expressed by a sum of money.[236]

We might ask, therefore, what the value of T's title to the car is and mean by that how much money someone would be willing to pay for it. The answer may, obviously, vary from person to person; however, aggregating the preferences of people in the market for titles to cars, it is possible to arrive at a fixed monetary amount representing the likely price of T's particular title to that particular car. Discovering the value of T's title to the car in this sense – its market value – is a matter of investigating the facts that determine the price for which that title is likely to be sold, given the actual market that exists for it (rather than some notional perfect market).

If we return to the example of the sale of T's title to a car for title to £1000 in banknotes, it follows from this definition that the market value of T's title may or may not have been £1000 at the date of the sale, depending on the circumstances. T may have been fortunate enough to sell it at above the market price for a car of that kind, or she may have been unlucky or foolish and have sold it below market price. Further, it is not the title to those banknotes, as such, that represent the market value of the car

---

[235] ibid, 34.

[236] D Fox, *Property Rights in Money* (OUP 2008) 8.

but the abstract money amount that T *could* have obtained for it. The point can be more clearly expressed if the facts are varied, so that T sells her title to the car to X and receives a title to a painting instead. The fact that T has decided to barter her title to the car for a title to another chattel will not alter the objective market value of that title in any way: if it was £1000 at the date of the sale, that will be true even if the market value of the title to the painting is £10. The market value of an asset is always, by definition, to be expressed in abstract terms, by reference to a sum of money obtainable for that asset.

As noted above, Smith has rejected the idea that this market conception of value is relevant in the context of tracing. Instead, he offers the following account of the relevant conception of value:

> If £100 note is used to buy a painting, then the value inherent in ownership of the banknote is traceable into ownership of the painting. Ownership of the painting might be, or might become, worth £10 or £10,000. ... There are good and bad bargains, and the invocation of 'value' as the object of the verb 'to trace' does not entail that an asset must have the same market value as the asset used to acquire it.[237]

This idea that the value inherent in a right to one thing is traceable into a right to another thing, *regardless of the market value of the rights transferred*, introduces another possible conception of value. This is the notion of 'value' as an incident of a particular right, the 'ownership' referred to by Smith in this passage. Weinrib, drawing on Hegel, proposes an account of the value of a thing in these terms, by reference to the entitlement to the outcome of 'a set of legal operations' involving the use of the thing:

---

[237] *The Law of Tracing*, p 16-17 (emphasis added).

> One is entitled to the value of something by virtue of one's ownership of the thing that is the locus of the value. … [T]he owner of anything alienable is entitled to realize its value through exchange …Value is thus the potentiality that is actualized through a set of legal operations –exchange and liability –with respect to things that one owns.[238]

Weinrib's own approach incorporates the market notion of value into this idea of ownership, in that he suggests that the right of an owner to realise the value of his thing is a right to realize the market value of the thing. This is because he follows Hegel in the view that that value, by definition, is abstract and not particular, so that the 'exchange of value' in a given transaction depends on the conditions of the transfer rather than the particularity of what was transferred and what was received:

> Whether a person who gives another something of value has in return received something of equivalent value is an objective question, the answer to which is systemically determined by exchanges within a competitive market.[239]

On this approach, Smith's example of the use of the £100 to buy a title to a painting worth £10 is not an exchange of value at all, because the owner of the banknotes will not have received their true value if he makes this bargain. Similarly, if T sells her title to the car for £1000, when the car is actually worth £1500 on the market, the true value of the car will be greater than the value of the banknotes received from X. As such, the value that T has applied to obtain the title to the banknotes exceeds the actual value of the right held by her under the exchange transaction.

However, Rudden offers an account of tracing in terms of value that is more

---

[238] E Weinrib, 'Correctively unjust enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 31, 34.

[239] ibid, 38.

consistent with Smith's explanation of value in this context. Like Weinrib, Rudden suggests that value as such can be the object of a right held by a claimant. However, unlike Weinrib, the conception of value he relies on is not abstract but particularised. He argues that the relationship between a beneficiary under a trust and the trust property is 'one which treats things as wealth and not as thing.'[240] He then defines the treatment of a thing as wealth in the following terms:

> …every thing may be treated merely as the clothing (in-*vestment*) worn by a certain amount of wealth. In this case, the relevant law accords it the modest role of the member of a class, perfectly replaceable and subject to an implacable regime of real subrogation.[241]

Here Rudden uses the language of 'wealth', rather than 'value', but he also describes a thing that is treated as wealth as merely 'the external form of a value.'[242] The exchange of T's title to the car for X's title to cash, on this model, is a transmission of value in the narrow sense that it involves an asset losing its place in the class of things that are the object of B's entitlement, and another asset becoming a member of the same class. This is a conception of value that is defined purely by reference to the network of legal relationships between T, B, and X, rather than by reference to empirical facts about the price obtainable for an asset in a market. It is irrelevant, on this model, whether the substitute asset is worth the same as the original asset, in terms of its market value; the relationship between the two does not depend on equivalence or the quality of being interchangeable in some factual sense, but in some legal sense that derives its meaning from the content or nature of B's relationship with T as the holder of those assets.

---

[240] B Rudden, 'Things as Things and Things as Wealth' (1994) 14 OJLS 81, 87.

[241] ibid, 83.

[242] ibid, 87.

III. VALUE AND THE RATIONALITY OF TRACING

The two senses of value sketched in the previous part produce inconsistent accounts of the rational justification for English law's adoption of the tracing concept and the particular rules that define the operation of that concept in different circumstances. This part argues that neither of two justifications supplied is a satisfactory one. The market conception provides a very clear account of what the rules are for, but suffers from a problem of 'fit': it does not cohere with the existing authorities. On the other hand, the entitlement conception does not work as a substantive justification: it coheres well with the positive law, but does not explain it in terms that allow us to make sense of it.

A. The market conception of value and the rationality of tracing

As explained above, the value of an asset could be understood to mean a fact susceptible to empirical proof: that is, the abstract worth of a given asset in monetary terms, determined by reference to the conditions operating in the market where it could potentially be exchanged. On such an analysis, the claim that the value of one asset has been 'transmitted' to another is a metaphor to express the conclusion that the two are of equivalent market value in this empirical sense: that the trustee who has transferred *x* and acquired *y* can still be said to retain 'the value' of *x,* because *y* is in fact of equivalent value to *x*. From this perspective, the rules of tracing are to be understood as rules of evidence, which treat the asset acquired by a defendant under a particular exchange transaction as conclusive evidence of the abstract market value of the asset exchanged, and thus of the gain obtained by the defendant in misappropriating it.

1. Market value and the tracing concept: why transactional links?

As noted above, Smith has explained that the transactional model of tracing is radically inconsistent with an objective of identifying the market value of the asset transferred and determining whether the defendant still has that value. There are two reasons for this.

First, there is the fact that the transactional question takes no interest in whether the defendant has made a good or a bad bargain, so that evidence about a differential in value between the asset sold and the asset obtained is simply irrelevant to whether the asset obtained counts as a traceable substitute for the asset sold.

It might be argued that this only shows that the rules aim at a rough quantification of the value retained by the defendant, and ignore the possibility of a differential between value transferred and value obtained, on the basis that taking such a possibility into account would involve too complex an exercise in accounting. However, as has been explained,[243] in the context of making confiscation orders under the Proceeds of Crime Act 2002, courts routinely calculate the benefit obtained by a defendant as a causal consequence of a crime and then determine whether his overall wealth has fallen below this amount. They do this by investigating the market price both of any asset obtained as a result of a criminal offence, and of all the assets held by the defendant at the date of proceedings.[244] It is implausible to suggest that identifying a chain of transactional links between the asset held and the one transferred is a less complex and more straightforward accounting exercise.[245] The emphatic rejection of 'swollen assets' models of tracing by the English courts appear

---

[243] Discussed at 39-34 above.

[244] *R v Islam* [2010] UKHL 30.

[245] As noted by Kennedy's comparison of the civil recovery proceedings, which depend on tracing, and the confiscation order proceedings: see text to n 55 above.

to be based on the idea that these approaches are inconsistent with the fundamental objectives of the tracing exercise; this indicates that the judges do not take the view that the tracing rules provide a more convenient and straightforward method of answering essentially the same question that the 'swollen assets' inquiry poses (ie is the defendant better off and by how much).

Secondly, there is the point that causal links are actually irrelevant to tracing, as is made clear by the decision in *Foskett v McKeown*. If the aim of the tracing exercise is to determine whether the defendant still has the 'value' of the asset transferred, tracing ought to fail where it is proved by positive evidence that the defendant's transfer of that asset has not, as things have turned out, enabled him to obtain anything of equivalent value. On the facts of *Foskett v McKeown*, the death benefit would have been paid to the defendants even if Mr Murphy had not misappropriated the trust money. In this sense, he made a bad bargain; he could have kept the money and declined to pay the insurance premiums due and, in the events that happened, his children would have obtained the same amount of money as the death benefit under the insurance policy. The rejection of the relevance of causation in the context of tracing, and the insistence on the necessity and sufficiency of transactional links, would be deeply irrational if, as has been suggested by proponents of the market conception of value in the context of tracing, the rules of tracing themselves are merely 'a complicated facade for a rough doctrine of causation'.[246]

2. Justifying particular rules of tracing: the problem of attribution of payments and the cherry-picking rule

[246] D J Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172, 190.

Secondly, it is impossible to make sense of the specific rules of tracing applicable to mixed substitutions on the model of tracing that proposes that the aim of the rules is to quantify 'value surviving' in the hands of the defendant. As has been explained, the value of the asset transferred will always be represented by a fixed monetary sum. On this model of tracing, the aim of the rules is to discover whether the defendant has other assets of equivalent value, and had not reduced the amount of value available to him through his subsequent acts. However, it is unclear what the attribution of payments in and out of a particular bank account has to do with this question. Nor is it clear that the mixture of money in a bank account poses any kind of evidential obstacle to determining the answer to it.

Suppose that the defendant pays £1000 of trust money into his private bank account, which is already in credit to the amount of £1000. He then spends £2000 on his rent, reducing the credit balance of the account to nil. His employer then pays his £1000 salary into the same account. In this scenario, the defendant was initially enriched by £1000 and is still enriched by £1000, since he has made use of the trust money to save a necessary expense. If not for the misappropriation, he would have had to use his salary to pay his rent. Instead, he retains the salary as the credit balance of his bank account. If our question is whether the defendant still has 'the value' of the trust money – ie if he is still as well off as he was after misappropriating it – the answer is a straightforward 'yes'. It is unclear why the exhaustion of one particular bank account or pool of assets held by the trustee should be evidence that the trustee is no longer enriched by an amount equivalent to the misappropriated trust money.

Further, although Smith and Birks assert that the cherry-picking rule is a rule intended to overcome an evidential impossibility, it is very difficult to identify the

fact that it is impossible to prove in a case like *Re Oatway*. There was sufficient evidence, on the facts of that case, to prove exactly what transactions had been undertaken by Oatway and in what order. The issue was whether the £2,137, 12s and 3d used by Oatway to buy the Oceana shares should be attributed to the claimant beneficiaries or to Oatway himself. This cannot mean that the court was unsure whether the cheque drawn on the account on that day was of equivalent market value to the £3000 of trust money misappropriated by Oatway: it is obvious exactly what the differential was between the two, and between the misappropriated £3000 and the money eventually obtained by the sale of the Oceana shares. The only doubtful question was whether that cheque ought, in the events that had happened, to be treated as the subject-matter of a right vested in the beneficiaries under the trust or whether it ought to be treated as an asset that Oatway was entitled to use on his own account. This is a question of law, rather than fact. It cannot be treated as legally equivalent to asking which of the coins in a box was used to buy some asset.

3. Conclusions on the market conception

Thus, neither the transactional concept, nor the particular rules applicable to mixed substitutions, can be rationally justified by reference to the objective of discovering the abstract value of the asset substituted: from this perspective, the rules involve both unnecessary complexity in investigating the facts and also lead to inaccurate results in many situations. It follows that, if this is what tracing is for, the whole of the current law is need of a systematic overhaul;[247] it is not merely that particular rules may need reform, but that the whole transactional 'agenda' of the rules should be replaced by a

[247] As Oesterle and Evans both argue: D J Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172, and S Evans, 'Rethinking tracing and restitution' (1999) 115 LQR 469.

causal, swollen assets model of identifying value. Such radical conclusions are inconsistent with the doctrinal enterprise, and can only be accepted if *no* rational explanation for the law as it currently is can be found, forcing us to the conclusion that the rules are trying to do something which they are fundamentally unfitted to achieve.

B. The entitlement conception

On this approach, the value of an asset should be understood in legal rather than factual terms: ie as reflective of the content of the claimant's entitlement to a particular asset or class of assets. On this analysis, the claim that the value of one asset is capable of being 'transmitted' to another means that a person with an entitlement to the first asset is, for that reason, entitled to any asset acquired by its use; or, as Rudden put it, the two meet the conditions necessary for membership in the class of assets, or 'fund', belonging to the claimant. From this perspective, the purpose of the tracing rules is to map out the scope of the claimant's entitlement to the original class of assets or 'fund': they capture assets acquired under transactions that the claimant has a legal right to the benefit of, and exclude assets acquired under other transactions.

Unlike the market conception, Rudden's version of the entitlement conception of value accommodates the law's focus on transactional links. His argument suggests that it is a specific network of rights, powers and duties, that exists between trustee and beneficiary, which renders a certain set of assets held by the trustee a fund or pool of wealth or value from the perspective of the beneficiary. As such, the theory coheres well with the idea that things acquire the status of objects of value, or membership in the fund, by virtue of specific transactions carried out by the trustee. Since this

approach depends on the idea of a fund as an existing pattern of rights, powers and duties in respect of things held by the trustee, it can also accommodate the cherry-picking rule and the lowest intermediate balance rule, as a matter of identifying the boundaries of the fund.

However, there are two problems with this analysis as a 'value' account of the function of tracing. First, it is circular in the explanation it supplies. This is because Rudden defines the concept of the fund by reference to the availability of 'real subrogation' – ie claims to traceable proceeds – without explaining the nature of what he calls real subrogation in any detail. Thus, the model indicates that we can understand the nature of tracing by invoking the idea of a fund, but defines the idea of a fund primarily by reference to the availability of tracing.

Secondly, it is not clear what the ideas of 'value' or 'wealth' really add to the model. As explained above, the model depends on a conception of value that is far removed from the conception that does any work in the context of the law of unjust enrichment or elsewhere in factual or ethical discourse. Instead, it relies on a 'transactional' conception of value that is peculiar to the tracing context and has no reference point outside that context. While tracing can be validly defined in the language of 'value', if value is taken to refer to the entitlement conception, it is not clear why this language is useful, since it does not enable us to relate tracing to any other body of law, system of meaning, or factual reality like the market.

IV. Conclusions

It is difficult to avoid the conclusion that the only advantage of describing tracing by reference to the concept of value is that it supplies us with an answer to the otherwise unanswerable question, 'what is it that is traced by the rules of tracing?' Having made

the crucial point that tracing is qualitatively different from following, it may seem natural to attempt a definition of the difference that explains tracing in a manner that aligns with following, ie where following is about finding the current location of a thing, tracing is about finding the current location of some value. However, as has been demonstrated, this answer does not help us to understand the concept of tracing, since only a conception of value that has very little substance is actually consistent with the positive rules of English law in this area.

This failure of the value model is, arguably, instructive: it indicates that it is a mistake to approach the tracing rules with the aim of discovering some underlying constant that is being 'traced' through successive transactions. Rather, in this context, it is preferable to set aside the metaphor of tracing entirely and to focus on the normative significance, if any, of the transaction that these rules determine has taken place. The nature and role of the tracing/claiming distinction can be understood only within the context of an answer to that question, which the next chapter addresses.

3. THE NATURE OF A SUBSTITUTION

It has been argued that the metaphor of 'tracing', if over-extended, becomes an analytical dead-end, incapable of explaining the normative significance of the distinctions drawn by the rules that are conventionally described as rules of tracing. The previous chapter suggested that a better account of the rationality of those rules could be obtained by focusing on the nature of the substitution or transactional link that is central to their functioning.

However, the concept of a 'substitution' is not, on the face of it, more intuitive or less circular than the entitlement conception of value that was criticised in the previous chapter. The term itself is not revealing because it describes the outcome of the application of the tracing rules – that one asset is to be thought of as the substitute for another – without explaining why this occurs in one set of situations and not in another. Like the entitlement conception of value, it is open to attack as an empty concept, defined solely by reference to the outcomes of the rules and without adding anything to our understanding of why those outcomes are justified. The goal of this chapter is to flesh out the concept of a substitution in terms that avoid this criticism and enable us to answer the justificatory questions arising out of the law.

The chapter argues that we can answer these questions, and resolve doubts about the content of the rules where they are uncertain as matter of authority, by thinking of them as defining and limiting a sphere within which the law will not allow the defendant to exercise his legal rights so as to serve his own purposes but, instead, subordinates his exercise of rights to the ends of the claimant. The rules define this sphere by reference to the idea of legal powers, held by the defendant, that are distinguishable from his general legal capacities and that are held subject to duties owed to the claimant. A substitution, therefore, is defined as an acquisition of a right

by the exercise of a power of this kind.

The argument is made in four parts. Part 1 identifies the problem of understanding the term 'substitution', in the context of the case law and the use made of it in the academic literature. It argues that it is difficult to construct an abstract definition of a substitution, because the term is used to cover a range of acts by a defendant that seem, in terms of their legal consequences and impact on the claimant, to be analytically different from each other and to be open to description from a number of alternative perspectives. For this reason, it suggests that it is necessary to explore the moral basis for treating these cases as similar, despite their differences, and that it is necessary to look to the reasoning of the judges in the cases to identify this basis.

Part 2 offers an analysis of the various judicial approaches to the normative importance of a substitution from this perspective. It suggests that judicial discourse on the nature and purposes of tracing has oscillated between a focus on the effect of the transaction on the rights of the claimant – claiming that those rights must remain unaffected by the transaction or must, in some sense, persist despite it – and a focus on the moral responsibility of the defendant to account to the claimant for his acts. It suggests that these two ways of looking at the tracing question can be unified by the idea of the defendant's subordination to the ends of the claimant, in a context where the absence of such subordination would produce a deprivation of legal rights previously vested in the claimant. While this analysis gets us closer to understanding the moral significance of a substitution – ie, why it matters to characterise an act of the defendant as a substitution – it does not describe exactly which of his transactions ought to attract this consequence.

Part 3 attempts to arrive at an answer to this question via an analysis of the issues that the judges disagreed on in the case of *Foskett v McKeown*, a case that captures a number of different dimensions of the preceding law. Based on this analysis, and given the terms of the majority decision, it concludes that three factors are significant to the definition of a transaction as a substitution.

First, the transaction must involve the acquisition of a legal right, by the defendant, which can be shown to be separable from his pre-existing legal entitlements and capacities. The disagreements in *Foskett* demonstrate that the distinction between a mixed substitution and an improvement of a subsisting asset is normatively charged one, requiring the judges to draw a line between entitlements that can be separated from the personality of the defendant in this way and entitlements that cannot. The lowest intermediate balance rule can be explained on this basis, as prohibiting the extension of the principles applicable to mixed substitutions to the assets held by the defendant generally.

Secondly, the transaction in question must be capable of varying or extinguishing subsisting legal rights of the claimant; it is this legal consequence of the transaction that explains and justifies the otherwise opaque distinction between 'attribution' and causation emphasised in *Foskett*.

Thirdly, the internal character of the right acquired by the defendant – the terms of the relationship constituted by the existence of that right – matters to the claimant only to an extent defined by the scope of the defendant's duty to the claimant. The cherry-picking rule is explained on this basis, as reflecting the particular content of the duty owed by the person exercising the right.

Part 4 sums up the conclusions of the chapter and of this part, arguing that it

allows us to define a substitution, in Hohfeldian terms, as the exercise of a private legal power in breach of a duty owed in relation to the exercise of that power. It then considers some questions arising out of those conclusions, which will be considered in the next two chapters.

I. THE PROBLEM OF DEFINING A SUBSTITUTION

Textbooks often introduce the concept of a substitution through the use of illustrative examples, constructed by reference to the case law. A trustee sells shares that he holds on trust, and receives £1000 in cash from the purchaser as their price;[248] an employee embezzles funds from his employer, and uses the money to buy some shares in a company;[249] a thief steals the claimant's car and sells it, and then uses the proceeds of sale to buy another car;[250] a car is exchanged for a boat, or a cow for a goat, or £1000 in cash for a picture;[251] and so on.

In seeking to identify the features that unify these examples, it is tempting to appeal to the intuitively clear and common sense idea of a swap. In each example, A has something — it is immaterial whether this be a set of shares, access to a bank account, a boat, or a goat — and he then gives that something to another person, C, and gets something else (shares, cash, a car, a cow) from them in return. If the thing swapped belonged to a third person, B, it seems clear that this transaction constitutes a swap or exchange of B's thing for the thing received from C.

However, this apparent simplicity is misleading. The similarity between the

---

[248] J Penner, *The Law of Trusts* (OUP 2012) 36.

[249] Smith, *The Law of Tracing* (n 25 above) 3.

[250] G Virgo, Principles of the Law of Restitution (OUP 2006) 625.

[251] A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 123.

examples described above is obvious only if we disregard the legal position of the parties and focus exclusively on the idea of physical changes in the location of tangible things. From this perspective, the exchange of a car for a boat looks like a similar sort of event to the exchange of a cow for a goat or a car for some cash. In each case, by the act of a person, one thing comes to occupy the physical space that was previously occupied by another thing. The particular identity of the person who has brought about this physical change, and the legal relations in which he stands, makes very little difference to our idea of what has happened.

However, a perspective that focuses on changes in the physical location of a tangible thing cannot offer us any explanation of what is happening in the examples where the 'thing' swapped is a share in a company or the credit balance of a bank account. In these cases, there is no physical object that has moved from one place to another, or from the possession of one person into the possession of another. If anything at all has changed in a case where an employee has drawn on his employer's bank account in order to buy shares in his own name, it is surely the *legal* position of the employee, the employer, and/or the bank: to say that the credit balance of the employer's bank account has fallen, or that shares in the company are now vested in the employee, is to describe a change in legal relations.[252]

As Smith has argued, even in cases involving the sale or barter of chattels, it is a mistake to characterise the event of exchange as merely involving a change in physical control or possession of the original chattel and the substitute respectively.[253]

---

[252] This change in legal relations may have factual consequences, in terms of loss to the employer or gain to the employee. However, as has been explained, causation – either of gain or of loss – is not relevant to the characterisation of a transaction as a substitution.

[253] Smith, *The Law of Tracing* (n 25 above) 16.

This is because it is not possession that is transferred by a sale, but the title to the chattel held by the vendor. Possession, in fact, need not be transferred immediately in order for the vendor's title to pass.[254] In a case where there is a delay between the transfer of title and delivery of possession, therefore, there is a necessity for choice in deciding when the substitution has taken place. Has it taken place once title to the original chattel has vested in the purchaser, and title to the purchase price has vested in the vendor, or has it taken place only when the cash and the chattel have been physically delivered to their new owners? Given that the majority of the tracing cases concern rights that are incapable of physical delivery, it seems improbable that physical delivery is relevant in itself, apart from in those instances where it coincides with the passing of title. As Smith has put it, therefore:

> The object of following is tangible things; but the object of tracing is the value which inheres in rights. That is why tracing, unlike following, can be concerned with those rights which have no tangible subject matter.[255]

Thus, we are obliged to bring the legal relationships between the parties into the picture in order to make sense of the concept of an exchange transaction or substitution. This is the only basis on which we can accommodate the majority of the cases, where apparent transfers or variations of rights with no material subject matter — bank accounts,[256] shareholdings,[257] and other choses in action[258] — do take place

---

[254] Title passes when the parties to a contract of sale intend it to pass: Sale of Goods Act 1979, s 17. Where the parties have entered into an unconditional contract for the sale of specific goods in a deliverable state, and have not expressed any contrary intention, they are presumed to intend that title should pass as soon as the contract is concluded: Sale of Goods Act 1979, s 18, rule 1. The rule specifies that it is immaterial for this purpose whether the time of payment or the time of delivery of the goods is postponed to sometime after the date of conclusion of the contract.

[255] Smith, *The Law of Tracing* (n 25 above) 16.

[256] eg *Small v Attwood* (1831-1832) You 407, 159 ER 1051; *Pannell v Hurley* (1845) 2 Coll 241, 63 ER 716; *Trench v Harrison* (1849) 17 Simons 111, 60 ER 1070; *Pennell v Deffell* (1853) 4 De G M & G 372, 43 ER 551; *Frith v Cartland (*1865) 2 H & M 417, 71 ER 525; *Re Hallett's Estate* (1880) 13 Ch D

at some stage during the chain of substitutions.

However, once we think of the substitution concept as entailing an alteration in legal rights, rather than merely in the physical location of things, the similarities between the different scenarios that are treated as standard in the textbooks become less obvious. Although there are some similarities, there are also suggestive differences which need to be taken into account in any explanation of why the cases are alike and should be treated alike. In particular, it becomes difficult to explain in what sense the standard textbook examples each represent an instance of the *claimant's* rights being exchanged, or substituted, for a different right by the defendant.

The point can be illustrated by reference to McFarlane's discussion of the law of tracing in his textbook, *The Structure of Property Law*,[259] The book introduces the concept of tracing by reference to a series of examples, which are presented as typical of the kind of exchange transaction found in the case law. It then offers a systematic legal analysis of each example in turn, seeking to demonstrate the features that they have in common. The complexities that are generated by this close analysis are revealing.

696*; Cave v Cave* (1880) 15 Ch D 639; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321; *Re Tilley's WT* [1967] Ch 1179; *Re Leslie* [1976] 1 WLR 292; *Agip (Africa) Ltd v Jackson* [1991] Ch 547; *Trustee of FC Jones v Jones* [1997] Ch 159; *Foskett v McKeown* [2001] 1 AC 102; *Shalson v Russo* [2003] EWHC 1637; *Dyson Ltd v Curtis* [2010] EWHC 3289; *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360.

[257] eg *Lord Chedworth v Edwards* (1802) 8 Ves Jun 47, 32 ER 268; *Harrison v Harrison* (1740) 2 Atk 121, 26 ER 476, reported as *Harrison v Pryse* (1740) 2 Barn Ch 324, 27 ER 224; *Lane v Dighton* (1762) Amb 409, 27 ER 27*; Liebman v Harcourt* (1817) 2 Mer 512, 35 ER 1036; *Marsh v Keating* (1834) 1 Bing (NC) 198, 131 ER 1094; *Murray v Pinkett* (1846) 8 ER 1612; *Great Eastern Railway Co v Turner* (1872) LR 8 Ch App 149; *Roadchef (Employee Benefit Trusts) v Hill* [2014] EWHC 109.

[258] eg *Burdett v Willett* (1708) 1 Eq Ca Ab 370, 23 ER 1017; *Trustee of FC Jones v Jones* [1997] Ch 159; *Foskett v McKeown* [2001] 1 AC 102.

[259] B McFarlane, *The Structure of Property Law* (Hart Publishing 2008).

McFarlane makes use of three examples. The first involves a set of transactions carried out by a thief, A, who has stolen a bicycle to which B has a legal title ('Ownership', in McFarlane's terminology).[260] A then 'swaps that bike for C's car': that is, McFarlane elaborates, 'in return for giving *his* Ownership of the bike to C, A receives C's Ownership of the car.'[261] In this situation, it is said, tracing enables B to 'identify A's Ownership of the car as a product of *B's* initial right: *B's* Ownership of the bike.'[262]

The second example varies these facts by making A into a trustee, rather than a thief. He holds his title to the bike on trust for B, and then 'swaps that bike for C's car.'[263] In this scenario, McFarlane explains, A's title to the car is 'a product of the right initially held on trust for B: *A's* Ownership of the bike.'[264]

The final example is a simplified variation on the facts of *Lipkin Gorman v Karpnale Ltd.*[265] B becomes B Co, a firm that has a bank account with Z Bank, while A becomes a partner of the firm who, in accordance with the terms of the contract between B Co[266] and Z Bank, may validly withdraw funds from that account. A makes an unauthorised withdrawal of £5000 from B's account with Z Bank, and uses

---

[260] See McFarlane (n 259 above) 140, defining 'Ownership' as 'a right to immediate exclusive control of a thing forever'. This definition is intended to capture any legal title to a chattel, including a possessory title capable of being defeated by the better title of another: *The Structure of Property Law*, 144-146.

[261] McFarlane (n 259 above) 323 (emphasis added).

[262] ibid (emphasis added).

[263] ibid.

[264] ibid (emphasis added).

[265] [1991] 2 AC 548.

[266] ie between the partners in B Co jointly and Z Bank. In England and Wales, a firm is not, itself, a legal person capable of entering into contracts but a collective term describing persons who are in partnership with each other and who are jointly bound and benefited by contracts entered into in the name of the firm.

this money to buy C's title to the car. Both transactions count as substitutions, in accordance with the rules of tracing: that is, A's title to the £5000 in cash received from Z Bank, and his title to the car bought using that money, are both products 'of *B Co's* initial right: its personal right against Z Bank.'[267]

According to McFarlane, each of these examples counts as an obvious case of a substitution. In each case, he says, 'A clearly used B's right in order to acquire Ownership of the car.'[268] In fact, however, this analysis holds in rather different senses in each of the three scenarios.

In the first case, the case of the thief who has sold a stolen bicycle, A has transferred his own possessory title[269] to the bicycle to C, receiving C's title to the car in exchange. This transaction will have had no legal effect at all on B's independent title to the bicycle, which will remain vested in him unless C, for some reason, has a defence capable of defeating that title.[270] The only legal consequence of the transaction for B would be that, in addition to his claim in conversion against A, he might also gain a claim in conversion against C.[271] Here, it is very unclear how A could be said to have used B's *right* in respect of the bicycle in order to acquire title to

---

[267] McFarlane (n 259 above) 324 (emphasis added).

[268] ibid.

[269] For the principle that even wrongful or dishonest possession of a thing gives rise to a title to that thing that shares all the standard characteristics of a property right in English law, including assignability, see R Hickey, *Property and the Law of Finders* (Hart Publishing 2010) 96-125.

[270] Since the abolition of market overt in 1994, no such defence would exist in favour of a purchaser of title to a chattel from an ordinary thief like A: see the Sale of Goods (Amendment) Act 1994, repealing the Sale of Goods Act 1979, s 22. The position would be different if A had entrusted B with possession of the bicycle in circumstances that engaged one of the limited statutory exceptions to the *nemo dat quod non habet* principle: for an overview of these defences, see, generally, M Bridge, 'Transfer of Title by Non-Owners' in M Bridge and others, *Benjamin's Sale of Goods* (8th edn, 2010) paras 7-001 to 7-115.

[271] *Hollins v Fowler* (1874-75) LR 7 HL 757.

the car, since A and B have two distinct and free-standing rights[272] in respect of the bicycle and A has used his own title, not B's, in order to acquire title to the car. The only link between A's act and B's 'rights' arises out of the fact that A, in selling his title to the bicycle to C and delivering possession of that bicycle to C, has committed the tort of conversion; as such, the act of sale itself could be seen as a breach of a duty owed by to B and thus an interference with the rights of B. In this rather loose sense, it could be said that A has 'used' B's rights to acquire title to the car, since the acquisition of the title to the car is a causal consequence of a violation by A of B's rights.

In the second scenario, where A is a trustee, it is equally true that the title to the car is acquired in circumstances that constitute a breach of a duty owed by A to B. Assuming that the sale of A's title to the bicycle is unauthorised, and that the acquisition of the car is intended to be for A's own benefit, A will have committed a breach of trust by entering into the sale with this motive.

In addition, however, there is a further sense in which it could be said that A has 'used B's right' in order to acquire the car on the facts of this example. Unlike a thief and his victim, a trustee and his beneficiary do not hold two distinct and

---

[272] This analysis depends on the assumption that a thief does not, by virtue of his theft, become a trustee of his possessory title for the benefit of his victim. In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 716, Lord Browne-Wilkinson expressed the obiter view that a thief of money would become a trustee of (presumably) his title to the stolen money. For an overview of the competing perspectives on whether this ought to be the case in English law, as in Australian law, see R Chambers, 'Trust and Theft' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 223; S Barkehall-Thomas, 'Thieves, owners and the problem of title' (2011) 5 Journal of Equity 228 and (2012) 6 Journal of Equity 1; and J Tarrant, 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 Journal of Equity 170. If Lord Browne-Wilkinson is right, McFarlane's first example would be open to alternative analysis as an instance of his second example (a trustee sells the trust asset). However, it has been sometimes asserted that a holder of common law title to a chattel is, by virtue of that title and apart from the existence of any beneficial interest, entitled to claim the traceable proceeds of the stolen chattel in the hands of a thief at common law. As such, it is necessary to analyse the implications of this example separately.

independent titles to a chattel held on trust: the orthodox analysis[273] is that the trustee holds his own title to the chattel on trust for the beneficiary, whose claims in respect of the chattel are contingent on the continued existence of that title, either vested in the trustee or in a successor in title to the trustee. By contrast, a thief and his victim can be said to have two distinct entitlements to the stolen chattel, each of which exists independently of the other so that, if one is destroyed, the other might continue to exist.

This structural feature of a trust thus produces a distinct sense in which it could be said that A has acquired his title to the car 'by using B's right', regardless of whether the sale of the bicycle constituted a breach of a duty owed to B. Even if the transaction were an authorised one, entered into for B's sole benefit, it would still be true that A had acquired the title to the car using the very right that he held on trust for B. Unlike the victim of theft, the beneficiary's entitlements are mediated via the rights held by the trustee; as a result, any exercise of those rights by the trustee could meaningfully be described as a use of '[the subject-matter of] the beneficiary's rights.'

Finally, there are the *Lipkin Gorman v Karpnale Ltd* facts. Two substitutions are said to have taken place on the facts of this scenario: first, A has substituted title to £5000 in cash for B Co's personal claim against Z Bank and, next, A has substituted C's title to the car for his title to the £5000 in cash.

The effect of the unauthorised withdrawal from B Co's bank account depends

---

[273] eg F W B Maitland, *Equity* (CUP 1929) 112-121.

on the terms of the banking contract between the partners in B Co and Z Bank.[274] In withdrawing money from the account for his own private purposes, A will be acting beyond the scope of his actual authority as an agent of his partners.[275] As such, the general rule is that Z Bank will not have satisfied the debt owed by it to B Co by paying £5000 to A individually;[276] unless Z Bank has inserted an express term into the contract with B Co, restricting its liability in such cases, B Co will be entitled to demand that the £5000 be re-credited to the account. However, if A had apparent authority to draw on the account – for example, if he is an authorised signatory and the account is one that partners regularly drawn on in their own names, without the consent of the others, for the purposes of their business – the position will be different. In such a case, A's withdrawal from the account will be a transaction binding on his principals[277] and will have the legal effect of reducing Z Bank's liability to B Co. If so, in paying the £5000 in cash to A, Z Bank will have satisfied the debt in that amount that it previously owed to B Co and will be under no obligation to re-credit the account or compensate B Co for its losses.[278]

In the case of this example, then, A has not only gained his title to the £5000 as a result of committing a wrong against his partners in B Co, although this is undoubtedly also an available characterisation of the facts. In addition, A has either

---

[274] See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, rejecting the relevance of a potential duty of care in the law of tort as between banker and customer in this context.

[275] Partnership Act 1890, s 5.

[276] See, generally, E P Ellinger, E Lomnicka and C V M Hare, *Ellinger's Modern Banking Law* (5th edn, OUP 2011) 332-334.

[277] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

[278] As in *Lipkin Gorman v Karpnale Ltd* itself, where the Court of Appeal held that Lloyds Bank plc had acted within the terms of its mandate in paying cash to the wrongdoing partner and debiting the firm's client account accordingly: [1989] 1 WLR 1340, overruled by the House of Lords on a different point, [1991] 2 AC 548.

obtained his title to the £5000 in cash by directly varying B Co's rights against Z Bank or by leaving those rights entirely unaffected by his act. Unlike both thief and trustee, there is no sense in which he can be said to have altered his own rights to the bank account, quite apart from the impact of the transaction on his partners in B Co. This is because, on the facts of the scenario, A has no such rights in his personal capacity, ie apart from in his role as a partner in the firm. The £5000 is owed by Z Bank to the partners in B Co jointly. Either A's withdrawal of this amount from the account is simply a nullity so far as the bank account is concerned, so that Z Bank remains liable to the partners in that amount, or the transaction validly extinguishes the debt. There is no mediating entitlement held by A in his own right, which he might have transferred or varied in consideration for his title to the £5000.

