COMMON LAW TRACING: THE EMPEROR'S NEW CLOTHES?

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Abstract

At the heart of the case for the unification of common law and equitable tracing rules is a premise: that tracing rules at common law *exist*. In this article we challenge the validity of that premise in Australian law. We demonstrate that, as a matter of authority and principle, tracing at common law is not, nor was it ever, possible. The error began with a misreading of *Taylor v Plumer* (1815) 3 M&S 562; 105 ER 721. English courts have since recognised this error but have held, in effect, that it is too late to turn back. We show that Australian law has not yet taken this turn, and offer several reasons why it should not do so. The position that obtains is that there are only equitable tracing rules in Australian law. We demonstrate that these rules are sufficient, noting in particular that the equitable rules can support certain actions for money had and received (as demonstrated by *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230). The result is not a unification of tracing rules but rather the removal of an historical anomaly based upon an error.

I INTRODUCTION

The commentary and case law surrounding common law tracing reveal that it has at least three key features. First, it is contentious: the precise character and limits of common law tracing "are uncertain, and may give rise to differences of opinion".[1] Secondly, and compared with the amount of time devoted to equitable tracing in the cases and in the literature, it is rare. Indeed, it is so rare that it has been argued by some to be irrelevant in practice.[2] Thirdly, it is unsatisfactory. In this respect, Lord Millett once suggested that the "common law's remedies are inadequate and its jurisprudence defective".[3] In this article, we tackle a more basal question: whether, in Australian law, common law tracing actually *exists*.

The basic tenet of common law tracing is that where A disposes of B's legal property without B's authority, B can assert legal title to the substitute asset. The defining feature of common law tracing is often said to be its inability to trace through a mixed fund. Other supposed features of common law tracing include: (i) that it is not subject to the defence of bona fide purchaser for value without notice, although with the exception that an analogous defence applies where what has been received is money;[4] and (ii) that it may only be invoked in aid of legal rights. The genesis of common law tracing is said to be the decision of the Court of King's Bench in *Taylor v Plumer*.[5]

This article commences (in Part II) with an overview of the decision in *Taylor v Plumer* and the judgment of Lord Ellenborough CJ. We explain (drawing on the earlier work of Khurshid and

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Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2) [1994] 2 Qd R 159 at 162.

2 See, eg, ELG Tyler and NE Palmer, *Crossley Vaines' Personal Property* (Butterworths, 5th ed, 1973) at 162.

3 Lord Millett, 'Tracing the Proceeds of Fraud' (1991) *Law Quarterly Review* 71 at 71.

4 See *Clarke v Shee* (1774) 1 Cowp 197 at 200; 98 ER 1041 at 1043; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 575.

5 (1815) 3 M&S 562; 105 ER 721.

Matthews, and of Smith) that notwithstanding it being a decision of a common law court, the case was in fact about equitable tracing. Read correctly, *Taylor v Plumer* was simply a decision of a common law court in which the court took notice of equitable titles and applied equitable principles. In Part III we examine the English authorities on common law tracing and show that they have consistently misinterpreted *Taylor v Plumer* as a decision about common law tracing. While the misreading has since been judicially acknowledged,[6] English law has concluded that it is too entrenched to turn back and reconsider the existence of common law tracing.

In Part IV we consider the decided cases in Australian law and show that Australian courts are not yet bound to accept that common law tracing actually exists. Accordingly, we turn in Part V to consider whether Australian law *should* recognise the existence of common law tracing. We offer several reasons of authority, history, and principle as to why it should not do so.[7] The article then concludes in Part VI with a discussion of the consequences of our thesis being accepted. We explain that, due to unique developments in Australian law, the consequences of recognising that common law tracing does not exist are modest. This is, in part, because Australian law permits a claimant to bring a common law action for money had and received based upon the receipt of proceeds traceable in equity.

II THE DECISION IN *TAYLOR v PLUMER*

The facts of *Taylor v Plumer* are well-known. The defendant was Sir Thomas Plumer. Walsh was his stockbroker. After the sale of certain stock, Plumer instructed Walsh to withdraw £22,200 in proceeds and to invest it in Exchequer bills. Walsh only used £6,500 to buy Exchequer bills, and used the rest to purchase American shares, stock, and bullion for himself. He then attempted to abscond to the United States but was caught by Plumer's attorney as he attempted to board a ship. He surrendered the securities and bullion to Plumer's attorney. A difficulty arose because Walsh was bankrupt and under the relevant bankruptcy legislation all of his property vested in his assignees in bankruptcy. Those assignees (Taylor and another) claimed that the securities and bullion formed part of Walsh's estate and that they therefore acquired legal title to it. They commenced an action in trover against Plumer, who argued that he was entitled to the securities and bullion.

It was clear that Walsh had legal title to the securities and bullion as they had been sold to him, even though he had paid with Plumer's money. The question for the Court was whether they were held on trust for Plumer. The assignees accepted that property which was held on trust by the bankrupt (and property lawfully exchanged for trust property) would not form part of the bankrupt's estate. However, they argued that property acquired fraudulently in breach of trust would form part of the bankrupt's estate because the bankrupt could not, by his own fraud, prejudice all of the other creditors. The assignees contended that because the securities and bullion had been acquired in breach of trust they formed part of Walsh's estate and legal title to them passed them.

Lord Ellenborough CJ rejected the assignees' argument, noting that it was "mischievous in principle" and "supported by no authorities of law".[8] His Lordship held:

> [I]f the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him.[9]

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6 *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159 at 169.

7 We are unaware of any case or article which has presented this argument from an Australian perspective. From an English perspective, Peter Birks once suggested that the "[c]ommon law never traced at all, and would perhaps never have done so but for a mistaken understanding of [*Taylor v Plumer*]": Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 246. However, for the reasons discussed below, the argument appears to be unavailable in English law.

8 *Taylor v Plumer* (1815) 3 M&S 562 at 574; 105 ER 721 at 725-6.

In a famous passage, his Lordship explained why it made no difference to Plumer's rights that the proceeds of sale of the stock were converted into securities and bullion:

> … the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, (as the property in question did,) in the hands of the factor, or his general legal representatives.[10]

Plumer was therefore entitled to trace into the securities and bullion. His Lordship held that because the assignees in bankruptcy did not have title to the securities and bullion, Plumer was entitled to retain it.[11]

As the above summary makes clear, *Taylor v Plumer* was a case about tracing in equity. However, primarily because it was a decision of the Court of King's Bench, for over 150 years it was regarded as *the* decision which established that it is possible to trace at common law, but that the common law does not permit tracing through a mixed fund.[12] The received interpretation of the case was that Plumer owned the banknotes which Walsh obtained at Plumer's bank (because Walsh was acting within authority when obtaining them) and that when Walsh used them to purchase the securities and bullion (which was an unauthorised transaction), Plumer was able to trace into the securities and bullion and assert a legal interest in them.

The misreading of *Taylor v Plumer* was first exposed by Khurshid and Matthews in 1979 in their seminal article in the *Law Quarterly Review.*[13] They explained that Walsh was the legal owner of the banknotes, but that he held them on trust for Plumer. When Walsh purchased the securities and bullion he acquired legal title to them, but continued to hold them on trust for Plumer. Plumer therefore succeeded because he was able to assert equitable proprietary rights in the property, which took it out of Walsh's estate. A comprehensive legal analysis of *Taylor v Plumer* was later undertaken by Lionel Smith and published in the *Lloyd's Maritime and Commercial Law Quarterly* in 1995. He agreed with Khurshid and Matthews and concluded that Plumer had indeed prevailed by successfully asserting his equitable proprietary rights.[14] It is now accepted that "although *Taylor v Plumer* was decided by a common law court, the court was in fact applying the rules of equity".[15]

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9 *Taylor v Plumer* (1815) 3 M&S 562 at 574; 105 ER 721 at 725.

10 *Taylor v Plumer* (1815) 3 M&S 562 at 575; 105 ER 721 at 726.

11 *Taylor v Plumer* (1815) 3 M&S 562 at 579; 105 ER 721 at 727.

12 In addition to the cases specifically cited here, see the primary and secondary sources cited in Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at fn 61-63.

13 Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78. See also R Pearce, 'A Tracing Paper' (1976) 40 *Conveyancer and Property Lawyer (New South Wales)* 277; Brian Fitzgerald, 'Tracing at Law' [1994] University of Tasmania Law Review 116, 147– 150; David Fox, 'Common Law Claims to Substituted Assets' [1999] *Restitution Law Review* 55.

14 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240. See also Smith's later detailed analysis of the facts behind the decision: Lionel Smith, '*Taylor v Plumer*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford University Press, 2006) at 39.

15 *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159 at 169.

III ENGLISH TREATMENT OF COMMON LAW TRACING

The misinterpretation of *Taylor v Plumer* and, consequently, the idea that it is possible to trace at common law (and that the tracing rules are different to those applied in equity), seems to have originated in the speech of Viscount Haldane LC in *Sinclair v Brougham*.[16] His Lordship said:

> If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset if capable of being earmarked as purchased with the money can be claimed by the true owner of the money. This is a principle not merely of equity but of the common law. It is explained in the judgment of Lord Ellenborough in *Taylor v. Plumer* … But Lord Ellenborough laid down as a limit to this proposition that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his bankers, the principal had no remedy excepting to prove as a creditor for money had and received.[17]

Subsequent cases also made the mistake of supposing that *Taylor v Plumer* was a case concerned with common law tracing. In *Banque Belge pour l'Etranger v Hambrouck*,[18] Hambrouck was an employee of Pelabon, a company which banked with Banque Belge. Hambrouck obtained by fraud a number of cheques purporting to be drawn by Pelabon, which he paid into an account with his bankers. He later withdrew the money and paid some of it to Spanoghe, a woman with whom he was living, who then paid some of the money into her account with a different bank. After certain withdrawals £315 remained in the account. The money had not been mixed with other money at any stage. Banque Belge commenced proceedings seeking to recover the £315 in an action for money had and received. One of the arguments raised by the defendants was that Banque Belge could not trace from the money in its account to the money in Spanoghe's account because it had passed through two bank accounts, and that therefore it could not establish that the money in Spanoghe's account was its money.

Bankes LJ noted that "the right of an owner to recover property in the common law Courts from a person who can show no title to it, where the property was capable of being traced, whether in its original form or in some substituted form" was "fully accepted" in *Taylor v Plumer* and *Sinclair v Brougham*.[19] Atkin LJ noted that the Bank's common law rights were "large and admirably stated in *Taylor v Plumer*",[20] and referred to Viscount Haldane LC's statement of principle in *Sinclair v Brougham*. Both Atkin and Bankes LJJ held that because there had been no mixing, Banque Belge could trace at law into the money in Spanoghe's account.[21] Although both judges felt no need to resort to the more liberal equitable tracing rules, each accepted that it would also have been possible for the Bank to trace in equity. The third member of the Court, Scrutton LJ, accepted that the fact that the money had passed through two bank accounts barred tracing at common law, but was of the view that Banque Belge could trace in equity to the money in Spanoghe's account.[22]

The high water mark of common law tracing in English law is the decision of the House of Lords in *Lipkin Gorman v Karpnale Ltd*.[23] A partner at the claimant firm of solicitors (Cass) stole money from

16 [1914] AC 398. See Lionel Smith, '*Taylor v Plumer*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford University Press, 2006) 39 at 60.

17 *Sinclair v Brougham* [1914] AC 398 at 418-419.

18 [1921] 1 KB 321.

19 *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 at 327.

20 *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 at 334.

21 *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 at 328 (Bankes LJ), 336 (Atkin LJ).

22 *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 at 329-30.

23 [1991] 2 AC 548.

the firm's client account to finance his gambling habit. Cass's primary method of misappropriating the money was to have a cheque made out by the firm's cashier (who the partner had suborned) and made payable to cash. Cass would then sign the cheque and the cashier would cash the cheque and hand the money to Cass. He would then spend the cash at the defendant's casino. The firm sought to recover the money from the defendant in an action for money had and received. One question which the House of Lords had to address was whether the firm could trace from the money in its client account to the money received by the defendant.

It was conceded by the defendant that if the firm could establish legal title to the money in the Cass's hands, then that money could be traced to the money received by the defendant. Accordingly, the only question on this aspect of the case was whether the firm could establish legal title to the money in the hands of Cass. Lord Goff[24] accepted that, as a matter of authority, Cass acquired legal title to the money misappropriated from the firm's client account.[25] However, his Lordship considered that the firm could establish legal title to the money by tracing into it. He explained that *Taylor v Plumer* was authority for the proposition that "a legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property".[26] His Lordship noted that before the partner withdrew the money, the firm had legal title to it, in the sense that they owned the chose of action against the bank. He then continued:

> There is in my opinion no reason why the solicitors should not be able to trace their property at common law in that chose in action, or in any part of it, into its product, i.e. cash drawn by Cass from their client account at the bank. Such a claim is consistent with their assertion that the money so obtained by Cass was their property at common law.[27]

His Lordship also relied on *Marsh v Keating*,[28] which is discussed further in Part V below, in support of the firm's right to trace at common law. When combined with the defendant's concession, this had the result that the firm could trace from their chose of action into the money received by the defendant, and the claim succeeded.

The same approach to common law tracing was again applied by the Court of Appeal in *Agip (Africa) Ltd v Jackson*.[29] The plaintiff was an oil company which maintained a bank account at the Banque du Sud in Tunis. The plaintiff's chief accountant fraudulently altered an otherwise valid payment order by substituting as the payee a company named Baker Oil Services Ltd, which was controlled by the defendants, and by giving their account number with a branch of Lloyds Bank Plc in London. The Banque du Sud executed the order by debiting the plaintiff's account and instructing Lloyd's Bank in London by telex to credit Baker Oil's account. It also telexed instructions to its correspondent bank in New York, Citibank, to reimburse Lloyd's Bank with a similar amount. Lloyd's Bank credited Baker Oil's account five hours before business opened in New York and it was reimbursed. The sum in Baker Oil's account (which was not otherwise mixed with other money) was subsequently transferred to the account of the defendants' firm at Lloyds Bank, then to the firm's client account, and then dispersed.

The plaintiff brought an action against the defendants to recover the value of the money in an action for money had and received. One question was whether the plaintiff could trace at law into the money

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24 Lord Goff and Lord Templeman delivered the only substantive speeches, with which the remaining Law Lords agreed. Only Lord Goff addressed the tracing issue in detail.

25 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573. His Lordship cited *Union Bank of Australia Ltd v McClintock* [1922] 1 AC 240 and *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1.

26 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573.

27 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 574.

28 (1834) 1 Bing (NC) 198; 131 ER 1094.

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

received by the defendants. Fox LJ (with whom Butler-Sloss and Beldam LJJ agreed) referred to *Banque Belge*, and noted that "the inquiry which has to be made is whether the money paid to [the defendants' firm's] account 'was the product of, or substitute for, the original thing'".[30] His Lordship held that the plaintiff could not trace at law into the money received by the defendants because the money was mixed in the New York clearing system.[31] It could not be established that the money with which Lloyds Bank was reimbursed was the traceable product of the money which Banque du Sud paid without attempting to trace through the New York clearing system.

Over 180 years after *Taylor v Plumer* was decided, the first judicial recognition of the misreading of that case occurred in *Trustee of the Property of FC Jones & Sons (a firm) v Jones*,[32] a 1997 decision of the English Court of Appeal. The firm FC Jones & Sons carried on business as potato growers. The respondent was the wife of one of the three partners of the firm. The firm committed an act of bankruptcy and in due course the partners were adjudicated bankrupt. In the period after the act of bankruptcy but before the adjudication, the respondent's husband drew three cheques on the firm's joint account totalling £11,700 in favour of the respondent. The respondent paid the proceeds of the cheques into her account with a firm of commodity brokers so that she could deal on the London potato futures market. Her dealings were successful, and she received two cheques totalling £50,760 which she paid into a call deposit account at R Raphael & Sons Plc. The respondent's husband withdrew £900 from the account, leaving a balance of £49,860.

The appellant trustee in bankruptcy made a claim to the moneys, and they were paid into court by Raphaels. The effect of the relevant bankruptcy legislation was that from the date of the act of bankruptcy title to the firm's joint account (i.e. the chose in action) vested in the trustee. In order to make good his claim to the money paid into court, the trustee was required to trace into that money to demonstrate that it represented the money to which he had legal title. Applying the principles of common law tracing, Millett LJ (with whom Nourse LJ agreed) held that the trustee could trace the money in the account into the cheques drawn by the respondent's husband, and into the proceeds of those cheques which the respondent deposited in her account. The trustee could also trace into the profits made by the respondent through her dealings on the potato futures market by tracing into the chose of action which the respondent acquired when she authorised the firm of commodity brokers to deal on the market with the money in her account. That chose in action was the right to any balance after the dealings had been completed.

Importantly, by the time of this decision Smith's article in the *Lloyd's Maritime and Commercial Law Quarterly* had been published, and it evidently came to the attention of Millett LJ. After referring to that article, his Lordship admitted that in *Agip (Africa) Ltd v Jackson* he had fallen into a "common error" and that it had "since been convincingly demonstrated that, although *Taylor v Plumer* was decided by a common law court, the court was in fact applying the rules of equity".[33] However, his Lordship held that this was not a reason to deny the existence of common law tracing:

> But this is no reason for concluding that the common law does not recognise claims to substitute assets or their products. Such claims were upheld by this Court in *Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 KB 321 and by the House of Lords in *Lipkin Gorman (a Firm) v. Karpnale Ltd.* [1991] 2 AC 548. It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor v. Plumer*, but that is not how the English doctrine of stare decisis operates. It would be more consistent with that doctrine to say that, in recognising claims to substituted assets, equity must be taken to have followed the law, even though the law was not declared until later. Lord Ellenborough CJ gave

30 *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 565.

31 *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 565-566; cf the approach taken in Canada: *BMP v Bank of Nova Scotia* [2009] 1 SCR 504.

32 [1997] Ch 159.

33 [1997] Ch 159 at 169.