Thus, the three examples generate different definitions of the 'exchange transaction' or 'substitution' carried out by A, since in each case A has 'used B's rights' in a different sense. It could be said, in order to accommodate the theft case, that A has substituted the subject-matter of B's rights in any case where he has obtained a right by transferring a right of his own, in circumstances where that transfer is also a wrong against B. Alternatively, and more narrowly, it could be said that a substitution takes place where A has obtained a right by transferring a right of his own, in circumstances where the right transferred is itself the subject-matter of an equitable interest vested in B. Finally, in order to accommodate the case of the unauthorised withdrawal from the bank account, it could be said that a substitution takes place where A obtains an right by acting in such a way as to directly alter B's own rights. In order to know what a substitution is, we need to know exactly when it is true to say that A has 'used B's rights' to acquire a right for himself in the sense dictated by the tracing rules.

One reason why this issue matters is because it is relevant to determining the incidence of entitlements to traceable proceeds and the extent to which the case law actually does support a definition of 'unauthorised substitution' that encompasses the case of the thief as well as the trustee and the agent. This issue is discussed in chapter 5 below. However, it also matters in connection with the problem of making sense of the tracing rules. An understanding of what makes a substitution a normatively relevant event is also needed in a context where we are sure, as a matter of authority, that a claimant is entitled to anything obtained by an unauthorised substitution but we are not sure whether, on the facts, what the defendant has done counts as a substitution at all.

Consider, for example, the tangled facts that confronted Kay J in the case of *Patten v Bond.*[279] In that case, the claimants, James and Robert Patten, were solicitors who held certain consols on the terms of an express trust for one Mrs Dixon. In September 1869, they sold these consols and received money in exchange. Clearly, Mrs Dixon immediately gained an entitlement to this money; we know that sale of a trust asset by the trustee is undoubtedly a substitution, if anything is, and that a beneficiary under a trust is entitled to the proceeds of an authorised as well as an unauthorised substitution. However, it is more difficult to decide on the appropriate characterisation of the trustees' subsequent transactions.

The Pattens had sold the consols held on trust for Mrs Dixon because they had been asked to supply money to satisfy part of a debt owed by the trustees of another settlement. This was a marriage settlement under which James Patten's daughter,

---

[279] (1889) 60 LT 583; he describes the facts as representing a 'strange conjunction of circumstances' at 585.

Rebecca Bond, was a beneficiary. Under the terms of that settlement, Mrs Bond had a life interest in a 99-year lease of 34 James St, Westminster, with a remainder to her husband for life and a power to appoint the remainder among the children of the marriage, the defendants. This leasehold title had been mortgaged to secure a debt of £1000; in 1869, the mortgagees were threatening to seek an order for foreclosure, unless £600 of the debt was paid off immediately. In response to a request from the Bond trustees, the claimants paid £600 of the Dixon money to the mortgagees. In response, the Bond trustees reduced the amount of interest that they paid to the mortgagees, to reflect the reduction of the debt from £1000 to £400, and began to pay the difference to the Bond trustees.

In 1887, Mrs Bond died. By her will, she had appointed the defendants, Mary and Barnabas Bond, as the remaindermen under the marriage settlement. In 1888, the mortgagees assigned the outstanding £400 debt, still secured on the leasehold title, to Mary and Barnabas. They also obtained the title deeds to the property, which had previously been deposited with the mortgagee.[280] At this point, the Bond trustees stopped making payments of interest to the Dixon trustees. They, therefore, brought an action seeking an injunction to prevent Mary and Barnabas from dealing with or

---

[280] It is not clear from the report of the case what the effect of this transaction was. This is because, before the enactment of the Law of Property Act 1925, there were two methods for creating a mortgage over a leasehold title. The mortgagor might either assign his lease to the mortgagee, subject to an equity of redemption, or he might grant a sub-lease to the mortgagee that was one day shorter than the mortgaged lease and that was subject to a term providing for cesser on redemption: see C Harpum, S Bridge, and M Dixon (eds), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell 2012) 1123-1124 (and see, now, the Law of Property Act 1925, s 86(1), abolishing the mortgage by assignment of the leasehold title, and the Land Registration Act 2002, s 23, effectively abolishing the mortgage by sub-demise in the context of registered land). As it is unclear from the report which method was used, it is unclear whether the Bonds had obtained an assignment of the legal lease that had originally been mortgaged or only an assignment of the sub-lease representing the mortgage. The question whether, in accordance with Smith's account, the case can be analysed as an example of backwards tracing, rather than subrogation, depends on which of these took place on the facts. If the Bonds had obtained an assignment of the very lease that had been mortgaged, it would be arguable that the Dixon trustees had obtained a beneficial interest in the asset obtained through redemption of a debt ('backwards tracing') rather than merely being subrogated to the rights of the creditor.

disposing of the leasehold title, a declaration that they were entitled to a charge over that title in the amount of £600, and a declaration that Mary and Barnabas held their legal title, obtained from the mortgagee, on trust for them, in a share reflecting their £600 contribution to its acquisition.

Kay J granted all three orders, holding that the claimants were not only subrogated to the initial £600 debt and entitled to remedies equivalent to those of the mortgagee, but that the Bonds' title to 34 James' St was held on trust in the proportion claimed. His reasoning on this point is very brief: he merely quotes a passage from Lord Ellenborough's judgment in *Taylor v Plumer* and then says, 'I apply that doctrine to this case … The money, to the knowledge of all concerned, was trust money and persons have a right to follow it where it has gone.'[281]

As previously noted, the characterisation of this decision as involving a claim based on unauthorised substitution is a controversial one,[282] linked to the on-going debate over the possibility of 'backwards tracing'.[283] The point being made here is that we cannot resolve this controversy unless we know what it means to say that one person has obtained a right by 'using' the right of another, and that this question seems inescapably normative or evaluative.

It has already been argued that we cannot solve the problem by asking whether, in *Patten v Bond*, the value of the money used to pay the debt has been transmitted to the value of the leasehold title to 34 James' St or not. The same is true

---

[281] (1899) 60 LT 583, 586.

[282] Contrast the view of Smith in *The Law of Tracing* (n 25 above)153 (*Patten v Bond* is an example of a claim contingent on tracing) to the view of M Conaglen, 'Difficulties with Tracing Backwards' (2011) 127 LQR 432, 442, fn 87 (arguing that, together with several similar cases, the result in *Patten v Bond* can be explained on the basis of the doctrine of subrogation without any need to invoke the concept of tracing).

[283] Addressed at 62 above.

if we ask whether or not the money has been 'substituted' for the lease. Like value, the term 'substitution' cannot do any explanatory work unless we first define what it means. The dictionary definition is that a substitution is 'the action or an act of putting one person or thing in place of another'.[284] Understood literally, this might lead us to think of things being physically swapped, in terms of their actual locations in the world: T, the trustee, hands some cash over to C, the purchaser, and receives a teapot[285] or a motorbike in exchange. However, as has been explained, this is an implausible definition because it does not cohere with the case law. If we ask whether the leasehold title to 34 James' St is now 'in the place of' the consols that were held on trust for Mrs Dixon, the question that immediately follows is, 'in their place for what purpose?' In the absence of a clear account of the principled basis for the tracing rules, no answer to this question can be reached. The characterisation of a transaction as a 'substitution', like the characterisation of it as a 'conversion of property from one species to another' or a 'movement of value', seems to define it by reference to the law's response to it: a transaction is a substitution if, in accordance with the tracing rules, one asset can stand in the place of another for the purposes of a given claim. To say that the transaction in *Patten v Bond* is a substitution is only to express the conclusion that the leasehold title held by the Bonds is the traceable product of the trust money paid by the Pattens. It does not explain why that conclusion is sound.

The choice depends, ultimately, on the justification for treating such a transaction as relevant in the context of litigation. The next part explores the extent to which judicial explanations of the significance of tracing can solve this question.

---

[284] J Simpson and E Weiner (eds), *The Oxford English Dictionary* (2nd edn, Clarendon Press, Oxford 1989).

[285] See D J Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306' (1984) 68 Cornell L Rev 172, 196.

II. JUDICIAL ACCOUNTS OF THE IMPORTANCE OF TRACING

It has been argued that judicial accounts of the function of tracing have tended to rely on metaphors and analogies, the idea of the persistence of the claimant's value through a series of transactions being only the most recent of these. This part offers an overview of the development of judicial discourse surrounding tracing and suggests that the metaphors and analogies developed by the judges cluster around two themes – reification of the defendant's transactions and the defendant's moral responsibility to the claimant – which together indicate that the effect of transactional tracing is to subordinate the defendant's freedom of action to the ends of the claimant within a limited sphere.

A. Background: origins of the tracing concept

According to Lionel Smith, the earliest recorded example of a case recognising a claim based on an unauthorised substitution is *Bale v Marchall*,[286] decided in 1457. The claimants, Agnes and Robert Bale, sought relief in Chancery against the defendant, Nicholas Marchall, who was the executor of the will of Agnes' uncle, Thomas Hansard, a vintner. According to their pleadings, Thomas and some others had been enfeoffed of two plots of land to the use of Agnes' father, John, and his heirs. One plot was in the parish of St George's Bar, in Southwark and was held by Thomas and his brother William, a fishmonger; the other was in the parish of St Mary Magdalen, also in Southwark, and was held by Thomas and five other feoffees, including Agnes' grandmother and two of her other uncles.

---

[286] (1457) 10 SS 143, identified as the earliest such case in Transfers' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 112 and 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281.

After John Hansard's death, when Agnes had become his heir – and, therefore, cestui que use under the terms of both uses – William and Thomas sold the land in St George's Bar to Herbert Brews, a smith, 'for the sake of which land the said Thomas received [50 marks][287] unto the use of the said Agnes.'[288] Thomas remained seised of the land in the parish of St Mary Magdalen until his death, the other feoffees having pre-deceased him, and received 'of the issues of the lands and tenements after the decease of the said John Hansard [9] marks yearly during [16] years, which is [144] marks'.[289] The Bales alleged, further, that Thomas had also held various chattels to Agnes' use, which he had been expected to give her on the occasion of her marriage but had instead retained. They added that they had 'of great tenderness and special love and trust' left all the money due to them 'to be always with the said Thomas and in his keeping without specialty or writing',[290] because he had led them to believe he would leave them the amount due in his will 'and much more because he had no more kindred living.'[291] They also alleged personal misconduct on the part of Marchall, the executor, contending that, 'at such time as the said Thomas Hansard was greatly enfeebled and sickness grew upon him towards death', Marchall had employed 'undue means' to estrange him from the Bales and induce him to make a 'feigned and pretended Testament … in his … feebleness at such time as he understood not well

---

[287] As Smith notes, the English pleadings refer to 'l marc' but 'the context, and the indorsement (at 150), show 'that this is a lower case L, that is a Roman numeral 50': Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281, 300. This is borne out by the comments of the editor of the Selden Society report of the case, who summarises it as a case 'where feoffees to uses sold part of the land and received 50 marks for it': 10 SS xxviii.

[288] (1457) 10 SS 143.

[289] (1457) 10 SS 143, 144. The report states these numbers in Roman numerals.

[290] (1457) 10 SS 143, 145 ..

[291] (1457) 10 SS 143, 145 ..

what he said or did'.[292]

Nicholas Marchall replied, inter alia, that he had not known of the land at St George's Bar that had been sold or that the land at St Mary Magdalen had been held to Agnes' use;[293] the Bales replied that this was 'no sufficient answer'[294] to their complaint. In invoking the aid of the court of Chancery, they argued that Marchall had failed to pay over the amounts due to them 'against all right faith and conscience and to right heavy example and great peril to the soul of said Thomas',[295] and that they could have no recovery against Marchall 'by course of the common law'.[296]

The judgment of the court, as translated by the editor of the Selden Society report, was as follows:

> [T]he matters contained and specified in this bill … having been seen, read, and fully understood in the Chancery of the … King at Westminster, and mature deliberation with the King's justices of both Benches and others of the King's Council there present having been held: It was considered in the said court that the within-written Robert and Agnes should recover against the said Nicholas, 194 marks of the goods and chattels of the within-written Thomas Hansard, deceased; to wit, 50 marks for the within-written lands and tenements sold by the said Thomas Hansard, situated at S George's Bar in Southwark, and 144 marks received by the said Thomas Hansard of the issue of other lands and tenements in the parish of S Mary Magdalen in Southwark aforesaid, also specified in the said bill.[297]

No reasons that expressly generalise from the particular facts of the case are

---

[292] (1457) 10 SS 143, 146 ..

[293] As quoted by the Bales in their response to his reply, (1457) 10 SS 143, 148. The editor of the Seldon Society report notes that Marchall's first reply to the allegations made against him are not available, 'because a large piece of this document is torn off' (1457) 10 SS 143, 146) but that the main points can be gathered from the Bales' subsequent reply.

[294] (1457) 10 SS 143, 148.

[295] (1457) 10 SS 143, 146.

[296] (1457) 10 SS 143, 145.

[297] (1456) 10 SS 143, 150 (translated from the Latin by the editor, W P Baildon) ..

given in this judgment; the decision, as stated, is tightly linked to the details of particular times, places, and people. Since the judges do not articulate any general rule that governs the particular situation, it requires an act of interpretation in order to see the report of the case as an authority, i.e. a source of law, rather than as merely a description of a singular event in the past. The gap between the language of the pleadings and judgment and Smith's interpretation of the case, in 2009, is instructive:

> We need to … ask what were the possibilities in respect of the trustee's obligations regarding the 50 marks received for the land? …There were really only two realistic options. Either there was a pure debt, an obligation to repay any 50 marks; or there was an obligation to hold the particular 50 marks for the benefit of the beneficiaries. … As between the two, it seems rather obvious that the Chancellor would choose the second. … Just as we say 'equity treats that as done which ought to be done', we might say that, as between a trustee and his own beneficiaries, the trustee cannot plead his own breach of duty. …As between them, he cannot be heard to say, 'yes, I sold the land, but I did it for my own account, so you have no rights in relation to the proceeds.[298]

While this description of what was decided in *Bale v Marchall* is perfectly consistent with the pleadings and the judgment, it is interesting to note that the question that looms large in this modern picture of what was at issue in the case – the choice between a pure debt and an obligation in respect of the particular 50 marks – is not explicitly considered anywhere in those texts. In particular, there is nothing in those records about the fate of the particular 50 marks after they were received from Herbert Brews. The Bales do not allege that he kept them up until the moment of his death, or that their specific traceable proceeds could be identified among the various goods and chattels received by Marchall on Hansard's death. This lack of interest in

---

[298] L Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281, 301-302.

problems of identification is true of the judicial order that Marchall pay 194 marks 'of the goods and chattels' of Thomas Hansard to the Bales; the order does not identify the claim to 50 marks as having some specific subject-matter, either in the form of a bag of coins retained until Hansard's death or some particular chattel obtained in exchange for it, and it does not distinguish Marchall's liability to pay the 50 marks obtained in consideration for the sale of the land in St George's Bar from his liability to pay the 144 marks received in rents and profits from the land in St Mary Magdalen.

Thus, while the evidence does not contradict Smith's interpretation of the decision – the outcome in the case is consistent with a finding that Hansard had held his title to the particular 50 marks to the use of Agnes – there is a difference in priorities. From Smith's perspective, the critical point to be decided, on the facts of *Bale v Marchall*, was whether those facts gave rise to a pure debt, an obligation to pay any 50 marks, or whether they gave rise to a claim affecting Hansard's title to the particular 50 marks received from Brews. From the perspective of Agnes and Robert Bale, however, it is unclear if this distinction made any difference. What mattered to them was the liability of the executor to pay the money out of (any) of the personal estate of the deceased: it made no practical difference to their case if the executor was liable as a personal representative of Hansard,[299] or if he was liable *qua* recipient of title to chattels held to their use. The importance of this distinction, and the need to justify a claim to a particular right rather than a claim to an abstract sum of money, only gradually comes into focus over the succeeding centuries and brings with it a focus on the importance of the substituting transaction.

---

[299] For an overview of situations in which an executor was liable as a personal representative of the testator, as opposed to liable in his personal capacity, see W S Holdsworth, *A History of English Law: Volume 3* (3rd edn, 1923) 578-579. An analogous liability was imposed on administrators in 1357 by the Stat 31 Edw III c 11.

Thus, in his *Prolegomena of Chancery and Equity*, Lord Nottingham briefly described the decision[300] as follows, citing a mention of it by Lord Ellesmere (Sir Thomas Egerton MR, as he then was) in *Mears v St John*:[301]

> Feoffee to use sells the land to one who has no notice. Ruled [in Chancery] by all the Judges, 34 Hen 6, that cestui que use should recover the money from the executors of the feoffee. So if a trustee sell &c, by Egerton, Keeper. … Trustee during minority of heir receives profits, and dies leaving assets to his executors. Adjudged clearly in equity the executor or administrator of the trustee shall be chargeable. But how far the heir shall be contributory was the doubt. And Egerton, Master of the Rolls, cited the case of 34 Hen 6, the record of which remains in the Tower, where executors of feoffees who received profits were charged to cestui que use.[302]

In this reading, *Bale v Marchall* is authority that a cestui que use may recover any profits made by the feoffee to use against the feoffee's executor – and, in a crucial extension for the modern law,[303] the same is true as between trustee and beneficiary under a trust. However, Smith's distinction between the claim to be paid 50 marks and the claim to recover the *particular* 50 marks is not mentioned. Nothing is said about whether the feoffee is in breach of duty. The liability of the executor is emphasised, but it is not clear whether the issue is that the executor is bound because he has received the very 50 marks representing the price of the land or because the obligation is of a kind enforceable against personal representatives.

---

[300] For the identification of this case of 34 Hen 6 with *Bale v Marchall,* see L Smith, 'Transfers' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 112, 131 (fn 94).

[301] (1596) 4 Co Inst 86, 4 Viner's Abbr 391. Lord Nottingham calls it *Meers v St John* but, as it is reported as *Mears v St John* in Coke's Institutes and in its subsequent citation in *Kirk v Webb*, this spelling has been adopted here.

[302] D E C Yale (ed), Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity' (CUP 1965) 260-261.

[303] For the use as the legal ancestor of the trust, and for the differences between the medieval use and the modern trust, see generally J Barton, 'The Medieval Use' (1965) 81 LQR 562 and N G Jones, 'Uses, Trusts and a Path to Privity' (1997) CLJ 175, 176-182.

According to Coke's report of the case, Lord Ellesmere in *Mears v St John* itself offered an even narrower formulation of what was actually decided in *Bale v Marchall*. In *Mears*, a fresh issue had arisen because the trustee in that case had not only received several years' worth[304] of rents and profits from the trust land, like the feoffee to use in *Bale v Marchall*, he had also 'with parcel of the profits purchased land in fee'.[305] Under the rules of succession then applicable,[306] only the personal estate of the intestate trustee was within the control of his administratrix; the real property, including the estate in fee purchased using the trust money, descended directly to the heir.[307]

The question 'whether the heir should be contributory', as Lord Nottingham puts it, therefore depended on whether the beneficiary under the trust had a right enforceable against the heir, ie a right affecting the title to the land itself. Enforcement against an executor or administrator might have meant that the deceased had owed the beneficiary an obligation to pay a money sum, which was enforceable against his personal representative. Enforcement against the heir could not be reconciled with such an approach: the heir was not a personal representative of the deceased and was only liable for those debts of the deceased that had been created by deed and that expressly stated that the heir was to be bound.[308] Thus, if the heir had been made to

---

[304] According to Coke (n 301 above), ten year's worth: 'from the 23rd year of Queen Elizabeth [I] to the 33rd year of her reign.'

[305] (1596) 4 Co Inst 86. For 'parcel' as an archaic synonym for 'part', see A Stevenson (ed), *The Oxford English Dictionary* (3rd edn, OUP 2010).

[306] See, now, the Administration of Estates Act 1925, s 33(1), which provides that both the real and personal property of a person who dies intestate will vest in his personal representatives as trustees with powers and duties of distribution in accordance with the scheme laid out in that Act.

[307] See F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 1898, Cambridge University Press reissue 1968) 359-361.

[308] See W S Holdsworth, *A History of English Law: Volume 3* (3rd edn, 1923) 572-575. It became possible to demand that lands that descended to the heir be sold to pay the intestate's debts in 1830, by

contribute in *Mears v St John*, it would have meant something new. It would have meant that the beneficiary under the trust had obtained a right in respect of the specific title to land purchased by the trustee, capable of binding the heir merely by virtue of the descent of the title to him.

This move was not made in *Mears v St John*. In Coke's report of that case, Lord Ellesmere is said to have remembered the decision in *Bale v Marchall* in terms that tightly restricted its scope and it was clearly thought that the question of the liability of the heir remained open, despite the earlier decision:

> Sir Thomas Egerton … said, that he had seen a case in Chancery in Anno 34 Hen 6 resolved by all the judges of England remaining in the Tower that *where the feoffees took the profits of the land, and received the rents, and made their executors, leaving assets to satisfy all debts over and above the said rents and profits,* that the executors should be charged to satisfy cestui que use for the said rents and profits and accordingly it was decreed in Mears' case against the defendant: but whether the heir should be contributory or no, it was doubted.[309]

It was unnecessary to resolve this doubt in *Mears v St John* because the personal estate was sufficient to pay the value of all the rents and profits taken. In *Kirk v Webb*,[310] by contrast, the point was vigorously argued because it made a practical difference on the facts. It was in argument in this case that the rule was formulated in recognisably modern terms, although the decisive move to actually enforce it in relation to land was only taken several years later, in the eighteenth century.

---

the statute 1 Wm 4 c 47. Under the Administration of Estates Act 1925, both real and personal property of a deceased person are now available to their personal representatives for the purposes of paying debts: see the Administration of Estates Act 1925, s 32(1).

[309] (1596) 4 Co Inst 86, 87 (emphasis added).

[310] (1698) Prec Ch 84, 24 ER 41; also reported (1698) 2 Freem Ch 229, 22 ER 1177.

The dispute in *Kirk v Webb* arose out of the misinterpretation of the terms of a marriage settlement, as a result of which a trustee mistakenly came to believe that a beneficial interest in the trust assets had vested in him. The settlement provided that, in the event of the death of the Duke of Southampton without issue, his wife, the Duchess, was to become the life tenant. In the event of her death, her uncle, the Bishop of Litchfield and Coventry, who was also one of the trustees of the settlement, was to become the life tenant. On his death, the life tenant was to be one Sir Caesar Cranmer. The settlement was silent as to entitlements during the lifetime of the Duke.

The Duchess predeceased the Duke. The Bishop, having been advised that his life interest had vested on her death, took possession of the lands, and 'enjoyed the profits for several years'.[311] According to one of the two reports of the case, the total amount of the rents and profits received constituted £2700;[312] both reports agree that some part of this money was spent on purchases of freehold land,[313] although it was unclear exactly how much had been so used. The Bishop devised this freehold land to the defendant, Webb, who was also the executor of his will. After his death, the Duke of Southampton and Sir Caesar Cranmer litigated to determine who was entitled to enjoy the trust assets in the events that had happened. The House of Lords concluded that neither of them had any interest during the lifetime of the Duke: since the settlement had failed to dispose of the beneficial interest in the property during this time period, it was 'an undisposed interest' and belonged to the settlor and his heirs.[314] The claimant, Kirk, was the widower of the settlor's niece, who had been his

---

[311] (1698) Prec Ch 84, 85, 24 ER 41.

[312] (1698) 2 Freem Ch 229, 22 ER 1177.

[313] (1698) 2 Freem Ch 229, 22 ER 1177; (1698) Prec Ch 84, 87, 24 ER 41, 42.

[314] ie there was an automatic resulting trust in favour of the settlor, which had descended to his heirs on his death during the lifetime of the Duke.

heir during the time when the Bishop was in possession, and administrator of her estate. He brought a claim against Webb both as executor of the Bishop's will and as devisee of the freehold land purchased using the trust money.

It seems that there was, or might have been,[315] a shortfall in the personal estate and so the main question in the case was whether the land purchased by the Bishop, which had devolved to Webb, was affected by an entitlement on the part of Kirk. Sir John Trevor MR, with whom Lord Somers LC agreed, rejected the claim on the facts but is reported to have expressed doubt about the underlying principle:

> if it had been expressly and plainly proved that these purchases had been made with the profits of the trust estate, he thought it might have been otherwise.[316]

The court seems to have considered that, as a result of the Statute of Frauds,[317] a deed reciting that the trust money had been laid out in the purchase of land would have been necessary to sustain a finding of a trust. The Master who had been asked to investigate the facts had been satisfied by the evidence of 'a man who received great part of the profits of the trust, and paid the money for several of the purchases';[318] the decision was that this parol evidence was inadequate because of the Statute of Frauds.

On this point, *Kirk v Webb* had been overruled by the middle of the eighteenth century.[319] The case is of more than merely historical interest, however, because of

---

[315] The shortfall is explicitly identified only in the Freeman report, where the reporter says that the Bishop had died 'leaving no personal assets to answer [the claimant's] demand'. The Finch report frames the issue in more hypothetical terms, suggesting that the issue was raised by the claimant 'in case he had not a full satisfaction out of the Bishop's estate': (1698) Prec Ch 84, 87, 24 ER 41, 42.

[316] (1698) Prec Ch 84, 87, 24 ER 41, 42.

[317] per Powell J at (1698) Prec Ch 84, 88, 24 ER 41, 42: 'it was against the Statute of Frauds and Perjuries and would let in all the mischiefs that it intended to prevent.'

[318] (1698) Prec Ch 84, 86, 24 ER 41, 42.

[319] The case was followed, or distinguished, in the following cases: *Halcott v Markant* (1689-1722) Prec Ch 167, (1701) 24 ER 80*; Kinder v Miller* (1701) Prec Ch 171, 24 ER 83*,* also reported as *Kendar*

the way in which the arguments in favour of Kirk, which might have persuaded the court but for their view as to the scope of the Statute of Frauds, were framed. Both reports note an appeal by counsel to 'justice and reason'[320] or 'natural justice',[321] as well as authority. Finch paraphrases the argument from natural justice as follows:

> [I]t was insisted for the plaintiff, that it is but justice and reason that the land purchased with the profits should go in the same manner as the profits themselves would have gone; and though it did not appear in the case, that the whole purchases had been made with the trust money, that was through the trustee's own fault, whose part it was to have kept the account … and it was compared to the case where a man mixes his money with another man's heap, he shall lose his own money[.][322]

According to the Freeman report, counsel also cited *Audley v Audley*,[323] a case where the guardians of a person lacking mental capacity had used his money to purchase land in fee and his next of kin had successfully argued that the land should be treated as personal property, rather than real property, for the purposes of the inheritance rules.

Three points emerge from this argument in *Kirk v Webb*, elements of which recur throughout the subsequent case law. First, there is the citation of *Audley v Audley*, which links the argument in the case to the equitable doctrine of conversion and thus to the maxim 'equity sees as done that which ought to be done'. The idea that the substituting transaction ought to make no difference to the rights of the claimant

---

v Milward (1702) 2 Vern 440, 23 ER 882; *Heron v Heron* (1701) Prec Ch 162, 24 ER 78; *Deg v Deg* (1727) 2 P Wms 412, 24 ER 791. It was not followed in *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39 and *Balgney v Hamilton* (1729) Amb 414, 24 ER 276. In *Lane v Dighton* (1762) Amb 409, 27 ER 274, and Sir Thomas Clarke MR held that *Kirk v Webb* and the cases following it had effectively been overruled by the subsequent cases: (1762) Amb 409, 412, 27 ER 274, 275.

[320] (1698) Prec Ch 84, 87, 24 ER 41, 42.

[321] (1698) 2 Freem Ch 229, 22 ER 1177.

[322] (1698) Prec Ch 84, 87, 24 ER 41, 42.

[323] (1690) 2 Vern 192, 21 ER 172.

depends on a kind of inversion of the 'equity sees as done that which ought to be done' maxim, whereby the court refuses to acknowledge that the defendant has done something that he ought not to have done. This theme emphasises the need to protect the claimant from the consequences of the defendant's breach of duty, but frames this protection of the claimant in the language of rights that persist despite changes of form; the defendant almost disappears from view as the agent bringing about these changes.

Secondly, there is the recognition of the necessity of identifying the very money that was used to buy the land, and the tacit acceptance that, if it could be shown that the trust money was not the source of the purchase price of the land, the argument from natural justice and reason would fail. This can be linked to subsequent cases dealing with situations where there was positive evidence of no transactional link between the misappropriated asset and the alleged product, in which judges have rejected the possibility of a 'swollen assets' approach to identifying the subject-matter of the claimant's right. In explaining why it is necessary to identify links of this kind, the judges indicate that the claimant's right must be bounded within certain fixed limits; seen from the correlative perspective of the defendant, this indicates that there are limits to the consequences of a breach of duty on his part.

Thirdly, there is the proposed solution to the evidential problem that arose on the facts of *Kirk v Webb* itself, based on the fault of the trustee and the analogy to physical mixture. This aspect of the reasoning can be linked to other cases where courts have responded to an absence of any evidence of transactional links and resolved the problem by an appeal to the status of the defendant as a wrongdoer. This is often described as being about what the defendant 'cannot be heard to say', a phrase that captures the sense in which tracing limits the defendant's ability to determine the

outcomes of his own deliberate acts.

B. Conversion and tracing: 'a rule so powerful as to alter the very nature of things'

In *Audley v Audley*, the Court is reported to have declared that the guardians of the intestate

> had not power to alter the nature of a lunatic's property, and that the laying out of the lunatic's money in the purchase of lands did not in any manner alter the property thereof.[324]

It is obviously untrue, in the literal sense, that the laying out of the intestate's money in the purchase of land had not 'in any manner' altered his entitlements. Assuming that title to the money had validly passed to the vendor of the land, 'the property' in it would indeed have been altered: the intestate would have lost the title he had once had to the money, as a result of the transaction. However, the argument that the sale has not altered 'the property', in the context of the dispute in *Audley v Audley*, was not about the particular title to the money but was rather about the generic classification of the intestate's entitlements as either real or personal, for the purposes of the inheritance rules. As such, there is a connection between this usage and the equitable doctrine of conversion.

Under this doctrine, money held subject to an obligation to use it to purchase real property was[325] treated as actually being real property for the purposes of

---

[324] (1690) 2 Vern 192, 21 ER 172.

[325] Under the Trusts of Land and Appointment of Trustees Act 1996, s 3, this effect no longer takes place where the duty to buy or sell land arises under a trust (unless the trust is a testamentary trust and the testator died before 1 January 1997). It has been suggested the doctrine remains operative where the duty arises in other circumstances, as where there is a contract for the sale of land or a direction to sell land pursuant to a court order. See, generally, P H Pettit, 'Demise of trusts for sale and the doctrine of conversion?' (1997) 113 LQR 207.

inheritance[326] and certain other legal rules;[327] conversely, land held subject to an obligation to sell it was treated as if it was personal property for the purposes of the same rules.

A typical case is *Lechmere v Earl of Carlisle.*[328] In that case, Lord Lechmere had covenanted with the defendant, his father-in-law, to spend £30,000 to buy freehold land and then settle it on particular terms within a year of the covenant. He never fulfilled this covenant and died intestate. The claimant, Lord Lechmere's heir who would also have been the remainderman under the terms of the promised settlement, argued that £30,000 of the personal property should be used to buy freehold land and to settle it on the terms agreed. Sir Joseph Jekyll MR made an order to this effect, which he justified in the following terms:

> [T]he forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the cestui qui trust, since at that rate it would be in power of trustees … by delaying to do their duty … to affect the right of other persons, which never can be maintained. Wherefore the rule in all such cases is that what ought to have been done shall be taken as done, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money.[329]

In a sense, the problem faced by the heir in *Lord Lechmere v Earl of Carlisle*

---

[326] Following the Administration of Estates Act 1925, this doctrine has had no role to play in the context of intestacies occurring after 31 December 1925, since the distinction between real and personal property was rendered irrelevant in that context by the Act. It remained relevant, however, to the construction of wills so that, subject to an expression of contrary intention, a devisee of 'real property' would be entitled to any money that had been directed to be invested in land and a devisee of 'personal property' would be entitled to any land that had been directed to be sold.

[327] For example, whether a charging order could be imposed on land held on trust where the beneficiary under the trust was a debtor: until the Charging Order Act 1979, such an order could not be made because the beneficiary was not treated as having an interest in the land itself but only in the proceeds of sale. See *Irani Finance Ltd v Singh* [1971] Ch 59, and see, generally, C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 542-543 and authorities cited there.

[328] (1733) 3 P Wms 211, 24 ER 1033.

[329] (1733) 3 P Wms 211, 215; 24 ER 1033, 1035 (emphasis added).

was the inverse of the problem faced by the claimant in a case like *Kirk v Webb*. In *Lechmere v Earl of Carlisle*, the intestate had been under a duty to enter into a transaction and had not done so. In *Kirk v Webb*, the testator had been under a duty *not* to enter into a transaction and had done so. However, the metaphor in which the legal response is described – the idea that the land has *become* money, or the money has *become* land – recurs in both contexts, as does the justification that the law would not allow the legal position of the claimant to be affected by another's failure to comply with a duty.

So, for example, in *Lane v Dighton*,[330] once it had been established that the life tenant in that case had purchased land using trust money advanced to him by the trustees, the court made a declaratory[331] order that the land 'ought to be considered in the same plight and condition *as if [the money] had not been invested* and to be subject to the trust and limitations in the [marriage articles].'[332] Similarly, in *Waite v Whorwood*,[333] Lord Hardwicke LC commented on his own decision in *Ryall v Ryall*[334] in the following terms:

> if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or should transfer the money from one particular stock, and invest them in another …. *you may still follow it, as much as if it had continued in the same plight or condition as it stood in at the death of the testator*; for, in the nature of the thing itself, the executor could do no otherwise, where a testator's estate is standing out in the

---

[330] (1762) Amb 409, 27 ER 274.

[331] The claim had been brought by creditors of the deceased life tenant, John Dighton, seeking to have his debts satisfied by sale of the land. The effect of the declaration was that the land was not so available, but was held on trust for the benefit of the defendant to the cause of action, John Dighton's widow, and their children.

[332] (1762) Amb 409, 414; 27 ER 274, 276 (emphasis added).

[333] (1741) 2 Atk 160, 26 ER 500.

[334] (1739) 1 Atk 59, 26 ER 39.

> funds, for of course they will require to be varied and changed according to the circumstances of things.[335]

There is a suggestion, in this passage, that the origin of the right to follow the property lies in the fact that the executor is authorised to use the testator's money in this way and should, therefore, be taken to have intended to add the proceeds to the testator's estate. A few other cases also indicate a similar basis for the entitlement to the product, denying that such a right could arise in response to an unauthorised transaction. In *Newcomb v Burdon*,[336] for example, a life tenant had fraudulently obtained the signature of the remaindermen, his children, who were illiterate, to a conveyance of the trust land. He invested the money obtained in government consols, 'where it still remained, and was clearly identified'. The Court of Exchequer is reported to have rejected the children's assertion that they had a lien in respect of the consols, holding that:

> as the testator had obtained their signatures … fraudulently, he should be considered as a trustee to the amount; but as no agreement had been made, so as to make this particular fund answerable, it was to be considered as a general charge on the estate, not as a specific lien.[337]

In *Taylor v Plumer*, however, this analysis based on the intention of the person entering into the transaction, or his authority to do so on behalf of the claimant, was decisively rejected. In that case, Sir Thomas Plumer's agent, Walsh, had used cash obtained in exchange for a cheque given to him by Sir Thomas to buy share certificates and gold doubloons. He had then run away to Falmouth, with the intention

---

[335] (1741) 2 Atk 160, 26 ER 500.

[336] (1793) 2 Anst 343, 145 ER 897.

[337] (1793) 2 Anst 343, 344; 145 ER 897. See also *Cox v Bateman* (1715) 2 Ves Sen 19, 28 ER 13, where Lord Cowper LC is reported to have refused to allow beneficiaries under a trust 'to follow [trust money] and charge [the trustee's] real estate therewith' in a case where the trustee had purchased land in Ireland using £1500 that he held on trust.

of absconding to Lisbon and from there to North America; it was clear that he had carried out all the transactions with the intention of appropriating the shares and doubloons to his own use.[338] Counsel sought to distinguish earlier cases, involving bankrupt agents who had sold their principal's goods and used the money to purchase more goods,[339] on the basis that those cases depended on the transaction being carried out in compliance with the duty owed to the principal.[340] It was in the context of his rejection of this argument that Lord Ellenborough CJ articulated the principle that the claimant's rights persisted through any change in form and regardless of the intentions of the defendant. He puts his objection to counsel's argument in two ways. First, looking at the matter from the claimant's perspective, he says that when property 'in its original state and form' is 'covered with a trust' in favour of the claimant, no 'change of that state or form'[341] can *divest* the claimant of his rights under the trust. Secondly, looking at the matter from the defendant's perspective, he says that an 'abuse of trust' can *'confer* no rights on the party abusing it, nor on those who claim in privity with him.'[342] As a result:

> The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so

---

[338] See L Smith, 'The Stockbroker and the Solicitor-General: The Story Behind *Taylor v Plumer*' (1994) 15 Journal of Legal History 1, 3-9, describing the factual context of the case and the development of Walsh's fraudulent plans in the face of his pressing financial difficulties. His motives for entering into the transactions are detailed in his letter to his brother, Joseph, quoted by Smith at (1994) 15 Journal of Legal History 1, 7: 'Oh! my God, pardon my heinous offence. – Sir Thomas Plumer employed me to sell a large sum of stock to pay for an estate, and I have withheld a part of the proceeds. I might have taken it all; but I thought it crime enough for my future life to answer for to take what I conceived would be sufficient to maintain my family in competence and pay those debts which hung heaviest on my mind.'