> no indication that, in following assets into their exchange products, equity had adopted a rule which was peculiar to itself or which went further than the common law.[34]

Millett LJ's justification for continuing to recognise the existence of common law tracing after the misreading of *Taylor v Plumer* was exposed has been criticised by commentators, including Smith, for various reasons.[35] However, the idea that it is now too late for English law to correct the misreading has garnered academic support. Indeed, Andrew Burrows has said that "[t]oo much water has since passed under the bridge … for one to be able to assert that the most accurate interpretation of the law is that there is no difference between common law and equitable tracing".[36] And in a comment more squarely directed at the existence of common law tracing, Peter Birks said:

> Not without some reluctance, because it entails shutting a door which might be thought to have opened most conveniently, [Millett LJ's approach in *Trustee of the Property of FC Jones & Sons (a firm) v Jones*] must be judged to be the right approach. It would attribute too much weight to one authority to say that its misinterpretation necessarily invalidated every decision that subsequently proceeded on the erroneous basis. It would be difficult, as well as inconvenient, to argue that *Lipkin Gorman* was wrong simply because it proceeded upon a view of *Taylor v Plumer* which has now been destroyed.[37]

The position in England is rather unsatisfactory. While courts and academic commentators have recognised that the foundations of common law tracing lie in a mistaken reading of *Taylor v Plumer*, the number of cases at all levels in the court hierarchy which have proceeded on this mistaken basis means that it is now accepted that it is too late to turn back. The purpose of this article is not to consider the merits of such an approach. Instead, the focus of this article, and particularly the next section, is whether the same position obtains in Australia.

IV THE CURRENT POSITION IN AUSTRALIA

To our knowledge, there are only 14 Australian cases[38] in which common law tracing has been discussed.[39] In this part we demonstrate that, with the potential exception of one decision, none of these cases require Australian law to recognise the existence of common law tracing.

In this section, and the remainder of this article, we attempt, where possible, to use the modern terminology of "following" and "tracing" to indicate the two separate processes which may be involved.[40] Following is the "purely physical exercise of locating a thing".[41] Tracing, on the other hand, is not concerned with locating the original asset but rather, in most cases, is concerned with identifying that which has been received in exchange for the original asset.[42] It is important to bear in mind, however, that the language used in the cases does not consistently reflect this distinction.

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34 [1997] Ch 159 at 169.

35 See, eg, Lionel Smith, '*Taylor v Plumer*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford University Press, 2006) 39 at 62.

36 Andrew Burrows, *The Law of Restitution*, (Oxford University Press, 3rd ed, 2011) at 124.

37 Peter Birks, The Necessity of a Unitary Law of Tracing, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 248.

38 At Supreme Court level or higher.

39 Cases in which only a passing reference to common law tracing is made are not discussed: see, eg, *Grant v The Queen* (1981) 147 CLR 503 at 508, 510-11; *Break Fast Investments Pty Ltd v Perikles Giannopoulos (also known as Perry Giannopoulos) & Anor (No 6)* [2012] NSWSC 286 at [19]; *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at 742 [43]; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 263-264 [143].

40 Lionel Smith, *The Law of Tracing* (OUP, 1997) at 6.

41 Lionel Smith, *The Law of Tracing* (OUP, 1997) at 6.

A High Court Authorities

One potential obstacle to the argument presented in this article is the decision of the High Court in *Brady v Stapleton.*[43] In that case, Dixon CJ and Fullagar J[44] noted that tracing was possible both at law and in equity but that, "up to a point, as is well known, the doctrines of the two systems were identical".[45] Their Honours noted that "nothing could be clearer than the exposition of the common law by Lord Ellenborough CJ in *Taylor v Plumer*",[46] and then proceeded to summarise the facts and judgment in that case. Undoubtedly, these comments do provide some support for the recognition of common law tracing in Australian law. In our view, however, this support is undermined by three features of the case. First, Dixon CJ and Fullagar J were labouring under the misapprehension that *Taylor v Plumer* was a case about common law tracing. As we have explained above, it has been "convincingly demonstrated" that *Taylor v Plumer* was not concerned with common law tracing. Secondly, their Honours did not refer to any other case in support of the ability to trace at common law. Thirdly, the facts of *Brady v Stapleton* itself required the application of equitable tracing rules, and as such the comments about common law tracing and *Taylor v Plumer* were only obiter dicta.

With respect to the obligation on lower courts to follow certain obiter dicta of the High Court, as set out in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[47] we doubt whether the dicta in *Brady v Stapleton* was "seriously considered". The passage in which these comments were made was concerned with the rules of equitable tracing. Their Honours did not consider the existence of common law tracing in detail, nor did their Honours consider its basis or rationale. In addition, to the extent that it is also necessary for the obiter dicta to concern a topic on which there is a long-established line of authority,[48] we submit that this was not the case.

B Intermediate Appellate Court Authorities

In *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)*,[49] McPherson ACJ recognised the existence of the ability to trace at common law which would, in his Honour's opinion, cease "when the thing, or more often the proceeds of its sale in the form of money, is intermixed with other things or money so as to lose its identity".[50] His Honour also observed that in *Taylor v Plumer*, "Lord Ellenborough CJ was speaking law not equity".[51] However, not only was his Honour's understanding of *Taylor v Plumer* based upon the incorrect assumption that it was about common law tracing,[52] his

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42 We acknowledge that even this explanation of tracing, and its focus on an "asset exchange" or a "substitution" is controversial: see James Edelman and Elise Bant, *Unjust Enrichment* (Hart, 2016) at 106-107; and Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff & Jones The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) at [7-31]. We do not examine its correctness here, but simply note that there is a distinction between "tracing" and "following".

43 (1952) 88 CLR 322.

44 The third member of the Court, McTiernan J, did not discuss *Taylor v Plumer*.

45 *Brady v Stapleton* (1952) 88 CLR 322 at 336-337.

46 *Brady v Stapleton* (1952) 88 CLR 322 at 337.

47 (2007) 230 CLR 89 at [134] and [158].

48 The position is not clear, but there are indications that this may also be a required element: see, eg, *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 161 [473]; *Ying v Song* [2009] NSWSC 1344 at [17]; *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 at 346 [31]; *Lavin v Toppi* (2014) 87 NSWLR 159 at 173 [77].

49 [1994] 2 Qd R 159.

50 *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162-163.

51 *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162.

52 Further, for the reasons given in Part V(B), Lord Ellenborough CJ was indeed referring to a limitation of *equity*.

Honour's judgment was also a dissenting one. The other members of the Queensland Court of Appeal did not discuss tracing.

In *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd*,[53] Hope JA (with whom Kirby P and Priestley JA agreed) noted that where a bailee sells goods which have been bailed to him or her, the bailor can trace his property both at law and in equity, although the legal remedy stops when the proceeds of the sale become part of a mixed fund.[54] However, these comments were only obiter as they were given as an example in support of the proposition that "the co-existence of legal and equitable remedies in respect of the same factual position is not a proposition of recent invention".[55]

In *R v Grant*,[56] the New South Wales Court of Criminal Appeal considered the summary offence of having in one's possession "any thing … which may be reasonably suspected of being stolen or otherwise unlawfully obtained". Bural had $35,470 in a savings account, and there was a reasonable suspicion that the money had been unlawfully obtained. Bural's solicitor withdrew the money and placed it in his trust account for Bural. On instructions, Bural's solicitors gave Thorn two cheques totalling $32,000. Thorn then gave Bural $10,000 from the proceeds, which he subsequently gave to Grant. Grant was convicted of the offence. The Court had to consider whether the illegality which attached to the money in the savings account continued to attach to, and taint, the $10,000 as proceeds of that money. Moffitt ACJ considered that the answer to that question lay in an application of the principles of common law tracing as set out in *Taylor v Plumer* and *Sinclair v Brougham*. His Honour construed the reference to "thing" in the provision according to these principles, and found that as the money handed to Grant was the traceable proceeds of the money in the savings account, the illegality attached to it.[57] Begg J concurred in the result but relied on reasoning not involving tracing, and Cantor J dissented.

This case does not provide support for the existence of common law tracing for two reasons. First, Moffitt ACJ's analysis of *Taylor v Plumer* proceeded on the same misreading outlined above – his Honour specifically noted, incorrectly, that Lord Ellenborough CJ was "dealing with the common law".[58] Secondly, Grant successfully appealed to the High Court, which held that "thing" refers to the same physical object throughout.[59] Gibbs CJ and Mason, Aickin, and Wilson JJ specifically noted that there was "no warrant for resorting to the common law doctrine of following or tracing".[60] Therefore, although the High Court did not criticise Moffitt ACJ's statement or application of the principles of common law tracing, those statements can have no precedential value.[61]

In *Russell Gould Pty Ltd v Ramangkura*,[62] the appellant company owed money to one of its directors, which was repayable on demand. The director caused the company to transfer $227,820.71 (which

53 (1988) 13 NSWLR 331.

54 *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 341.

55 *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 341.

56 [1979] 2 NSWLR 478.

57 His Honour also indicated that he would have reached the same conclusion even if he was wrong about the construction of "thing".

58 *R v Grant* [1979] 2 NSWLR 478 at 483.

59 *Grant v The Queen* (1981) 147 CLR 503 at 508.

60 *Grant v The Queen* (1981) 147 CLR 503 at 508.

61 Where a decision is reversed on appeal, all parts of the primary decision cease to be authoritative, even where it contains points which were not taken or considered on appeal: see *Federal Commissioner of Taxation v St Helen's Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 410; *Re French Caledonia Travel* (2003) 59 NSWLR 361 at 379-380 [59]; *Cemex Australia Pty Ltd v Takeovers Panel* (2009) 177 FCR 98 at 116 [95].

was less than he was owed) from its term deposit account into a home loan account which the respondent had with the same bank. The director considered the respondent a "surrogate daughter". The respondent's account was $227,820.71 in debit and the transfer therefore cleared the respondent's home loan to the bank. As against the bank, the director had unlimited authority to operate the company's accounts by his own signature alone. The company brought proceedings against the respondent seeking to recover the money in an action for money had and received, but failed at first instance.