[339] eg *Burdett v Willett* (1708) 1 Eq Ca Ab 370, 23 ER 1017; *Whitecomb v Jacobs* (1710) 1 Salk 160, 91 ER 149; *Ex parte Chion* (1721) 2 P Wms 186, 24 ER 1023; *Scott v Surman* (1742-3) Willes 400, 125 ER 1235.

[340] (1815) 3 M & S 562, 567-570;105 ER 721, 723-724.

[341] (1815) 3 M & S 562, 574;105 ER 721, 725.

[342] ibid.

> long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. … It makes no difference in reason or law into what other form, different from the original, the change may have been made … for 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[.][343]

This language of a change in the form of a thing, which leaves the nature of it intact, is therefore linked to the idea that it should not be within the power of the defendant to divest the claimant of his rights. It is notable that, in describing the operation of this principle on the facts of the case, Walsh himself almost disappears from the picture as the person actually bringing about the change or conversion of form to which the law responds.

This reification of the transactions of the defendant appears throughout the case law, whether the relevant metaphor is that of the survival of a fund, of a thing, or of value. So, for example, in *Frith v Cartland*,[344] Page Wood V-C said:

> The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.[345]

There is a telling shift from the active ('a trustee cannot assert a title') to the passive ('into which it has been converted') in this sentence. The doctrine is based on a principle to do with the scope of a trustee's duty – he cannot assert a title of his own

---

[343] (1815) 3 M & S 562, 574-575;105 ER 721, 725-726.

[344] (1865) 2 H & M 417, 71 ER 525.

[345] (1865) 2 H & M 417, 71 ER 525.

to trust property – but its effect is to remove him from the picture when it comes to determining the significance of his transactions. On this basis, the transaction is described as involving property being converted into other property, rather than, for example, the trustee contracting with a bank and then contracting with a vendor of shares. A similar reification can be found in Lord Millett's characterisation of the facts of *Foskett v McKeown*:

> At the beginning of the story the plaintiffs were beneficially entitled under an express trust to a sum standing in the name of Mr Murphy in a bank account. From there the money moved into and out of various bank accounts where in breach of trust it was inextricably mixed by Mr Murphy with his own money.[346]

Lord Millett goes on to make the point that it is imprecise to speak of 'money' passing in and out of the bank account. An account-holder transfers title to any cash he pays into his bank account to the bank, which becomes his debtor with respect to the amount due.[347] Payments out of the account do not involve any transfer of title to cash belonging to the account-holder: rather, the bank pays out its own money at the direction of the account-holder and reduces its indebtedness to the account-holder accordingly. Lord Millett describes this process, in the context of tracing, in the following terms:

> There is simply a series of debits and credits which are causally and transactionally linked. 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

---

[346] [2001] 1 AC 102, 127.

[347] *Foley v Hill* (1848) 2 HL Cas 28, 9 ER 1002.

but the value inherent in it.[348]

'Value', here, steps into the place of, and does the same metaphorical work as, 'money' or, in the older cases, the 'trust property'. Something, belonging to the claimant, persists through all the transactions of the defendant, such as his contractual dealings with a bank or an insurance company. In describing those transactions as movements of value, or conversions of trust property, or changes in the form of trust property, the law reifies them in such a way that the defendant himself drops out of the picture as an active agent.

C. The need for specific identification: boundaries of the fund

However, this reification has its limits. It is up to the claimant to show that the transactional links mentioned by Lord Millett actually exist, and the fact that the defendant is in breach of a duty owed to the claimant is not sufficient to justify the law in treating any or all of his subsequent acts as conversions of the claimant's property or movements of the claimant's value.

Perry v Phelips[349] is an early example of a case where a claim seems to have failed because of an inability to trace in this sense.[350] In that case, the deceased trustee

---

[348] [2001] 1 AC 102, 128.

[349] (1798) 4 Ves Jun 108, 110; 31 ER 56, 57.

[350] Counsel in *Taylor v Plumer* cites this case, together with *Kirk v Webb* and *Cox v Bateman*, as an example of a general principle that 'the Court of Equity has declined to extend the lien to lands purchased by a misapplication of trust money … or to any lands purchased by a trustee, where it is not clear that they were purchased in execution of his trust': (1815) 3 M & S 562, 567-568; 105 ER 721, 723. Lord Ellenborough CJ rejected this reading of the cases, citing *Lane v Dighton* and adopting counsel for Plumer's view that the 'reason equity would not interfere in *Perry v Phelips* … seems to be, because it did not appear the lands were purchased with the trust-money': (1815) 3 M & S 562, 570; 105 ER 721, 724. Although there are broad dicta in the case supporting the view that a trust of land would only arise where there was an intention to do so, the better interpretation – in the light of the decision in *Taylor v Plumer* – is that the objection was the absence of any evidence that the trust money had been used to buy the land. Contrast *Cox v Bateman*, where it is expressly said that the money used to buy the land was 'trust-money' and which must, therefore, be taken to be overruled in the context of English law by *Taylor v Plumer*.

had taken possession of land held on trust for his minor nephew, had received rents and profits from that land and had not accounted to the nephew for the amount received. His personal estate was inadequate to pay the amount due. The claimants, beneficiaries under the will of the nephew, argued that they were entitled to a lien over the land that he had purchased in his own name, after the date of his breach of trust. A Master in Chancery was appointed to inquire:

> in what manner [the trustee] paid, applied, and disposed of, the personal estate and the rents and profits of the real estate, … and whether he laid out or invested the same or any part thereof in the purchase of any and what estates.[351]

He reported that:

> no evidence had been produced before him of the prices paid for the purchase of any of the said estates: or whether such purchase-money or any part thereof was paid by [the trustee] out of the personal estate of the testator … or the rents of his real estate or either of them: but he found that [the trustee] was in his life-time in the habit of laying out to the most advantage the moneys, which came to his hands, in Government securities, or mortgages, or in the purchase of lands, as opportunity offered.[352]

There are two arguments that might be made to show that the land purchased after the date of the first breach of trust should be considered to be trust property. First, there is the argument that counsel actually made in the case, invoking the decision in *Lechmere v Earl of Carlisle* and suggesting that the underlying principle was that:

> where a man is bound to do an act, and does what may enable him to do it, he shall be taken to do that in performance of

---

[351] (1798) 4 Ves Jun 108, 112; 31 ER 56, 58.

[352] (1798) 4 Ves Jun 108, 112-113; 31 ER 56, 58.

what he is bound to do.[353]

On this approach, what matters is simply the chronological order of events – the fact that the trustee came under a duty to invest the trust money in land, followed by his subsequent purchase of land – coupled with a normative assertion that the law ought to interpret these events in the manner most favourable to the claimants. Lord Loughborough LC rejected the idea that any such broad principle existed in English law. While it would have been desirable if the trustee had invested the trust money in land, as he was under an obligation to do, the court could not disregard the fact that he had had no intention of subjecting the land that he purchased to the terms of the trust at the time that he purchased it.

Lord Loughborough LC commented that he would have liked to adopt the principle suggested and go even beyond it but that authority would not permit him to do so. It would have been desirable in every case where a person owed a debt for him to charge his land for the payment of those debts – he was under a 'moral obligation'[354] to do so – but the fact that something was desirable was not a sufficient basis, in English law, for finding that it had actually been done. In relation to the facts of the instant case, therefore, he said:

> I admit, he was under a trust; and if I had been to determine upon the conduct of [the trustee], this Court would have take care, that the rents and profits should have been laid out in land; and more than that, would have taken care, that he was improving the estate during the time he was to have the rents and profits. But it is clear, he conceived himself entitled to the

---

[353] (1798) 4 Ves Jun 108, 116; 31 ER 56, 60.

[354] (1798) 4 Ves Jun 108, 116; 31 ER 56, 60. It would have been desirable because, at the time, creditors of a deceased person could only recover the amounts due to them out of his personal estate; if he had spent all his money on real property, this would descend to the heir who would not be liable for any of the debts unless the deceased person had charged the land or the creditors had specifically contracted with both the deceased person 'and his heirs'.

> rents and profits. He acted upon it; taking upon himself the purchase of the estates; and I cannot raise the presumption in opposition to the fact.[355]

This passage can be taken as a kind of negative definition of what it is that makes a substitution normatively significant. Since the transaction does not qualify as a substitution, the court is bound to interpret its consequences by reference to the actual intentions of the person entering into it, even though he considers those intentions deplorable. Even where a transaction involving the appropriation of an asset is chronologically preceded by a breach of duty, involving the misappropriation of a trust asset, the court will refuse to interpret the later transaction as giving rise to a trust unless the two are linked by something more than chronology: there must either an intention to create a trust, or the transaction must qualify as a substitution.[356]

The facts of *Perry v Phelips* could be interpreted, however, as demonstrating a link between the trust money and the land that was not merely a matter of chronological sequence but genuinely causal. Given the trustee's 'habit' of investing whatever money came into his hands in land or securities, it is probable that his purchase of the land was made with money that might not have been available to him if he had not appropriated and spent the trust money. As such, on a causal model of tracing,[357] it could be said that the beneficiaries ought to have been entitled to trace. However, as previously explained, English judges have rejected causal models of tracing in most of the cases in which they have been proposed.

In *Re Hallett & Co*,[358] for example, trustees had held debentures in a company

---

[355] (1798) 4 Ves Jun 108, 117; 31 ER 56, 60-61.

[356] See also, in a similar vein, *Lench v Lench* (1805) 10 Ves Jun 510, 31 ER 943.

[357] Of the kind proposed by Oesterle, see 36-37 above.

[358] [1894] 2 QB 237.

called Hewitt & Co and had authorised the bankrupts,[359] Hallett & Co, to receive the money due (£1600) when the debentures matured. Hallett & Co operated a banking business, and the trustees also had a bank account with them into which trust money was regularly paid. In addition, Hallett & Co had a number of clients on whose behalf they dealt with Hewitt & Co, both receiving money due on debentures and paying the money needed to renew the investments of some of these clients.

On January 31 1893, when the £1600 due under the trust debentures was payable, Hallett & Co owed a total of £1900 to Hewitt & Co on behalf of their various clients. On February 3 that year, they set off these debts, paying £300 to Hewitt & Co by a cheque drawn on themselves, crediting the trustees' account with themselves in the amount of £1600, and debiting the accounts of their other clients by £1900. At the end of each day's trading, Hallett & Co paid its total receipts into a bank account held with Cocks, Biddulph & Co. When the partners become bankrupt in May 1893, this account was in credit to the amount of £4171. The beneficiaries under the trust argued that they could trace the £1600 due to them into the bank's account with Cocks, Biddulph & Co and ought to be paid out of that account in preference to the creditors. Vaughan Williams J, at first instance, held that the principle in *Re Hallett's Estate* applied to allow the claimants to trace into the current account with Cocks, Biddulph & Co, on a principle of but-for causation:

> In my judgment the current account of Hallett & Co with Cocks, Biddulph & Co became on February 3, 1893, in credit to the extent of 1600*l* more than it would have been but for the payment off of these debentures.[360]

His decision was overruled by the Court of Appeal, which rejected this

---

[359] One of the trustees, Hallett, was also a partner in the bank.

[360] [1894] 2 QB 237, 240.

argument based on causation. Davey LJ denied the premise that there was any causal link, arguing that the effect of the transaction was simply to increase Hallett & Co's indebtedness to the trustees while reducing their indebtedness to their other creditors,[361] but also joined with the other judges to emphasise the necessity of identifying a distinct right, or 'thing', received under the transaction. Lord Esher MR said:

> Hallett & Co did not in fact receive any money or tender of money or anything tangible which it would be possible to follow or to lay hands upon. … Had there been anything in existence representing that which the bankers were authorized to collect, [the beneficiary] might have followed it; but he cannot shew that; he can only shew a transaction between Hallett & Co and other persons.[362]

As has already been argued, tracing does not actually require the receipt of something genuinely 'tangible', in the sense of a thing with a physical existence that it would be literally possible for the claimants to lay their hands upon; it requires a transaction of a particular kind, which very often includes an adjustment of rights and liabilities as between the defendant and his bank or the defendant, his bank, and another bank. Granting this standard analysis of the nature of a bank account and what it means for money to be paid into or out of such an account, *Re Hallett & Co* cannot be authority that a transaction between persons, involving no receipt of a tangible thing, cannot count as a substitution in English law. It can only be authority that *one* kind of transaction between persons – setting off a debt owed to one as an agent for a trustee against debts owed by one in another capacity, and thereby increasing the

---

[361] [1894] 2 QB 237, 245: 'I do not see how, by this transaction, the assets of Hallett & Co were increased by a single penny; for, if the debt due to the … trustees was increased, on the other hand their debt to their other customers was diminished by an equivalent amount.'

[362] [1894] 2 QB 237, 244.

overall value of one's assets – is not a transaction of the relevant kind.

Nevertheless, this passage demonstrates the double-edged character of the metaphors that envisage the defendant's legal relations as constituting a kind of object, from the perspective of the claimant; it implies a subordination of the defendant within a certain sphere, but it also implies the idea of boundaries or restrictions to that sphere. The claimant is not allowed to treat just *any* transaction of the defendant that occasions him loss, and the defendant gain, as a change in the form of his right that leaves the substance of it intact. The law draws sharp distinctions between transactions that have this result and transactions that do not, and, in principle, the burden of proof is on the claimant to show that the transaction is of the relevant kind.[363]

D. Burden of proof and cherry-picking: things the defendant 'cannot be heard to say'

However, as counsel suggested in dealing with the evidential problem in *Kirk v Webb*, there are situations where the court will interpret the transactions of the defendant from the perspective most favourable to the claimant. There are two dimensions to this: the shift in the burden of proof in some situations where there is no adequate evidence of transactional links,[364] as in *Kirk v Webb* itself, and the cherry-picking rule applied in the context of mixed substitutions.

The first rule is clearly a rule of evidence, derived from *Armory v Delamirie*,[365] and raising a presumption of fact, ie that unknown transactional links do

---

[363] *Serious Fraud Office v Lexi Holdings plc* [2009] EWCA Civ 1443, [55], per Keene LJ delivering the judgment of the court (Keene LJ, Davis J, HHJ John Diehl QC).

[364] As opposed to cases where there is positive evidence of no transactional link, as in *Serious Fraud Office v Lexi Holdings plc* [2009] EWCA Civ 1443.

[365] (1722) 1 Stra 505, 93 ER 664.

exist between the assets received and assets acquired. As has been noted previously, the second rule cannot be explained in the same way because, in many of the cases, there are no unknown facts to be proved by evidential presumptions: it is known, for example, when the claimant's money was paid into the defendant's bank account, when he paid in his own money, and the order in which he made payments out again. The problem for the court is in how to determine the consequences of those facts, by attributing payments in and out of the account.

In describing the operation of the so-called cherry-picking rule, it is sometimes said that the defendant 'cannot be heard to say'[366] that he has made a bad investment with the claimant's share of the mixed pool of assets and has left his own share intact, or that he has made a good investment with his own share and untraceably spent the claimant's share. This terminology is common in a variety of different legal contexts in which a party's past conduct had precluded him from asking a court to interpret facts or apply a rule in a manner favourable to him.[367] However, in the context of the cherry-picking rule, its effect is more extensive. The defendant is not merely prevented from relying on an allegation that he had a dishonest intention when entering into a transaction for his own benefit; his intentions are irrelevant. Instead, it is the claimant whose perspective matters in this context, and who has the freedom to determine the significance of the defendant's transactions, with the benefit of hindsight.

---

[366] eg *Re Hallett's Estate* (1880) 13 Ch D 696, per Jessel MR at 727.

[367] See, for a few recent examples, *Patel v Mirza* [2014] EWCA Civ 1047, per Vos LJ at [102] (party, having relied on the existence of an illegal contract in proceedings at first instance, could not put his claim on an alternative basis in the Court of Appeal); *Orkritie International Investment Management Ltd v Urumuv* [2014] EWHC 191, Eder J at [163] (party who had paid a bribe could not escape liability by arguing that he had believed the bribed fiduciary would disclose the bribe to his principal); and *Dryja v District Court in Radam Poland* [2014] EWHC (Admin) 4679, per Bean J at [4] (appellant seeking to avoid extradition to Poland would not have been able to rely on the lapse of time since the alleged offence if he had known of proceedings pending against him before leaving the jurisdiction).

In this context, it has sometimes been suggested that the best interpretation of the tracing rules is that they reflect the content of the defendant's duty to account to the claimant.[368] Lord Millett, writing extra-judicially, has said that these rules do not depend on the claimant ratifying or adopting the defendant's transactions but that they do allow the claimant to determine whether or not those transactions should be treated '*as if* they were an authorised investment made for [the claimant's] account.'[369] From this perspective, the argument that the defendant 'cannot be heard to say' that he has done something undesirable with the claimant's money does not merely mean that he cannot rely on his wrong in asking the court to construe the meaning of his transactions. It means that, as between the claimant and the defendant, it is the claimant who is entitled to determine the meaning of the defendant's transactions within the sphere defined by the tracing rules.

III. WHEN DOES A SUBSTITUTION TAKE PLACE? FOSKETT V MCKEOWN AS A GUIDE TO THE ISSUES

The next question is how one determines the boundaries of that sphere, ie how one distinguishes between transactions that qualify as substitutions and transactions that do not. The argument so far has been that the authorities that answer this question can be better understood if they are thought of as solving the problem of limiting the defendant's autonomy to the extent necessary to protect the claimant from a loss of rights, and no further. This part looks at the leading case of *Foskett v McKeown* from this perspective, arguing that we can better understand the issues at stake in that case,

---

[368] eg P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thompson 2005) 309; J Penner, 'Duty and Liability in Respect of Funds' in J Lowry and L Mistelis (eds.), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, London 2006) 207; S Worthington, *Equity* (OUP 2006) 106; S Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) 258-260.

[369] P Millett (n 368 above) 315 (emphasis added).

and in the law of tracing generally, if we see the judges' disagreements as being about the extent to which Mr Murphy's freedom to determine the significance of his acts was affected by his position vis-à-vis the claimants.

It will be recalled that the different judges who analysed the facts of *Foskett v McKeown* disagreed about the significance of three distinct aspects of the situation.[370] First, the majority of the Court of Appeal considered it important that Mr Murphy had entered into his life insurance contract with Barclays Bank, and settled the benefits under that contract on trust for his children, *before* he first drew on the bank account held on trust for the claimants for his own purposes. The majority of the House of Lords did not think that this issue of timing was relevant. Secondly, the minority in the House of Lords thought that the issue of causation of gain was relevant and the majority disagreed. Thirdly, Lord Millett would have preferred to treat Barclays Bank's allocation of units in a notional investment fund, in response to the payment of individual premiums, as relevant on the facts. Lords Hoffmann and Browne-Wilkinson disagreed, and considered that the allocation of units in the notional fund was irrelevant.

A. Timing and the analogy to improvement of an existing asset

In *Re Diplock*,[371] some of the defendant charities had spent the money mistakenly paid to them out of the testator's estate on carrying out physical improvements to their land. Thus, for example, the Leaf Homeopathic Hospital had spent £1137 on improvements to its existing buildings while some of the other charities had built entirely new structures on their land. The Court of Appeal denied that these

---

[370] Outlined at 62-63 above.

[371] [1948] Ch 465.

transactions qualified as mixed substitutions, analogous to the payment of money into an existing bank account or the payment of money from two sources for the acquisition of a new asset, like land.

In *Foskett v McKeown,*[372] Sir Richard Scott V-C and Hobhouse LJ considered that Mr Murphy's use of the trust money to pay his life insurance premiums was essentially more closely analogous to an improvement of an existing asset – not a substitution – than it was to a mixed substitution. In the House of Lords, Lord Millett and Lord Browne-Wilkinson both rejected this analogy for slightly different reasons, with Lord Browne-Wilkinson focusing on the nature of the asset at stake in *Foskett v McKeown* and Lord Millett focusing on the relevance of chronology.

1. The rejection of the analogy to land

Lord Browne-Wilkinson focused on the distinctive character of a pre-existing title to a tangible thing, arguing that, once an improvement to the thing itself has been made, it cannot be separated out from the thing and treated as a freestanding asset. It is not possible to physically divide the improved thing 'into its separate constituent assets, ie the land and the money spent on it.'[373] He contrasted this with a mixed fund, the essence of which was its potential to be divided up into its constituent parts, pro rata, according to the contributions made to it.

Of course, a contractual claim to be paid a certain amount of money is not *physically* divisible into constituent parts, any more than land can be divided from the money spent on it. However, looked at from the perspective of a limitation on defendant autonomy, there is a plausible distinction between a pre-existing

---

[372] [1998] Ch 265, per Richard Scott V-C at 277-281 and Hobhouse LJ at 289.

[373] [2001] 1 AC 102, 109.

entitlement like a bank account, into which money has been paid, and a pre-existing title to land on which money has been spent in physical improvement. In the case of the bank account, its only function is its status as an assignable right capable of being exercised in the market in exchange for other rights. In the case of the pre-existing title to land, it can be said to have a use value and a potential link to the personhood[374] of the defendant that would render it more of an intrusion on his autonomy to treat it as an exchange product. The rights due under the insurance policy in *Foskett v McKeown* could be seen as something of an intermediate case. Lord Millett, in the House of Lords, indicated that it should be thought of as essentially resembling a bank account;[375] Sir Richard Scott V-C thought it should be thought of as resembling a house.[376]

If we generalise this reasoning, then, it seems to follow that a mixed substitution occurs only when the 'mixed' asset is one that can easily be separated from the person of the defendant. The core case of a substitution involves the acquisition by the defendant of an assignable right, capable of being transferred to another without loss to the personhood of the defendant; the concept excludes those valuable benefits that are incapable of being separately transferred in this way, such as the benefit of services that increases the defendant's earning potential or the market value of land that he already owns. Mixed substitutions, where the claimant traces into a pre-existing single right already held by the defendant, can only exist where the rights in question can easily be thought of as reducible to fungible units of value. A

---

[374] A distinction that loosely mirrors Radin's distinction between fungible property and 'personal property': see M Radin, *Reinterpreting Property* (University of Chicago Press 1996).

[375] [2001] 1 AC 102, 134.

[376] [1998] Ch 265, 279.

bank account is the paradigm case of such a right.

One implication of this approach is that it explains the lowest intermediate balance rule. If the substitution concept requires a claimant to point to a distinct right acquired by the defendant, separable in principle from his person, the extinction of a right in exchange for the reduction of a debt cannot qualify, without more, as a substitution. The defendant will perhaps be factually better off, but this is all. Thus, while the claimant is free to assert that any payments *out* of the mixed pool are for his benefit – or not – he is not free to assert that new payments into the pool, obtained from some other source, are for his benefit. A bank account can be thought of as divisible into constituent parts, and the parts allocated according to the convenience of the claimant at the expense of the defendant, but it is not permissible to treat all the assets vested in the defendant as a similar pool.

This argument may also explain the justification for the so-called rule that 'money has no earmark', which was originally applied in contexts where the defendant had received chattels with the status of currency that were indistinguishable from other such chattels in his possession. To receive money that was not in a bag was considered to mean that the particular cash received was no longer identifiable in the general mass of the defendant's assets. In *Re Hallett's Estate*, Jessel MR suggested that Lord Ellenborough's lack of learning in equity had led him to ignore the possibility of simply imposing a charge on a mixed fund of money, proportionate to the shares contributed.[377] However, in the context of money that was not in a bag, this solution is the equivalent of imposing a charge on the general pool of the defendant's assets, or at least on all the money in his possession. This is a much more

---

[377] (1880) 13 Ch D 696, 717.

radical intrusion on the defendant's autonomy that imposing such a charge on a single right that he holds, such as a bank account. In this context, it is unsurprising that the Court of Appeal in *Pennell v Deffell*,[378] in conceptualising the mechanism for imposing such a charge in relation to a mixed bank account, pictured the bank account as a repository of cash with defined boundaries: money in a box.

2. The irrelevance of timing: establishing the unity of a transactional link

In holding that the payment of the insurance premiums could properly be understood as the improvement of a subsisting asset, the majority of the Court of Appeal took the view that Mr Murphy had acquired his rights under the insurance contract as soon as he entered into his agreement with Barclays Bank. The payments of insurance premiums were later events, only linked to the initial acquisition of the rights under the contract by their potential (in the event, unrealised) for increasing their value. Before these payments took place, Murphy's children had already obtained vested rights under the trusts of the insurance policy and the issue, in the Court of Appeal, was therefore framed in terms of whether it would be just to divest the children of their existing rights as a result of the misappropriation of the trust assets by Mr Murphy.

By contrast, Lord Millett denied that Mr Murphy had obtained anything, which he could have vested in his children, before he paid the first premium; the situation was analogous to the purchase of an asset by instalments.[379] It has been suggested that this aspect of the decision in *Foskett v McKeown* renders it an example of successful backwards tracing:

---

[378] (1853) 4 De G M & G 372, 43 ER 551.

[379] [2001] 1 AC 102, 136-137.

> To transfer property in return for being paid in instalments is to advance credit, and to pay for a property right in instalments is to discharge one's debt to the transferor in consideration of his transfer of the property.[380]

However, this characterisation of the decision in *Foskett* depends on maintaining the idea, held by the majority of the Court of Appeal in that case, that what Mr Murphy had done was enter into a series of distinct transactions, each of which had to be independently assessed by reference to Mr Murphy's intentions and the causal consequences of each transaction. That is, he first entered into the contract and purchased his rights under that contract, incurring a debt under the same transaction; then he used the claimants' money to discharge a series of debts to the insurance company; and it was *because* he had used their money to pay the debts that the claimants could obtain a proportionate share of the death benefit.[381]

In fact, as his emphasis on the language of the contract makes clear, Lord Millett held that the payment of the premiums and the acquisition of rights under the contract represented the two sides of a single transaction. According to him, it was because the contract provided that the death benefit was payable 'in consideration of the payment of the first premium already made and of the further premiums payable' that the insurance policy represented the product of the premiums. The implication is that the status of a transaction as a substitution cannot be negated by the intentions of the defendant in relation to his individual acts and their consequences. Rather, the unity of a transactional link is defined objectively, by reference to its legal effects.

---

[380] J Penner, 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009) 306, 321.

[381] Thus, adopting this 'backwards tracing' analysis of the facts, Hobhouse LJ denied that tracing was possible on the authority of *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211: [1998] Ch 265, 289.

B. The relevance of the terms of the insurance contract 1: causation

As has previously been explained, the majority of the House of Lords in *Foskett* rejected the relevance of causation of gain to the defendant as a relevant factor in tracing. Lord Millett said that the issue was attribution, not causation, a somewhat opaque phrase. However, his justification for ignoring the causal consequences of the transaction in favour of its legal significance lends more precision to the concept. Commenting on the suggestion that the outcome represented a windfall for the beneficiaries under the trust, he compared it to a case where A used B's money to buy a lottery ticket and B claimed the winnings. He went on to say:

> Since A is a wrongdoer, it is irrelevant that he could have used his own money if in fact he used B's. This may seem to give B an undeserved windfall, but the result is not unjust. Had B discovered the fraud before the draw, he could have decided whether to keep the ticket or demand his money back. *He alone has the right to decide whether to gamble with his own money*. If A keeps him in ignorance until after the draw, he suffers the consequence. *He cannot deprive B of his right to choose what to do with his own money; but he can give him an informed choice.*[382]

As has been argued, the effect of treating a transaction by A as a substitution of B's rights is to remove A's entitlement to determine the significance of that particular transaction even though he is the person who has brought it about. He is, instead, obliged to concede the interpretation of the transaction that best suits B. The justification for this effect offered by Lord Millett is that A is a wrongdoer of a particular kind. In the example involving the lottery ticket, his wrong consists in depriving B of the right to decide what is done with the particular money that A has spent in buying the lottery ticket. This reasoning will not cover a case where A's

---

[382] [2001] 1 AC 102, 134.

particular act does not qualify as a deprivation of rights of this kind, even if it is in some other sense a wrong.

Thus, if we return to Oesterle's example of what causal tracing would look like,[383] we can see that this reasoning will not capture such a case. It will be recalled that Oesterle postulates a thief who has $100 of his own in gold coins and who has stolen bearer bonds worth $100 from the claimant. He keeps his own gold coins and spends the stolen bearer bonds on food, which he consumes. To say that the gold coins are the product of the stolen bonds is to say that the claimant, as owner of the bearer bonds, should have the ability to determine the significance of the thief's act in keeping the gold coins. The objection to this argument is that, although the thief is a wrongdoer and is personally liable to pay the claimant $100, nothing has happened that deprives him of his agency in respect of the gold coins. Presuming he obtained his title to them legally, he is entitled to make use of the coins, or not, as he pleases. Nothing in Oesterle's story offers a reason why the thief's ability to determine what is done with those particular coins should be affected by his wrong. Lord Millett's reasoning in this passage only captures a situation where the very right apparently exercised by the defendant in, for example, buying a lottery ticket, is one that the claimant has a right to control.

C. The relevance of the terms of the insurance contract 2: the 'units' of the fund

Finally, it will be recalled that under the terms of the insurance policy in *Foskett v McKeown*, the death benefit was to be calculated by reference to the value of a notional fund of investments, units in which were 'purchased' by each payment of a

---

[383] 36-37 above.

premium. No actual purchases of any investments were made but, on the payment of each premium after the first, Barclays Bank would allocate a certain number of units to Mr Murphy's account. The number varied, with more units being allocated on payment of the later premiums rather than the earlier ones. The total number that had been allocated was relevant to the upkeep of the policy, in the event of premiums not being paid and also to the calculation of the final death benefit in the event that their value exceeded £1m.[384]

The majority held that the allocation of these units, on each payment of a premium, was irrelevant in the events that had happened. The shares of the parties should be calculated by reference to the premiums as such, not the units allocated to the premiums. Lord Millett disagreed,[385] arguing that the investment element of the policy – ie, the number of units that had been allocated to the account by the date of Mr Murphy's death – ought to be shared out between the parties in proportion to their contributions to the actual units, while the remainder of the £1m death benefit should be apportioned by reference to the contributions to the premiums paid. He compared the units of account used to calculate the death benefit to a currency, and argued that, if the payments had been made in sterling but into a dollar account, the shares of the parties would have been calculated in terms of the number of dollars purchased with the sterling at different dates not the raw proportions of sterling contributed.

Lord Hoffmann rejected this approach as over-complicated. He said that the formula for calculating the amount payable was irrelevant to the position of the parties. What mattered were the shares of each party's money paid in consideration for the acquisition of the rights under the contract, not the precise terms of the

---

[384] See 38-40 above for the details of the policy.

[385] [2001] 1 AC 102, 144-146.

contract itself. He said:

> It would not in my view have mattered whether the formula for calculating the amount payable had been by reference to the movements of the heavenly bodies. The policy was a single chose in action under which some amount would fall due for payment in consideration of the premiums which had been paid. Immediately before Mr Murphy's suicide, it was owned by the children and the beneficiaries in proportion to the value of their contributions to that consideration.[386]

This disagreement can be seen as an argument about the extent to which a claimant ought to be affected by the internal character of a substituting transaction, as between the defendant and the third party with whom he is dealing. Here, the timing of the premiums paid undoubtedly affected Mr Murphy's legal position vis-à-vis Barclays Bank. If he had not paid the first or second premium, the policy would have lapsed entirely. If he had not paid the later premiums, the chances of the policy lapsing before his death would have increased since fewer units would have been available to compensate for any unpaid premiums. Should the internal adjustments of rights and duties, as between Mr Murphy and Barclays Bank, have had any effect on the position of the claimants who alleged that they were entitled to the benefit of that contract?

This is similar to the question whether, in the context of payments into and out of a mixed bank account, changes in the trustee's legal relations with the bank ought to have a bearing on the position of the beneficiaries under a trust of the bank account. As between trustee and beneficiary, the answer is clearly no: this is the consequence of the cherry-picking rule, which precludes the application of the rule in *Clayton's*

---

[386] [2001] 1 AC 102, 116.

Case[387] to determine which credits and debits from the account are attributable to the beneficiary and which to the trustee. As between passive contributors to the account, who are equally innocent of wrongdoing, the question is more doubtful as a matter of authority.[388] However, if we frame the tracing concept as involving a limitation on the defendant's autonomy with the aim of protecting the claimant from a wrongful deprivation of rights, it seems clear that the question ought to depend on the content of the duties owed by the defendant to the different claimants, rather than on the content of his relationship with the bank. If, unusually, the banker and customer were to agree that credits should be allocated to debits by reference to what is said in the customer's horoscope or some other idiosyncratic criterion,[389] this has nothing to do with the claimants, whose assertion is that a single chose in action – the bank account – is held by the defendants subject to a duty owed to them.

IV. CONCLUSIONS AND IMPLICATIONS

The argument of Part II has been that accounts of tracing that seek to treat it as a normatively neutral or evidential exercise do not offer a convincing doctrinal account of the current law, either in terms of 'fit' or 'justification'. Rather, it is only if the tracing rules are understood as answering normative questions that their content can be made sense of in these terms.

When the rules are looked at from this perspective, it has been argued they allow us to construct a definition of a substitution as an act whereby the defendant deprives the claimant of the control that he ought legally to have over some right, and

---

[387] (1816) 1 Mer 572, 35 ER 781.

[388] Discussed at 59-60 above.

[389] Thus contractually displacing the default presumption as to their intention in *Clayton's Case*.

acquires a right in consideration for the act that brings about this deprivation. This idea that the defendant has acquired a right in consideration for his deprivation of the claimant is an objective one, based on the legal effect of what the defendant has done. The defendant's intentional ordering of his acts cannot negate the characterisation of a given acquisition as a substitution, whether because of the chronology of those acts or because of other dispositions of rights that he has tried to make.

However, the right acquired by the defendant must be genuinely distinguishable from his pre-existing rights. This requirement of distinctness may be met either because the right acquired is a new assignable right or because the right varied is of a kind that can be thought of as a pool of fungible units rather than a right closely linked to the personhood of the defendant.

These formal characteristics of a substitution, which have been argued to emerge from the judicial accounts of its normative importance, centre on the idea of legal rights being altered, transferred, or distinguished from each other. In making sense of these ideas, it may therefore be helpful to think in terms of what Hohfeld calls the 'jural relations'[390] between the parties.

As is well-known, Hohfeld outlines four sets of jural relations which may exist between individuals: claim-rights and duties; privileges and no-rights; immunities and disabilities; and powers and liabilities. It is the power-liability relationship which describes the situation in which the legal system confers on one person the ability to alter the legal position of another by an act of will, either subjecting him to new duties or vesting new rights, powers, or privileges in him. It seems, from the argument of this chapter, that the concept of a substitution presupposes a power-liability

---

[390] W N Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, New Haven 1923).

relationship of this kind: the defendant can only alter the *legal* position of the claimant if he has a power, in Hohfeld's sense, to do so.

However, there are a number of different legal relations that could be described as constituting power-liability relationships in Hohfeld's very broad sense. In order to get a clearer sense of the kind of legal relation within which it makes sense to speak of a substitution having taken place, it is necessary to look to the substantive law on entitlements to traceable proceeds and the so-called 'proprietary base' requirement.

PART II – CLAIMS TO SUBSTITUTE ASSETS

4. 'PROPERTY', 'FIDUCIARY DUTY' AND UNAUTHORISED SUBSTITUTION

There is an extensive case law governing the circumstances in which one person may claim the traceable proceeds of another's transactions. In these cases, the judges have employed two key concepts to explain the circumstances in which such a right may arise in a private law context: fiduciary relationships and proprietary rights. However, this chapter argues, neither of these categories can make sense of the reasoning and the outcomes in the cases. In addition, the more frequently invoked 'property right' model, as well as lacking authority, is conceptually incoherent with the tracing concept and the underlying idea of a 'substitution' as a deprivation or variation of legal rights.

It makes this argument in four parts. The first part sets out a brief overview of the case law on this issue, identifying the ways in which the language of property, fiduciary duty, and other related concepts have been employed to justify allowing a claimant to trace through the transactions of a defendant and to refuse claims of this kind in some cases.

The second part considers whether the idea of a fiduciary duty as such can make sense of the case law. It argues that it cannot, because of the cases in which claims based on unauthorised substitution have arisen in the absence of any distinctively fiduciary character to the relationship between the parties.