The Court of Appeal (Barrett JA, with whom Bathurst CJ and Ward JA agreed) endorsed the primary judge's conclusion that the correct characterisation of the payment was that the company had paid the sum to the director by way of part payment of the loan balance owing by the company, and that the director had then made a gift of that sum to the respondent.[63] The company did not allege any breach of duty on behalf of the director, but simply contended that he did not have authority to cause the company to make the particular payment without the approval of the directors. Accordingly the conduct of the director had to be taken to be innocent, with the result that "equitable principle play[ed] no part in the adjudication of the Company's claim and that common law rules alone [were] to be applied".[64] Of common law tracing, Barrett JA said:

> [P]rinciples concerning following and tracing … facilitate the identification of particular property in someone else's hands as either the plaintiff's property or as a substitute for the plaintiff's property. Property is treated as identifiable as long as it has not become mingled with other property. The common law therefore does not allow tracing into a mixed fund (equity, by contrast, may grant or recognise a charge over such a fund in order to preserve an equitable interest arising from an addition or contribution to it).[65]

Barrett JA noted that neither the common law nor equity allows money to be traced into a bank account where it is overdrawn before the payment is made, and continues to be overdrawn afterwards. That was fatal to the company's ability to trace on the facts of the current case.[66]

Barrett JA therefore concluded that "no process of following or tracing countenanced by the common law allows to be identified in the [respondent's] hands anything that represents that money".[67] His Honour held that even if it were assumed that the payment that the director received from the company and gifted to the respondent was unauthorised, any action for money had and received could only lie against the director, and not the respondent, because of the inability to trace. His Honour did note that if equitable principles had been applicable, it may have been possible for the company to trace into the real property owned by the respondent on the basis that "the provider of the money that caused the mortgage debt to be discharged was subrogated to the property right of the mortgagee whose debt was paid out".[68]

It must be conceded that *Russell Gould Pty Ltd v Ramangkura* contains ratio comments which assume the existence of common law tracing. However, as a decision of an intermediate appellate court, the High Court is not bound by it and other courts outside of New South Wales are free to depart from the decision if they consider it "plainly wrong".[69] If the central thesis of this article is accepted, then the decision on this point is plainly wrong. Barrett JA did not rely on any Australian case for the ability to

62 (2014) 87 NSWLR 552.

63 The alternate case put by the company was that the payment was properly characterised as a gift by the company to the respondent.

64 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 557 [26].

65 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 559 [32].

66 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 559 [34]-[36].

67 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 560 [38].

68 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 559-560 [37].

trace at law, and although he relied upon *Lipkin Gorman* and *Agip (Africa) Ltd v Jackson*, those cases proceeded on an incorrect view of *Taylor v Plumer*. It is well-established in Australian law that "the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning".[70] It would be a mistake "simply to follow foreign judicial opinions as if courts in this country were still subject to their authority … It is important that Australian judges recognise the intellectual freedom (and responsibility) which is the consequence of the severance of the former institutional links".[71] Thus, in our view, this single decision of an intermediate appellate court is not an insurmountable obstacle standing in the way of concluding that, for the purposes of Australian law, common law tracing does not exist. It is not too late for the High Court, intermediate appellate courts, or other courts outside New South Wales, to correct the error.

C First Instance Authorities

In *Southage Pty Ltd v Vescovi*,[72] Macaulay J appeared to allow tracing at common law through a mixed fund.[73] However, his Honour did not hear argument on the matter and simply assumed, without deciding, that tracing was possible. Accordingly, this case provides no support for the existence of common law tracing.[74]

In *Re Global Finance Group Pty Ltd (in liq); Ex parte Read*,[75] McLure J noted that "at law, a claimant can trace into but not out of a mixed fund … unless perhaps the claimant can prove that part of its money was actually paid out of the fund".[76] Her Honour cited *Taylor v Plumer* and *Lipkin Gorman*. However, her Honour's comments were *obiter* because the claimants claimed equitable title to the funds and her Honour was required only to apply the equitable tracing rules.[77]

In *Commonwealth Bank of Australia v Saleh*,[78] Einstein J noted that "tracing at common law is available where it can be shown that the defendant has received the plaintiff's money and the extent of the defendant's liability will be determined by the amount received".[79] His Honour also noted that "because identification of the receipt is the crucial element at common law, the remedy is of limited or no utility where the plaintiff's moneys are mixed with those of others".[80] His Honour's comments were also *obiter* as only equitable tracing was relevant on the facts of the case.

In *Peter Kent Development Pty Ltd v The Australia and New Zealand Banking Group*,[81] a third party converted cheques belonging to the plaintiff. It paid the proceeds of the cheques into its account, and

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69 *Farah Constructions Pty Ltd v Say-Dee* (2007) 230 CLR 89 at 151-152 [135].

70 *Cook v Cook* (1986) 162 CLR 376 at 390. See also *Paciocco v ANZ Banking Group Ltd* (2016) 258 CLR 525 at 539-540 [7]-[10].

71 *Taikato v The Queen* (1996) 186 CLR 454 at 484 per Kirby J (dissenting).

72 [2014] VSC 141.

73 *Southage Pty Ltd v Vescovi* [2014] VSC 141 at [96]-[98].

74 See *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79]-[80]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]. The point was not taken on appeal: see *Southage Pty Ltd v Vescovi* (2015) 321 ALR 383.

75 (2002) 26 WAR 385.

76 *Re Global Finance Group Pty Ltd (in liq); Ex parte Read* (2002) 26 WAR 385 at 406-407 [96]. See also 407 [97].

77 See *Re Global Finance Group Pty Ltd (in liq); Ex parte Read* (2002) 26 WAR 385 at 407 [98], 428 [213].

78 [2007] NSWSC 903.

79 *Commonwealth Bank of Australia v Saleh* [2007] NSWSC 903 at [23].

80 *Commonwealth Bank of Australia v Saleh* [2007] NSWSC 903 at [24].

then drew new cheques in favour of the cross-defendants. David Hunt J struck out a paragraph of the statement of claim which alleged that the cross-defendants were liable in conversion for having converted the proceeds of the plaintiff's cheques, or alternatively for having converted the new cheques which were drawn on the proceeds. In support of the paragraph, the plaintiff relied on the analysis of the principles of common law tracing of Moffitt ACJ in *R v Grant*, which his Honour set out. His Honour then reasoned as follows:

> Accepting, with respect, that this analysis is correct, it does not in my view overcome the Bank's problem. Despite the common law's ability (albeit limited) to trace, the allegation remains one that the cross-defendants are guilty only of conversion. That conversion can relate only to chattels; tracing at common law cannot convert a right to recover the value of a chattel into the chattel itself; the only chattels involved are the cheques drawn by the [third party], and a conversion of those chattels does not, and cannot, make the cross-defendants liable to the plaintiff in tort.

This case does not provide any support for the existence of common law tracing for two reasons. First, his Honour relied on the analysis of Moffitt ACJ in *R v Grant*, which was later overturned by the High Court. More importantly, however, David Hunt J concluded that the paragraph of the statement of claim was bad in law because the cross-defendants could not be liable in conversion to the plaintiff for converting chattels other than the plaintiff's original chattels, even if the converted chattels were the traceable proceeds of the original chattels.[82] His Honour was not required to decide, and did not decide, whether or not the plaintiff could trace at law.

In *Opus Productions Pty Ltd v Popwing Pty Ltd*,[83] the plaintiff and first defendant were partners. The first defendant sought relief from an undertaking not to deal with two bank accounts held in its name, for the purposes of repaying to the second defendant a sum which was paid under a mistake of fact. The sum was mixed with other funds in one of the first defendant's bank accounts. His Honour recognised that where A's money is paid without authority to B, mixed in B's account with other funds, and then transferred to C, A's claim in money had and received against C would ordinarily be defeated. However, in the present case there was no transfer of the money from the first defendant to the plaintiff. The sum was received in the course of the partnership between the plaintiff and the first defendant, and both partners acquired an equitable interest in the money as a partnership asset. Santow J was satisfied that the plaintiff's equitable interest in the money could not defeat the second defendant's prima facie claim at common law. His Honour reasoned:

> Tracing in the present circumstances is not necessary to vindicate the Second Defendant's claim. So the fact that it is not possible, given the mixing of the moneys, is not to the point. Even granted the moneys in the account are partnership assets, both partners have received money in that account that does not belong to them. They clearly did so in the course of their (assumed) partnership … So there is nothing unjust in a result requiring both Plaintiff and First Defendant to meet the Second Defendant's claim out of partnership assets and in particular from money in the account.

This case therefore says nothing as to the existence of common law tracing. The second defendant succeeded without having to trace at common law.

Rabo Equipment Finance Ltd v Boutayeh[84] was an application for an interlocutory injunction in which Bryson J was required to assess the strength of the plaintiff's case. The plaintiff paid a sum into a bank account owned by the first defendant because of a fraud perpetrated by the first defendant. The first defendant obtained a bank cheque drawn on that account for $60,000 in favour of the fifth defendant and gave it to him. The fifth defendant banked the cheque to the credit of several accounts, including a term deposit of $25,000. The plaintiff claimed that it could trace in equity into the term

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81 [1980] NSWSC 1.