The third part considers the dominant 'proprietary base' approach to these cases, and rejects it on the basis that the rights that constitute the core of the category of 'property rights' – common law titles to chattels and land – do not generate claims of this kind. They do not feature in the authorities and it is difficult to imagine the

kind of scenario in which they would do so. This is because, apart from authority, there is a crucial analytical difference between the idea of a trespass and that of a substitution. As the previous part has argued, a substitution presupposes a relationship whereby the defendant has the power to alter the vested rights of the claimant, and a duty not to do so. A trespass, by contrast, is concerned primarily with a duty of non-interference. It is argued that this analytical difference is normatively significant, and that the law's response to a substitution involves different justificatory concerns than the law's response to a interference with a tangible thing.

Finally, the fourth part sums up the implications of the argument of the chapter. The claim that entitlements to traceable proceeds can be described both in the language of 'property' and that of 'fiduciary relationship', while inexact, suggests the existence of a category of legal relations that shares significant characteristics of both. This intermediate category, described in the next chapter as a relationship of 'stewardship of assets', must be shown not only to capture the outcomes in particular cases but also to explain the rhetorical basis of the appeals to property concepts, and to ideas of fiduciary loyalty, found in the judgments in the cases.

I. BACKGROUND: TRUSTEES, DEBTORS AND OTHERS

In *Burdett v Willett*,[391] the claimant had employed the deceased, Willett, as his factor[392] to sell cloth. Willett had taken the cloth from the customs house and sold it to

---

[391] (1708) 1 Eq Ca Ab 370, 23 ER 1017.

[392] That is, as an agent who has possession of his principal's goods, coupled with an authority to convey his principal's title to those goods to a third party in the ordinary course of his business. For this use of the term 'factor', see, for example, *Baring v Corrie* (1818) 2 Barn and Ald 137, 106 ER 319, per Abbott CJ at (1818) 2 Barn and Ald 137, 143, 106 ER 319, 320: 'A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name.' Although the term 'factor' was used to describe a variety of different

the first defendants, Wingfield and Bowater, for an agreed price of £115. Before Wingfield and Bowater had paid him, he died, insolvent.[393] The second defendant, the widow, brought an action at common law to recover the amount of the debt from Wingfield and Bowater, arguing that the money should be paid to her as Willett's administrator and used to satisfy his debts, including the debt that he owed her personally under the terms of their marriage articles. The claimant brought an action in equity, seeking an injunction to restrain Wingfield and Bowater from paying the money to the widow and ordering them to pay him instead.

The Lord Chancellor granted the injunction, and is reported to have justified this decision on the basis that 'the factor is in the nature of a trustee only; and although he has the right at law, yet he is in equity but a trustee.'[394] One could read this to mean that the factor *is* a trustee, in which case the case of the factor collapses into the case of the express trustee. The legal position, on this analysis, would be as follows: where a merchant consigns goods to a factor for sale, what is happening is that the merchant has assigned his[395] legal title to those goods to the factor outright,

---

relationships in the seventeenth and eighteenth century, a common theme was the combination of possession of the goods of another coupled with an authority to sell those goods and, perhaps, receive a commission on the sale: see, generally, R Munday, 'The Legal History of the Factor' (1977) 6 Anglo-Am Law Review 221.

[393] In the sense that the amount due on his debts exceeded the value of his assets at his death. It is not clear whether he could have qualified as a bankrupt, in the sense used in the bankruptcy legislation then in force, because the statute that explicitly extended the category of debtors capable of being bankrupted to include 'factors' was brought into force only ten years later, in 1718: see I Duffy, 'The English Bankrupt, 1571-1861' (1980) 24 Am Journal of Legal History 283, 292-295, discussing the impact of the statue (1718) 5 Geo I c 24. The statute (1624) 21 Jac I 19 had, however, extended the category to include persons who used 'the trade or profession of scrivener, receiving other men's monies or estates into their trust or custody' and this definition may have captured an agent to whom goods were consigned to be sold even before 1718: see, for example, *L'Apostre v Le Plaistrier* (1708) 2 Eq Ca Abr 113, 24 ER 406, also reported at Viner's Abr Tit Creditor and Bankrupt (T) 89.

[394] (1708) 1 Eq Ca Ab 370, 23 ER 1017.

[395] It must have been the principal's original legal title that was transferred to Wingfield and Bowater in any case, because a transfer to them of the factor's possessory title would have made them vulnerable to a claim in trover or detinue by the claimant with his superior title, and it is clear that no such claim was envisaged on the facts, even though Wingfield and Bowater were the defendants.

and the factor holds that legal title on trust for the merchant up to the moment of the sale.

However, in a series of decisions over the course of the eighteenth century,[396] spurred on by the introduction of the new bankruptcy legislation,[397] the courts developed an account of the position of a factor that was more complicated than this. It was held in *L'Apostre v Le Plaistrier*[398] that, where the factor had *not* sold the original goods but retained possession of them at the moment of his bankruptcy, the assignees in bankruptcy would be liable to the merchant in trover if they took possession of the goods and refused to give them up to the merchant at his demand. In *Tooke v Hollingworth,*[399] counsel for the assignees in bankruptcy sought to persuade a common law court that the principle applied in these earlier cases could not be invoked to support an action in trover to recover goods originally sent to the bankrupt by the claimant, on the basis that these cases had been decided in the Court of Chancery, while the action of trover was 'founded on strict legal right.'[400] The court rejected this argument, holding that the claimant in *Tooke v Hollingworth* had the necessary title to sue in trover.

If this line of cases is correct, then it is inaccurate to say that the factor cases involved express trusts of the title that was actually sold to the purchaser. If the

---

[396] *L'Apostre v Le Plaistrier* (1708) 2 Eq Ca Abr 113, 22 ER 96; also reported in Viner's Abr Tit. Creditor and Bankrupt (T) 89; *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149*; Copeman v Gallant* (1716) 1 P Wms 314, 24 ER 404; *Godfrey v Furzo* (1733) 3 P Wms 185, 24 ER 1022; *Paul v Birch* (1743) 2 Atk 621, 26 ER 776; *ex parte Flynn* (1748) 1 Atk 185, 26 ER 120; *Ryall v Rolle* (1749) 1 Atk 165, 26 ER 107; *ex parte Dumas* (1754) 1 Atk 232, 26 ER 149; *Kinloch v Craig* (1789) 3 TR 120; *Tooke v Hollingworth* (1793) 5 TR 215, 101 ER 121; *Collins v Martin* (1797) 1 Bos & Pul 648, 126 ER 1113 and *Ex parte Sayers* (1800) 5 Ves Jun 169, 31 ER 528.

[397] (1624) 21 Jac I c 19 and (1718) 5 Geo I c 24.

[398] (1708) 2 Eq Ca Abr 113, 22 ER 96; also reported in Viner's Abr Tit. Creditor and Bankrupt (T) 89.

[399] (1793) 5 TR 215; 101 ER 121.

[400] *Tooke v Hollingworth* (1793) 5 TR 215, 224; 101 ER 121, 126.

principal retained his legal title to the original goods, for the purpose of suing in trover, it cannot also be said that the factor held *that* title on trust for him. Rather, the factor was authorised, as an agent, to divest the principal of his legal title by carrying out a sale in the ordinary course of his business. On this analysis, some of the earliest cases recognising the existence of claims based on substitution, outside the context of land, were cases involving agents rather than trustees. However, as the quoted passage from *Burdett v Willett* makes clear, the analogy with trusteeship exerted a powerful influence.

In *ex parte Dale*,[401] Fry J felt compelled by authority to hold that a principal could not trace into a bank account in which his agent had paid his own money as well as money received on account of his principal, although *Pennell v Deffell*[402] had already decided that beneficiaries under trusts could trace in these circumstances. He was critical of the distinction he felt obliged to draw between the two situations, however, saying:

> Does it make any difference that instead of trustee and cestui que trust, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own.[403]

In *Re Hallett's Estate,*[404]Jessel MR took the same view and, overruling *Ex parte Dale*,

---

[401] (1879) LR 11 Ch D 772.

[402] (1853) 4 De G M & G 372, 43 ER 551.

[403] (1879) LR 11 Ch D 772, 777-778.

[404] (1880) 13 Ch D 696.

held that a bailee was in no different position from a trustee for the purposes of tracing into a mixed bank account. He criticised Lord Ellenborough CJ's obiter dictum in *Taylor v Plumer*, to the effect that the entitlement to claim money as a traceable product failed when it was 'mixed and confounded' in a mass of other money, commenting that this statement showed that Lord Ellenborough's 'knowledge of the rules of Equity was not quite commensurate with his knowledge of the rules of Common Law',[405] and that the concept of an equitable charge would allow shares in respect of such a mixed fund to be calculated and apportioned. He said:

> the moment you get into a Court of Equity, where a principal can sue an agent as well as a cestui que trust can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply.[406]

As Smith has shown,[407] subsequent cases have erroneously read these statements, in isolation, to mean that the 'modern rules of Equity' applied in cases where there was a fiduciary relationship, while common law cases – like *Taylor v Plumer* – were restricted by the old line of authority forbidding the tracing of money into a mixed mass. The idea of a fiduciary relation, which allowed a claimant to invoke 'the more refined doctrine of equity'[408] explained in *Re Hallett's Estate*, therefore became important. However, in *Re Hallett's Estate* itself, Jessel MR appeared to use the language of fiduciary relationship primarily as a kind of shorthand for 'beneficial ownership'. Thus, he said that the distinction between trustee-

---

[405] (1880) 13 Ch D 696, 717.

[406] (1880) 13 Ch D 696, 710.

[407] 'Tracing in *Taylor v Plumer*: equity in the Court of King's Bench' [1995] LMCLQ 240.

[408] eg *Collins v Stimson* [1881-85] All ER Rep 382, per Pollock B at 383, distinguishing 'the principle in *Taylor v Plumer*' from 'the more refined doctrine of equity explained in *Re Hallett's Estate*'.

beneficiary relations and bailor-bailee relations had no foundation in principle *because* 'the beneficial ownership is the same, wherever the legal ownership may be.'[409]

In *Kirkham v Peel*,[410] the scope of this aspect of the decision in *Re Hallett's Estate* was at issue. The claimant, Kirkham, was a merchant at Manchester who had sent goods to the defendant firm, John Peel & Co, to be sold on by the branch of the firm (Peel, Cassels, & Co) which operated in Bombay. Under the usual arrangement between the parties, Kirkham would consign goods to the defendants to be sold; the defendants would normally make some advances to him on their value and then ship the goods to Peel, Cassels & Co in Bombay; and, once the goods had been sold by Peel, Cassels & Co, the proceeds of sale were used to buy more goods that were shipped back to London and sold by the defendants.

In the accounts of Peel, Cassels & Co, Kirkham was credited with the net proceeds of sale of his goods and debited with the value, plus stamp duty and interest, of bills of exchange that had supposedly been sent to the defendants on his claimant's behalf. In fact there were no bills of exchange. On receiving the accounts, John Peel & Co would forward them on to Kirkham, credit him with the amount of these notional bills of exchange and, having debited the money previously advanced to him and the commission they were owed, paid over the balance due.

Having discovered that he had been wrongly charged stamp duty on the non-existent bills of exchange, the claimant brought an action seeking an account of the dealings and transactions between himself and the defendants as his agents, in respect of goods entrusted to them since 1 November 1875. By consent of the parties, Jessel

---

[409] (1880) 13 Ch D 696, 710.

[410] (1880) 43 LT 171, affirmed by the Court of Appeal in (1880) 44 LT 195.

MR ordered an account to be taken of all such dealings and transactions. The official referee directed an account not only of the transactions between claimant and defendant directly but also of the application by Peels, Cassel & Co of the proceeds of sale of the claimant's goods in India, including the amount realised by the sale of the goods for which they had been exchanged. The defendants objected to this direction, on the basis that it was not within the terms of the MR's order and it was not 'a direction which the plaintiff was entitled to under the circumstances.' Counsel for the claimant asserted that the defendants had 'bartered our goods instead of selling them, and we claim the value of the goods received in exchange', citing *Re Hallett's Estate* as authority. Jessel MR said:

> My observations in the case which has been cited had nothing whatever to do with the case of a commission merchant or agent. They were confined to the case of a bailee, ordinarily called a factor, who sells single articles and whose duty it is to remit the necessary proceeds to his principal. The case I have before me is one of a totally different character. … [T]he real transaction between the parties is for the consignor to treat such a consignee as creditor for his advances and interest and to regard him as a debtor for the amounts received and interest.[411]

The kind of relationship that gives rise to a claim to traceable proceeds is often, as in *Kirkham v Peel*, defined negatively as a relationship which is not merely a debtor-creditor relationship.[412]

In *Triffit Nurseries (A firm) v Salads Etcetera Ltd*,[413] an attempt was made to extend the principle to a case where the principals and their agent had undoubtedly stood in a debtor-creditor relationship at one stage, but this attempt failed. The

---

[411] (1880) 43 LT 171, 172.

[412] eg *Re Stenning* [1895] 2 Ch 433; *King v Hutton* [1900] 2 QB 504; *Henry v Hammond* [1913] 2 KB 515.

[413] [2001] 1 All ER (Comm) 737.

claimant vegetable growers had entered into a relationship with Salads Etcetera, the insolvent company, whereby they would deliver their produce to the company and the company would sell this produce, as their agent, to supermarkets and wholesale markets. Accounts were remitted to the claimants on a regular basis, showing the prices for which different classes of produce had been sold and the deductions made for commission and haulage fees, and payments of the amounts due were regularly made. After Salads Etcetera went into administrative receivership, under a debenture held by a bank, the receivers collected the book debts of the company, including money owed to them by purchasers of the claimants' produce.

The claimants argued that, to the extent that the debts collected represented the traceable proceeds of the vegetables consigned by them for sale to Salads Etcetera, they were held on trust for them and could not be applied to satisfy the company's indebtedness to the bank. Counsel accepted that, while the company had been trading normally, it had been under no obligation to hold the proceeds of sale of the vegetable produce on trust for each supplier. Its only duty had been to account to the growers for the abstract amounts due to them. However, he argued that the effect of the company's insolvency was to terminate the debtor-creditor relationship and, with it, the company's authority to appropriate the specific proceeds of sale of the vegetable produce.

The argument was rejected on the facts. Robert Walker LJ said:

> Mr Bannister has accepted that while Salads was trading as a going concern *it was not obliged to hold and account for receipts from customers as if it were a trustee*. It could use the money for the purposes of its own business, subject to a contractual duty to account to the claimants for what was due to them. Mr Bannister has accepted that he must point to some divesting event which impressed the post-receivership receipts *with a totally different character, so that they were not caught by the bank's charge, and were beneficially owned (as to an*

appropriate and quantifiable share) by the claimants.[414]

This passage captures a range of concepts at work in the law governing the situations in which a claimant can successfully assert a private law claim to the traceable proceeds of another person's transactions: trusteeship, obligation to account as if a trustee, mere contractual debt, and beneficial ownership. It is clear law that, at one extreme, a beneficiary under an express trust can assert a claim to the traceable proceeds of his trustee's transactions with the right held on trust. At the other extreme, it is clear that no such claim is available to a claimant who is contractually owed a duty to be paid an abstract sum of money. Difficulties arise, however, in accounting for the range of cases in which such claims have succeeded where it is difficult to characterise the relationship as one that gives rise to a trustee-like (or fiduciary) duty to account.

I. THE WEAKNESS OF THE FIDUCIARY MODEL

It is notoriously difficult to offer an abstract definition of a fiduciary relationship, either by reference to the type of situation that gives rise to fiduciary duties or by reference to the content of the duty itself.[415] However, it is generally accepted that a core feature of fiduciary relationships is that these relationships generate duties, or a duty, of 'loyalty'. In *Bristol and West Building Society v Mothew*, Millett LJ offered the following classic account of the origins and content of such relations:

---

[414] [2001] 1 All ER (Comm) 737.

[415] For recent perspectives on the problem of defining the circumstances in which a fiduciary relationship arises, see M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart 2010) 245-254; T Frankel, *Fiduciary Law* (OUP 2011) 6-42; and see, generally, A S Gold and P B Miller (eds), *Philosophical Foundations of Fiduciary Duties* (OUP 2014).

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. …. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[416]

As has been noted, the concept of a fiduciary relationship has been important in the context of tracing because *Re Hallett's Estate* has been thought of as establishing special or distinctive rules of tracing, that are more potent than the weaker rules available at common law, but that only apply in the context of fiduciary relationships. However, in reality, relationships with the characteristics defined by Millett LJ in *Mothew* have never been a necessity for invoking the tracing rules and claiming traceable proceeds. There is no difference between the common law cases and the equitable ones in this respect. In neither context is a genuine fiduciary relationship, of the kind described above, required.

Thus, English law does not require that the relationship between claimant and defendant, in the context of an equitable claim to traceable proceeds, be consensually constituted. Fraudsters and recipients of assets from others, who may never have genuinely consented to act for or on behalf of the claimant, are nevertheless sometimes subjected to this form of liability.

For example, in *Gladstone v Hadwen*,[417] a bankrupt, Sill, had received bills of exchange from Hadwen under a contract that he had induced Hadwen to enter into

---

[416] [1998] Ch 1, 18.

[417] (1813) 1 M & S 516, 128 ER 193.

under the influence of a fraudulent misrepresentation.[418] After receiving these notes, he gave them to his trading partner in London, who discounted some of them and received banknotes in exchange. However, Sill later 'felt uncomfortable'[419] about this transaction and, having disclosed the facts to Hadwen, promised him that he would have the bills and money brought back from London and would return them. After he had made this promise, he committed an act of bankruptcy; sometime after the act of bankruptcy, he regained possession of the bills and banknotes and returned them to Hadwen. Lord Ellenborough CJ held that the contract had been rescinded before the act of bankruptcy, so that title to the bills of exchange did not vest in the assignees in bankruptcy and they could not succeed in their action of trover against Hadwen. Counsel argued that, whatever the position with regard to the bills of exchange, the banknotes had vested in the assignee in bankruptcy, but Lord Ellenborough CJ dismissed this argument, saying that:

> as the bank-notes were not mixed with the rest of the bankrupt's property, and are capable of being distinctly traced, they stand in the same position as the bills themselves and therefore cannot be recovered.[420]

Gladstone v Hadwen was followed in *Small v Attwood*,[421] where it was held that the claimants could claim the traceable proceeds of transactions entered into by the recipients of banknotes paid under a contract that had subsequently been rescinded. In *El Ajou v Dollar Land Holdings (No 1)*,[422] Millett J held that a claimant

---

[418] He had purported to grant Sill security for the loan of the bills of exchange by assigning him rights over some coffee due to arrive from Jamaica. In fact, he had no rights in respect of the coffee to assign.

[419] (1813) 1 M & S 516, 519; 128 ER 193, 194.

[420] (1813) 1 M & S 516, 527; 128 ER 193, 197.

[421] (1831-1832) You 407, 507, 159 ER 1051, 1092, reversed by the House of Lords on a different point in (1838) 7 ER 684.

[422] [1993] 3 All ER 717, reversed on a different point by the Court of Appeal at [1994] 2 All ER 685.

who had rescinded such a contract was entitled to invoke the aid of the equitable tracing rules, in terms that expressly ruled out the necessity of finding that there was any genuine fiduciary relationship between the parties. He said

> [The claimants] employed no fiduciary. They were simply swindled. No breach of any fiduciary obligation was involved. …. [H]aving been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim.[423]

II. PROBLEMS WITH THE PROPRIETARY MODEL

It seems clear, therefore, that the fiduciary model does not account for the current law governing claims to traceable proceeds. Instead, the concept of ownership or beneficial ownership of the thing or asset substituted is often invoked. The implication is that any property right in respect of the thing, or asset, substituted will give rise to a claim based on the substitution.

Like the concept of a fiduciary relationship, the concept of 'property' is deeply contested, on two levels. First, there are debates about the nature of the legal relationship constituted by a 'property right' and, in particular, whether it makes sense to envisage such a right as a unitary relationship between a person and a thing.[424] Secondly, there are debates about the extent to which it is accurate to describe certain classes of right as proprietary: intellectual property rights; equitable interests, including and especially beneficial interests under trusts; and choses in action.

---

[423] [1993] 3 All ER 717, 734.

[424] Different perspectives are put forward by W Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, New Haven 1923); A Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1961) 104; J Penner, 'The 'Bundle of Rights Picture of Property'' (1996) 43 UCLA Law Rev 711; K Gray, 'Property in Thin Air' (1991) 50 CLJ 252; and S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H E Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 226.

However, despite these controversies, it is generally agreed that certain core categories of entitlement are members of the category, 'property', if that category is not completely empty of content. These include titles to chattels, such as books, cars, watches etc; leasehold and freehold titles to land; and certain non-possessory rights such as easements and profits à prendre.

If we generalise from these examples, we can say that the agreed core of the 'property' concept is occupied by an assignable right, in respect of a tangible object – such as a book, a car, or a plot of land – which is also the object of direct trespassory protection.[425] A right is the object of direct trespassory protection if every subject of the legal system, barring the right-holder, is under a *prima facie* duty not to interfere with the subject-matter of the right; the exact scope of the duty in each case is mapped out by reference to the law of torts. Thus, for example, in relation to land, English law grants trespassory protection both to certain rights to possession (leasehold and fee simple titles) and to certain defined forms of non-possessory enjoyment (such as rights of way). Where A acquires one of these rights, she acquires a right that every other subject of the legal system has a *prima facie* duty not to interfere with. Thus, for example, if she is granted a 'term of years absolute' – ie the right to exclusive possession of a plot of land for a certain term (a lease) – she can prevent any person from physically interfering with her possession of the land or, where such interference takes place, obtain damages from the person who has so interfered.[426] Similarly, if she acquires a more limited right, such as a right of way, she can prevent any person from disturbing her in her use of that right or obtain compensation for such a

---

[425] The terminology of 'trespassary protection', as a generic description for these duties of non-interference, is that of J Harris, *Property and Justice* (OUP 1996, 2003 reprint) 142.

[426] See, for example, *Lane v Dixon* (1847) 136 ER 311.

disturbance.[427] A right to exclusive possession of a chattel (tangible property other than land) is similarly regarded and similarly protected.

If any one of these characteristics is removed, the description of the right as proprietary becomes a controversial question. Thus, if we take away the characteristic of assignability, and say that any right that correlates with a duty of non-interference with a physical object is a property right, it would be reasonable extension of the term to say that a human body is the property of the person whose body it is. Since the totality of one's rights to one's body cannot legally be assigned to another, absent slavery, it is controversial to say one 'owns' one's body as a matter of law.

Similarly, if we take away the idea of the physical object – ie, say that any right that attracts trespassory protection and is assignable qualifies as 'property' – questions arise about intellectual property rights and about the extent to which, given the existence of the *Lumley v Guy*[428] tort of interference with contractual relations, an assignable right under a contract should be thought of as proprietary. If we take away the idea of trespassory protection altogether, and focus exclusively on assignability, an even broader range of rights would be admitted to the category and the question would again be controversial.

Thus, it could be said that rights sharing the triple characteristics of assignability, association with a tangible object, and trespassory protection form an agreed-upon core category of 'property rights'. In English law, common law titles to land and chattels are paradigmatic examples of rights of this kind. Although there is dispute about the proper analysis of the right-duty relationships created by such rights, no one doubts that, if the terminology of 'property rights' makes sense at all, it applies

---

[427] See, for example, *Thorpe v Brumfitt* (1873) 8 Ch App 650.

[428] (1854) 3 El & Bl 114, 118 ER 1083.

to them. If, therefore, claims to traceable proceeds are available to holders of property rights, *qua* holders of property rights, we ought to be able to find many instances of situations where the holder of common law title to land or a chattel has been able to assert a claim to the proceeds of someone else's transaction purely by virtue of his title, ie without standing in any other relationship to the person entering into the transaction other than that constituted by his property right.

In fact, however, authorities indicating the existence of such a claim are sparse and unsatisfactory. If we exclude all those cases where there is no tangible thing at stake – ie, cases where the claimant is complaining of what someone has done with a bank account,[429] stocks and shares,[430] or carbon emission licences[431] – there are only a few cases,[432] all of which are capable of alternative interpretation.

The earliest case is *Golightly v Reynolds.*[433] In that case, one Ferguson had stolen a £50 banknote from the claimant, Golightly, and used it to buy 6 silver tablespoons, two silver salts cellars, two silver salt-spoons, a £20 banknote and ten gold guineas. The claimant had presented these things as evidence of the theft during Ferguson's trial at the Old Bailey and, in the course of the prosecution, they had come into the possession of Reynolds, an officer of the state. After Ferguson's conviction for theft, the defendant, Reynolds, refused to deliver possession of the things purchased with the £50 to the claimant. The claimant brought an action in trover for them and succeeded. This action had a statutory basis; it had been enacted by

---

[429] eg, *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321; *Re Leslie* [1976] 1 WLR 292; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ; *Trustee of FC Jones v Jones* [1997] Ch 159.

[430] eg, *Marsh v Keating* (1834) 1 Bing (NC) 198, 131 ER 1094.

[431] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch).

[432] For a detailed and critical overview of these cases, see P Matthews, 'Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (OUP 1995) 23.

[433] (1772) Lofft 88, 98 ER 547.

Parliament that, where a victim of theft had been instrumental in the conviction of a thief, the judges were to have a power to award 'from time to time, writs of restitution for the said money, goods and chattels'.[434] Lord Mansfield's reported reasoning is extremely brief:

> There is no question … but some way, and to some extent, a plaintiff is entitled to restitution. But how are we to construe the restitution which should be made? Narrowly, for the very thing stolen? No: liberally, against so odious a prerogative.[435]

It is not clear, from this decision if the claimant would have been able to bring trover against Ferguson himself, or private parties who had received the things from Ferguson, or if the case turns on the scope of the citizen-state relation regulated by the statute. There is a suggestion that the claimant would have been entitled to bring trover *apart* from the statute – Lord Mansfield comments that the statute gives the claimant a new remedy but does not take away his existing remedies – but his reference to the state's prerogative suggests that the statutory context played a role in his reasoning.

In *Cattley v Loundes*,[436] the claimant, a former employee of the defendant,[437] sued him in conversion on the basis that she had left certain goods in his house, which he refused to return to her. According to one report of the case, these were clothes bought by the claimant for herself;[438] the other report indicates that she had also left

---

[434] (1529) 33 H 8 c 7.

[435] (1772) Lofft 88, 98 ER 547.

[436] (1885) 34 WR 139; reported as *Cattley v Lowndes* in (1885) 2 TLR 136.

[437] The two reports of the case differ on the precise nature of her employment. The Times Law Report describes her as a domestic servant employed by a victualler: (1885) 2 TLR 136. The Weekly Reporter describes her as a barmaid employed by an innkeeper: (1885) 34 WR 139. A L Smith J concurred.

[438] (1885) 2 TLR 136, 137.

behind some jewellery.[439] She failed in her action against the defendant because, as the two reports agree, she had purchased these things using cash she had dishonestly taken from the defendant's till. Although she had been acquitted of the criminal charge of theft,[440] the judges found as a fact that she had in fact stolen the money and used it to buy the chattels left behind in the defendant's house and that this was a sufficient answer to her claim against the defendant.[441]

As Paul Matthews has pointed out, it is difficult to draw any general conclusions from this case.[442] It is poorly reported, so that important elements of the fact situation are unclear,[443] and the reported remarks of the judges are so brief that it cannot be determined exactly what principle governed the outcome in the case. The case is of interest in this context, however, because of the following brief exchange between A L Smith J and counsel for the claimant:

> Stolen money may doubtless be followed, but not if it be converted. [A L Smith J – If a thief steals a sovereign from me and then changes it for two half-sovereigns, cannot I claim them?] No. [A L Smith J – I think you are wrong.][444]

No authority is cited for either of these abrupt statements, either by counsel or

---

[439] (1885) 34 WR 139.

[440] The Weekly Reporter states that this was on the 'technical ground' that her confession to the defendant was inadmissible in court, as she had made it in exchange for a promise that she would not be prosecuted.

[441] Matthew J is reported as saying that 'the property detained by the defendant was bought with money stolen from the till of the defendant' in the Weekly Reporter, while the Times has him saying 'that the goods stolen represented money stolen by the plaintiff from the defendant's till': (1885) 34 WR 139; (1885) 2 TLR 136, 137.

[442] P Matthews, 'Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (OUP 1995) 23, 52.

[443] In particular, it is not clear whether the claimant was a domestic servant who had no right to touch the cash in the defendant's till or a barmaid who was entitled to take cash from the till for his purposes but had improperly taken it for her own. That is, it is not clear whether she is best characterised as a tortfeasor who had taken wrongful possession of a stranger's assets, or as a fiduciary who had misappropriated her principal's assets in breach of duty.

[444] (1885) 34 WR 139.

by the judge. The only reference to authority in the report is introduced by the reporter, who adds a footnote to the judge's 'I think you are wrong', in which he cites a dictum of Willes J in *R v Bunkall.*[445] That case, and the dictum in the context of the facts of the case, shares some of the characteristics of *Cattley v Loundes*; it presents similar difficulties, and poses a similar question.

R v Bunkall was a case where the defendant was charged with larceny as a bailee of a quantity of coal;[446] the issue on which it turned was whether or not he had been a bailee for the victim at the time that he took the coal for his own use. The victim, a blacksmith, had entrusted the defendant with eight shillings and sixpence, and instructed him to buy half a ton of coal for him. Having bought coal at this price[447] from one Rix, the defendant delivered only part of it to the blacksmith, keeping the rest for himself. Counsel for the defendant argued that retention of the coal could not be larceny under the statute because, at the date that the defendant took the coals, he was not a bailee but their absolute owner. The court rejected this argument, holding that the blacksmith had acquired a property right to the coal and the defendant was therefore in possession of them only as a bailee. The judges divided on the source of this property right. Some members of the court thought that use of the victim's money to buy the coal '*ipso facto* vested the property in the coals'[448] in

---

[445] (1864) Le & Ca 372, 169 ER 1436.

[446] Under the Larceny Act 1861, s 3 (now repealed), which provided that 'whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof …shall be guilty of larceny'.

[447] It is not clear, on the facts, whether the defendant had paid the very cash given to him by the victim's agent in exchange for the coal. According to Rix's evidence, the defendant bought coal worth the amount given to him the day after he received the money, but paid only eight shillings immediately, saying that he did not have sixpence with him but would pay later: (1864) Le & Ca 372, 373, 169 ER 1436. There is nothing in the report to indicate that the money paid was the particular money given to the defendant by the claimant's agent and it seems likely that the sixpence in any case was not the same, as it was paid later.

[448] per Cockburn CJ (1864) Le & Ca 372, 373, 377; 169 ER 1436, 1438.

him, while others thought that there needed to be a specific intention by the defendant to appropriate the coals to the victim and that he had manifested such an intention.[449]

Willes J took the view that the use of the victim's money automatically gave him a right to the coal. He cited *Taylor v Plumer*[450] as authority, again in the course of argument, and said

> In *Taylor v Plumer* … it was held that … the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form…If I give a man money to buy a horse for me, and he buys a cow for himself with it, the cow is mine.[451]

Two points emerge from this. First, as in *R v Bunkall*, there is often a pre-existing relation between claimant and defendant; the claimant is not relying merely on his existing common law title, but on his act of entrusting his thing to the defendant.

Secondly, all these cases involve money. There are a few dicta in which the courts have indicated that, where money is stolen, the victim can trace through the transactions of the thief. If *Golightly v Reynolds* is a common law action in trover, rather than a statutory action, it can be analysed in this way. It is difficult to find even dicta suggesting that a similar principle that applies to land or to chattels other than money. This result can be seen to arise from the logic of the concept of a substitution, as an event involving the loss of *rights* on the part of the claimant. A thief of money

---

[449] per Cockburn CJ (1864) Le & Ca 372, 373, 378; 169 ER 1436, 1438.

[450] (1815) 3 M & S 562, 105 ER 721.

[451] (1864) Le & Ca 372, 373, 375-367; 169 ER 1436, 1437. The example is very close to one put forward by counsel in *Taylor v Plumer* itself, which Lord Ellenborough CJ adopted at (1815) 3 M & S 562, 575; 128 ER 721, 726: 'The contention on the part of the defendant was represented by the plaintiff's counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend, that "if A is trusted by B with money to purchase a horse for him, and he purchases a carriage with that money, that B is entitled to the carriage." And, indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument.'

has, in a sense, a private power to deal with the rights of the claimant: because of the currency of money,[452] a transaction by the thief can have the effect of depriving the claimant of his title. As such, such a transaction can meaningfully be described as a substitution.

Contrast this with the case of a different chattel or of land. Suppose that A, a thief, takes wrongful possession of a car to which B has better title. This is a breach of A's duty to B. Suppose that A then sells his own possessory title to X. This is also a breach of B's duty to A. If X takes possession of the land, he too will breach the duty of non-interference that he owes to A. The duties owed to B are delineated by the legal system by reference to the physical thing that is the locus of his rights;[453] he has a right to be compensated for any loss or damage to this physical thing. When B asserts that what A has done is enter into a substitution, however, he is not confining his attention to the particular physical thing that is the locus of his original right; he is arguing that *A himself*, or a power vested in A, is the thing he is entitled to control. The standard structure of an entitlement to a tangible thing does not easily accommodate this shift from the thing as the locus of rights to the person as the locus of rights.

III. Conclusions

This chapter has argued that the language of property and fiduciary obligation, which dominates the case law in this area, is insufficiently precise to describe the actual content of the kind of legal relation which generates claims based on unauthorised

---

[452] *Miller v Race* (1758) 1 Burrow 452, 97 ER 398.

[453] For a detailed analysis of the way in which the duties are mediated through interactions with the physical thing, see S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H E Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 226.

substitution. However, the rhetorical appeal of this language is obvious, and the frequency with which it is invoked is itself an element of the case law that has to be accounted for. In trying to identify the precise characteristics of the legal relation presupposed by claims based on unauthorised substitution, therefore, it will be important to identify the continuity between this type of legal relation and the morally charged language of property and fiduciary obligation. From this perspective, we can understand the cases as reflecting a preoccupation with preserving the claimant's wealth, on the one hand, and protecting him from a loss of valuable rights (property) while simultaneously holding to account a defendant who is under an obligation that relates to a particular status, position or office. The next chapter attempts to show that an intermediate category of 'stewardship of assets' can make sense of the case law in both these senses, justifying the decisions on the facts of the particular cases and also offering a moral justification for those decisions which relates to to the judicial appeal to concepts of property and fiduciary obligation.

5. STEWARDSHIP OF ASSETS AND UNAUTHORISED SUBSTITUTION

The previous chapter identified a logical inconsistency between the concept of a substitution, as we can derive it from the case law on tracing, and the idea that a claim based on unauthorised substitution is available to any holder of a property right. In addition, it identified a lack of doctrinal fit between the decided cases and the idea that such a claim is generally available either to any holder of a property right (over-inclusive) or to any principal in a fiduciary relationship (under-inclusive). This chapter proposes an alternative and intermediate category of legal relations, which does cohere with the substitution concept as previously defined and fits more closely with the case law governing the entitlement to traceable proceeds.

This is the category of 'stewardship of assets': that is, a relationship where the defendant has a private legal power to vary the rights of the claimant as against a third party, with respect to some assignable right ('asset'), and owes the claimant a duty governing the exercise of the relevant power. Its key characteristic is the existence of a gap between the scope of the power and the terms of the defendant's duty; this gap renders it possible for the defendant to validly exercise the power, effectively varying the claimant's rights, in circumstances where the exercise of the power is a breach of a duty owed to the claimant. This chapter argues the availability of a claim based on unauthorised substitution depends on the existence of this type of legal relationship, which may exist both at law and in equity.

The chapter is in three parts. Part I clarifies the question addressed by the chapter. Building on the argument, made in chapter 3, that the concept of an unauthorised substitution presupposes a power-liability relationship of some kind

between claimant and defendant, it explains the necessity of carving out the relevant set of legal relations from the over-broad conception of power-liability relations supplied by Hohfeld. It further suggests that the doctrinal category of 'private powers' in English law supplies a starting-point for this exercise.

Part II identifies the category of private powers that are presupposed by claims based on unauthorised substitution. It argues that claims based on unauthorised substitution arise in contexts where the defendant holds a private power that affects the claimant's legal rights as against a third party; owes the claimant a duty that specifically concerns whether or not that power is exercised; and can effectively exercise the power in breach of that duty, varying the claimant's legal rights as against a third person in circumstances where it is a wrong to bring about such a variation. It argues that this model makes sense of various aspects of the case law, including the authorities recognising common law claims based on unauthorised substitution, as well as those cases in which a person has what is conventionally thought of as a property right in respect of some asset but is not entitled to its traceable proceeds.

Finally, Part III justifies the adoption of the terminology of 'stewardship of assets' to capture the general category of legal relations that share this structure, in preference to other, more traditional phrases.