82 For reasons given in Part V, the idea that a third party cannot be liable for converting the traceable proceeds of the original property is a difficulty of principle which weighs against the recognition of common law tracing.

83 Unreported, Supreme Court of New South Wales, Santow J, 28 February 1995.

84 [2001] NSWSC 517.

deposit and assert an equitable interest therein. The plaintiff's counsel relied on the judgment of Lord Goff in *Lipkin Gorman* for the proposition that the onus of proof is on the recipient of money to show that the receipt was a receipt in good faith and for valuable consideration. His Honour doubted that *Lipkin Gorman* was authority for that proposition, and then went on to observe:

> In any event his Lordship's observations … show in my view that a claim based on tracing at law from the payment made by the plaintiff into the [first defendant's bank account] into the [term deposit] is not available. Prima facie the Term Deposit is traceable through several stages back to the amount advanced, but it is also clear that the payment of $60,000 to [the fifth defendant] and the credit of part of the proceeds of the bank cheque to the Term Deposit took place on 1 May, well before any event which could be thought to be a decision by the plaintiff to assert title to the proceeds of the advance to the Westpac Bank account; so that the common law tracing remedy is out of the question …[85]

His Honour's comments were only obiter because the claim in support of which an injunction was sought was an equitable claim supported by equitable tracing. Bryson J specifically noted that the claim for money had and received (or restitution for unjust enrichment) could not be the basis for an interlocutory injunction as it was not a proprietary claim.[86]

In *Downey v Aira*[87] the applicants, a company in liquidation and its liquidator, alleged that four payments made to the respondent were voidable transactions under the *Corporations Act* 2001 (Cth). The respondent, a manufacturer of heating and air-conditioning equipment, had provided goods on credit to the company in liquidation. One of the arguments raised by the respondent by way of defence was that the payments were not made as between debtor and creditor but rather represented moneys that were held on trust for it pursuant to a *Romalpa* clause:

> Property in goods shall not pass until payment in full has been effected. If the buyer resells the equipment or materials prior to making full payment to the company, the buyer shall hold the proceeds of sale on trust for the company.

Ashley J, in disposing of the case, considered tracing at common law and in equity. Of the former, his Honour said:

> The common law recognizes "tracing" … It is a right (essentially) in rem, lost if property in the goods has passed: Sinclair v Brougham and Ors [1914] AC 399 at 419- 420; Re Diplock; Diplock v Wintle [1947] 1 Ch 716 at 744. It is a right which in a retention of title context depends upon the purchaser retaining the goods or keeping the proceeds of sale identifiable.

While these comments about common law tracing appear to be ratio comments, the case itself provides weak support for the existence of common law tracing. Aside from the fact that it appears that counsel had sought to rely upon tracing in equity rather than at common law, the defence ultimately failed because Ashley J held that the respondent company could not rely upon the retention of title clause. First, his Honour considered it was doubtful on the facts whether there had been a resale of the equipment so as to enliven the operation of the clause. Secondly, his Honour noted that even if, contrary to his conclusion, there had been a resale, it could not be concluded that the money received by the respondent represented the "proceeds of sale". Thirdly, and most importantly, his Honour held that, despite the first sentence of the clause, legal title to the equipment had passed from the respondent to the applicant company at the relevant time and that a resale was permitted. Accordingly, the respondent could not have relied upon the clause to engage in a common law tracing exercise because the owner of the equipment at law at the relevant time was the applicant company and not the respondent. It was not a case concerned with the ability of an owner of equipment at law to assert rights in the proceeds received in exchange for its equipment.

It remains to note that in *NAB Ltd v Rusu*,[88] Bryson J referred briefly to the "tracing of moneys at common law" to note that there could be "no relation between the present facts and tracing NAB's

85 *Rabo Equipment Finance Ltd v Boutayeh* [2001] NSWSC 517 at [11].

86 *Rabo Equipment Finance Ltd v Boutayeh* [2001] NSWSC 517 at [12].

87 Unreported, Supreme Court of Victoria, Ashley J, 23 May 1996.

stolen money at common law".[89] More recently, in *Australia's Residential Builder Pty Ltd (in liq) v Robert Wiederstein*,[90] Randall AsJ noted that "the ability to trace in common law dissipates when the account is mixed and thereby equitable principles of tracing apply". The case was concerned with equitable tracing and did not involve any detailed consideration of common law tracing.

D Summary of Australian Position

In summary, the position in Australian law is as follows. Of the 14 cases in which common law tracing has been considered, tracing has only been allowed in one of them. However, that was a decision of a first instance court where the point was assumed without argument, and therefore provides no support for the existence of common law tracing.[91] The High Court has only discussed common law tracing on one occasion, in comments that were obiter and based upon a misreading of *Taylor v Plumer*.[92] Of the remaining authorities, only two contain ratio comments about common law tracing, and only one of them is a decision of an intermediate appellate court.[93] The position is far removed from that in England where both the House of Lords and the Court of Appeal have authoritatively recognised the existence of common law tracing.

V SHOULD AUSTRALIAN LAW RECOGNISE COMMON LAW TRACING?

The previous section has shown that in Australia, unlike in England, the path to holding that common law tracing does not exist remains relatively clear. In this section we consider whether Australian law *should* recognise the existence of common law tracing. The section is divided into three parts. First, we consider the authorities at the time of *Taylor v Plumer* and whether there were any other cases which support the existence of common law tracing. As will be shown, the decided cases, at best, provide very weak support for the proposition that it is possible to trace at common law. Secondly, we explain that the defining limitation of common law tracing, namely that it is not possible to trace through a mixed fund, was a rule which applied in equity, although it was abolished midway through the 19th century. Finally, we consider the issues of principle which would arise if common law tracing were recognised in Australia. The result, we suggest, is that common law tracing should not be recognised in Australian law.

A Authorities at the time of *Taylor v Plumer*

As we explained in Part II, *Taylor v Plumer* was a case based on the application of equitable principles, despite being a decision of a common law court. In the next section, we take that analysis one step further and explain why the limitation to which Lord Ellenborough CJ referred when he spoke of funds being mixed was a limitation which had been applied in *equity*. Accordingly, *Taylor v Plumer* is an extremely weak foundation for the existence of tracing at common law. In this section, however, we consider whether there were any other cases around the time of *Taylor v Plumer* which provide support for the existence of tracing at common law.[94]

88 [2001] NSWSC 32.

89 *NAB Ltd v Rusu* [2001] NSWSC 32 at [39].

90 [2018] VSC 37 at [71].

91 *Southage Pty Ltd v Vescovi* [2014] VSC 141.

92 *Brady v Stapleton* (1952) 88 CLR 322.

93 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552; *Downey v Aira Pty Ltd* (unreported, Supreme Court of Victoria, Ashley J, 23 May 1996).

94 We are grateful for the analysis undertaken in two key articles upon which this section is based: Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78 and Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240.

In *Whitecomb v Jacob*,[95] it was said that if one employs a factor, and entrusts him with the disposal of goods, then if the factor receives the money and that money is vested in other goods before the factor becomes bankrupt, those substitute goods shall form part of the merchant's estate and not the factor's. On the other hand, if the factor receives the money and becomes bankrupt and has not laid the money out in other goods, then the money shall form part of the factor's estate and is liable to debts of a superior nature. As Smith has explained, the "case is poorly reported and somewhat ambiguous".[96] If the subsequent purchase was authorised then tracing, which on most accounts is concerned with *unauthorised* substitutions,[97] is not needed to explain the rights in the substitute asset: "the rights would simply be acquired by intention, either in law or equity".[98] However, even if the purchase was unauthorised, it is clear that this case was concerned with the ability to assert equitable rights in the substitute asset.[99] The analysis of this case by Sir George Jessel MR in *Re Hallett's Estate*,[100] considered below, confirms that this was a case about tracing in equity. It therefore says nothing about the ability to trace at common law.

A slightly more difficult case is *Scott v Surman*.[101] The plaintiffs consigned a quantity of tar to Scott, the brother of one of the plaintiffs, as their factor. The factor sold the tar and it was agreed that the tar should be paid for in promissory notes and that a debt due from the factor to the buyers should be deducted. The buyers gave the factor two promissory notes. He subsequently committed an act of bankruptcy. The assignees in bankruptcy, who were the defendants in the proceeding, subsequently received possession of the notes, and received (i) the money due on them, (ii) the outstanding balance of the factor's account with the buyers, and (iii) "bounty-money" payable under an Act of Parliament for importing the tar.

The plaintiffs argued that the money received by the defendants "must be considered as money received to the use of the plaintiffs".[102] The defendants insisted that, as assignees, they were entitled to all the money which they had received, and that the plaintiffs were required to prove as general creditors. The plaintiffs were successful, although in respect of the debt which had been set off by the factor, the Court held that the "plaintiffs can only come in as creditors, [the debt] standing just on the same foot as if the bankrupt had received it in money before his bankruptcy".[103]

At first glance, this case looks like it might support common law tracing. The plaintiffs succeeded in their claim against the assignees in bankruptcy for money received from the buyer of the tar. There are two reasons why this case, arguably, does not provide strong support for the existence of common law tracing. First, Willes CJ (who delivered the judgment on behalf of the Court) would have decided the case upon the basis that the debt was held by the factor on trust for the plaintiffs.[104] His Lordship explained "a notion, I own, which weighs much with me … of which my brothers are doubtful",

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95 (1710) 1 Salkeld 160; 91 ER 149.