I. POWER-LIABILITY RELATIONS IN ENGLISH LAW: MAPPING THE POSSIBILITIES

It has been argued that the concept of a substitution has something to do with the exercise of a legal power, in the Hohfeldian sense. The law of tracing works, in part, by distinguishing between transactions that involve a variation of the claimant's

existing legal rights and transactions that have no such effect,[454] and it is difficult to find a case where a claimant has succeeded in bringing such a claim in the absence of any such power-liability relationship between himself and the defendant.[455] It follows that the existence of such a relationship is a precondition for an unauthorised substitution to take place — a power cannot be exercised unless it exists — and, therefore, a claimant cannot be entitled to the traceable proceeds of the defendant's transactions unless, in some sense, there is a power-liability relationship between her and the defendant.

A. The limited explanatory value of Hohfeld's 'powers'

However, it does not follow that a claimant is entitled to the traceable proceeds of the defendant's transactions whenever those transactions involve an exercise of a legal power in Hohfeld's sense. The Hohfeldian conception of a legal power is too broad for this analysis to be plausible. As has been noted,[456] Hohfeld considers A to hold a legal power, correlative to a liability in B, in any situation where B's legal position would be altered by the occurrence of some fact and A has 'volitional control'[457] over whether the fact occurs.

Based on Hohfeld's own examples, it seems that he considers a power-liability relation to exist in any situation where A can, by her voluntary act, either remove a duty owed to her by B or, conversely, impose a fresh duty on B. His suggestion that

---

[454] As argued in chapter 3.

[455] As argued in chapter 4.

[456] See 184 above.

[457] W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (D Campbell and P Thomas eds, Asghgate Publishing Company 2001) 21.

the law governing the abandonment of chattels should be characterised in the language of the exercise of a power represents an example of the first scenario. By abandoning a chattel and so extinguishing my title to it, I remove the duty of non-interference that was previously owed to me by a stranger; in doing this, Hohfeld says, I have exercised a power over the stranger.[458] His treatment of the law governing the formation of contracts provides an example of the second scenario. When A makes a contractual offer to B, the effect is that B, 'by dropping a letter of acceptance in the box, has the power to impose a potential or inchoate *obligation ex contractu* on A and himself'.[459] B has the capacity, by his voluntary act of acceptance of the offer, to subject B to a new duty that he did not owe before. On the facts of *Carlill v Carbolic Smoke Ball Company*,[460] for example, this analysis implies the existence of a power-liability relationship between the company and every reader of the Pall Mall Gazette. When the newspaper published the company's advertisement, promising £100 to any user of the carbolic smoke ball who contracted influenza, everyone who saw the advertisement gained a power over the company. By voluntarily buying the carbolic smoke ball, and using it according to the instructions over the prescribed period, a reader could impose a new contingent obligation to pay £100 on the company, albeit one that would only crystallise in the event that she contracted influenza.

However, it could hardly be suggested that an exercise of power in either of these senses could qualify as 'unauthorised' in the sense relevant to claims based on

---

[458] W N Hohfeld (n 457} above) 22.

[459] W N Hohfeld (n 457} above) 23.

[460] [1893] 1 QB 256.

unauthorised substitution. Suppose that A, the holder of a right of light over B's land, entered into a deed of release that extinguished the easement in consideration for a payment of £1000 from B. The transaction would not only extinguish B's duty to avoid obstructing A's enjoyment of light, it would also remove the duty owed to her by others, such as B's tenants, licensees, and successors in title. It would be true that A had obtained a right – the £1000 – in consideration for altering the legal position of these third parties without their consent. However, they would hardly have grounds for complaining that the alteration was 'unauthorised' and demanding the proceeds of the transaction. It is possible to have a power to change someone else's legal position in a way that is beneficial to them, as in the case of the release of a duty, and a 'power' in this sense clearly does not generate the kind of vulnerability that is the concern of the judges who developed the tracing concept.

However, it is also improbable to believe that the concept of want of authority could have any role to play even in some situations where the alteration is not beneficial, as in the case of a discharge of a duty, but involves the imposition of a new duty. For example, there might be situations where A obtains a new right from a third party as a result of accepting a contractual offer and so changing the legal position of B, the offeror. Suppose that, on the facts of *Carlill v Carbolic Smoke Ball Co*, a rival company, with the aim of discrediting the claims of the Carbolic Smoke Ball Company, had promised a monetary reward to anyone who fulfilled the terms of the advertisement and successfully sued the company. If Mrs Carlill had accepted this offer, and received the reward in cash, she would in a sense have obtained a new right in consideration for her decision to alter the legal position of the Carbolic Smoke Ball Company without its consent. Nevertheless, the company would have had no basis for arguing that the money represented the product of an unauthorised variation of its

rights and therefore ought to be paid to it.

The language of authority or want of authority is inapplicable to these cases, then, because in neither case is there any duty owed to the person affected by the exercise of the supposed power. If Mrs Carlill had the power to impose a new obligation on the Carbolic Smoke Ball Company, she was free to exercise it as she saw fit for her own ends. If not – if, for example, the advertisement had been held not to comprise a genuine contractual offer but a 'mere puff'[461] – then her attempt to exercise it by accepting the supposed offer would simply have been a nullity. The concept of an *unauthorised* exercise of a power to subject another to a duty owed to oneself, or release him from such a duty, would only make sense if some other legal relationship between the parties[462] co-existed with the power-liability relationship.

On the face of it, and apart from his own examples, Hohfeld's definition also seems to capture the case where A has a choice as to whether to breach a duty to B, and in this sense to alter B's legal position by conferring a new right on B. The definition can even be extended to capture a person's ability to commit a criminal offence and thus to alter the legal position of the state and officials of the state. As MacCormick has pointed out,[463] if we define a legal power purely as an objective capacity to bring about any sort of legal consequence by one's voluntary act, this

---

[461] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, 261 (per Lindley LJ).

[462] It is possible, of course, to imagine cases where A's power over B is governed by a duty owed to C. For example, a holder of an easement might have promised his mortgagee that he would not release the benefit of the easement without the consent of the mortgagee. In such a situation, however, the power-liability relationship is independent of the right-duty relationship: the same transaction is a breach of a duty owed to C and an exercise of a power over B, rather than an exercise of a power over B that is, simultaneously, a breach of a duty owed to B.

[463] In the context of his discussion of Hart's account of power-conferring rules: N MacCormick, *H.L.A Hart* (Stanford University Press, California 1981) 73-79.

would compel us to accept:

> the odd conclusion that among the powers conferred … by law are powers to commit wrongs and so to make oneself liable to reproaches and punishments.[464]

In order to be liable in the tort of trespass, for example, the trespasser must intentionally or negligently intrude upon the land of the claimant.[465] As such, any subject of the legal system has 'volitional control' over the set of facts – the intrusion upon his neighbour's land – that would render him liable in trespass and thus vest a new legal right in his neighbour. On Hohfeld's account, therefore, every subject of the legal system has a power correlative to a liability in every landowner. In a similar vein, the commission of a criminal offence can be understood as the exercise of a Hohfeldian power correlative to a liability in the state: the criminal, by voluntarily committing the offence, confers new legal rights (such as the right to deprive him of his liberty) on the state.[466] Again, the implication is that every subject of the legal system stands in a power-liability relation to the state.

This leads us to the conclusion that, for Hohfeld, a power-liability relation exists wherever A owes B a duty that can be breached by a volitional act, with the exercise of the power being identical to the breach of the duty. Granting this definition of a Hohfeldian power-liability relationship, it is implausible to suggest that every such relationship generates an entitlement to the proceeds of any wrongful exercise of the power. If this were true, it would mean that every acquisitive wrong

---

[464] N MacCormick (n 463 above) 74.

[465] *Smith v Stone* (1647) Sty 65, 82 ER 533.

[466] N MacCormick, *H.L.A Hart* (Stanford University Press, California 1981) 75 and A Halpin, 'The Concept of a Legal Power' (1996) 16 OJLS 129, 143.

generated a claim to assets representing gains made in breach of duty. It seems clear that, with the specific exception of the duty not to profit from one's position as a fiduciary,[467] this is not the law. A profit-making breach of contract may, exceptionally,[468] generate a claim to an account of profits but it will not generate a claim to the specific asset representing the profit.[469] Similarly, although there is controversy regarding the exact range of situations in which a profit-stripping remedy will be available in response to a common law tort,[470] it seems clear that such remedies are not routinely available in the current state of the law.[471] An unauthorised substitution occurs when A wrongfully varies the legal rather than the factual position of B, as the tracing case law demonstrates, but this clearly cannot mean that every case where A breaches a duty owed to B counts as a variation of legal rights of the relevant kind.

Thus, while the idea of the 'power-liability relation' in its Hohfeldian sense is necessary to our understanding of unauthorised substitution, it is obviously not sufficient. The category is over-inclusive, capturing cases where the courts would undoubtedly reject the possibility of any claim based on unauthorised substitution. In order to make sense of the case law, and to identify the category of legal relations presupposed by a claim based on unauthorised substitution, it is necessary to carve out this category from the broad range of Hohfeldian power-liability relations. A starting-

---

[467] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

[468] In *Attorney-General v Blake* [2001] 1 AC 268, the majority describes the remedy of an account of profits in response to a breach of contract as 'exceptional' six times (per Lord Nicholls at 284, 285, and 286 and Lord Steyn at 292).

[469] *Attorney-General v Blake* [2001] 1 AC 268, per Lord Nicholls at 288.

[470] Discussed, eg, by C Rotherham, 'Gain-based relief in tort after *A-G v Blake*' (2010) 126 LQR 102.

[471] *Forsyth-Grant v Allan* [2008] EWCA Civ 505.

point for that exercise is supplied by the doctrinal usage of the term 'power' in the context of English private law.

B. Private powers in English law: definition and overview

By contrast with the sweeping Hohfeldian usage, English private lawyers conventionally use the term 'power' to denote a far more limited set of legal relations. The leading textbook on the subject, *Thomas on Powers*, offers the following definition:

> [I]n this book, the term 'power' … is used, in the main, to signify an authority or mandate conferred on, or reserved by, a person to deal with, as well as dispose of, property which he himself does not own. Thus, a power is distinct from the dominion that a man has over his own property.[472]

'Property' in this usage is not restricted to title to tangible things, but includes such rights as shares and bank accounts and other choses in action. The definition can be glossed, therefore, to mean that a power is an authority to deal with or dispose of a right vested in some other person; as such, it is to be contrasted with that capacity to deal with a right which is an incident of having that right vested in oneself.

One reason[473] why this definition is narrower than the Hohfeldian one is because it specifies the kind of change in legal position that the power-holder is able to bring about. It excludes those situation where A has the ability to alter the duties owed to herself by B, either by extinguishing a subsisting duty (as where she extinguishes her title to a chattel and so extinguishes B's duty of non-interference) or

---

[472] G Thomas, *Thomas on Powers* (2nd edn, OUP, Oxford 2012) 2-3.

[473] Another reason is that the language of authority or mandate presupposes a relationship constituted by consent. This aspect of the definition of private powers is argued to be irrelevant for our purposes at 227-229 below.

by creating a new duty (as where she accepts B's contractual offer). In these cases, A is only altering duties owed to herself by other subjects of the legal system and thus, by definition, dealing with rights vested in her and not in someone else. It also excludes cases where A alters B's legal position by breaching a duty and thus conferring a new set of claims on B; here, A is not 'dealing with or disposing of' B's pre-existing rights, which remain intact, but adding a new right to the number. Excluding these cases, then, it captures those situations where B has a pre-existing claim-right, which is correlative to a duty owed to him either by A or by some other person, C, and A has the capacity to extinguish or alter that relationship by his voluntary act.

Uncontroversial examples of powers in this technical sense include equitable powers of appointment, powers of attorney, and the power of a company director to deal with the assets of the company. The terminology used by English lawyers to describe these relationships varies with context. For example, an agent is normally described as having an 'authority' to affect the rights of his 'principal', while the holder of a bare power of appointment is referred to as a 'donee' of the power, which enables him to alter the rights of its 'object'. For the sake of consistency, this thesis adopts a modified version of the terminology that is standard in the context of powers of appointment when speaking generally of private powers: the person who grants a power is its 'donor'; the person who holds the power is its 'donee'; and the person whose rights may be varied by its exercise is the 'object'.[474] (In some cases, as with

[474] Describing the person whose subsisting rights are altered by the exercise of a power as its 'object' is a departure from the language conventionally used in the context of powers of appointment, where it is the class of persons who may be benefited by the exercise of the power who are described as its objects. The objects of a power of appointment, in the traditional sense, have no vested interest in the assets subject to the power until the power is exercised and therefore it cannot be said that the donee of

principal-agent relationships created by consent, the donor of the power is likely to be the same person as its object: the agent is empowered to alter the principal's rights because of the authority granted to him by the principal himself.)

Powers have been classified in several different ways, depending on the purpose of the classification.[475] Some[476] traditional classifications distinguish between powers based on their jurisdictional origin – law, equity, and statute[477] – as well as based on their scope (e.g. administrative and dispositive, special and general) and the content of the duties constraining their exercise (e.g. fiduciary and non-fiduciary).

At first glance, the jurisdictional distinction between legal, equitable and statutory might be thought to be a classification based on the source, as a matter of legal history, of the rule recognising the existence of the power. As such, its relevance might be questioned on the basis that it reflects a purely historical and accidental distinction that is no longer of any analytical or normative significance in the modern

---

the power has varied their subsisting rights by exercising the power: *Re Brooks Settlement Trusts* [1939] Ch 993, per Farwell J at 997. Rather it is the persons entitled in default of appointment whose rights are varied by the exercise of the power, and who are the 'objects' in the sense used in the thesis.

[475] See, generally, G Thomas, *Thomas on Powers* (n 472 above) 4 to 12.

[476] The other traditional classification, which is being ignored here, is the classification of powers by reference to the nature of the donee's own interest in the right in respect of which the power exists: see C J W Farwell, *A concise treatise on powers* (3rd edn Stevens & Sons, London 1916) 9 to 10 and E Sugden, *A practical treatise of powers* (8th edn H Sweet, London 1861) 46 to 49. These distinctions (between powers in gross, powers merely collateral, and powers appendant or appurtenant) developed because of the need to distinguish between powers to deal with land that were to be treated like future estates in that land and powers that were to be treated as personal mandates only. The questions whether the exercise of a power could be revoked, or forfeited to the Crown in cases of treason, turned on this classification: see Goodhart and Hanbury (eds), *W S Holdsworth*, *A History of English Law: Volume 7* (2nd edn, Sweet & Maxwell, London 1937) 165 to 168. Apart from a residual significance in relation to the capacity of minors to exercise powers, these distinctions are now 'of antiquarian interest only': *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, per Warner J at 1613.

[477] *Thomas on Powers* (n 472 above) 6. In *Farwell* and *Sugden*, the distinction is between equitable powers, common law powers, and powers deriving their effect from the Statute of Uses: see Farwell (n 476 above) 1 to 4, and Sugden (n 476 above) 45 to 47. On powers deriving their effect from the Statute of Uses, see (text to n 485) below.

law.[478] However, apart from the doubtfully relevant historical question, the question of jurisdictional origin can be understood as a proxy for two other questions that are undoubtedly significant in the modern law.

First, the distinction between 'common law' and 'equity' in modern law does not only describe the historical origins of a given body of doctrine; it also describes the characteristics of rights which are governed by substantively different legal rules in the modern law, since the location of a right in one or other of these categories can, in some circumstances, dictate the terms on which that right will be enforced.[479] As such, the terms can be used on the basis that they denote a given cluster of modern rules on the creation, transfer and enforceability of rights rather than their historical origin only.[480] It is in this doctrinal, rather than historical, sense that the terms 'common law' and 'equitable' can be used to classify powers: a power to vary a legal right could be described as a common law power, while a power to vary an equitable

---

[478] For the view that it is a mistake to classify private law doctrines by reference to the jurisdictional distinction between law and equity, without more, see W J Swadling, 'Snell's Equity' (2011) 127 LQR 638: 'a random collection of disconnected doctrines, confusing issues of substance and procedure, covering topics only connected by historical accident.'

[479] There is an on-going debate regarding whether the historical terminology of common law versus equitable should be abandoned in favour of one which better reflects the work done by the distinction: see A Burrows, 'We Do This At Common Law and That In Equity' (2002) 22 OJLS 1, 4, arguing that 'the general rules of priority in relation to property cannot easily be replicated without using the law and equity labels'. Attempts to provide alternative labels have been made by, for example, Jaffey and McFarlane: P Jaffey, *Private law and property claims* (Hart Publishing, Oxford 2007) 111 to 128, B McFarlane, *The Structure of Property Law* (Hart Publishing, Oxford 2008) 66 to 77. Since nothing turns on this labelling issue for my purposes, the orthodox terminology of common law and equitable rights is here retained, since it is the language most frequently used by commentators and courts in this jurisdiction.

[480] It is worth noting, in this context, that Parliament has sometimes deliberately re-classified formerly legal rights and powers as 'equitable', in order to ensure that their creation and exercise attract the consequences that follow from that classification: see the Law of Property Act 1925, ss 1(3), 1(7). Along similar lines, the Law Commission has recently recommended the reverse strategy of replacing a formerly equitable right (the restrictive covenant) with a legal equivalent in order to arrive at the desired outcome: Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327) 5.70. It cannot be said, as a matter of legal history, that the jurisdictional source of these rights is their recognition by the courts of equity; in such cases, the use of the label 'equitable' can only signify the modern rules that govern the right, not its historical origins.

right is an equitable power. As such, the classification is one based on the consequences of an exercise of a power, rather than the jurisdictional source of that power.

The language of statutory powers is also often used to describe the consequences of the exercise of a power rather than its source: although, as Thomas notes, there are important equitable powers that are conferred by statute,[481] the term 'statutory power' is traditionally reserved for powers conferred by statute that can be said 'to authorise the creation or conveyance of a legal estate'.[482] This can be traced to Sugden and Farwell, who distinguished between common law powers, equitable powers, and powers made effective by the Statute of Uses. The Statute of Uses 1536 enabled the creation of a number of future legal estates in land that were previously unknown to the common law,[483] and also made it possible for landowners to vest powers to create such estates in others.[484] These powers were statutory in the sense that, but for the Statute of Uses, donors would have been unable to create them, but they were not statutory in the sense that they were actually vested in donees by virtue of the statute.[485] On this basis, the characterisation of a power as statutory also represents a classification by reference to the potential consequences of its exercise,

---

[481] eg Powers of advancement and maintenance conferred on trustees by the Trustee Act 1925, s 31 and 32.

[482] *Thomas on Powers* (n 472 above) 6.

[483] For the new future legal estates that were made possible by the Statute of Uses, see Goodhart and Hanbury (eds), *W S Holdsworth*, *A History of English Law: Volume 7* (2nd edn, Sweet & Maxwell, London 1937) 122 to 129.}. It is no longer possible to create any sort of future estate in land at common law: Law of Property Act 1925, s 1(1).

[484] For these powers, see J H Baker, *An Introduction to English Legal History* (4th edn, OUP 2007) 289.

[485] As Baker notes (n 484 above), they became an important part of the machinery of the traditional strict settlement, an elaborate structure for facilitating the intentions of a settlor.

with statutory powers representing a sub-category of common law powers.[486]

However, the distinction between statutory and other powers could, with some modification, instead be generalised to a distinction based on causative event, allowing us to distinguish powers arising by operation of law from powers arising by the consent of some private person. This characterisation is not plausible for those statutory powers that are implied into consensual transactions between private individuals and can be excluded, limited, or modified by the intentions of the parties to the transaction. An example of such a power is the mortgagee's power of sale under section 101 of the Law of Property Act 1925, which arises in response to a deed[487] and can be varied[488] or excluded[489] by express provision in the deed. The statutory grant of such a power can essentially be seen as 'a form of conveyancing shorthand designed to implement the ordinary expectations'[490] of the parties to the relevant transaction. Although the power does, in a sense, arise by operation of law, being implied into the agreement between the parties by statute, it will only do so when the parties have entered into such an agreement in the first place and have neglected to exclude or modify it.

Such powers are similar to powers that arise by the consent of private parties, and there is a limited justification for distinguishing them from non-statutory powers

---

[486] Under the Law of Property Act 1925, s 1(7), the only powers to create or transfer an estate in land which are now capable of existing at law are the mortgagee's power of sale and the rights of the person in whom that estate is vested (which may be exercised by himself or by his duly appointed agent on his behalf).

[487] Law of Property Act 1925, s 101(1).

[488] Law of Property Act 1925, s 101(3).

[489] Law of Property Act 1925, s 101(4).

[490] *Horsham Properties v Clark* [2008] EWHC 2327, per Briggs J at [35].

that also arise in the context of consensual transactions. However, other statutory powers do genuinely arise by operation of law, in the sense that the event that gives rise to them is not a bargain or other consensual transaction but some event that may take place without anyone's consent. For example, if a person dies intestate, section 33 of the Administration of Estates Act 1925 confers a power of sale on his personal representatives. Although the deceased can prevent the power from arising, by choosing to make a will,[491] the power itself does not arise in response to any consensual act; dying intestate may sometimes be a choice, but it certainly does not need to be one. The power in this case is better understood as a default rule, applicable in the absence of any expressed intention by the deceased, rather than as directly intended to reflect his likely intentions.

Apart from such instances of the statutory grant of a power in default of the expression of a relevant intention, there are also stronger cases of statutory powers that arise by operation of law and cannot be excluded by anyone's choice. For example, a trustee in bankruptcy has a power of sale[492] in respect of the bankrupt's estate; this power arises by operation of law, has nothing to do with the consent of the bankrupt and cannot be excluded by the decision of either the bankrupt or his creditors.[493] Similarly the powers of a life tenant under a strict settlement of land, governed by the Settled Land Act 1925, could not have been[494] excluded or modified

---

[491] Administration of Estates Act 1925, s 33(7).

[492] Insolvency Act 1986, s 314(1) and schedule 5, para 9.

[493] Although the trustee has an obligation to inform the creditors' committee of certain intended exercises of the power of sale, such as a sale to an associate of the bankrupt: Insolvency Act 1986, s 314(6).

[494] Under section 2(1) of the Trusts of Trust and Appointment of Trustees Act 1996, it is no longer possible for a settlor to create a strict settlement governed by the Settled Land Act 1925. Any attempt

by the intention of the settlor.[495] On this basis, the jurisdictional divide between statutory and other powers can sometimes refer to a distinction based on causative event: some powers arise in response to consent, while others arise by operation of law.

Private powers can, therefore, be seen from three distinct perspectives. First, they may be classified by reference to the potential consequences of an exercise of the power, with some powers enabling the donee to transfer or create common law entitlements and others applying to equitable entitlements. Secondly, powers may be distinguished from each other based on the terms of the duty attached to the exercise of the power. Some powers can be exercised freely, with no consideration for the interests of the object of the power; some impose stringent duties of fiduciary loyalty, while others allow for a degree of self-interest in the decision to exercise the power; and some, as in the case of powers held by thieves and wrongdoers, co-exist with a duty never to exercise them at all. Finally, powers can be classified by causative event. While many powers arise in response to the consent of a donor, there are cases where the law confers a power on a donee on other grounds and without reference to anyone's consent.

This classification presupposes a definition of a private power as the objective capacity to bring about a certain result: wherever A's transaction can deprive B of his subsisting rights, whether at law or in equity, a private power exists. It is only on the basis of this broad definition of private power that we can envisage a situation where

---

to create such a settlement after 1 January 1997 will take effect as an ordinary trust of land, governed by the 1996 Act.

[495] Settled Land Act 1925, ss 106 and 108.

such a power exists despite it being a wrong ever to exercise it.

It might be objected that this definition is inaccurate because it abandons the consent-based concepts of authority and mandate that are critical to the traditional understanding of a private power. If a private power is not only an objective capacity to bring about a given result but is an authority to bring about that result, arising from a mandate, it is inaccurate to characterise situations where there has been no grant of authority by anyone as instances of private power. In addition, the explanatory force of even a consensually created power, understood as an authority, runs out when we are dealing with unauthorised transactions. On this view, we can explain the legal consequences of a transaction carried out by the donee of a power by reference to that power only where transaction is an authorised one. If the donee does something in purported exercise of the power, which is actually unauthorised by the initial mandate granted by the donor, this would not count as a genuine 'exercise' of the power: even if the transaction were effective in bringing about some consequence, that consequence would have to be explained by reference to some other principle than the principle of facilitating the donor's intentions which justifies the law's response to the authorised disposition.

For example, suppose the case of the donee of a power of attorney, authorised to sell his donor's title to a painting, who purports to sell that title to a third party. If the transaction is authorised, we can explain the legal consequence – title is transferred from the donor of the power to the third party – by reference to donor intention. If, however, the donor revoked the power of attorney the day before the

sale, this explanation would no longer hold. Under section 5 of the Powers of Attorney Act 1971, the purported sale might[496] have identical[497] legal consequences to the authorised sale – title would pass to the third party who did not know of the revocation – but the consent of the donor would no longer entirely explain that consequence since the donor would have withdrawn that consent. It could be argued, on this basis, that the transaction in this scenario does not count as an exercise of the (revoked) power of attorney: it is, instead, the operation of a mandatory rule of law that has no connection to the idea of a power in its proper sense.

This argument, however, collapses the distinction between the justification for the existence of a power-liability relationship and the content of such a relationship, once it exists. In the example above, it is true that the consent of the donor of the power supplies a complete justification for the transfer of title to the painting in the case of the authorised disposition and cannot do so in the case of the post-revocation disposition. If we are classifying legal relations by reference to the causative event to which they respond, the two power-liability relations (the one constituted by the initial grant of the power of attorney and the one constituted by the operation of section 5 of the 1971 Act) are fundamentally different: one goes in the 'consent' category and the other in the 'miscellaneous fourth column' of the Birks grid.[498] On the other hand, if we are classifying legal relations by reference to their content, the

---

[496] Depending on whether the third party knew of the revocation. Where the third party is a purchaser, and the transaction has taken place within twelve months of the initial grant of the power, there is a presumption that he did not know of the revocation: Powers of Attorney Act 1971, s 5(4).

[497] Where the donee of the power also does not know of the revocation, the effect is identical as he will not incur any personal liability for purportedly exercising the revoked power: Powers of Attorney Act 1971, s 5(1). Where he does know, but the third party does not, the effect of the transaction will differ as between donor and donee but not as between donor and third party.

[498] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 24.

two cases are either very similar or identical.[499] From the perspective of the third party dealing with the donee, the transaction is 'as valid as if the power had then been in existence';[500] as a corollary, the effect is the same for the object, at least so far as her relationship with the third party is concerned. For whatever reason – whether by her consent or by the operation of a legal rule – the decision of the donee of the power will have changed her legal relationship with the third party, without her having any involvement in that particular decision. Thus, prior to the transaction, the donee of the power possessed the objective capacity – or power – to transfer the object's title to the third party, even in a situation where the initial grant of the power of attorney has been revoked.

Of course it is perfectly plausible to say, by definitional fiat, that such an objective capacity should not be described as a private power because the idea of a power is intrinsically linked to the idea of a mandate: that is, the idea of a private power is intrinsically linked to a particular causative event (the consent of some donor). Whether this definitional choice is a good one depends on what it is we are trying to understand about power-liability relations.

In the context of claims based on unauthorised substitution, the primary puzzle is the nature of the power-liability relationship presupposed by the availability of the claim, rather than its origins. It is clear that some claims based on unauthorised substitution arise where the initial relationship between the parties is constituted by

---

[499] See n 496 above.

[500] Powers of Attorney Act 1971, s 5(2).

consent, as in the case of an express trust.[501] However, this is not the sole fact unifying those cases, if there is any such fact: we know that there are relationships constituted by consent where such claims are not available,[502] and that there are cases where such claims seem to be available where the parties are effectively strangers to one another, as where a beneficiary under a trust traces through the transactions of a recipient from the trustee.[503]

In seeking to generalise from these cases, and to identify the category of legal relations that will entitle a claimant to recover the proceeds of a defendant's transactions, the key questions – whether these relations must be proprietary or personal, legal or equitable, fiduciary or non-fiduciary – are primarily to do with the content of the relationship between the parties, not their origin as a matter of causative event.

II. PRIVATE POWERS THAT GENERATE CLAIMS BASED ON UNAUTHORISED SUBSTITUTION

This part, therefore, adopts a broad definition of a private power as an objective capacity, however arising, to vary the vested legal or equitable rights of another person. However, not all such powers give rise to claims based on unauthorised substitution. For example, it has been plausibly argued that the common law right to rescind a voidable contract for the sale of goods is best understood as a kind of legal power.[504] On this analysis, the vendor's title to the goods sold initially passes to the

---

[501] eg *Foskett v McKeown* [2001] 1 AC 102.

[502] eg *Henry v Hammond* [1913] 2 KB 515.

[503] eg *Dudley v Champion* [1893] 1 Ch 101.

[504] B Häcker, 'Proprietary restitution after impaired consent transfers: a generalised power model' (2009) 68 CLJ 324, at 336.

purchaser under the contract for sale;[505] the vendor, by rescinding the contract, also rescinds the transfer of title[506] and re-vests legal title in himself.[507] Prior to the decision to rescind, the seller can be said to have a legal power correlative to a liability in the buyer under the initial contract of sale, and this power shares the structure of other private powers: it is a capacity to deprive another person (the buyer) of a right (the title obtained under the voidable contract of sale) that is already vested in him (this follows from the conclusion that the initial transfer of title was voidable rather than void, implying that title did pass to the buyer prior to the seller's decision to rescind).

However, the purchaser under such a voidable contract obviously has no right to claim any asset acquired by the vendor in consideration for his exercise of this power. If, on the facts of *Car and Universal Finance v Caldwell*,[508] Caldwell had been paid a sum of money by a third party in consideration for his rescission of the contract,[509] it would hardly have been open to the fraudster, Norris, to object to the transaction and to demand the money as a substitute for his lost title to the car. There is no duty owed to the object of the power, in such a case, and therefore no room for a claim based on unauthorised substitution to operate.

---

[505] *Cundy v Lindsay* (1878) 3 App Cas 459, per Lord Cairns LC at 464, describing a voidable contract for sale of goods as a 'contract passing [the] property [in the goods], even although…that contract might afterwards be open to a process of reduction, upon the ground of fraud.'

[506] For criticism of this analysis as conflating the rules of contract-formation with the rules for the passing of title to goods, see W Swadling, 'Rescission, property and the common law' (2005) 121 LQR 123.

[507] *Car and Universal Finance v Caldwell* [1965] 1 QB 525.

[508] The facts of the case are discussed above at 92-93.

[509] For example, if he had contracted to sell his title to the car to a third person once he recovered it, and had received the purchase price in advance.

In identifying those private powers that, unlike the Caldwell-Norris power, do generate claims based on unauthorised substitution, we need to answer two questions. First, assuming that the power in question must be a power to deal with a right vested in another person, what sort of effect on the rights of another person counts as a 'dealing' of the relevant kind? This question involves the distinction between legal and equitable powers, and between substitution and other events that are potentially destructive of vested rights, like accession and specification. The case law demonstrates that the existence of a power, in the relevant sense, is a phenomenon recognised both at common law and in equity. Such a power has a distinctive transactional character, with the law treating the objectively determinable intention of the donee as normatively significant to the question whether the power has been exercised. In this sense, it contrasts with doctrines like accession and specification, which involve the destruction of rights by virtue of some physical event that may or may not be the result of human agency.

Secondly, granting the obvious point that no claim will arise in a case where the donee of a power owes no duty at all to the object of that power, what sort of duty generates a claim based on unauthorised substitution? Is it sufficient for a person to hold a power and simultaneously owe some duty to the object of that power, or must there be a closer connection between power and duty? In addition, must the duty prescribe or proscribe some particular type or standard of conduct? The case law shows that the duty must be specific to the power in question, relating to the donee's decision to exercise the power; it is not enough that the donee owes the object some other duty, which he breaches, while simultaneously holding a power that has the potential to destroy the object's vested rights. This requirement explains the cases where the courts have refused to allow some claimants to trace through the transaction

of their agents, as well as the distinction between equitable interests that generate claims based on unauthorised substitution and equitable interests that do not. That distinction cannot be explained on the basis of a distinction between a duty of fiduciary loyalty and other duties, since claims based on unauthorised substitution arise, both at law and in equity, in situations where the donee of the power owes no such duty.

A. Content of the power

1. Substitutions at law and in equity

The concept and significance of 'common law tracing' has been a major source of doubt and discussion in recent years. Questions have been raised[510] about the traditional interpretation of the supposed leading case, *Taylor v Plumer*,[511] and it has been argued that the whole idea of tracing at common law, as opposed to in equity, has been an unfortunate historical misunderstanding that badly distorts our understanding of the general distinction between common law and equitable rights.[512]

There are three elements of the traditional account of *Taylor v Plumer* that have been challenged on these grounds. The traditional story is that Sir Thomas Plumer once had a common law title to a cheque. By virtue of this title, he obtained a common law title to some gold bullion and share certificates purchased by a person in possession of the cheque and its cash proceeds, Walsh. In order to show that the gold and share certificates were in fact the product of his initial cheque, however, he was

---

[510] L Smith, ''Tracing in *Taylor v Plumer*: equity in the Court of King's Bench' [1995] LMCLQ 240

[511] (1815) 3 M & S 562, 105 ER 721.

[512] S Khurshid and P Matthews, 'Tracing Confusion' (1979) 95 LQR 75.

obliged to rely on the stringent common law tracing rules, which he was luckily able to do because Walsh never paid the cash into a mixed bank account.

It has been objected that none of these claims are true on the facts of the case, properly analysed. First, it is arguable that Walsh was a trustee of his title either to the cheque or to the banknotes obtained in exchange for it,[513] and that Sir Thomas's right to traceable proceeds depended on his status as a beneficiary under this trust rather than any common law title. Secondly, whatever the status of his right to the original asset, there was no need for him to assert a common law title to the substitute assets in the litigation in the Court of King's Bench and in fact he did not do so: in defending himself against the claim in trover brought by Walsh's assignees in bankruptcy, he could rely on the argument that Walsh had held his title to them on trust for him,[514] which would prevent that title from vesting in assignees in bankruptcy. Finally, given the argument that the case involved a beneficiary under a trust asserting that substitute assets were also held on trust for him, Lord Ellenborough CJ's dicta about the impossibility of tracing into a mixed fund had nothing to do with any distinctive common law principles.[515] Instead, they reflected his understanding of the tracing concept in general, an understanding that was decisively rejected by the Court of Appeal in *Re Hallett's Estate*.[516]

In *Trustee of FC Jones v Jones*,[517] Millett LJ rejected these arguments based

---

[513] S Khurshid and P Matthews, 'Tracing Confusion' (1979) 95 LQR 75.

[514] L Smith, 'Tracing in *Taylor v Plumer*: equity in the Court of King's Bench' [1995] LMCLQ 240.

[515] L Smith, *The Law of Tracing* (n 25 above) 5.

[516] (1880) 13 Ch D 696.

[517] [1997] Ch 159.

on the historical facts as irrelevant to the modern law, given that later authoritative decisions[518] had relied on the traditional interpretation of *Taylor v Plumer* in recognising common law claims based on unauthorised substitution:

> It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor v Plumer*... but that is not how the English doctrine of stare decisis operates. It would be more consistent with that doctrine to say that, in recognising claims to substituted assets, equity must be taken to have followed the law, even though the law was not declared until later.[519]

It is true that the purely historical question – what actually did happen on the facts of *Taylor v Plumer*, and what Lord Ellenborough CJ thought he was deciding at the time – is of doubtful relevance to the modern law. If, over the next two centuries, the courts had consistently applied *Taylor v Plumer* on the basis of a clear, if factually mistaken, understanding of the principle that justified that decision, that principle would then have a sound footing in English law as a matter of authority. It would make little difference if it turned out, on detailed investigation, that all the later judges had been wrong about the principle operative in Lord Ellenborough CJ's own mind on the facts of the case actually before him; their own decisions would have been sufficient to support the principle that they thought *Taylor v Plumer* supported.

The problem, however, is that the later authorities are much less clear-cut than this: it is as difficult to understand these later cases, including *Trustee of FC Jones v Jones* itself, as it is to interpret *Taylor v Plumer*. This is not because of a lack of historical data but because of conceptual problems with the traditional accounts based

---

[518] *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 (Court of Appeal) and *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (House of Lords).

[519] [1997] Ch 159, 169.

on common law title.[520] It is these conceptual problems that have produced the search for a reading of *Taylor v Plumer*, and the cases following it, that 'does [the least] violence to established doctrines of property and title in English law.'[521] As has been explained, the key question is whether and in what sense the holder of a common law right can say that someone else has substituted a new thing for the original subject matter of his right: what sort of power-liability relationship is presupposed by this claim, and is it the same kind that we find in the context of the express trust?

In addressing this issue, it is first necessary to define the difference between common law and equitable powers, and inquire into any distinctive characteristics possessed by equitable powers that are not shared by common law powers. Once this has been done, the question becomes whether it is these distinctive characteristics that explain the availability of claims based on unauthorised substitution, or whether the basic structure that explains the claim of a beneficiary under a trust also explains a similar response at common law. It will be argued that the common law cases can be explained on the basis of common law power-liability relations that are very similar to those found in the equitable cases but that are somewhat different in structure. These differences are not, however, of a kind that justify the adoption of special and more restrictive 'common law' rules of tracing. To the extent that such rules could be justified, they would have to be justified on the basis of a difference in the content of the duty owed by the donee of the power to its object at law and in equity.

a. The distinction between common law and equitable powers

---

[520] As discussed in chapter 4 above.

[521] Khurshid and Matthews, 'Tracing Confusion' (1979) 95 LQR 78, 94.

Common law powers have been defined as powers to create or convey a legal estate vested in someone else;[522] by extension, they can be said to include powers to enter into transactions which create or transfer other rights recognised by the courts of the common law. Thus, they include the powers to transfer title to chattels belonging to others, as well as to create or assign choses in action, such as rights to sue under contracts.

A prototypical example of such a power could be found in the medieval English law in the context of devises of land. In those parts of England where, prior to the Statute of Wills 1540,[523] local custom allowed estates in land to be devised away from a man's heirs, he was also allowed to give his executors a power to sell his estate. In this situation, the estate itself was vested in the heirs until the moment of sale, while the executors had only the ability to convey that estate to the purchaser. The effect of the exercise of the power of sale was to transfer the very rights vested in the heirs directly to the purchaser, without those rights ever being vested in the executors themselves:

> And this is an amazing proposition in law, but it seems to that it is the nature of a devise and devises have always been used in that way. Thus may a man lawfully acquire a freehold from someone who has nothing, in the same way as a man can get fire from a flintstone even though

---

[522] *Thomas on Powers* (n 472 above) 6.

[523] Before the Statute of Wills, legal title to freehold land in England could not be alienated by will but descended automatically, on death, to the heir of the freeholder. However, title to land held according to the customs of the boroughs of England could be alienated by will, 'like a chattel', even before the Statute of Wills: see Pollock and Maitland, *A History of English Law Before the Time of Edward I* (2nd edn, Cambridge University Press, Cambridge 1968) 645 and M de W Hemmeon, 'Burgage Tenure in Medieval England III' (1911) 27 LQR 43.

there is no fire inside the flint.[524]

While such powers to transfer land no longer exist in English law,[525] Babington CJ's dictum captures the distinctive characteristic of those common law powers that do survive in the modern law. Examples include powers of attorney,[526] a security-holder's power, on default, to sell the right on which the debt is secured[527] and the authority of an agent to contract with third parties on behalf of his principal,[528] as well as to transfer the principal's legal property rights to third parties.[529] In each of these cases, the effect of an exercise of the power is to directly alter the relationships between the object of the power and other subjects of the legal system. Thus, for example, where an agent acts within the scope of his authority to enter into a contract with a third party on behalf of a person disclosed to be his principal, the new contractual relationship arises between, and only between, the principal and the third party: the obligations created by the contract bind and benefit the principal himself

---

[524] *Farynton v Darell* (1431) YB Trin 9 Hen VI, fo 23, pl 19; translation from J Baker, *Baker and Milsom, Sources of English Legal History: Private Law to 1750* (2nd edn, OUP, Oxford 2010) 80, per Babington CJ at 83.

[525] Since the Land Transfer Act 1897, the real property of a deceased person has vested directly in his personal representatives (that is, his executors or administrators), rather than in his heirs: see now the Administration of Estates Act 1925, s 1(1). The executor's power to transfer those rights in accordance with the testamentary dispositions of the deceased are not, therefore, powers to transfer rights that are vested in someone else.

[526] Aldridge defines a power of attorney as 'a document by which one person ("donor") gives another person ("attorney") the power to act on his behalf and in his name': T Aldridge, *Powers of Attorney* (10th edn, Sweet & Maxwell, London 2007) 1. As this definition suggests, the defining characteristic of such a power is not what the power itself enables the donee to do (which may be very general or highly specific) but the formalities necessary for its creation: Powers of Attorney Act 1971, s 1(1). A power created by these means can be considered simply as an instance of an authority vested in an agent, but is distinctive in that the instrument creating it is subject to special rules of interpretation which do not apply to documents (or spoken words) creating other forms of consensual agency: see P Watts (ed), *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell, London 2014) paras 3-010 to 3-012.

[527] For the power of sale of a pledgee of a chattel, see *In Re Morritt* (1886) 18 QBD 222; for the mortgagee's power of sale, see the Law of Property Act 1925, s 101(1)(i).

[528] See *Bowstead & Reynolds on Agency* (n 526 above) para 8-001.

[529] Ibid, para 8-126.

and, unless the circumstances fall within one of a defined set of exceptions to the general rule,[530] the agent can neither sue or be sued on the contract.[531] Similarly, an agent acting within the scope of his authority may directly transfer his principal's legal property rights in a chattel to a third party: as a result of this transaction, the third party will not have committed any tort in respect of the chattel by taking possession of it and the duties formerly owed by other subjects of the legal system to the principal will now be owed to the third party.

As Babington CJ notes, there is something 'amazing' about the effect of these powers. From the perspective of the third party, the valid exercise of the power can enable him to acquire a right by dealing with someone other than the person who is normally able to create that right. From the perspective of the object of the power, the exercise of the power can result in him being deprived of a right, or subjected to an obligation, otherwise than by his own personal act. Both effects may be called amazing because they involve a sharp departure from the *prima facie* rules which govern the transmission and creation of rights in English law: that is, the rule that only a person in whom a right is vested can transfer that right[532] and the rule that only a person who himself enters into a contract can be bound by its terms.[533] The donee of the power, like the flintstone in Babington CJ's simile, is able to give what he himself does not have.

---

[530] Ibid.

[531] *Montgomerie v United Kingdom Mutual Steamship Association* [1891] 1 QB 370, per Wright J at 371.

[532] In accordance with the maxim *nemo dat quod non habet* (nobody gives what he does not have).

[533] This follows from the doctrine of privity of contract which, in relation to the burden of contractual obligations, has been regarded as 'so obvious that it hardly needs to be stated: if a contract between A and B provided that C was to pay £100 to A, no-one would suppose that this contract could oblige C to make the payment': H Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) para 18-33.

If we turn this on its head, so that any person able to give what he himself does not have is thought of as the donee of a common law power, we are led to the various exceptions to the principle *nemo dat quod non habet* recognised by English law.[534] For example, a seller in possession of goods is able to transfer his buyer's title to those goods by delivering them to a purchaser in good faith without notice of the prior sale.[535]Any person in possession of cash is able to extinguish a superior title by paying the money to a bona fide recipient who has given value for it.[536] The same is true for a negotiable instrument.[537] In all such cases, it might be said that a common law power exists in the objective sense: the seller in possession or the thief of cash is effectively able to do something very like what the agent of a principal can do, ie alter the rights of the object of the power against a third party, without the personal involvement of the object in the particular transaction.

An equitable power involves a more complex interplay of legal relations, and it is only in a somewhat different sense that the donee of such a power gives what he does not have. Sugden describes such powers as capacities to create duties binding on particular persons, rather than as capacities to create rights capable of binding or benefiting anyone who deals with the donee of the power: he calls them 'declarations or decisions operating only on the conscience of the person in whom the legal interest

---

[534] For an overview of both common law and statutory exceptions to the principle, with a particular focus on security interests, see L Gullifer (ed), *Goode on Legal Problems of Credit and Security* (5th edn, Sweet & Maxwell 2013) 175-189.

[535] Sale of Goods Act 1975, s 24: 'the delivery or transfer ... has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.'

[536] *Miller v Race* (1758) 1 Burrow 452, 97 ER 398. See D Fox, 'Bona Fide Purchase and the Currency of Money' (1996) 55 CLJ 547 and *Property Rights in Money* (OUP 2008) 265-303.

[537] *The London Joint Stock Co v Simmons* [1893] AC 201.

is vested'.[538] Farwell, on the other hand, offers a definition which is a closer parallel to the definition of the common law power: he says that equitable powers 'are such as affect the equitable, not the legal, estate or interest: *i.e.*, where the legal interest is properly vested in one or more, but the power of disposing of the beneficial interest is in some other person.'[539]

It could be said, glossing Farwell, that an equitable power is a power to create or transfer rights recognised by the court of equity; thus, such a power is similar in its nature to a common law power, except that it enables the creation of a different set of rights which happen to have a different jurisdictional history. But, as both definitions make clear, a complication is introduced by the fact that the subject matter of an equitable right is itself usually a legal[540] right.[541] The person who has an equitable interest has a right or set of rights that is directly enforceable against another person in that other's capacity as the holder of a right; he normally[542] gains rights against other people only if they themselves acquire the right in question or other rights derivative from it.[543]

---

[538] Sugden (n 476 above) 45.

[539] Farwell (n 476 above) 3.

[540] In the broad sense of a right recognised by the legal system. It need not be a legal right in the narrow sense of a common law rather than equitable right.

[541] For the 'right to a right' conception of equitable interests, see B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1. Although the significance of this feature of equitable interests has been contested, it is generally accepted that they do have the feature: see, eg, J Penner, 'The (True) Nature of the Beneficiary's Equitable Proprietary Interest Under a Trust' (2014) 27 Canadian Journal of Law and Jurisprudence 473, 475.

[542] An exception is the restrictive covenant which, although an equitable interest, does not bind only the original covenantor and his successors in title but also affects any stranger who makes use of the land in breach of the terms of the covenant: *Re Nisbet and Potts Contract* [1906] 1 Ch 386.

[543] *Burgess v Wheate* (1759) 96 ER 67; *MCC Proceeds Inc v Lehman Brothers International Ltd (Europe*) [1998] 4 All ER 675. Penner characterises this aspect of equitable interests as reflecting a 'successor' rather than a 'trespassory' conception of rights in rem: J Penner, 'Duty and Liability in

As a result, an additional layer of legal relations is introduced into the picture of the power as a capacity to deal with the rights of someone else. In the case of the equitable power, the subject matter of the equitable interest is itself a legal right, which must be necessarily be vested in some person other than the holder of the equitable interest. Put in Hohfeldian terms, the standard case is one where T has a claim-right correlative to a duty owed to him by X, and himself owes B a duty as to his exercise of his rights against X. This is the situation where, for example, there is a trust of a bank account that is in credit: the trustee (T) is owed a debt by the bank (X), and owes his beneficiary (B) a duty as to whether he undertakes any transactions that reduce, increase, or extinguish the debt. The same analysis holds in relation to a trust of a title to a tangible thing, such as land; the trustee (T) is owed a duty of non-interference with the thing by every subject of the legal system (X), and owes the beneficiary (B) duties as to whether he enforces, varies, or extinguishes those duties (for example, by granting a lease of the land to one member of class X and thus, inter alia, extinguishing X's pre-existing duty of non-interference with the land.)[544]

The term 'equitable power' usually refers to a power to alter the T-B relationship, altering or extinguishing T's duty to B. The exercise of such a power, in itself, leaves the T-X relationship unaltered, although it will often produce a duty or a liberty to alter that relationship[545] and, where the trustee is the holder of the equitable power, may coincide with his decision to do so. Examples include powers of

---

Respect of Funds' in J Lowry and L Mistelis (eds.), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, London 2006) 215.

[544] See S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H E Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 226.

[545] See Sugden (n 476) above, cited in *Re Brown* (1886) 32 Ch D 597, per Fay J at 601: 'The legal interest is not divested by the execution of the power, but equity will compel the person seised of it to clothe the estate created with the legal right.'

appointment, which may be held either by trustees or by third parties, and powers of sale or investment, which are conventionally held by trustees themselves. However, quite apart from the existence of such powers, T will necessarily possess the legal capacity to alter the T-X relationship, by virtue of his status as the person holding the right correlative to X's duty. Such an alteration will have inevitable legal consequences for B, producing a double sense in which it could be said that a power exists in equity.

The point can be illustrated by comparing a donee of a common law power, such as an agent, with the paradigm donee of equitable powers, the trustee. A common law power exists, for example, in a case where P, the principal, holds a legal title to Blackacre and authorises his agent, A, to deal with or dispose of that title. A trustee, T, who holds his title to Whiteacre on trust for B may, instead, have an equitable power to deal with or dispose of B's beneficial interest: for example, he may hold his title on trust for B and his wife for their joint lives, with a power to appoint the remainder to one or more of B's children at his discretion, and with the survivor of B and his wife taking the remainder in default of appointment.

In the case of the common law power, A's attempt to exercise the power – for example, by mortgaging P's title to Blackacre to M Bank – could have one of two possible consequences, so far as P's legal relations to M are concerned. Either the exercise of power will be effective,[546] and M Bank will gain a new set of rights and remedies directly enforceable against P, or it will be ineffective and nothing will

---

[546] Whether because it is authorised or because, for example, M Bank was entitled to rely on A's ostensible authority to enter into the transaction: *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480.

happen. The same analysis would hold if A had been authorised to draw on P's bank account with Bank D. Either the attempt to make such a withdrawal from the account would extinguish D's debt, owed to P, or it would not. The supposed exercise of a common law power either directly intervenes in the legal relations between the object of the power and a third person, or it is a nullity.

In the case where T is a trustee of title to Whiteacre or the bank account, however, the situation is more complex. By virtue of his status of as a trustee – a holder of the very rights held on trust – T's dealings with his title to Whiteacre will never be a complete nullity.[547] This will be true whether or not he has any specific powers to vary B's beneficial interest. For example, suppose T were to mortgage his title to Whiteacre to Bank M. Assuming T's own consent was genuine and that he complied with all the necessary steps for the creation of such a right, the transaction would be effective at law and would give rise to the mortgage in favour of Bank M.

It might be argued that, in the absence of an express power to enter into such a transaction, held by T, the creation of this mortgage will be irrelevant to B. Her beneficial interest under the trust of T's title to Whiteacre will remain and, unless M has a defence, B can enforce her rights against it as a successor in title to the trustee. However, this in itself represents a change in B's legal relations with a third person, M. Rather than relying on her rights against T, and insisting that T enforce his rights in respect of Whiteacre against any interfering strangers, like M, she is now obliged to deal with M herself if she wants title to Whiteacre to continue to be used for her

---

[547] Assuming that the transaction is not void for some freestanding reason, such as the operation of the *non est factum* doctrine.

benefit.

So, for example, if M seeks an order for possession of Whiteacre, B can no longer demand that T resist the order on the basis of his superior common law title; she will instead have to ask the court to refuse the order on the basis that she herself is in possession, or is entitled to possession, and the mortgagee's right is not enforceable against her.[548] If M exercises its power of sale, and transfers T's title to Whiteacre to a purchaser, this transaction will not be a nullity from B's perspective. Although the sale in exercise of the mortgagee's power of sale will not, in itself, overreach her interest under the trust,[549] the purchaser from the mortgagee may have a freestanding defence against her claim.[550] Even if they do not have such a defence, the mortgagee will nevertheless have brought her into a new legal relationship with yet another person, the purchaser, against whom she must enforce any claims she has in respect of the title to Whiteacre.

These conclusions would flow from the trustee's decision to mortgage his title to Whiteacre even in a situation where M has no defence and B's right is binding on it as successor in title to the trustee. The grant of a new right in respect of the trust asset, or its outright transfer to a third person, is thus a non-trivial change in the legal

---

[548] *Williams & Glyn's Bank v Boland* [1981] AC 487.

[549] Under the Law of Property Act 1925, s 2(1)(ii), a conveyance by a mortgagee in the exercise of its exercise of its power of sale will overreach 'any equitable interest … capable of being overreached by such conveyance.' This includes the equity of redemption of the mortgagor and any interests derivative of the equity of redemption, but not a right that takes priority over the equity of redemption. See M Conaglen, 'Mortgagee powers rhetoric' (2006) 69 MLR 583 and the Law of Property Act 1925, s 104(1).

[550] Either because they are a bona fide purchaser for value without notice of her equitable interest (unregistered land), or because the transaction in their favour is a registered disposition for value (registered land) and her interest did not have overriding status at the date of the disposition: Land Registration Act 2002, s 29(1) and schedule 3, para 2.

position of a beneficiary under a trust even where her right is binding on the transferee. She stands in a new legal relation to the transferee, which does not exactly mirror her relationship to the trustee,[551] and which leaves her rights vulnerable to the decisions of a new person.

In addition, of course, her right might not bind a transferee in the first place. In the example above, M may have a defence which effectively extinguishes B's rights in respect of title to Whiteacre as against the bank and its successors in title. In the context of registered land, a purchaser may rely on the completion by registration of a registered disposition for value.[552] In any other context, where the trust asset is unregistered land[553] or title to a chattel or a chose in action,[554] a purchaser may have the defence of bona fide purchase for value of a legal interest without notice of the equitable interest. Whether one of these defences operates has nothing to do with any specific power to deal with the equitable interest, and vary the terms of the trustee-beneficiary relationship. Title passes to the mortgagee because the trustee has exercised his powers as the holder of legal title to Whiteacre; the extinction of the equitable interest happens by operation of law, as a result of the rule favouring a bona fide purchaser for value of a legal estate (or a purchaser of a registered estate where the land is registered).

---

[551] In particular, a transferee who is bound by a trust may not be personally liable, as the original trustee would be, for dealing with the trust asset and untraceably spending the proceeds: *Re Montagu's Settlement Trusts* [1987] Ch 264. The transferee would only be liable to the beneficiary for the value of the lost assets if she knew, or ought to have known, that she had received the trust assets in breach of trust: *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437.

[552] Under the Land Registration Act 2002, s 29(1). Unless B was in actual occupation of the land, the mortgagee's legal charge would take priority over her beneficial interest once the registration requirements for creation of a charge were met: Land Registration Act 2002, s 29, and schedule 3, para 2.

[553] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 793.

[554] *Macmillan Inc v Bishopsgate Investment Trust plc* [1995] 1 WLR 978.

There is an obvious analogy between the operation of these rules, on a conveyance of the trust asset to a third party, and the *nemo dat* exceptions that can apply to certain common law rights. The primary difference is that *nemo dat* defences are only sometimes available at common law, in certain contexts or in relation to certain assets, while any equitable interest is always vulnerable to some version of such a defence. In addition, a person who has the power to deal with the subject matter of the equitable interest is inherently able to alter the legal rights of the holder of the equitable interest even where no defence is available to the purchaser.

b. Unauthorised substitution in equity

Beneficiaries under trusts are able to bring claims based on unauthorised substitution against any person with the power to deal with the subject matter of their interest under the trust, regardless of any power to deal with the equitable interest. This is clear from the range of cases in which the holder of an equitable interest has succeeded in tracing through the transactions of someone who has no power to vary the equitable interest, but who has been authorised by the trustee to deal with the subject matter of the equitable interest.

In *Lane v Dighton*,[555] for example, Dighton was the life tenant under a marriage settlement. He had 'prevailed upon the trustees to let him have £4010, 10s of the trust money',[556] which he then used to buy land.[557] More specifically, he had gained control of the trust assets – shares in the South Sea Company – by virtue of a

---

[555] (1762) Amb 409, 27 ER 274.

[556] Ibid.

[557] In fact, he first used the money to buy bank annuities and then declared a trust of these annuities in favour of persons nominated by the vendor of land who, in consideration for this declaration of trust, conveyed title to the land to him.

power of attorney granted to him by the trustees. This power of attorney gave him the legal capacity to deal with the shares, but did not give him any power to alter the equitable interests of his wife and children under the terms of the marriage settlement.[558] Their claim to trace through his transactions rested purely on his status as a person with the legal power to deal with the assets held on trust for them, not his status as a donee of a specifically equitable power.

In a number of these cases,[559] where the substituting transactions were carried out by agents of trustees, the trustees themselves brought the claim to recover the proceeds. Nevertheless, it seems clear that they were able to do so qua trustees, on behalf of the beneficiaries, as well as qua principals in an agency relationship. This was so regardless of whether, under the terms of the trust, it was permissible for the trustees to authorise the particular transaction undertaken by the agent.

For example, in *Trench v Harrison*,[560] another marriage settlement case, the trust instrument stipulated that the trust money could be used to purchase only certain types of investment: in the case of land, the trustees were authorised to purchase only leasehold estates or heritable estates, which might be either freehold or copyhold. In addition, they were authorised to exercise the power of investment only with the consent of both husband and wife. The life tenant, Harrison, a solicitor, proposed to the trustees that he invest the trust money in a copyhold estate in Cornwall. Without

---

[558] The settlement did grant the survivor of the marriage, or the couple jointly, a power of appointment among their children, but Dighton, who had died by the date of the litigation, survived by his widow, was never in a position to exercise that power.

[559] eg *Price v Blakemore* (1843) 6 Beav 507, 49 ER 922; *Trench v Harrison* (1849) 17 Simons 111, 60 ER 1070*; In Re Strachan* (1876) 4 Ch D 123; *Birt v Burt* (1877) 11 Ch D 773.

[560] (1849) 17 Simons 111; 60 ER 1070.

the consent of his wife, the trustees granted Harrison a power of attorney to sell some of the trust consols for this purpose. Having done so, he used the proceeds of sale to get himself admitted to the copyhold, which, rather than being a heritable estate, was for a term of lives. This transaction was outside the scope of the trustees' powers under the marriage settlement both because it had been entered into without the consent of the wife, and because the wrong sort of copyhold had been purchased. The Master, having investigated the facts and found that the purchase price of the copyhold represented the proceeds of sale of the trust consols, reported that:

> Harrison, in making the purchase ..., was to be deemed and considered as an agent acting for and on behalf of the Petitioners *in their character of trustees of the settlement.*[561]

Counsel for Harrison's creditors, who sought to have the copyhold sold to pay his debts after his death, argued that he could not have purchased it on behalf of the trustees of the settlement because such a purchase was beyond the scope of their powers as trustees. The Vice-Chancellor held that this was irrelevant as between Harrison and the trustees. While he considered that 'questions may hereafter arise between Mrs Harrison and the trustees', on the grounds that the purchase of the copyhold represented a breach of trust, this did not mean that 'as between Harrison and the trustees, he must not be considered to have purchased the copyholds for them.'[562] In itself, this seems to suggest that the trustees were simply bringing a claim against Harrison on their own account, as the donee of a power of attorney and thus as their agent, rather than on account of the beneficiaries and against Harrison as a person dealing with trust assets. However, the Master's opinion suggests that they

---

[561] (1849) 17 Simons 111, 116; 60 ER 1070, 1073 (emphasis added).

[562] (1849) 17 Simons 111, 119; 60 ER 1070, 1074.

were relying on their status as trustees, rather than merely as principals, and were bringing their claim on behalf of the beneficiaries.

In the later case of *Re Strachan*,[563] the Court of Appeal clearly distinguished these two types of claim (the trustee claiming qua principal, in his own right, and the trustee claiming qua trustee, on behalf of his beneficiaries). The trustee in that case, Cooke, had authorised Strachan, a stockbroker, to sell trust consols and invest the proceeds in railway stock. Strachan sold the consols and received a cheque as their price, which he paid into his own bank account. He then became a bankrupt. The Court of Appeal unanimously held that the trustee was entitled to recover as much of the credit balance of the bank account as was attributable to the sale of the trust consols. James LJ and Bramwell JA, citing *Taylor v Plumer*,[564] considered that, even if Cooke had not been a trustee, he would have been able to recover the money on the basis that Strachan was his agent dealing with his cheque. Baggallay JA, although 'much impressed' by *Taylor v Plumer*,[565] did not take a view on what would have happened if the money had not been trust money. However, because it was trust money, all three judges agreed that it was recoverable on the facts. Bramwell JA said:

> If the whole of the money had remained in the hands of the bankers without being drawn out, I think it clear that *the cestui que trust could have claimed it as trust money* traced into their hands, and if on properly attributing the payments any part of it is found to remain there, the same rule must apply to what so remains.[566]

---

[563] *In Re Strachan* (1876) 4 Ch D 123.

[564] (1815) 3 M & S 562, 105 ER 721, cited by James LJ at (1876) 4 Ch D 123, 127 and by Bramwell JA at 129.

[565] (1876) 4 Ch D 123, 127.

[566] (1876) 4 Ch D 123, 128 (emphasis added).

The claim, therefore, runs directly between the beneficiary and the trustee's agent. The agent, in such a case, clearly does not have any power to vary the particular equitable interests of the beneficiaries: that is, he has not been authorised to change the content of the duty owed to the beneficiaries by the trustees, or the identity of the beneficiaries to whom the duty is owed. All he has is the capacity, obtained from the trustee, to transfer the subject matter of the trust – for example, the shares in the South Sea company in *Lane v Dighton* – to a third person. This was sufficient to generate the right to trace through his transactions.

c. Unauthorised substitution at law

It has long been clear that a person who starts out holding a common law right can sometimes trace through the transactions of another person. Where there is a fiduciary relationship of some kind between the parties, such as the relationship between agent and principal or company director and company, the principal does not have to show that his fiduciary actually held assets on express trust for him in order to claim the traceable proceeds of the fiduciary's transactions with his assets. The early factor cases are examples of such tracing through the transactions of an agent and, in *Re Hallett's Estate*,[567] the Court of Appeal held that it did not matter that there was no express trust in these cases: the applicable rules of tracing, including the ability to trace into a mixed fund, were the same.

These cases are often thought of as instances of tracing in equity, on the basis that the fiduciary relationship in itself attracts the equitable jurisdiction. This might mean that, although the claimant has a common law right correlative to a common

[567] (1880) 13 Ch D 696.

law power in the defendant, the equitable tracing rules apply to the defendant's transactions because he owes the claimant the distinctive equitable duties of fiduciary loyalty, such as the duty to avoid a conflict of interest and a duty not to profit from his office. If so, these cases are sufficient evidence that an equitable right in the strict sense – a right that a right vested in some other person be used in accordance with a duty owed to one – is not necessary for a claim based on unauthorised substitution. Such claims are available if one holds a right oneself, but stands in a fiduciary relationship with some other person whose transactions may affect that right. The implication is that claims based on unauthorised substitution can arise where A has the power to vary B's vested rights against C, just as they can arise where A himself holds a right subject to a duty to B and then transfers that right to C.

However, it is possible to read the cases where fiduciaries hold common law powers differently, and to find that the specific equitable structure of the trust is a precondition for tracing even in this context. Such an argument would require us to show that there is an initial trust of the asset acquired by the fiduciary, justified by some principle other than unauthorised substitution itself; claims to the proceeds of subsequent unauthorised substitution could then be explained as dependent on that initial trust. For example, in *Taylor v Plumer* itself, it might be argued that Walsh became a trustee of the title to the banknotes he obtained from Goslings Bank because Sir Thomas was entitled to ratify that transaction and render him a trustee. The claim to the gold bullion and share certificates, subsequently purchased by Walsh from third parties who did not know he was Sir Thomas's agent, could then be understood as dependent on this initial trust, which itself arises out of ratification of the transaction of a person known to be an agent who happened to be outside the scope of his authority. Where a company director or other agent uses the money of his principal to

acquire rights vested in himself, it could be said that these purchases represent profits made in breach of the duty not to profit from one's office as a fiduciary; as such,[568] they are held on constructive trust for the principal. In order to determine whether a claim based on unauthorised substitution can arise out of the wrongful exercise of a common law power, in the absence of a pre-existing trust arising for one of these reasons, it is necessary to address these arguments.

There are two lines of authority that challenge the idea that a trust or other equitable right is a precondition for a claim based on unauthorised substitution. First, there are cases where an analysis based on a pre-existing trust is potentially available, either because of a profit-making breach of fiduciary duty or because of a transaction that might be ratified by the claimant, but where the court holds that a common law claim also exists. In *Lipkin Gorman v Karpnale Ltd*,[569] for example, a partner in the claimant firm, Cass, had drawn on the firm's client account with Lloyds Bank, receiving banknotes that he then gave[570] to the defendant gambling club. Lord Goff acknowledged that, in these circumstances, Cass would have received his title to the banknotes as a trustee for the claimants. However, because the claimants were not arguing that the defendants were knowing recipients of trust property, but were instead bringing the common law action for money had and received, the argument that there was a trust was irrelevant: in his view, the claimants were seeking to show 'that the money in question was their property at common law.'[571] In order for them to

---

[568] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

[569] [1991] 2 AC 548.

[570] The House of Lords held that the transaction was equivalent to a gift, since gambling contracts were rendered void by the Gaming Act 1845, s 18.

[571] [1991] 2 AC 548, 572.

do this, they did not need to show that Cass was their fiduciary or their trustee, but only that they were entitled at common law to the chose in action represented by the bank account with Lloyds; they could then trace from this chose of action into the cash received by Cass from Lloyds.[572]

Smith has argued that the conclusion that the firm was asserting a common law property right to the cash does not follow from the premise that they were bringing the action in money had and received, since this action has historically been available to beneficiaries under trusts.[573] However, even if this argument is accepted, it does not alter the implication of Lord Goff's analysis that Cass's transaction with Lloyds Bank counted as an unauthorised substitution from the perspective of the claimant firm. Whether the substitution then gave rise to a trust, as Smith argues, or to some sort of innominate common law right, is a separate question; the issue addressed here is whether substitution itself can occur in the absence of any trust or equitable interest.

That possibility is supported by a second line of authority, where the claimant not only seems to rely on a common law right, but where it is difficult to find a pre-existing legal relationship between the parties of a kind that might give rise to a trust on the basis of some principle other than unauthorised substitution. In these cases, there is no fiduciary duty owed by the defendant to the claimant and no justification for finding a trust on the basis of some freestanding principle; in each case, however, the connection between claimant and defendant on the facts can best be explained by

---

[572] [1991] 2 AC 548, 574.

[573] L Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 LQR 338.

showing that the defendant has exercised a legal power to deprive the claimant of a vested right against a third party.

1. Common law powers held by fiduciaries

There are two arguments that could lead to the conclusion that a claimant, tracing though the transactions of his fiduciary, is relying on the existence of a trust that arises on the basis of some principle other than unauthorised substitution. First, in relation to both *Taylor v Plumer*[574] and *Lipkin Gorman v Karpnale Ltd*,[575] there is the argument based on a principal's right to ratify the unauthorised transactions of his agent, purporting to be acting on his behalf. Secondly, in relation to cases where there no scope for an argument based on ratification – as where the defendant is not purporting to act as anyone's agent but on his own account – there is the argument based on profits made in breach of fiduciary duty. The first of these arguments is inconsistent with the decision in *Taylor v Plumer* and with the facts of *Lipkin Gorman v Karpnale Ltd*. The second, while an available reading of the fiduciary cases, does not explain the cases where the claimant relies on his common law title against someone who does not owe him any fiduciary duties.

In *Taylor v Plumer*,[576] the claimant, Sir Thomas Plumer, had instructed Walsh to take a cheque for £22,200 to Goslings & Co Bank, where he had an account, and to use the cash obtained from the bank to buy Exchequer Bills and deposit them with Goslings to the claimant's account. Walsh did as he was told so far as the cheque was concerned, receiving a number of banknotes from the bank in consideration for the

---

[574] (1815) 3 M & S 562, 105 ER 721.

[575] [1991] 2 AC 548.

[576] (1815) 3 M & S 562, 105 ER 721.

reduction of the debt owed by the bank to the claimant. In undertaking this transaction, it could be said that Walsh was acting outside the scope of his actual authority because he had already[577] formed the intention of misappropriating the money and using it for his own ends.[578] However, Goslings knew of him as the claimant's agent, and paid the cash to him on this basis; it could, therefore, be argued that the claimant had the right to ratify the transaction and treat Goslings as having vested its title to the banknotes in Walsh on trust for him.

It is not wholly clear, however, why ratification in these circumstances would generate a trust. If Goslings were to be treated as transferring its title to the banknotes to Walsh in his capacity as the claimant's agent, rather than in his own right, their intention would presumably have been to vest legal title in the claimant outright. Walsh would simply have obtained a possessory title to the money. In then claiming the proceeds of the subsequent transactions, with third parties who did not know Walsh as an agent for the claimant, he would be relying on his common law title to the banknotes rather than on Walsh's status as his agent or trustee. The possibility of ratification of these subsequent transactions, in its orthodox sense, breaks down beyond this point because Walsh did not purport to be acting as Sir Thomas Plumer's

---

[577] See L Smith, 'The Stockbroker and the Solicitor-General: The Story Behind *Taylor v Plumer*' (1994) 15 Journal of Legal History 1, 4: he had gone to the bank with the cheque on 5 December 1811, having formed the intention of using the cash obtained in this way to buy gold bullion and stock on 4 December. His original intention had been to pay for these purchases using money stolen from another client, Oldham, but this transaction fell through on 4 December, leading to the decision to use the claimant's money instead.

[578] *Biggar v Rock Life Insurance Company* [1902] 1 KB 516, per Wright J at 525, adopting a dictum of the US Supreme Court in the case of *New York Life Insurance Company v Fletcher* (1886) 117 US 519: 'When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal[.]'

agent in buying the gold bullion and share certificates.[579] In addition, Lord Ellenborough CJ expressly rejected any argument for the claimant that was based on a ratification of these subsequent transactions. This was because the claimant, via his agent, had compelled Walsh to execute a deed indemnifying him for his losses as a result of Walsh's misappropriation of the money and Lord Ellenborough thought that this precluded the possibility of ratifying that misappropriation:

> ...the defendant, by taking a security by bond and judgment to indemnify himself against the pecuniary loss he had sustained by that very act, must be understood to have disapproved and disallowed that act instead of adopting and confirming it.[580]

Apart from the question of his later conduct, however, the larger point is that the explanation based on ratification presupposes that the claimant had a free choice as to whether he should treat Walsh's transactions as effective in altering his relations with the bank, or with the recipients of the cash. In reality, it is very unlikely that he had the option of repudiating Walsh's dealings with Goslings and insisting that the credit balance of his account be restored; it is also unlikely, assuming that he had a superior common law title to the banknotes in Walsh's possession, that he could have asserted this title against the recipients of those notes who had given value for them.[581] The bank could have relied on Walsh's ostensible authority to reduce the credit balance of the account;[582] the vendors of the gold bullion and the stock

---

[579] *Keighley Maxstead & Co v Durant* [1901] AC 240.

[580] (1815) 3 M & S 562, 578; 105 ER 721, 727.

[581] A possible exception might be Walsh's brother-in-law, who received £1000 in consideration for the discharge of a debt owed to him by Walsh. It is likely that the brother-in-law had sufficient knowledge of Walsh's financial circumstances, and intentions, that he would not have been able to show that he was in good faith.

[582] *Hambro v Burnand* [1904] 2 KB 10.

certificates could have relied on the currency of money.[583]

The same set of arguments holds in relation to *Lipkin Gorman v Karpnale Ltd*.[584] The solicitors' firm could have argued that Lloyds Bank had paid the cash over to Cass, their agent,[585] in the belief that he was drawing on their client account for their purposes and on their behalf. This would have allowed them to ratify the transaction, accept that the debt owed to them by Lloyds Bank had been validly reduced in consideration for the transfer of title to the cash to themselves and insist, on this basis, that they had title to the cash or that it was held on trust for them. On the facts of the case, however, they did nothing of the kind. They objected to the reduction in the credit balance of their client account, and sued Lloyds Bank on the basis that, in so reducing it, they had acted in breach of contract.[586]

In this situation, the bank would clearly have perceived its decision to transfer title to the banknotes to Cass as part of the same transaction that justified reducing the credit balance of the Lipkin Gorman account; it transferred title to Cass, qua agent or otherwise, in consideration for the reduction in its indebtedness to Lipkin Gorman. Orthodox principles of ratification prevent a principal in this situation from affirming the half of a transaction that benefits himself (the transfer of title to his agent) and refusing to be bound by the other half (the reduction in a debt owed to himself).[587]

---

[583] *Miller v Race* (1758) 1 Burr 452, 97 ER 398.

[584] [1991] 2 AC 548.

[585] Under the Partnership Act 1890, s 5.

[586] *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA). At first instance, the claimants had succeeded against Lloyds but the Court of Appeal allowed the bank's cross-appeal and the claimants did not challenge this decision on appeal to the House of Lords.

[587] *Hovil v Pack* (1806) 7 East 164.

Like Sir Thomas Plumer, however, the language of ratification here presupposes a choice that does not exist. Lipkin Gorman were not in a position to treat Cass's transactions as a nullity and to say that the debt owed to them by the bank remained intact. As the Court of Appeal decided, on the terms of the banking contract between themselves and the bank, Cass's transaction was effective in reducing the debt owed to them without their consent.

2. Common law powers held by non-fiduciaries

In *FHR European Ventures LLP v Cedar Capital Partners LLC*,[588] the UK Supreme Court held that a fiduciary who had received a bribe or secret commission from a third party, in breach of his duties to his principal, held that bribe on trust for his principal. More broadly, the case may be authority for a broad principle that any benefit received by a fiduciary as a causal consequence of his breach of fiduciary duty will be held on trust for the principal.[589] Such a principle would obviously capture a number of situations where a fiduciary wrongfully varies his principal's rights against a third party, and acquires a new right in consideration for that transfer. On the facts of *Taylor v Plumer*, the principle would have made Walsh a trustee of the gold bullion and stock obtained as a result of his breach of duty as an agent, and would equally have made Cass[590] a trustee of the title to the cash that obtained from Lloyds in breach of duty. This principle, however, seems to depend on the special characteristics of a

---

[588] [2014] UKSC 45.