96 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 248.

97 See e.g. Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) at 118.

98 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 248.

99 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 248.

100 (1880) 13 Ch D 696 at 714.

101 (1742) Willes 400; 125 ER 1235.

102 *Scott v Surman* (1742) Willes 400 at 401; 125 ER 1235 at 1236.

103 (1742) Willes 400 at 401; 125 ER 1235 at 1236.

namely, that "nothing vests in [the] assignees at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts".[105] Relying upon a rule concerning circuity of action, his Lordship said "it would be very absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account".[106] On this analysis, the factor would have held the proceeds of sale (namely the common law debt) on trust for the plaintiffs. On his bankruptcy, the debt would not have passed to the assignees and would have "remain[ed] in the bankrupt for the benefit of the cestui que trust".[107] His Honour ultimately decided not to rely upon this view, because the other members of the Court were "doubtful" about this way of disposing of the case, but we submit that it is the better view. It was also subsequently adopted by Lord Ellenborough CJ, with express reference to Willes CJ, in *Gladstone v Hadwen*[108] and in later cases.[109]

Secondly, for the reasons given by Smith,[110] it is doubtful whether, even on the reasoning with which the other members of the Court agreed, this case involved common law tracing at all. Willes CJ held that the debt was due at common law to the plaintiffs (not the factor) from the moment of sale since they were the sellers of the tar.[111] On bankruptcy, the debt continued to be owed to the plaintiffs. His Honour referred to the "general rule" that "if a man receives money which ought to be paid to another or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received".[112] And as had been held previously:

> [T]he debt was not in law due to [the factor], but to the person to whose goods they were, and therefore it was not assigned to the defendant by a general assignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use of him to whom it was due, and so an action will lie as for money had and received to his use.[113]

The case then did not depend upon the establishment of proprietary rights in the money received from the buyer of the tar. As Smith has explained, "the plaintiffs' claim in money had and received was identical to the type of case where the defendant receives the fees of the plaintiff's office or the rents of the plaintiff's land. It was not based on the establishment of any proprietary interest, but on the

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104 See the analysis in Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 243-244.

105 *Scott v Surman* (1742) Willes 400 at 402; 125 ER 1235 at 1236.

106 *Scott v Surman* (1742) Willes 400 at 402; 125 ER 1235 at 1237.

107 *Scott v Surman* (1742) Willes 400 at 403; 125 ER 1235 at 1237.

108 (1813) 1 M & S 517 at 525-527; 105 ER 193 at 197.

109 See Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 247 fn 28 and the cases there cited.

110 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 249-250.

111 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 249, citing *Scott v Surman* (1742) Willes 400 at 405-407; 125 ER 1235 at 1238-1239.

112 *Scott v Surman* (1742) Willes 400 at 404; 125 ER 1235 at 1238.

113 *Scott v Surman* (1742) Willes 400 at 406; 125 ER 1235 at 1238.

unjust enrichment of the assignees."[114] *Scott v Surman* does not provide strong support for the existence of common law tracing.

Golightly v Reynolds[115] was an action in trover brought for some silver and gold, and a banknote of £20, all of which were acquired with a £50 banknote stolen by Ferguson. Those goods were produced as evidence at Ferguson's trial and Reynolds had taken possession of them as sheriff. The *Restitution of Goods Stolen Act* 1529 (21 Hen 8 c 11) provided that a victim of theft "shall be restored to his ... Money, Goods, and Chattles" if the felon was found guilty, or otherwise attainted, by reason of the evidence given by the victim. Justices were empowered to give effect to this right by way of Writs of Restitution. In various cases[116] it had been held that this right extended not just to the goods stolen from the plaintiff, but also to the money or goods for which the original goods had been exchanged. The question was whether the plaintiff could recover in an action in trover, or whether the mode of recovery provided for in the statute necessarily excluded any other mode. The plaintiff succeeded in his action in trover. Lord Mansfield said:

> There is no question, therefore, 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.[117]

His Lordship then added:

> I don't see why trover is not good.—The statute puts an indictment in the same case as a writ of appeal. The statute says, it shall be restored; but leaves the party to his own way of recovery.—Since this statute, it gives him a particular remedy, but does not take away his other remedy.[118]

This case is "ambiguous"[119] and on one view might be seen to support the view that at common law, and quite apart from the statute, the plaintiff had common law rights in the substitute for the stolen goods, sufficient to found an action in trover. However, the better view[120] is that the Court simply gave an expansive interpretation to the statutory right to recover stolen goods, extending it to the substitute for the goods. Trover was available as an alternative means of enforcing this right. Indeed, as Lord Mansfield observed there had not been a writ of restitution for two hundred years. The case therefore "has no general implications about the common law of property".[121]

All of these cases were prior to the decision in *Taylor v Plumer*. None provides strong support for the existence of the ability to trace at common law. It therefore appears safe to conclude that no case prior to *Taylor v Plumer* supports the existence of common law tracing.[122] Indeed, just over a year later, in *Liebman v Harcourt*[123] (a case concerning equitable tracing), counsel for the plaintiff, Sir Samuel Romilly, said in his reply:

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114 See Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 249

115 (1772) Lofft 88; 98 ER 547.

116 The plaintiff referred to *Harris's Case* (1607) Noy 128; 74 ER 1092 and *Holiday v Hicks* (1598) Cro Eliz 661; 78 ER 900.

117 *Golightly v Reynolds* (1772) Lofft 88 at 90; 98 ER 547 at 548.

118 *Golightly v Reynolds* (1772) Lofft 88 at 90; 98 ER 547 at 548.

119 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 251.

120 See both Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 251 and Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78 at 83.

121 Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 251

> It has been decided, in *Lane v Dighton*, and other cases, that, where a trustee, having trust money in his hands, has converted that money into property of another description, the *Cestuis que trust*, may follow the money so converted. *But I have never heard that this doctrine will apply to persons not having a trust character*. It has never, for instance, been so decided in the case of a purchaser for valuable consideration.[124]

There is, however, one case which arguably does support the existence of common law tracing. It is the decision in *Marsh v Keating*,[125] decided almost 20 years after *Taylor v Plumer*. The question which arose in *Marsh v Keating* was the right of Mrs Keating to prove in bankruptcy against the partners of Marsh and Co, in respect of money which had been received by them on the sale of stock which belonged to her, but which had been transferred by one of the partners, Fauntleroy, under a forged power of attorney purporting to be granted by Mrs Keating to the partners of Marsh and Co. Park J delivered the advice to the House of Lords and held in favour of Mrs Keating. His Lordship said:

> [W]e are of opinion that the Plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the Defendants below.[126]

Park J explained that Mrs Keating was "at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it".[127]

If *Marsh v Keating* is the only case around the time of *Taylor v Plumer* that can be said to support the existence of tracing at common law, then it has some serious implications, chief of which is that it means the common law can trace through a mixed fund.[128] The stockbroker who had sold Mrs Keating's shares received £6,018 from the purchaser. This amount must have been deposited into the stockbroker's account because he wrote a new cheque to Marsh & Co for the same amount, less half of his usual commission. It would, therefore, have been mixed in the stockbroker's account. That Mrs Keating was able to succeed in her action for money had and received against the defendants would mean that it is possible at common law to trace through a mixed fund.

But there is a much simpler explanation for *Marsh v Keating*.[129] At no point did Mrs Keating suggest that the money standing to the credit of Marsh & Co was legally her money; the question stated was simply whether the surviving partners were indebted to Mrs Keating. Although the statement of Park J might suggest that Mrs Keating obtained title to the money, the context in which it is said makes clear that the case was one concerned with a waiver of tort.[130] Indeed, this was the way the case was argued. Counsel for Mrs Keating had argued "[t]here are several cases to show that it is competent for a party

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122 A conclusion reached by Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240 at 251 and Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78 at 98. It should be noted that Khurshid and Matthews conclude that common law tracing is limited to what we would now call 'following'; in substance, their conclusion is the same.

123 (1817) 2 Mer 517 at 518; 35 ER 1036 at 1038.

124 *Liebman v Harcourt* (1817) 2 Mer 517 at 519; 35 ER 1036 at 1038 (emphasis added).

125 (1834) 1 Bing (NC) 199; 131 ER 1094.

126 *Marsh v Keating* (1834) 1 Bing (NC) 199 at 214; 131 ER 1094 at 1100.

127 *Marsh v Keating* (1834) 1 Bing (NC) 199 at 215; 131 ER 1094 at 1100.

128 For a discussion of this see James Edelman, '*Marsh v Keating*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) 97 at 116-118.

129 We are grateful to Lionel Smith, Tatiana Cutts, and Jonathan Silver for their discussions with us about this difficult case.