[589] For a discussion of this possibility, in relation to the facts of *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, see M Conaglen, 'Proprietary remedies for breach of fiduciary duty' [2014] CLJ 490, at 492.

[590] A partner in a firm has a duty to account to the firm for private profits made without their consent: Partnership Act 1890, s 29(1).

fiduciary, as a person who owes a duty of 'undivided loyalty'[591] As such, its ambit is limited to cases where the defendant owes the claimant a duty of this kind.

However, common law claims based on unauthorised substitution have arisen in situations where the idea of a duty of undivided loyalty, in its usual sense, seems out of place. In fact, it has traditionally been supposed that the key difference between these common law claims and equitable claims based on unauthorised substitution is that no fiduciary duty of loyalty needs to exist in the common law context. The question whether the donee of a power must owe the object a specifically fiduciary duty – i.e. a duty of loyalty, or a duty to avoid situations of conflict and to avoid profiting from the exercise of the power – is considered below, and rejected in the context of both common law and equitable powers. The issue as to the content of the power is a different one: it depends on whether, even in the so-called common law cases, the defendant is actually a trustee of an asset because he has acquired it in breach of fiduciary duty and the claimant, in asserting an entitlement to its traceable proceeds, is making the distinctively equitable complaint that the defendant has wrongfully dealt with the subject matter of the claimant's right, which is a right vested in the defendant himself.

There are a number of cases in which common law claims based on unauthorised substitution have been recognised in the apparent absence of any fiduciary duty that could engage the *FHR* principle or any other justification for a trustee-beneficiary relationship. The continuity between the reasoning in these cases and that in *Lipkin Gorman* and *Taylor v Plumer* shows that, even where it is

---

[591] [2014] UKSC 45, per Lord Neuberger at [34].

theoretically possible for the defendant to be holding assets on trust for the claimant, it is not this element in the situation that justifies the law's response. The fact of a change in one's rights against a third party, without one's consent, is enough.

1. Cases involving possession of cash and negotiable instruments

In *Calland v Loyd*,[592] the claimant's father-in-law died, bequeathing £373 to his daughter.[593] The claimant paid £300 of this money into his bank account, and left £73 in banknotes in the hands of his wife 'to take care of.'[594] His wife then took a £50 banknote and used it to open a bank account with the defendant bank in the name of her son. The claimant brought an action for money had and received against the bank, and succeeded on the basis that the contract it had supposedly made with the son was void, since he was twelve years old, and therefore the bank could not rely on the currency of money as a defence. In the course of argument, Alderson B raised the question whether the wife had paid the specific £50, taken from her husband, to the bank, asking:

> Is there any evidence here of the identity of the note? Is there anything to shew that the wife might not have changed it and got money for it, and paid in the money?[595]

Counsel replied that it made no difference if she had, and the judgment of the court takes it for granted that the husband was entitled to recover from the bank as recipient of his money, whether or not they had received the very note belonging to

---

[592] (1849) M & W 27, 151 ER 307.

[593] It seems that the money was left to the wife specifically, since the report refers to it as 'her share'. Under the doctrine of coverture as it then operated, however, title to the money, as personal property, would have vested in the husband rather than the wife: see 1 Bl Comm 442, and 2 Bl Comm 433.

[594] (1849) M & W 27, 28; 21 151 ER 307, 308.

[595] (1849) M & W 27, 28; 151 ER 307, 308.

the husband. The case is interesting, from this perspective, because title to the cash, or to any other personal property, could not possibly have been vested in the wife as trustee for her husband: as a married woman, she lacked the legal capacity to hold such rights.[596] Despite this lack of capacity, which precluded the existence of a trustee-beneficiary relationship, it would have been legally possible for her to be expressly granted a power to vary rights vested in her husband.

This is because a principal is able to empower his agent to enter into transactions that the agent lacks the capacity to enter into on his own behalf. For example, in the early case of *Grange v Tiving*,[597] a power to revoke a settlement of land and to declare new uses had been reserved by the settlor to any of the heirs of his body.[598] The heir, Mary, was a married woman of nineteen at the time that she purported to exercise this power, revoke the settlement and limit the land to new uses. Bridgeman CJ held that, though she would not have been able to dispose of any estate or interest in land in her own right, being both an infant and feme covert at the time, she was able to exercise the power of revocation as this was derived from the settlor who was under no such disability:

> [W]here an infant or feme covert is used but as an instrument or conduit pipe, by another who has no such disability ... the law looks upon him from whom that power or authority is derived, not upon the weakness of the person acting by it; and therefore an infant may, as an attorney, give livery upon a feoffment; so may a feme covert, though it

---

[596] Although counsel did try to argue, at 151 ER 307, 308-309, that she had some sort of moral claim to the money: 'This must undoubtedly have been the plaintiff's money when paid in by her, although it may be observed, that she was the meritorious cause of his becoming possessed of it, and would have been entitled to a settlement in equity.' Lord Abinger CJ seemed unimpressed by this argument, commenting at 309 that, if the bank's case succeeded, it would be 'a recipe for every woman who gets possession of her husband's money, to go and make a provision out of it for her minor children.'

[597] (1665) 124 ER 494.

[598] This was a common law power, made effective by the operation of the Statute of Uses.

be to her own husband.[599]

Similarly, in the case of the old common law power of the executor under a devise of land, the courts frequently reiterated that the purchaser from the executor was 'in by the devisor' so that the purchaser himself was considered to be the person to whom the land had been devised by the will.[600] On the same model, a monk, although incapable of either contracting or holding property rights, could nevertheless purchase goods on behalf of an abbot[601] and a married woman could purchase goods on behalf of her husband, vesting title to the goods in him and rendering him liable for the price to the vendor.[602]

In *Calland v Loyd*, therefore, it was possible that the wife was in possession of the cash as an agent for her husband even though she could not have held it as a trustee. If, before going to the bank, she had handed the £50 over to a third party, who gave her other banknotes in return, that third party might have been able to resist the husband's claims on the basis of her apparent authority.[603] In this sense, and on the particular facts of the case, she would have possessed the objective power to destroy her husband's title to the banknote in her capacity as his agent.

---

[599] (1665) 124 ER 494, 495.

[600] See, for example, *Wiseman v Baldwin* (1650) 74 ER 938, per Gawdy at 939: 'when the executors have sold, the vendee is in by the devisor and then it is no other than a devise to one in fee on condition of payment'.

[601] Pollock and Maitland, *A History of English Law Before the Time of Edward I* (2nd edn, Cambridge University Press, Cambridge 1968) 225.

[602] *Manby v Scott* (1663) 1 Lev 4, 83 ER 1065. In *Manby v Scott* itself, the husband had expressly forbidden the claimants to sell goods to his wife and the question, on which the court divided, was whether his obligation to supply her needs prevented him from denying his liability after the claimants had sold her necessities. It was accepted by all the judges that the debt would have arisen if he had authorised her to make the purchases on his behalf.

[603] *Debenham v Mellon* (1880) 6 App Cas 24.

However, even if she had simply stolen the money, a recipient from her might have had a good defence based on the currency of money. On the facts of *Calland v Loyd* itself, the problem was that she had purported to contract on behalf of her son who was a minor and unable to enforce the contract against the bank; as a result, it was held that the bank had not given good consideration. If it had done so – for example, if the son had been an adult who had authorised his mother to contract on his behalf – the husband's title to the cash would have been destroyed.[604] In this situation, the question becomes whether he could have traced from this lost title to the cash to the chose in action obtained in consideration for the transfer; that is, could he have asserted a right in respect of his son's bank account?

As was noted in chapter 4, a series of nineteenth century cases offer limited authority, and forceful dicta, in favour of a claim to the traceable proceeds of stolen money. In *Re Hulton*,[605] the bankrupt was a cashier employed by the claimant bank who had stolen fifteen £100 notes that were sent to his branch in Oldham by the head office in Manchester. He had used these notes[606] to buy shares in a gold mine from a stockbroker in London. On his bankruptcy, the claimants sought a declaration that the shares were 'the property' of the bank and an order that the trustee in bankruptcy deliver up the share certificates and 'other documents of title' to the bank. In the county court at Oldham, HHJ Jones refused to grant this relief, holding that the bank must come in as an ordinary creditor in the bankruptcy to recover its losses, but the

---

[604] 'There is no doubt, that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker[.]' (per Abinger CB at (1849) M & W 27, 31; 21 151 ER 307, 309).

[605] (1891) 8 Morr 69, 39 WR 303.

[606] The report says the notes received by the stockbroker were 'identical in amounts, dates and numbers to those sent to the bankrupt from the head office'.

decision was overturned by the Queen's Bench Division of the High Court on appeal. Counsel for the bank did argue that Hulton had received the money in his capacity as a servant of the bank and 'held them in a fiduciary relation', but Cave J did not comment on this aspect of the argument in his judgment, treating the money as simply stolen. He said:

> It is admitted that if the clerk had simply stolen the fifteen notes and retained them, the trustee must have been ordered to give them up; but it is said that since the notes were exchanged into shares, something was thereby effected so as to enable the trustee to keep the proceeds. In my opinion it is impossible to find any authority for such a contention.[607]

This argument obviously invokes the familiar fiction of persistence of rights through changes of subject matter. Setting the fiction aside, the reality is that something was effected by the exchange of the notes into shares: the London stockbrokers, who had received the notes and sold Hulton the shares in exchange, were likely to have gained an indefeasible title to the notes, leaving the bank with no remedy except its claims against Hulton. The judicial intuition in favour of tracing into the proceeds of stolen money, which does not appear in the case of stolen chattels that do not have the status of money, can be explained on the basis of this legal consequence. The *nemo dat* exception of the currency of money operates to deprive a claimant of his rights even where the person undertaking the transaction is a thief rather than a trustee or a fiduciary.

The difficult case[608] of *Banque Belge pour l'Etranger v Hambrouck*[609] is best

---

[607] (1891) 8 Morr 69, 39 WR 303.

[608] See Millett J's comments on the case at first instance in *Agip (Africa) v Jackson* [1990] Ch 265 at 287 (Ch), at 400: 'It is not easy to know what that case decided.'

understood within the context of this line of authority. In that case, Hambrouck had forged[610] the signature of his employer, who had an account with the claimant bank, on cheques payable to himself. The cheques were crossed cheques, meaning that they could not be directly exchanged for cash at the employer's bank but could only be collected via another bank.[611] Hambrouck, therefore, opened a new bank account with Farrow's Bank, who obtained the amount due from the claimants, through the clearing system,[612] and credited it to Hambrouck's account with them. The bank claimed that it could trace into the credit balance of this account, and its proceeds in the hands of the recipient for Hambrouck, and succeeded.

All three judges treated the clearing system as a mechanism under which the claimant bank had paid cash to Hambrouck directly. Thus, Atkin LJ spoke of the bank's void or voidable title to 'the cash which under the operations of the clearing house they must be taken to have paid to the collecting bank'.[613] Scutton LJ did not mention the existence of Farrow's Bank as the collector of the cheque; in his version of the facts, Hambrouck first received money from the claimant bank *and then* paid it into his account with Farrow's.[614] Bankes LJ mentioned the process by which Hambrouck's account came to credited with the amount debited from his employer's account with the claimants, but also treated the bank as having dealt directly with Hambrouck himself, receiving the cheques from him and transferring possession to

---

[609] [1921] 1 KB 321.

[610] [1921] 1 KB 321, per Atkin LJ at 331.

[611] Bills of Exchange Act 1882, s 77.

[612] According to Atkin LJ, it did not deal directly with the claimant bank but collected via the London and South Western Bank, who then collected from the claimants.

[613] [1921] 1 KB 321, 332.

[614] 'The defence is that ... payment into Hambrouck's bank, and his drawing out other money in satisfaction, had changed its identity': [1921] 1 KB 321, 329-330.

the money to him in consideration for the cheques authorising them to debit their customer's account.[615]

The case must, therefore, be looked at from two perspectives: first, on the actual facts and, secondly, as a judicial account of the law's response to a direct transfer of title to money, or possession of money, under a void or voidable disposition. In terms of the effect of Hambrouck's actual transactions, it seems that what he did, via his agent, Farrow's Bank,[616] was to bring about a change in the legal relations of the claimant bank with the London and Southwest Bank, and perhaps other banks, within the clearing system. Hambrouck obtained his own rights against Farrow's in consideration for authorising them to collect on the cheque, which transaction was effective in varying the claimant's rights within the clearing system. This is a somewhat tenuous basis on which to hold that the claimants had a right in respect of Hambrouck's bank account, however, as the possibility of tracing through the adjustments of rights and duties in the clearing system in this way at common law was rejected by the Court of Appeal in *Agip (Africa) v Jackson*.[617] But it is difficult to see on what other basis they could have made a claim in respect of the account, since there is nothing else that Hambrouck did which could qualify as something he did to them as opposed to his employer, from whom he took the physical cheques and the credit balance of whose account he succeeded in reducing.

---

[615] 'Whatever the position of the plaintiff Bank may have been in relation to their customer ... in the event of the Bank being unable to recover the moneys which they had paid out when the cheques were presented to them for payment, it is I think clear that the moneys which were so paid out were the moneys of the plaintiff Bank which they were entitled to recover if they could': [1921] 1 KB 321, 324-325.

[616] A bank collecting on a cheque is an agent for its customer: *Capital and Counties Bank Ltd v Gordon* [1903] AC 240.

[617] [1991] Ch 547.

The alternative seems to be the *Re Hulton* model of the facts, in which Hambrouck is seen as someone who has wrongfully possessed himself of cash belonging to the bank and used it to buy a new chose in action, like a bank account or shares in a gold mine. If the case is understood in this way, in the light of the Court of Appeal's invocation of cash payments, the issues look clearer. On Hambrouck's payment of cash to Farrow's, the bank would have lost whatever title it had to that cash because Farrow's, not having any knowledge of Hambrouck's fraud, would have received it as currency. The strength of the analogy, therefore, depends on the judges seeing Hambrouck's transactions as effective in altering the legal position of the claimant as against Farrow's bank or someone else: the objection to the idea that 'their money' 'lost its identity' on payment to Farrow's seems to depend on the idea that some right of theirs was lost or altered when the payment to Farrow's was made.

2. Other nemo dat *exceptions*

Marsh v Keating[618] is another difficult case from the perspective of defining what it is, exactly, that the claimant says has been done to her by the defendant in order to justify her claim based on his transactions. The claimant, Mrs Keating, was entitled to stock in the Bank of England; that is, the Bank owed her £12,000 in 3 per cent annuities. She also held a bank account with the defendants' firm, Marsh & Co, into which the dividends due to her from the Bank of England were always paid. One of the other partners in the firm (Henry Fauntleroy) used a forged power of attorney to purportedly authorise his stockbroker to transfer some of her rights in the stock to a third party (a Mr Tarbutt). In reliance on that forged power, an entry was made in the

[618] (1834) 1 Bing (NC) 198, 131 ER 1094.

'transfer-book' of the Bank of England, stating that the claimant transferred £9,000 of her share in the stock to Tarbutt and, in reliance on this entry in the transfer-book, that sum was debited from her account and credited to his account in the 'ledger book' at the Bank. Tarbutt paid the purchase price to the stockbroker who, having deducted his usual commission, gave a cheque payable to the defendants to Fauntleroy, who paid it into the defendants' bank account. Tarbutt then entered into many transactions with other parties by which shares in the same stock were transferred to him and by him. As a result of these transactions, according to the special verdict in the case,

> ...in the books kept by the said Governor and Company [of the Bank of England] the said sum of £9000 reduced 3 per cent annuities had become blended and mixed with other stocks standing in the said ledgers in the said W. B. Tarbutt's name... [and] it was not possible to distinguish the account to the credit of which the said 9000l reduced 3 per cent annuities stood.[619]

After his various forgeries were discovered, Fauntleroy was arrested, tried and executed;[620] the remaining partners of Marsh & Co, the defendants, became bankrupt. The claimant, having discovered the forgery, informed the Bank of England but did not seek to have criminal proceedings brought in respect of that forgery. After the bankruptcy, she wrote to the Bank of England asking for her stock to be replaced. The Bank agreed to replace the stock and pay the dividends that would have been due on it if it had not been transferred, provided that she agreed to attempt a recovery of the proceeds of the sale of her stock in the defendants' bankruptcy. Having received the dividends from the Bank, she duly claimed the value of the cheque as money had and received by the defendants to her use and succeeded in this claim.

---

[619] (1834) 1 Bing 198, 202; 131 ER 1094, 1096.

[620] He was the last person to be executed in England for forgery: see J Edelman, 'Marsh v Keating' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (OUP 2006) 97, 98.

The problem, from the perspective of understanding the power-liability relationship between Henry Fauntleroy and Mrs Keating, is that he seems not to have done anything to her rights. In *Davies v Bank of England*,[621] the Court of Common Pleas had held that a purported transfer of stock in the Bank of England books, under a forged power of attorney, did not affect the Bank's liability to the holder of that stock: the claimant in that case, whose stock had been purportedly transferred to a third party, had sued the Bank of England for dividends due on the stock and had succeeded in the claim. If this is right, then it seems that Mrs Keating still had her right to dividends against the Bank of England and Henry Fauntleroy's supposed transfer of the stock to Tarbutt was a nullity from her perspective. However, Park J emphasised that this did not mean that the transaction had no effect on her at all:

> If the Plaintiff below... were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact: although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the Bank to purchase, de novo, in her name, an equal quantity of the same stock.[622]

The reason for this was that the Bank of England could not simply deny that Fauntleroy's transfer to Tarbutt and Tarbutt's subsequent transactions with purchasers had been effective. As Park J said, Tarbutt and those who had purchased from him had, as against the Bank of England, 'the right to insist upon the payment of the dividend.'[623] This right arose simply by virtue of the entry of Tarbutt's name in the Bank's books, which estopped the Bank from denying his title to the stock. In *Davis v Bank of England*, Best CJ expressly said that the decision that the original holder of

---

[621] (1824) 2 Bing 391, 130 ER 357.

[622] (1834) 1 Bing (NC) 198, 215; 131 ER 1094, 1100.

[623] ibid.

the stock could sue for the dividend did not mean that the Bank of England could deny the right of the purchaser of the stock to also be paid a dividend:

> If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners.[624]

It is because the Bank of England could not simply cancel Fauntleroy's transaction with Tarbutt and all Tarbutt's transactions with third parties that there was any practical difficulty involved in Mrs Keating asserting her rights, and that such an assertion of rights would ultimately have involved the Bank altering its books to add to its own liabilities by purchasing stock in Mrs Keating's name.

This leaves us with a number of possible interpretations of *Marsh v Keating* as a claim based on unauthorised substitution. First, we might take Park J's statement to mean that, where A's transaction renders it very difficult for B to exercise his rights, this is equivalent to depriving B of those rights and entitles B to claim the traceable proceeds of A's transaction. This is a very broad proposition, the scope of which is difficult to define, and which is unsupported by other authority. Alternatively, the facts of *Marsh v Keating*, understood in the context of the surrounding litigation, are susceptible to two other possible explanations.

First, the argument that Mrs Keating still had her stock, after the transfer to Tarbutt, was not absolutely clear as a matter of authority even at the date of *Marsh v*

---

[624] *Davis v Bank of England* (1824) 2 Bing 391, 407-408, 130 ER 357, 363.

Keating. The judgment of the Court of Common Pleas in *Davis v Bank of England* had been reversed two years later, on a writ of error,[625] on the basis that the claimant could not have his dividends because he had not pleaded that the Government had issued any dividends on his stock. In *Marsh v Keating*, counsel argued that this decision must have meant that Davis did not own the stock after all:

> How could the stock, which was as it were the tree, be treated differently from the dividends, which was the fruit?[626]

In *Stracy v Bank of England*,[627] another case arising out of Fauntleroy's forgeries, the claimants had attempted to sell the stock they still, supposedly, held after Fauntleroy's forged transfer of their stock to the third party. The Bank of England refused to alter its books to reflect this sale and the claimants brought an action seeking damages for the Bank's breach of its duty to make such a transfer at the request of a holder of the stock. Like Mrs Keating, the claimants had entered into an agreement with the Bank under which it promised to replace their stock provided that they came in as creditors in the bankruptcy of the defendant firm and then assigned their rights to the Bank. They had failed to do this, but counsel argued that this made no difference to their right to assign the stock, which, according to *Davis v Bank of England*, they still had. It was also argued that the contract was not binding in any case, because the Bank of England's promise to replace the claimant's stock was not good consideration: if, as was contended, the claimants still had their original stock, unaffected by the fraudulent transfer, the Bank's promise was of no benefit to

---

[625] (1826) 5 & C 185, 108 ER 69.

[626] This remark is not reported in the Bingham report, but appears in the Clark & Finelly report of the arguments in *Marsh v Keating*: (1834) 2 Cl & F 250, 277; 6 ER 1149, 1159.

[627] (1830) 6 Bing 754.

them. The court, without taking a view on the correctness of *Davis*, rejected this argument:

> It was at that time a question of great nicety and difficulty, whether the Bank was by law liable to make good this loss: so that the engagement of the Bank to replace this stock without any litigation on their part, was of itself a very valuable and important concession.

If this is right, it seems that Fauntleroy did significantly alter Mrs Keating's legal position: the standard incidents of her original right, such as the right to recover dividends and to sell the stock held in her name, were no longer enforceable as of right against the Bank. Although she did receive dividends, this was after she had promised to prove in the insolvency of the defendant firm and this suggests that the Bank no longer acknowledged that she was entitled to these dividends as of right.

The other argument is that, on the realities of the case, Mrs Keating was actually suing as a proxy for the Bank of England and the decision of the court in her favour could be explained as a response to Fauntleroy's exercise of a power to radically alter the legal position of the Bank of England by multiplying its liabilities. The Bank was unable to unravel the transactions that had taken place, and obliged to pay dividends to all the purchasers whose names it had entered in its books in reliance on Fauntleroy's forged powers of attorney; in addition, if *Davis v Bank of England* was right, it was obliged to pay the equivalent dividends to all the defrauded original holders of stock. It is plausible to argue that the decision in *Marsh v Keating* was ultimately aimed at allowing the Bank to recover some of its losses, given that Mrs Keating had agreed to assign her claims against the bankrupt firm to it. If so, the case is unique on its facts and is difficult to generalise from.

On either view, however, an important element of the situation in *Marsh v*

Keating arises out of the fact that Fauntleroy succeeded in persuading the Bank of England to change what its books said. It was not the forged power of attorney, or the supposed contract of sale between Mrs Keating and Tarbutt, which gave Tarbutt his rights: rather, he gained those rights against the Bank of England, and perhaps against Mrs Keating, because the bank had 'registered [him] as owner of the stocks' in 'the books which the law require[d] them to keep'. The role of such a public registration system, in allowing fraudsters to alter rights by acts which would otherwise constitute nullities, explains the decision in *Armstrong DLW GmBH v Winnington Networks Ltd.*[628]

That case concerned European Union Allowances (EUAs), which are essentially carbon emission licenses that permit the holder to emit a specified amount of carbon dioxide within a specified period without incurring a penalty.[629] Under the scheme of the Directive, each member state has a national registry of EUAs, and individuals and companies may open accounts in this registry and acquire and trade in EUAs within the system. Account-holders are able, via nominated individuals, to alter the register themselves; the national registry issues usernames and passwords that allow access to the system, and, subject to additional security requirements that vary across member states, anyone with the relevant access may alter the register. A fraudster, purporting to represent a company called Zen Holdings Ltd, gained access to the claimant company's username and password via an email fraud. They then used these details to transfer 21,000 EUAs from the claimant's account to that of the defendant, in consideration for a payment by the defendant of €267,645. On the same

---

[628] [2012] EWHC 10 (Ch).

[629] Established under EU law, Directive 2003/87/EC.

day, the defendants transferred these EUAs[630] to a third party purchaser, and obtained €272,500 as their price. The claimants sought to recover the money from the defendants, and succeeded on the basis that the money represented the traceable proceeds of their EUAs. The power-liability relationship between claimant and defendant can be explained on the basis of a bona fide purchaser defence available to the purchaser from Winnington. Stephen Morris QC said, obiter, that such a defence was generally available where the claimant was asserting his subsisting legal rights in an intangible asset against a third party recipient.[631] The category of intangible assets is a disputed one, however, and the power-liability relationship between the parties on the particular facts may be better explained by features of the EUA system and its rules governing transferability. Article 37(4) of the Regulations provide that

> A purchaser and holder of an allowance or Kyoto unit acting in good faith shall acquire title to an allowance or Kyoto unit free of any defects in the title of the transferor.[632]

The fraudster who gained access to the claimant's passwords was, therefore, in a position to divest the claimant of its EUAs and thus to vary its legal position against the state, by reducing the amount of carbon it could emit without penalty. In fact, because the defendants were not in good faith, the transaction did not have the effect of destroying the claimant's title to the EUAs; the subsequent sale of the EUAs by the defendant to a third party would be likely to have had this effect. However, Stephen Morris QC held that the claimants could trace through the transactions of the defendants because they were recipients of trust property, rather than because they

---

[630] It was known that these were the same EUAs, because each one had a unique reference number incorporating a reference to the national registry of origin.

[631] [2012] EWHC 10 (Ch), at [94].

[632] EU Regulation No 1193/2011.

had this power to vary the claimants's rights as against the state.

He held that, prior to the transfer of the EUAs from claimant to defendant, the fraudster had become a constructive trustee. This analysis raises the problem of identifying the subject matter of the trust. It could not have been the EUAs themselves, since these remained registered in the name of the claimants until the fraudster executed a direct transfer to the defendants; there was no moment in time when the EUAs were vested in the fraudster himself. Instead, Stephen Morris QC said that the fraudster held his *control* over the EUAs on trust for the claimants:

> Some time between 0745 and 1130 on 28 January 2010, the third party fraudster gained de facto ministerial control over the EUAs lying in Armstrong's account. ... To the extent that the fraudster had obtained ministerial control, he was to be regarded as, at least, in possession of the EUAs. He was in a position such that he could offer to sell them to strangers, such as Winnington, and subsequently effect their transfer away.[633]

It is unclear what it means to be a trustee of a de facto ministerial control over the rights of another person. Where the person with the correlative liability and the beneficiary under the trust are different people, it is possible to understand this structure in the orthodox terminology of the trust: the trustee has a power over X, and he owes Y a duty to exercise the power and alter X's legal position in accordance with Y's best interests. However, it is not clear what this type of analysis would add in a situation where X and Y are the same person: in such a case, the distinctive double layer of legal relations found in the case of the trust is missing, and there is a single legal relationship involving both a power and a duty not to exercise that power. This structure is itself sufficient to give rise to claims based on unauthorised substitution,

---

[633] [2012] EWHC 10 (Ch), [276].

when the power is wrongfully exercised, and an invocation of the trust concept should not be necessary in these circumstances.

2. Substitutions and other events affecting vested rights

The argument above might suggest that A has a power capable of generating claims based on unauthorised substitution whenever his act has the potential to be the immediate cause of B's loss of rights as against C. Such a definition of a power would capture, for example, any situation where B's rights are contingent on the continuation of some physical state of affairs and, unluckily for B, A has the factual ability to alter that state of affairs. For example, anyone who physically destroys a thing will, inevitably, have destroyed the vested rights of the person who previously had title to the thing. If A steals B's cake, and eats it, B will no longer be in a position to assert that C owes him a duty of non-interference with that particular cake. For all practical purposes, the cake has ceased to exist and so no one can owe B the duties they owed him before its destruction, which duties were shaped by the physical characteristics of the cake. As soon as a thing ceases to exist in its original form, 'the title to [it] simply disappear[s].'[634]

In *Borden (UK) Ltd v Scottish Timber Products*,[635] the claimants had contracted to sell resin to the defendant company under a contract which included a retention of title clause providing that title to the resin would not pass to the defendants until the purchase price had been paid in full. In the course of the defendant's manufacturing operations, the resin was mixed with various other things

---

[634] *Borden (UK) Ltd v Scottish Timber Products* [1981] Ch 25, per Bridge LJ at 35.

[635] ibid.

in an irreversible process that led its incorporation within the chipboard manufactured by the defendants. The claimants argued that they could trace from their title to the resin into the chipboard and any proceeds of sale of the chipboard. One aspect of their argument was that there was an analogy between unauthorised substitution and what the defendants had done, such that they were entitled to trace the value of their lost resin into the chipboard. Bridge LJ accepted, in line with the long history of such analogies in English law, that there is an analogy between tracing and physical mixture but denied that there was any such analogy between tracing and a situation where the claimant's thing was simply destroyed:

> I can well see the force of that argument if the goods mixed are all of a homogenous character. .... But a mixture of heterogeneous goods in a manufacturing process wherein the original goods lose their character and what emerges is a wholly new product, is in my judgment something entirely different.[636]

It might be argued that a person who turns someone else's thing into a wholly new product, without his consent, is exercising a power over that person in destroying her rights without her consent. There is limited authority to suggest, however, that the owner who has lost her title in this way can claim the product, on the basis that it represents a right obtained in consideration for the destruction of her vested rights. According to Moore-Bick J in *Glencore International AG v Metro Trading International Inc*,[637] the claimant in such a case must show that her thing has *not* been so fundamentally altered as to extinguish her title; in such a situation, she can characterise what the defendant has done as a mixture and make claims in respect of

---

[636] *Borden (UK) Ltd v Scottish Timber Products* [1981] Ch 25, per Bridge LJ at 35.

[637] [2001] 1 All ER (Comm) 103.

the product. But:

> There are, of course, limits to the extent to which it is possible to identify the original materials in the new commodity ... where the goods can no longer be regarded as remaining in existence as a substantial component of the product with the result that property in them must be considered to have passed to the [manufacturer]...by accession.[638]

The implication is that there is something fundamentally different about the kind of legal power presupposed by a substitution, where it is the very fact that the claimant has been able to alter the legal position of the defendant that justifies the law's response. There are two important differences, which illustrate the normatively distinct character of the kind of powers that are at issue in cases involving substitution as opposed to other acts that have consequences for the rights of others.

First, taking the example of A destroying B's title to his cake by eating it, there is a distinction arising from the fact that A's general ability to eat cake is not conferred on him by the legal system, but would exist even in the absence of any legal rules recognising and regulating titles to cakes. The fact that A's decision to exercise that ability and eat B's cake has a destructive effect on B's legal rights, on the other hand, is a consequence of a choice made by the legal system but cannot be thought of as a freestanding choice in itself: rather, it is a logical corollary of the decision to allow B to enjoy rights that are contingent on the existence of physical objects in the world in the first place. If rights of this kind are to exist at all, their content will depend on features of the physical universe that the legal system cannot determine but can only respond to. The only way to prevent B's losing his title to a piece of cake, in

---

[638] [2001] 1 All ER (Comm) 103, [179].

the face of A's decision to eat the relevant piece, is to reject the possibility that anyone could have such a title in the first place.

By contrast, it is likely to be both logically and practically possible for B to recover his cake from a person, C, who purchased it from a bakery run by A. It is conceptually possible for B to enforce his original right to the cake against C in the circumstances: it makes as much sense to say that C must refrain from damaging or destroying B's cake as it did prior to the sale. It is also practically possible for this right to be enforced, if the cake can actually be found and identified as the very one wrongfully sold by B. If the law is nevertheless to refuse to allow B to enforce that right against C, on the grounds that A was a mercantile agent who sold the cake in the ordinary course of his business,[639] this is a positive choice to depart from the logic of B's original right. In this scenario, the relation between B and A is constituted by a positive choice by the legal system rather than by the inevitable logic of B's original rights.

Secondly, the two scenarios attribute a different significance to A's agency as a person. If, without meaning to, I accidentally destroy my neighbour's cake – for example, if I step on and smash it without seeing it there – the fact that I had no intention of destroying it (let alone doing anything to my neighbour's title to it) will have no bearing on the outcome. The destructive effect on her title would happen automatically in response to any chain of events leading to the destruction of the cake, even if no person were involved at all and the cake had been eaten by a cat or destroyed in an earthquake.

---

[639] Factors Act 1889, s 2.

By contrast, whether a *nemo dat* exception operates in a given situation will normally depend on the character of the transaction purportedly engaging the exception: the status of a recipient as a 'purchaser' who has given 'value' ultimately depends on exactly what has been agreed between that purchaser and the person he is dealing with. If the transaction is void,[640] or was never intended to involve any transfer of legal rights,[641] it will not be effective in conferring a defence against the claims of the original right-holder. It is impossible to determine whether a transaction has these characteristics without reference to the intentions of the parties to it, in accordance with the ordinary rules for the interpretation of contracts. While the donee of the power need not have any conscious intention of depriving the object of her rights, he must have an objectively discernable intention to dispose of his own rights in exchange for some consideration supplied by his counterparty. Absent such an intention, it would not be possible to characterise the transaction as a disposition for value in favour of the purchaser.

This characteristic of the powers at issue in the case law governing claims based on unauthorised substitution can be explained by reference to Raz's account of legal powers as 'normatively, not causally, effective'.[642] In his view, legal powers do

---

[640] eg *Clark v Shee and Johnson* (1774) 1 Cowp 197, 98 ER 1041; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[641] eg *Worcester Works Finance Ltd v Cooden* [1972] 1 QB 210, a case concerned with the Sale of Goods Act 1893, s 25, the predecessor of s 24 of the 1979 Act. In holding that there had been a genuine 'disposition' within the meaning of the section, engaging the rule conferring title on the purchaser from the seller in possession, the court relied on the intentions of the seller as objectively understood by the purchaser: 'It is perfectly clear that at that time, when Mr Gillingham collected the car, it was understood that if they retook the car, the defendants would not attempt to pursue Griffiths in regard to the cheque; and it was on this basis that Griffiths cheerfully handed over the key and probably the log book as well.' (per Phillimore LJ, at 219).

[642] J Raz, 'Voluntary Obligations and Normative Powers' (1972) 42 Proceedings of the Aristotelian Society 79, 80.

not include all abilities to influence events in the world, such that some event takes place that the law recognises as effecting a change in legal relations. A legal power must be the ability to act such that *one's own act* is the event recognised by law as effecting the legal change. The distinction is illustrated by the difference between a factual ability to persuade A to make a gift of A's property rights to B and the legal power to convey one's own property rights to B.[643] Raz suggests that we can define the exercise of legal powers, as distinct from other acts that bring about a change in relations, on the basis that

> An action is the exercise of a legal power only if one of the law's reasons for acknowledging that it effects a legal change is that it is of a type such that it is reasonable to expect that actions of that type will, if they are recognised to have certain legal consequences, standardly be performed only if the person concerned wants to secure these legal consequences.[644]

However, paradoxically, he also argues that a legal power is not necessarily a sub-category of the class of 'rights' because there are situations in which one may have a power to act without also having a liberty to exercise the power at will (since one has a duty not to exercise the power in certain circumstances or unless certain conditions are met). Company directors and agents are the examples that he suggests; he also presents a thief, in a legal system that recognises market overt,[645] as a person

---

[643] Raz (n 642 above): 'I may be able to bring it about that my wife will make a gift of all her property to me, but it is she not I, who has the power to make a gift of her property.' The law may take account of the means of persuasion employed by the donee under these circumstances, in order to decide whether the donor has properly exercised her power to make the gift or if her exercise of that power is vitiated by undue influence or duress, but the ability to persuade is not itself a legal power although, at its boundaries, its consequences are regulated by law.

[644] Raz (n 642) above) 81.

[645] By the common law doctrine of market overt (codified in statutory form in the Sale of Goods Act 1893, s 22) the buyer of a stolen chattel in an open market, if purchased in accordance with the usages of that market, obtained a good title to the chattel provided that he was a good faith purchaser without notice of the defect in his vendor's title. The doctrine was abolished in England by the Sale of Goods

who 'has the power, but not the right, to sell stolen property in the open market.'[646] His argument is that people in this position are undoubtedly power-holders but their powers are not conferred upon them by the legal system in their own interest; as such, they are not properly characterised as rights since the normative guidance which they provide (to their holders and to duty-bearers within the legal system) has nothing to do with the protection of the interests of the power-holder.[647]

Even if we set aside Raz's claim that rights are best defined in terms of the interests they protect, as opposed to the choices they confer,[648] these examples still pose a challenge to any account of legal powers that defines them in terms of the legal system's reasons for conferring them on a person. If the circumstances are such that the purported power-holder is not legally entitled to exercise a power for his own benefit (like the agent or the company director) or is not legally entitled to exercise it at all (like the thief in market overt), then in what sense can it true to say that he nevertheless has that power? The answer seems to be that even a person who has a legal duty *not* to exercise a power can, without contradiction, be said to have the power because the law recognises his intentional act as a valid source of change in the legal position of others.