130 See Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78 at 89.

to sue for the proceeds of his property, in an action for money had and received, and wave [sic] the damages for the tort".[131] And as Park J noted:

> If the goods of A are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected that such general rule will not apply to the present case, on various grounds of objection which have been advanced on the parts of the Defendants in the action.[132]

The tort being waived was the vicarious liability of the defendants for the actions of Fauntleroy in converting the stock of Mrs Keating. Or put more precisely, by adopting the sale, Mrs Keating was adopting the sale *by the partners* of Marsh & Co (the power of attorney purporting to be granted to all the partners of Marsh and Co). As Parke J later explained, "if the same money had been paid into Martin and Co's [account], as the produce of the Plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiff".[133] This is the case notwithstanding that if Fauntleroy had acted lawfully, the money would not have belonged to Mrs Keating at law.

There may be a question as to whether this was a case of a *true* waiver, or merely waiver in the fictitious sense so as to allow the proceeds to be recovered in an action for money had and received.[134] One factor pointing to the former conclusion is that Fauntleroy *did* purport to act on Mrs Keating's behalf.[135] The effect of ratifying the act of Fauntleroy in selling the stock was that Marsh & Co acted as her agents in the disposal of the stock. On either view, however, the result is the same. The tort being waived was that of conversion of the stock, for which the partners were all jointly responsible.[136]

In summary then, the history of tracing has been "badly misunderstood".[137] The decided cases around the time of the decision in *Taylor v Plumer*, at best, provide doubtful support for the existence of common law tracing. As Peter Birks has observed, it would seem that common law tracing is an illusion: "[t]he truth appears to be that tracing was exclusively the creature of equity. Common law never traced at all, and would perhaps never have done so but for a mistaken understanding of [*Taylor v Plumer*]".[138] Moreover, as the next section shows, the primary feature of common law tracing, namely its inability to trace through a mixed fund, is a limitation which, for the most part, applied in equity.

B The inability to trace through a mixed fund was a limitation of equity

The defining feature of common law tracing is often said to be its inability to trace through a mixed fund: "[i]f the property becomes unidentifiable, or if it becomes mixed with any other property" then

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131 *Marsh v Keating* (1834) II Clark & Finnelly 250 at 275-276; 6 ER 1149 at 1159, referring to *Hunter v Prinsep* (1808)10 East 378; 103 ER 818 and *Young v Marshall* (1831) 8 Bing 43; 131 ER 316.

132 *Marsh v Keating* (1834) 1 Bing (NC) 199 at 215-216; 131 ER 1094 at 1100.

133 *Marsh v Keating* (1834) 1 Bing (NC) 199 at 219; 131 ER 1094 at 1102.

134 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 28.

135 As observed by Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 28.

136 Another view of the case is that the proceeds were trust property, and although the partners were liable for the amount received, this was because they were vicariously liable for the frauds of Fauntleroy – their liability, unlike that of an innocent recipient, could not be reduced by dissipation subsequent to receipt: see Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 *Law Quarterly Review* 338 at 340 fn 15.

137 Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 245.

138 Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 246.

common law tracing is not possible.[139] This is said to be because the common law, unlike equity, approached tracing in a "strictly materialistic way"[140] and so "could treat a person's money as identifiable so long as it had not become mixed with other money".[141] The picture thus painted is one of the "poor mutt, the common lawyer, able to grasp the identity of specific coins, but retiring mouth agape in baffled amazement once they are mixed with other coins".[142]

The foundation of this limitation is said to be the judgment of Lord Ellenborough CJ in *Taylor v Plumer*, where his Lordship, apparently describing the limits of common law tracing, said:

> [T]he 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 fails when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.[143]

We have explained above that *Taylor v Plumer* was a case which turned on the application of equitable principles. In this section we show that, unsurprisingly, Lord Ellenborough CJ was referring to a limitation which had been applied in *equity*.[144] Indeed, cases in the 19th century appear to have recognised that Lord Ellenborough CJ was referring to the view, prevalent at the time, and "commonplace [in] text-books and cases on trusts that if the trustee converts money or property belonging to the trust and mingles it with other property, the trust is gone."[145] This rule was not clearly abolished until 1853 in *Pennell v Deffell*[146] and was finally put to rest by the Court of Appeal in 1879 in *Re Hallett's Estate*[147]. The contrary suggestion, that equity "would never have had the slightest hesitation"[148] in tracing into a mixed fund, is simply not correct.

There were cases around the time of *Taylor v Plumer* which had held that where a trustee mixed trust funds with his own money, the whole of the fund was treated as trust property until the trustee had satisfactorily distinguished his property.[149] However, it was probably not until the decision in *Pennell v Deffell*[150] in 1853 that the modern position began to emerge, and it became settled that the mixing of trust funds with the trustee's own money did not prevent the beneficiaries from tracing the trust property and asserting proprietary rights in the mixture. That decision was an appeal from a decision of Sir John Romilly MR. It related to the administration of the estate of Mr Green, deceased, who was one of the official assignees of the Court of Bankruptcy and a trustee for various persons and

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139 Alastair Hudson, *Equity and Trusts*, (Taylor and Francis, 2010) at 815. See also the cases referred to in Part III.

140 *In re Diplock* [1948] Ch 465 at 518.

141 *In re Diplock* [1948] Ch 465 at 518.

142 Michael Scott, 'The Right to Trace at Common law' (1966) 7 *Western Australian Law Review* 463 at 470.

143 *Taylor v Plumer* (1816) 3 M & S 562 at 575; 105 ER 721 at 726.

144 See also Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78 at 81; Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 250.

145 Samuel Williston, 'The Right to Follow Trust Property When Confused with Other Property' (1888) 2 *Harvard Law Review* 28 at 28.

146 (1853) 4 De G M & G 372; 43 ER 551.

147 (1880) 13 Ch D 696. The Court of Appeal delivered two judgments. The one with which we are concerned was delivered on 3 December 1879.

148 *Brady v Stapleton* (1952) 88 CLR 322 at 338.

149 See e.g. *Lord Chedworth v Edwards* (1802) 8 Ves Jr 46 at 50; 32 ER 268 at 269.

150 (1853) 4 De G M & G 372; 43 ER 551.

purposes. The plaintiff was the official assignee who had been appointed in place of Mr Green. The defendants were his administratrix and her husband. Mr Green had opened an account with the Bank of England into which he paid all monies received by him whether in his trustee or private capacity. There was therefore a mixing of funds. Sir John Romilly MR held that the balances in Mr Green's bank account belonged wholly to his estate. As he explained in a later case, he thought that:

> [W]here moneys had been paid into a general account with bankers, and cheques had been drawn indiscriminately upon it, they became so mixed up that the trust fund could not be distinguished from the other moneys paid in.[151]

On appeal, Knight-Bruce LJ, delivering the judgment of the Court, held that where a trustee pays money into a bank account, not marked or distinguished as a trust account, the debt owed by the bank to him is "one which, as long as it remains due, belongs specifically to the trust".[152] His Lordship also held that this would not "be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own".[153] However, his Lordship thought that withdrawals from the account would be governed by the "mode explained and laid down by Sir W Grant, in *Clayton's case*".[154] This latter aspect of the case was overruled in *Re Hallett's Estate.*[155]

Pennell v Deffell did "not indeed lay down any new principle", but it contained a "particularly clear and able enunciation of established doctrines in their bearing upon circumstances of some difficulty".[156] The decision was followed in 1865 in *Frith v Cartland*,[157] in which Vice-Chancellor Sir William Page Wood explained the two principles upon which *Pennell v Deffell* was decided: (i) that a trustee cannot assert a title of his own to trust property and therefore "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";[158] and (ii) "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".[159] It was said that "the sole question in every case is whether the property can or cannot be identified".[160]

In April 1879, in *Ex parte Dale & Co*,[161] Fry J said the "logical result of *Pennell v Deffell*" was that "wherever [a] fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own".[162] However, even at that late stage in equity's development, Fry J refused to extend *Pennell v Deffell* to categories other than those involving a trustee in the strict sense, noting that the "result is

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151 *Harford v Lloyd* (1855) 20 Beavan 310 at 321; 52 ER 622 at 626.

152 *Pennell v Deffell* (1853) 4 De G M & G 372 at 383; 43 ER 551 at 556.

153 *Pennell v Deffell* (1853) 4 De G M & G 372 at 384; 43 ER 551 at 556.

154 *Pennell v Deffell* (1853) 4 De G M & G 372 at 384; 43 ER 551 at 556.

155 (1880) 13 Ch D 696.

156 *Frith v Cartland* (1865) 2 H & M 417 at 420; 71 ER 525 at 526.

157 (1865) 2 H & M 417; 71 ER 525.

158 *Frith v Cartland* (1865) 2 H & M 417 at 420; 71 ER 525 at 526.

159 *Frith v Cartland* (1865) 2 H & M 417 at 420; 71 ER 525 at 526.

160 *Frith v Cartland* (1865) 2 H & M 417 at 421; 71 ER 525 at 526.

161 (1879) 11 Ch D 772.

162 *Ex parte Dale & Co* (1879) 11 Ch D 772 at 778.

opposed to the long line of authorities to which I have referred and from which I do not feel myself justified upon any reasoning of my own in departing".[163] It was not until December 1879 that *Ex parte Dale* was overruled and the "rather irrational limitation of a useful doctrine"[164] was finally put to rest, in *Re Hallett's Estate*.