3. Conclusions on the content of the power

Amendment Act 1994, s 1. For a historical survey of its operation in England, see P M Smith, 'Valediction to Market Overt' (1997) The American Journal of Legal History 225.

[646] Raz (n 642 above) 82.

[647] For Raz's general theory of rights as protective of interests, see J Raz, 'On the Nature of Rights' (1984) 93 Mind 194.

[648] For the debate between 'will' and 'interest' theorists of legal rights, see M Kramer, N Simmonds, and H Steiner, *A Debate over Rights* (Oxford University Press, Oxford 1998).

As the case law demonstrates, English law treats certain acts by a defendant as a 'substitution' where it entails an alteration in the vested rights of the claimant. Such an alteration may occur in equity, when it may be said that the subject matter of the claimant's rights have been transferred, or at law, when it may be said that the claimant's rights against a stranger have been directly varied. This distinction is not normatively significant in explaining the case law. However, it is a key characteristic of both common law and equitable cases that the control exerted by the defendant reflects control over the rights of the claimant, exercised in circumstances where the law takes the defendant's intentions seriously as a source of legal change. In this sense, therefore, we could say that the key characteristic of the powers that generate claims based on substitution is that they are transactional. The question that then arises is why one ought to take the particular contract entered into by a wrongdoer seriously, as a source of change in the legal position of others.

The primary reason, which seems to operate across the broad range of situations where these powers exist, is the protection of strangers to the relationship of claimant and defendant, especially purchasers for value. It is from the perspective of the stranger dealing with the wrongdoer, in a market context, that the objectively discernable intention of the donee of the power matters and is effective in depriving the claimant of rights. The donee of such a power, therefore, possesses a capacity to make legally significant decisions affecting the legal rights of the object for reasons

that are external to the relationship between the donee and the object.[649]

B. Content of the duty

1. The link between power and duty

However, it seems that a donee may hold a transactional power of this kind, which enables him to deprive the claimant of his rights against a third party, in circumstances where he owes the claimant a duty of some kind, and yet no claim based on unauthorised substitution is available.

For example, in *Kirkham v Peel*,[650] it was plausible to argue that the claimant had transferred possession of his goods to the defendants as his agents, authorising them to sell the goods and remit the money obtained to him. If so, they possessed a common law power to deprive him of his title to those goods by selling them. In addition, they owed him a duty to account to him for their transactions, which they breached by adding false items to the accounts that they remitted to him. Nevertheless, as noted in chapter 4, the claim to trace the proceeds of the goods that they had sold did not succeed. Jessel MR denied the claim on the basis that the defendants' duty, which they had breached, had nothing to do with the sales that the claimant authorised them to carry out. They were not in the same possession as Hallett, or a factor 'who sells single articles and whose duty it is to remit the necessary proceeds to his principal.'[651] As this reference to 'single articles' suggests,

---

[649] They may be justified by elements of the relationship between the object and the third party, as in cases where the donee's power exists because the object's conduct, from the perspective of the third party, estops her from denying the donee's capacity to bind her. This does not, however, alter the paradoxical character of the situation as between object and donee.

[650] (1880) 43 LT 171. The facts are discussed at 188-189 above.

[651] See 195 above.

the issue seems to relate to certainty of subject-matter and a duty to segregate: in both *Henry v Hammond*[652] and *King v Hutton,*[653] the claim failed because of the absence of any obligation on the part of the agent or stockbroker to segregate the proceeds of the transactions affecting his claimant's rights.

In addition, every equitable interest in land is susceptible to a *nemo dat* defence under the Land Registration Act 2002 (registered land)[654] the Land Charges Act 1972 (some equitable interests in unregistered land),[655] and the doctrine of notice (equitable interests in unregistered land that are not registrable land charges). In the context of registered land, certain legal interests, such as some easements arising by prescription or implication,[656] are also subject to the same defences. In a sense, then, it might be said that every registered proprietor of title to land has a power to destroy the rights of the holders of these lesser interests on a conveyance. However, it is inherently implausible to suppose that, when A sells his land to B and a restrictive covenant over the land held by C ceases to be enforceable because B has a defence, C can demand a share of the purchase price of the land on the basis that this purchase price was obtained in consideration for a transaction destructive of C's rights. The simple answer to such an argument is that selling land affected by a restrictive covenant is not, itself, a breach of the covenant: the duty owed by the landowner to the holder of the covenant concerns his use of the physical land but not his powers of disposition as a landowner. In other words, he is under no obligation to take the

---

[652] [1913] 2 KB 515.

[653] [1900] 2 QB 504.

[654] Land Registration Act 2002, s 29.

[655] Land Charges Act 1972, s 4.

[656] Land Registration Act 2002, sch 3, para 3.

holder of the restrictive covenant into account at all when he is transferring or assigning his rights, even when the transfer or assignment has a destructive effect on C.

If we compare this example to cases like *Kirkham v Peel*, the necessity of the link between power and duty becomes clear: claims based on unauthorised substitution can arise when the defendant holds a power to vary the rights of the claimant against a third party *and* owes the claimant a duty as to his decision to exercise that very power. In *Kirkham v Peel*, the agents had the power to sell the principal's goods and also, separately, had a duty to pay him an abstract amount of money equivalent to the proceeds of sale of the goods. They did not owe him a duty to account for the proceeds of each individual sale of his goods, ie each individual exercise of their power to vary his rights. Like the landowner bound by a restrictive covenant that could be extinguished by a transfer, they held a power over, and owed a duty to, the same person but this was not enough to entitle him to claim the proceeds of their exercise of power when they breached the unrelated duty.

2. The requirements imposed by the duty

The idea of a duty that affects the exercise of a particular power is often linked to the idea of fiduciary relationship.[657] Fiduciary relationships, in turn, are often associated with certain paradigmatic obligations owed by trustees and agents, which include a duty not to profit from one's position as the relevant power-holder. However, the fact that the donee of a power may have a liberty to exercise that power for his own self-interest, and to profit from his position as power-holder, is no obstacle to claiming the

[657] eg P Miller 'Justifying Fiduciary Duties' (2013) McGill Law Journal 58;

proceeds of his transactions when he exercises the power in breach of some other duty concerning when or if he exercises it the power.

In *ex parte Kingston*,[658] for example, the defendant was a county treasurer, a statutory office that authorised him to receive public money for various purposes including the payment of the local police. He opened separate bank accounts for the purpose of receiving this money and using it for the public purposes, but then began to draw on one of the accounts in order to make payments into his personal account, which was held at the same bank. He became overdrawn on his personal bank account, partly as a result of restoring the credit balance of the accounts he held in his public capacity to what they ought to have been, and eventually became bankrupt. His banker sought to appropriate the credit balance of all his accounts, including the ones labelled public, to pay off the indebtedness on the overdrawn personal account but it was argued that the public money could be traced into the various accounts and they were, therefore, held on trust for the county. One of the arguments made by counsel for the bank was that Kingston could not be a trustee or a fiduciary, because he was free to profit from his position as a public official. Mellish LJ accepted that Kingston did not owe any duty not to make a profit out of his office, but held that this made no difference to the claim based on unauthorised substitution:

> As regards the question whether these are trust moneys or not, it really is quite impossible to avoid seeing that they are ... and I do not think that the mere circumstance of the treasurer being allowed to make a profit from them is at all a conclusive argument to the contrary. When these old Acts were passed, it was always considered that the obligation was only to account for the actual sums received, and the rule which the Court of Chancery applies to ordinary private trusts, that a trustee shall not make a profit of his office, was not considered

---

[658] (1871) LR 6 Ch App 632.

applicable to public trusts of this nature.[659]

The obligation to account for the actual transactions undertaken, rather than to pay an abstract sum of money or perform some other duty, is central to the claim based on unauthorised substitution. The duty to account for what has been done using the claimant's rights extends to cases where the donee of the power should not have done anything at all, as where he is a recipient under a contract that has been rescinded in equity,[660] or a thief of cash. A mortgagee is obliged to account to the mortgagor for the surplus proceeds obtained in the exercise of its power of sale,[661] and the same is true for a pledgee.[662] A mortgagor is entitled to acquire a security over rights obtained by a mortgagor in consideration for transactions that affect or destroy its original security.[663] These are duties that vary considerably in their content, in terms of the standard of concern for the interests of the claimant that they mandate, but they share the common characteristic of being particular to a specific power to deal with a third person in a manner that varies the rights of the claimant. It seems, therefore, that it is a duty that is linked with a power that is required for the claim to be available; the actual content of the duty, while relevant for many purposes, has no bearing on whether the claimant is entitled to trace through exercises of a power of this kind undertaken in breach of duty.

III. THE 'STEWARDSHIP OF ASSETS' GENERALISATION

As has been noted, the language surrounding the entitlement to claims based on

---

[659] (1871) LR 6 Ch App 632, 639.

[660] *El Ajou v Dollar Land Holdings (No 1)* [1993] 3 All ER 717 (Ch).

[661] Law of Property Act 1925, s 105.

[662] *Mathew v T M Sutton Ltd* [1994] 1 WLR 1455.

[663] *Buhr v Barclays Bank* [2001] EWCA Civ 1223.

unauthorised substitution has oscillated between the language of property – proprietary base, beneficial ownership, title – and the language of fiduciary obligation. Given the characteristics of the legal relations that emerge from this case law, the appeal of both concepts is clear.

The power held by the defendant in these cases is always a power to alter the claimant's rights as against third person, by an act that deprives her of rights that are inherently capable of being assigned or transferred to such a third person. As has been explained, the characteristic of assignability is fundamental to the concept of property, and relates to conceptions of property that treat it as synonymous with wealth. When a defendant deprives the claimant of her shares, or the credit balance of her bank account, what the claimant has lost is her control over the future assignment of these rights as well as rights of immediate enjoyment in respect of them. Some rights, like rights to money, are less valuable from the perspective of immediate enjoyment than they are from the perspective of their fungibility with other things. With rare exceptions,[664] the primary advantage of holding title to a banknote or a pound coin is the ability to determine to whom it is transferred and in exchange for what. The language of property can, therefore, readily be used to describe the right of the claimant that is interfered with by her loss of control over the transfer of her rights, and that is vindicated by the availability of the claim based on unauthorised substitution. However, the language of 'assets' arguably better captures this element of the relationship, since it captures the dimension of assignable wealth while excluding rights, such as common law titles to chattels other than money, which the law does not protect in this way.

---

[664] eg *Moss v Hancock* [1899] 2 QB 111.

Similarly, the concept of a fiduciary duty is closely tied to the idea of a duty linked to power. Many fiduciary duties arise out of situations involving an imbalance of power between principal and fiduciary and share the characteristic of intertwining specific powers and responsibilities with duties as to their exercise. However, as has been explained, the concept of fiduciary duty also implies that the duty governing the exercise of the power must be one of fiduciary loyalty, including a duty not to profit and to avoid conflicts. 'Stewardship' is proposed instead because it captures the key idea of a power that is coupled with a duty specific to the exercise of the power, while excluding the specific connotations of disinterested loyalty that are linked to the term 'fiduciary'.

PART III – CONCLUSIONS

6. CONCLUSIONS AND IMPLICATIONS

It has been argued that the legal discourse surrounding claims contingent on tracing involves a certain oversupply of concepts. The judges have explained what they are doing, in these cases, by reference to metaphors of persistence and transformation, by analogy with ratification and physical mixture, and by reference to legal relations – property, fiduciary duty – that do not precisely match up to the actual facts of the cases before them. I have suggested that these various metaphors, analogies, and generalisations, although imprecise in some degree, reflect a set of moral concerns with defendant autonomy on the one hand and the claimant's vulnerability to a loss of rights on the other. It has also been argued that the concept of a relationship of stewardship of assets does the work of summing up and expressing these moral concerns better than the language of property or fiduciary duty, and coheres better with the case law.

This chapter summarises the explanatory advantages of this stewardship of assets model of claims contingent on tracing and examines its implications. It suggests that, by focusing on the power-liability relationship between the person whose transactions are at issue and the person making the claim, the model allows us to more clearly understand and evaluate the rules in terms of their meaning for individual subjects of the legal system. Part I considers what the stewardship model implies about the availability of claims based on unauthorised substitution, identifying situations that raise similar normative concerns but where such claims have not so far been recognised, and proposing arguments against a broader expansion of the tracing concept. Part II considers the implications of the stewardship model for the content of

the tracing rules, and possibilities for future development of those rules. It argues that the stewardship model allows us to draw a sharper distinction between rules that are evidential in function and rules that are essentially about the rights of persons, and highlights the implications of this argument for the rules that govern tracing into and out of mixed funds. Finally, Part III considers the implications of the justification for claims based on unauthorised substitution put forward in this thesis for their classification within English private law.

I. Entitlement to Traceable Proceeds

I have argued that the tracing concept reflects a major intrusion into the autonomy of the defendant, but this intrusion is justified in a context where the particular legal rights exercised by the defendant were never conferred on him for the furthering of his own ends but for instrumental reasons. This implies that such claims ought to be available in a range of situations in which a defendant has such a power, but only when such a power exists. This section sketches out some examples of situations where the justification would extend to a defendant, and suggests other situations where the justification for treating the defendant in this way is weaker.

1. The requirement of a power

The argument of the thesis denies the possibility that a proprietary right, as such, generates claims based on unauthorised substitution. It proposes instead that any assignable right can potentially generate such a claim, provided that there exists a defendant who has a power to deprive the claimant of that right without his consent and who owes the claimant a duty not to exercise the power.

This excludes the possibility of claims based on unauthorised substitution in a

number of scenarios involving outright thefts of chattels. A thief of a chattel, which is not money or a negotiable instrument, does not possess such a power. If A steals a book from B, for example, he may purport to sell the book to C but this will not have any bearing on B's superior title. A will have sold his own possessory title to C, and B can still sue A or C, at his election, for the value of the book or the book itself.

If, instead, B decides that he would prefer not to have his book or its value but instead the guitar that A has purchased from D with the money received from C, there is no authority for such a claim. Apart from authority, it is also difficult to see why the law should respect such a preference. B's title to his book entitles him to possession of the book, and to compensation from anyone who has violated his rights in respect of the book. It is difficult to get from this right to the conclusion that B is also entitled, at his election, to the guitar that formerly belonged to D and which D has decided to sell to A. Nor is it clear why A's decision to buy a guitar with the money he obtained for selling his possessory title to the book should be subordinated to B's ends in this scenario. If we substitute the *Foskett v McKeown* facts, so that B is now insisting that A's contract of life insurance should be treated as entered into for his benefit, the oddity of the argument becomes even clearer. The subordination of personal autonomy that arises from the operation of the tracing rules, with their focus on the transactions by persons rather than the physical identity of things, cannot be justified on the basis of a principle of respect for property in things as such.

If, however, A has a power in this scenario capable of defeating B's title to the book, the situation changes. If A has sold B's book to C, and B's title to the book has

been extinguished,[665] B's complaint is no longer about an interference with his right to possession of his thing but about a loss of a right: his title to the book, which he was previously entitled to rely on and exchange for other things if he wished, is gone. The reason for this loss is that the legal system has given A the legal power to bring about the destruction of this right, which he has exercised to obtain cash on his own account. In this situation, it is precisely A's decision-making that B is concerned with. In the absence of the legal power, A would not have been able to make the decision to sell B's title to the book at all. The logic of B's claim that he is therefore entitled to treat A's decision as made for his benefit is much clearer than in the case where A's decision to sell his possessory title, and to use the money to buy a guitar, has no particular bearing on B's rights as holder of a title superior to A's.

2. The requirement of a duty linked to a power

This argument raises the possibility that, wherever there is a *nemo dat* exception capable of defeating the vested rights of the claimant, the claimant ought to be able to claim the traceable proceeds of the transaction in the hands of the person who brought about the transaction. However, as has been explained, this contention only holds in cases where the transaction in question is one that the defendant cannot enter into, in the circumstances, without breaching a duty owed to the claimant.

The impact of dispositive title registration under section 58 of the Land Registration Act 2002 provides a useful illustration of the work that this principle can do in clarifying the situations in which claims based on unauthorised substitution

---

[665] For example, because A is a seller in possession within the meaning of section 25 of the Sale of Goods Act 1979.

might be justified. Section 58 of the 2002 Act vests title to registered land in the registered proprietor upon registration, by virtue of his registration, and even if the supposed disposition justifying this decision by the Registrar is void. There is a specific statutory scheme for dealing with this situation, so far as the title to the land itself is concerned.[666] However, from the perspective of a potential claim based on unauthorised substitution in respect of whatever is obtained in exchange for the land, there are two distinct classes of defendant. First, there is the defendant who has brought about the initial change in registration – whether in his favour or someone else's – and obtained some asset in consideration for that change. In this situation, the original registered proprietor ought to have a claim to recover the proceeds of the transaction in the hands of the fraudster. The fraudster, in persuading Land Registry to alter the claimant's rights by registration, has exercised a power he had no right to exercise at all and the claimant is therefore entitled to claim the proceeds of his decision to exercise the power, if he can find them.

Contrast the position of the third party in whom title may actually be vested under section 58 of the Land Registration Act 2002, as a result of the fraud. Assuming that the third party is not himself a wrongdoer, who owes duties to the original registered proprietor for this reason, his position will differ significantly from that of the fraudster who brought about the initial transfer. This is not because he does not have a power to alter the legal position of the original registered proprietor. Although, by virtue of the statute, the original registered proprietor no longer has his legal title, and so it cannot be said that the third party has the power to deal with that title, the original registered proprietor does have an equitable right to seek alteration or

[666] Land Registration Act 2002, schedule 4.

rectification of the register[667] and this right could potentially be defeated if the new registered proprietor, once on the register, makes an registered disposition in favour of a purchaser for value. Does this mean that the original registered proprietor can claim the traceable proceeds of any such disposition in the hands of the new registered proprietor? The answer seems to be no: the original registered proprietor's right to seek rectification of the register does not correlate to any duty in the new registered proprietor to avoid exercising the powers given to him by the statute.

This two-stage inquiry, based on whether or not the defendant has a power to vary the rights of the defendant and then on whether that power itself is subject to any duties as to its exercise, offers a more focused guide to determining when claims based on unauthorised substitution should be available than the vaguer concept of fiduciary duties or the 'proprietary base'. Unlike these concepts, it allows us to clearly isolate the elements in the fact situation that might justify the subordination of the defendant's decision-making to the claimant, which ultimately underpins the tracing concept.

II. UNDERSTANDING TRACING

It has been argued that the rules that are properly described as rules of tracing are not rules of evidence, solving factual uncertainties, but are instead substantive rules that determine whether or not a given decision by a defendant ought to be treated as a decision entered into for the benefit of the claimant. The justification for treating the defendant's decisions in this way arises out of a concern to protect the claimant from

---

[667] *Malory v Cheshire Homes* [2002] EWCA Civ 151, rejected as decided per incuriam on a different point by the Court of Appeal in *Swift v Chief Land Registrar* [2015] 3 WLR 239.

a legally-mandated vulnerability to the defendant's decision-making power, but that concern must be balanced by an equal concern for preserving the autonomy of the defendant in circumstances where he is exercising rights conferred on him by the legal system for his own ends.

This argument has certain practical implications for our understanding of the specific content of tracing rules. First, it flags up the importance of avoiding any conflation between the law's response to genuine evidential obstacles to tracing and its response to the so-called mixed substitutions. The normative issues involved in the two questions are entirely separate and, while the law's handling of evidential obstacles in this context is similar to its general response to such obstacles, the cherry-picking rule and the lowest intermediate balance rule are peculiar to transactional tracing.

Secondly, once we see that the rules that respond to mixed substitution are normative in function, we can better understand the otherwise puzzling distinction between payment into a mixed fund (tracing is possible) and payment for the purpose of increasing the value of one's subsisting rights (tracing is impossible). This allows us to properly evaluate the issue at stake in the arguments surrounding 'common law tracing' as a special and limited form of tracing and to reject the limitation for the right reasons.

Finally, understanding the tracing rules as an intrusion into the autonomy of the defendant, justified by the vulnerability of the claimant, allows us to evaluate the issues at stake in relation to possible future developments of the law: swollen assets tracing, backwards tracing, and the development of other models of tracing that look

beyond individuated rights acquired by the defendant.

1. Evidential obstacles to tracing, cherry-picking and the rule in *Armory v Delamirie*

The rule in *Armory v Delamirie*[668] undoubtedly has an important role to play in the context of tracing, as in other contexts, where facts about what the defendant has done are unknown because of his own wrongful concealment of them. To take a simple example, suppose a case where T sells shares that he held on trust for B and receives £100 in cash. At the time of litigation, it appears that his current bank account has a £100 credit balance. T refuses, or is unable, to provide any information about what he did with the banknotes he received in exchange for the trust shares or where the £100 credit balance of his bank account came from.

In such a case, the ordinary evidential presumption against wrongdoers who have caused evidential uncertainties, which operates across the law, will apply. It will presumed as a fact, against T, that he paid the £100 note to his bank in consideration for an increase in the credit balance of his current bank account. As in other contexts, positive evidence inconsistent with the fact presumed will rebut the presumption. Thus, if T can show that he obtained the £100 currently in his bank account as a gift from his mother, and that he set fire to the trust banknotes the day after he acquired them, the presumption that he used the banknotes to increase the credit balance of his account will have been rebutted. The court will accept the positive evidence that the money in the bank account has nothing to do with the banknotes that were set on fire.

---

[668] (1772) 1 Stra 505, 93 ER 664.

Since the claim based on unauthorised substitution depends on proof that the asset claimed was obtained in consideration for a wrongful deprivation of rights vested in the claimant, and this chain of events shows that this was not the case, the claim will fail. It will not matter, in this situation, that T is a wrongdoer who has behaved unreasonably. The rule in *Armory v Delamirie* is evidential, not confiscatory.

By contrast, the cherry-picking rule depends on the argument that, within a certain sphere of actions, the defendant 'cannot be heard to say' that he has chosen to undertake transactions for his own benefit rather than for the claimant's. There is no way to rebut this supposed presumption; it applies because the claimant has a right to treat the defendant as a person acting for her benefit and not his own when the defendant is undertaking transactions that have the effect of varying her rights. Thus, in the example above, the law would respond very differently if it were known that T had paid the trust money into his bank account and then paid in the £100 gift from his mother, and the question was not 'what did he actually do next?' but 'how should the payments out of the account be attributed?'

Thus, if T had drawn out £100 in banknotes and purchased engraved jewellery with the clear intention of giving it to his wife, and then drawn out the remaining £100 and spent it untraceably on food and drink, there would be no way for him to rebut the 'presumption' that he bought the jewellery for B and not for his wife. This is not because evidential uncertainties are resolved against a wrongdoer – there are no evidential uncertainties in this scenario – but because T had no right to reduce the credit balance of the trust bank account for the purposes of his own projects and intentions. It is up to B to determine how T's transactions that vary his vested rights should be interpreted.

This argument only extends, however, to those transactions carried out by T that do involve a change in the vested rights of B. The lowest intermediate balance rule has the effect of imposing this limitation. This is because, in consideration for fresh payments into the mixed fund, T or someone else will have exercised powers that do not correlate to fresh liabilities in B. So, again, if T pays the trust money into the bank account and reduces its credit balance to £25, and then his mother pays the £100 gift into that account, a claim by B to this £100 involves saying that T's mother, in exercising her power to convey the £100 to the bank in consideration for an increase in T's credit balance, is acting for B's benefit. We can understand what is at stake in the application of these rules – cherry-picking and the lowest intermediate balance rule – if, in the case of each transaction, we ask what power has been exercised by the defendant in acquiring or altering the rights that the claimant is alleging represent the proceeds of her own rights.

2. The possibility of tracing into a 'mixed fund'

As has been explained, the maxim 'money has no earmark' was originally developed in English law in response to the situation where A literally took B's coins or notes and B wanted to bring a claim in trover. The rule that money could not be followed if it was not in a bag seems like a straightforward rule of evidence, capturing the problem of proving that the particular note, coin or other fungible in A's possession was the very one taken from B. The analogy between this situation and tracing into a mixed fund, and the objection to doing so at common law, can be explained on the basis that substitution must relate to specific transactions of the defendant, involving his exercise of specific powers that can be shown to correlate to liabilities in the claimant. If it was possible to follow a single banknote into a mixture of notes *not* in a

bag, or box, or other separate container, and then trace through the subsequent transactions of the defendant using the mixed fund of his money, this would mean treating all the money of the defendant as if it was a single fund, and all his powers to deal with his money as potentially subject to the rights of the claimant.

This objection obviously has no meaning when it is applied to a mixed fund in a bank account, since a bank account is a single chose in action and the conclusion that the defendant holds such a chose in action subject to the rights of others, and must take them into account in exercising his rights under the banking contact, is much more limited in scope than a proposition that involves following, and then tracing from, loose currency which is inherently indistinguishable from all other currency.

The more difficult problem, in relation to tracing into 'mixed funds', is in deciding which of the defendant's pre-existing rights can be treated as fungible units in such a fund and which cannot be so treated and so cannot be traced into. At one extreme, there is the case where the defendant uses trust money to pay for an extension to his house, where the law refuses to treat his title to the land as a 'fund' that has increased in value and in which the claimant has a partial share. At the other, there is the case where the defendant uses trust money to increase the amount of the debt owed to him by his bank, where the claimant is clearly entitled to treat the bank account as a mixed fund and to claim a share in proportion to her contribution. The focus on defendant autonomy implies that only some of the defendant's pre-existing rights can be sensibly treated as a fungible collection of units for value and that the question ought to be approached in terms that expressly address the distinction between rights of these types.

3. The (ir)relevance of chronology: backwards tracing

The focus on the power exercised by the defendant when he acquires a right explains the limited relevance of chronology to the process of tracing. It has been explained that A has a power, in this context, where the law treats his decisions as a reason for depriving B of a vested right. An overly mechanical account of tracing, which disregards A's conscious goals and intentions – ie which rights he intends to acquire in consideration for the exercise of a power over B – would disregard this element of the fact situation. On the other hand, whether or not a substitution has taken place is a matter of showing, objectively, that there was a transactional connection between A's decision to deprive B and A's acquisition of the substitute. Where A's decision to deprive B is only causally connected with the acquisition of a new right, as opposed to connected to it as a result of his bargain with another person, there is a weaker case for treating the new right as a substitute even if there is a connection in A's mind.

4. The (i)relevance of causation: swollen assets

This scenario must be distinguished from a situation where the link between the deprivation and acquisition is entirely causal, as where the thief buys a title to a painting for himself because he has the stolen money at his disposal to pay his rent. Confiscation of the painting in these circumstances would extend the principle well beyond its current limits. This is because it would disregard the existence of the thief's title to the money actually used to buy the painting and the fact that his power to make decisions as to the disposition of *that* money arises by virtue of his status as an owner and not because the law has given him the power for instrumental reasons.

III. Classification of Claims Based on Unauthorised Substitution

A. Unauthorised substitution and the vindication of property rights

The argument of the thesis has been that the structure of a stewardship relationship differs significantly from that constituted by the existence of a common law title in respect of a tangible thing. Its focus has been on the distinctive normative character of private powers, as legal relations that enable one person to alter the subsisting rights of another. However, the argument could also be taken to highlight the difference between a common law title to a tangible thing and other rights than could sensibly be called 'proprietary' under various definitions of that term. As such, it could contribute to a more general study of the extent to which the category of 'property rights', as conventionally used, encompasses radically different normative structures that serve different ends.

B. Unauthorised substitution and unjust enrichment

The aim of the thesis has been to elucidate the internal structure of the event of unauthorised substitution, with the aim of understanding how the cases cohere with each other. It has offered a definition of the 'narrow causative event' of unauthorised substitution as the acquisition of a right in consideration for an exercise of a power to deprive another of rights. It proposes that the law responds to such an act by giving the person deprived of their rights the ability to determine the significance of the acts of another person and suggests that this response cannot be coherently extended to beyond those situations where the power exercised was initially conferred for instrumental reasons. The extent to which it is possible to generalise from this narrow causative event to the broad category of unjust enrichment depends on how the unjust enrichment inquiry itself is understood. The definition offered in the thesis is more

consistent with an understanding of enrichment that focuses on rights, in opposition to value, and with an account of 'at the expense of' that is not built on causation but on conceptions of responsibility.

BIBLIOGRAPHY

Books

T Aldridge, *Powers of Attorney* (10th edn, Sweet & Maxwell, London 2007)

E Anderson, *Value in Ethics and Economics* (2nd edn, Harvard University Press 1995)

J H Baker, *An Introduction to English Legal History* (4th edn, OUP 2007)

J Baker, *Baker and Milsom, Sources of English Legal History: Private Law to 1750* (2nd edn, OUP, Oxford 2010)

P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989)

P Birks, *Restitution – The Future* (The Federation Press 1992)

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

A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 123

M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart 2010)

P Davies and G Virgo, *Maudsley & Burn's Equity & Trusts: Texts, Cases and Materials* (OUP 2013).

E P Ellinger, E Lomnicka and C V M Hare, *Ellinger's Modern Banking Law* (5th edn, OUP 2011)

D Fox, *Property Rights in Money* (OUP 2008)

S Green and J Randall, *The Tort of Conversion* (Hart 2009)

D Hayton and C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (18th edn, LexisNexis 2010)

C J W Farwell, *A concise treatise on powers* (3rd edn Stevens & Sons, London 1916)

T Frankel, *Fiduciary Law* (OUP 2011)

S Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011)

A S Gold and P B Miller (eds), *Philosophical Foundations of Fiduciary Duties* (OUP 2014)

C Harpum, S Bridge, and M Dixon (eds), *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell 2012)

J Harris, *Property and Justice* (OUP 1996, 2003 reprint)

R Hickey, *Property and the Law of Finders* (Hart Publishing 2010)

A Hudson, *Equity and Trusts* (7th edn, Routledge 2013)

W N Hohfeld, *Fundamental Legal Conceptions* (Yale University Press, New Haven 1923)

W S Holdsworth, *A History of English Law: Volume 3* (3rd edn, 1923)

W S Holdsworth, *A History of English Law: Volume 7* (3rd edn, 1923)}

P Jaffey, *Private law and property claims* (Hart Publishing, Oxford 2007)

A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012)

N MacCormick, *H.L.A Hart* (Stanford University Press, California 1981)

F W B Maitland, *Equity* (CUP 1929)

B McFarlane, *The Structure of Property Law* (Hart Publishing 2008).

J McGhee and others, *Snell's Equity* (32nd edn, Sweet & Maxwell 2010)

C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell 2011)

J Mowbray and others, *Lewin on Trusts* (18th edn, Sweet & Maxwell 2008)

J Penner, *The Law of Trusts* (OUP 2012)

F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 1898, Cambridge University Press reissue 1968)

M Radin, *Reinterpreting Property* (University of Chicago Press 1996)

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

J Simpson and E Weiner (eds), *The Oxford English Dictionary* (2nd edn, Clarendon Press, Oxford 1989).

E Sugden, *A practical treatise of powers* (8th edn H Sweet, London 1861)

G Thomas and A Hudson, *The Law of Trusts* (OUP 2010)

G Thomas, *Thomas on Powers* (2nd edn, OUP 2012)

G Virgo, *The Principles of the Law of Restitution* (2nd ed, OUP 2006)

P Watts, *Bowstead & Reynolds on Agency* (20th edn, Sweet & Maxwell 2014)

S Worthington, *Equity* (OUP 2006)

D E C Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (CUP 1965)

Journal articles

S Barkehall-Thomas, 'Thieves, owners and the problem of title' (2011) 5 Journal of Equity 228 and (2012) 6 Journal of Equity 1

J Barton, 'The Medieval Use' (1965) 81 LQR 562

P Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45 CLP 69

P Birks, 'Tracing, Subrogation and Change of Position (*Boscawen* v *Bajwa, Abbey National plc* v *Boscawen*)' (1995) 9 Trust Law International 124

P Birks, 'Tracing Misused (*Bank Tejarat* v *Hong Kong and Shanghai Banking Corp*)' (1995) 9 Trust Law International 91

P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623

P Birks, 'On taking seriously the difference between tracing and claiming' (1997) 11

Trust Law International 2

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

P Birks, 'Establishing a Proprietary Base (*Re Goldcorp*) [1995] RLR 83

A Burrows, 'Proprietary restitution: unmasking unjust enrichment' [2001] LQR 412

A Burrows, 'We Do This At Common Law and That In Equity' (2002) 22 OJLS 1

M Conaglen, 'Difficulties with tracing backwards' (2011) 127 LQR 432

M Conaglen, 'Mortgagee powers rhetoric' (2006) 69 MLR 583

A T Denning, 'The Recovery of Money' (1949) 65 LQR 37

I Duffy, 'The English Bankrupt, 1571-1861' (1980) 24 Am Journal of Legal History 283

S Evans, 'Rethinking tracing and restitution'(1999) 115 LQR 469;

J Edelman, 'When do fiduciary relationships arise?' (2010)126 LQR 302

B Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13 U Tas LR 116

D Fox, 'Common law claims to substituted assets' [1999] RLR 55

K Gray, 'Property in Thin Air' (1991) 50 CLJ 252

B Häcker, 'Proprietary restitution after impaired consent transfers: a generalised power model' (2009) 68 CLJ 324

A Halpin, 'The Concept of a Legal Power' (1996) 16 OJLS 129

C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277

M de W Hemmeon, 'Burgage Tenure in Medieval England III' (1911) 27 LQR 43

N G Jones, 'Uses, Trusts and a Path to Privity' (1997) CLJ 175

A Kennedy, 'An evaluation of the recovery of criminal proceeds in the United Kingdom' (2007) 10 Journal of Money Laundering Control 33

Khurshid and Matthews, 'Tracing Confusion' (1979) 95 LQR 78

B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1

P Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill LJ 969

R Munday, 'The Legal History of the Factor' (1977) 6 Anglo-Am Law Review 221

D Oesterle, 'Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306' (1983) 68 Cornell LR 172

J Penner, 'The 'Bundle of Rights Picture of Property'' (1996) 43 UCLA Law Rev 711

J Penner, 'The (True) Nature of the Beneficiary's Equitable Proprietary Interest Under a Trust' (2014) 27 Canadian Journal of Law and Jurisprudence 473

P H Pettit, 'Demise of trusts for sale and the doctrine of conversion?' (1997) 113 LQR 207

C Rotherham, 'The Metaphysics of Tracing: Substituted Title and Property Rhetoric'

(1996) 34 Osgoode Hall LJ 321

C Rotherham, 'Gain-based relief in tort after *A-G v Blake*' (2010) 126 LQR 102

B Rudden, 'Things as Things and Things as Wealth' (1994) 14 OJLS 81

J C Shepard, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQR 51

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

L Smith, 'The Stockbroker and the Solicitor-General: The Story Behind *Taylor v Plumer*' (1994) 15 Journal of Legal History 1

L Smith, 'Tracing in *Taylor v Plumer*: equity in the Court of King's Bench' [1995] LMCLQ 240

M Stone and A McKeough, 'Tracing in the Age of Restitution' [2003] 26 University of South Wales Law Journal 377 paras 7-01 to 7-44.

W Swadling, 'Rescission, property and the common law' (2005) 121 LQR 123

J Tarrant, 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 Journal of Equity 170

HLW, 'Following Trust Funds Mingled in One Deposit with Funds of the Trustee' (1922) 8 Virginia LR 356

Book chapters

P Birks, 'Trusts in the Recovery of Misapplied Assets: Tracing, Trusts, and Restitution' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press 1992)

P Birks, 'Overview: Tracing, Claiming and Defences' in P Birks (eds) *Laundering and Tracing* (Clarendon Press 1995) 289

P Birks, 'Mixtures' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998) 227;

P Birks, 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1999) 239

R Chambers, 'Trust and Theft' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 223

G K Chesterton, 'Reflections on a Rotten Apple' in *The Well and the Shallows* (Ignatius Press, San Francisco 2006) 163

S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H E Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013)

A Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1961) 104

P Matthews, 'Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (OUP 1995) 23

P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thompson 2005) 309

J Penner, 'Duty and Liability in Respect of Funds' in J Lowry and L Mistelis (eds.),

Commercial Law: Perspectives and Practice (LexisNexis Butterworths, London 2006) 207

L Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 281.

L Smith, 'Tracing' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 119.

L Smith, 'Transfers' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 112

E Weinrib, 'Correctively unjust enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 31

Other sources

T Cutts, 'There is no law of tracing and this is why it matters' (Obligations VII conference, Hong Kong, 2014)

Halsbury's Laws (4th edn reissue, 2007) vol 48

Halsbury's Laws (4th edn reissue, 2003) vol 16(2)

Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327)

PriceWaterhouseCooper, Lehman Brothers International (Europe) – In Administration, Joint Administrators' progress report for the period 15 March 2011 to 14 September 2011 (13 October 2011), available at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie-6th-progress-report.pdf, last accessed on 12 August 2015.