In *Re Hallett's Estate*, Sir George Jessel MR examined the "long line of authorities" (culminating in *Taylor v Plumer*) upon which Fry J had relied in *Ex parte Dale & Co*. To make good the argument that the rule which prevents tracing into or through a mixed fund was one which was applied in equity, it is necessary to examine this part of the judgment carefully. Jessel MR began with the decision in *Whitecomb v Jacob*.[165] That case decided (i) that the equity as to following the proceeds attaches to the case of a factor as well as to the case of a *cestui que trust* and trustee, and (ii) that one could not follow[166] money because it had no ear-mark.[167] Jessel MR considered the first proposition to be good law at the time, but the second was not. His Lordship said:

> Whether it was good law or not at the time of *Salkeld* it is immaterial to consider. It is very doubtful whether Equity had got quite so far at that date as since, and therefore I will not say it was not: but it is not so now.[168]

Jessel MR noted that in *Ex parte Dale*, when considering *Whitecomb v Jacob*, Fry J had gone on to say:

> "Now, with the single exception that it appears to have been held subsequently that money may be so far ear-marked that it may be followed if it has been kept separate, that case appears to have always been held to be an authority".[169]

Jessel MR said of this:

> "That is to say, with the single exception that the sole ground for the decision has been overruled, it is to be an authority! Did ever any one hear anything, if I may say so, so extraordinary as such a comment on an old case?"[170]

Accordingly, Jessel MR considered that the sole ground of the decision had been "long since overruled".[171] His Lordship observed that the same reasoning applied to the decision in *Ryall v Rolle*.[172] Of this, Jessel MR said:

> But it is to be observed that the Judges thought then that you could not follow money in Equity, not that you could not follow it between principal and agent or merchant and factor, they thought that you could not follow it at all, even as between trustee and *cestui que trust*, because money had no ear-mark.[173]

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163 *Ex parte Dale & Co* (1879) 11 Ch D 772 at 778.

164 (1879) 24 *Solicitors' Journal* 101.

165 (1710) 1 Salkeld 160; 91 ER 149.

166 Using the modern terminology established by Lionel Smith and *Foskett v McKeown* [2001] 1 AC 102, we would say follow *or* trace. However, the language in the earlier cases was less precise given that this distinction was not clearly established until much later.

167 *Re Hallett's Estate* (1880) 13 Ch D 696 at 713-714.

168 *Re Hallett's Estate* (1880) 13 Ch D 696 at 714.

169 *Re Hallett's Estate* (1880) 13 Ch D 696 at 714, quoting *Ex parte Dale & Co* (1879) 11 Ch D 772 at 775-776.

170 *Re Hallett's Estate* (1880) 13 Ch D 696 at 714.

171 *Re Hallett's Estate* (1880) 13 Ch D 696 at 714.

172 (1749) 1 Atk 165; 26 ER 107.

The Master of the Rolls then referred to another case, *Ex parte Dumas*.[174] In that case Lord Hardwicke had said that if goods were consigned to a factor who sold them and turned them into money, the principal then could only have come in as an unsecured creditor. Jessel MR noted, referring to *Lewin on Trusts*, that "it seems in the time of Lord Hardwicke it was supposed that you could not follow money in Equity, which perhaps is the explanation, namely, that the doctrine is more modern than his decision. This is certainly not law now".[175] Jessel MR explained that there was no doubt that in bankruptcy if the money was kept separate it could be followed.[176] After referring to later cases,[177] which had purported to apply *Whitecomb v Jacob*, Jessel MR noted that they did not advert "to the distinction between money ear-marked and money not ear-marked"[178] and that, in equity, "[i]f the money had been laid aside by the bankrupt, and put into a bag, and marked, you could take the money".[179] The problem with these cases was that they did not distinguish "between the cases of the money being kept separate and the cases where it was mixed with his own, and could not be followed".[180]

It was in this context, after considering the line of cases which had supposed that in equity money could not be followed[181] because it had no earmark, that Jessel MR came to consider the decision in *Taylor v Plumer*. Consistently with an understanding of that case being about tracing in equity, Jessel MR explained that Lord Ellenborough CJ had entirely overthrown "all the prior decisions as to money not ear-marked not being followed" because "[a]t that time it was well known it could be ear-marked in Equity".[182] His Lordship then proceeded to extract, and comment on, a passage from Lord Ellenborough CJ's judgment. The passage is worth extracting in full (although formatted to make clear which statements are from Jessel MR and which are from Lord Ellenborough CJ):

> [Lord Ellenborough CJ] … 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.
>
> [Jessel MR] That, if I may say so, is law at the present moment; and though I cannot say it always was law, it always ought to have been law, because it is consonant with principle. Now comes the point …
>
> [Lord Ellenborough CJ] and the right only ceases when the means of ascertainment fail.
>
> [Jessel MR CJ] that is correct. Now there comes a point which is not correct, but which I am afraid only ceases to be correct because Lord Ellenborough's knowledge of the rules of Equity was not quite commensurate with his knowledge of the rules of Common Law …
>
> [Lord Ellenborough] which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.

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173 *Re Hallett's Estate* (1880) 13 Ch D 696 at 715.

174 (1754) 1 Atk 232; 26 ER 149.

175 *Re Hallett's Estate* (1880) 13 Ch D 696 at 715.

176 *Re Hallett's Estate* (1880) 13 Ch D 696 at 715.

177 *Scott v Surman* (1742) Willes 400; 125 ER 1235; *Ex parte Sayers* (1800) 5 Ves Jr 169; 31 ER 528.

178 *Re Hallett's Estate* (1880) 13 Ch D 696 at 716.

179 *Re Hallett's Estate* (1880) 13 Ch D 696 at 716.

180 *Re Hallett's Estate* (1880) 13 Ch D 696 at 716-717.

181 We use this in the broad, historical, sense of the term, which includes tracing.

182 *Re Hallett's Estate* (1880) 13 Ch D 696 at 717.

> [Jessel MR] He was not aware of the rule of Equity which gave you a charge … Equity could follow [the funds], and create a charge; but he gives that, not as law – the law is that it only fails when the means of ascertainment fail – he gives it as a case in which the means of ascertainment fail, not being aware of this refinement of Equity by which the means of ascertainment still remain. With the exception of that one fact, which is rather a fact than a statement of law, the rest of the judgment is in my opinion admirable. It goes on …
>
> [Lord Ellenborough] The difficulty which arises in such a case is a difficulty of fact, and not of law, and the *dictum* that money has no ear-mark must be understood in the same way, ie, as predicated only on an undivided and undistinguishable mass of current money.
>
> [Jessel MR] There, again, as I say, he did not know that Equity would have followed the money, even if put into a bag or into an undistinguishable mass, by taking out the same quantity.[183]

There is no suggestion in this passage that Lord Ellenborough CJ was referring to common law rules of tracing, and indeed, on a proper understanding of the case, there is no reason that he would have been. The reference to Lord Ellenborough CJ's knowledge of the rules of equity not being commensurate with his knowledge of the rules of the common law is best understood as a reference to the fact that Lord Ellenborough CJ, an esteemed judge of a common law court, was applying rules which had been developed in equity – rules with which he was less familiar. After referring to the decisions in *Pennell v Deffell*[184] and *Frith v Cartland*,[185] Jessel MR said that:

> [I]t must now be considered settled that … the mere error of supposing that Equity could not follow or distinguish money in the cases supposed, if error it was, and perhaps it was not so originally (I am not sure that the doctrine of equity had got so far at the first start, but it was certainly an error at a later period), is attributable really to the fact that the Judges who followed the earlier cases were not aware of what I may call the gradual refinement of the doctrine of equity.[186]

This reference to the gradual refinement of the doctrine of equity must be understood as a reference to the eventual abolition of the rule in equity that trust property, when converted into money, and mixed, could not be followed or traced. The reference in Lord Ellenborough CJ's judgment to "the difficulty of fact, and not of law", which occurred when the property was "turned into money, and mixed and confounded in a general mass of the same description", was a reference to difficulties originating in cases in equity, which had been overcome by the time of *Re Hallett's Estate*. Indeed, *Re Hallett's Estate* shows that, insofar as the equitable rules of tracing "were expressed more restrictively than we have come to expect" it was "because the resourceful modern tracing rules of equity had not yet been fully worked out".[187] One contemporary commentator, commenting on the example of a trustee mixing trust funds with his own in a bank account, said that "[t]here can be little doubt that, according to the older English precedents, the question [whether the beneficiaries have any rights to the bank account] would have to be answered in the negative. Money when mixed with other money could not be followed, because it had no ear-mark."[188]

In the United States, it appears that Lord Ellenborough CJ's statements were recognised for what they were: statements about the limitations of equity's capacity to trace money, particularly when mixed. Even before *Taylor v Plumer* was decided, the Supreme Court of New York, in a unanimous decision in 1813, said of equitable tracing:

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183 *Re Hallett's Estate* (1880) 13 Ch D 696 at 718.

184 (1853) 4 De G M & G 372; 43 ER 551.

185 (1865) 2 H & M 417; 71 ER 525.

186 *Re Hallett's Estate* (1880) 13 Ch D 696 at 720.

187 Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 246.

188 Samuel Williston, 'The Right to Follow Trust Property When Confused with Other Property' (1888) 2 *Harvard Law Review* 28 at 34.

> The only check to the operation of the rule is, when the property is converted into cash by the bankrupt, and has been absorbed in the general mass of the estate, so that it cannot be followed or distinguished. It is the difficulty of tracing the trust-money, which has no earmark, that prevents the application of the rule. But here that difficulty ceases, for the money, which was the proceeds of the trust goods, was kept separate and distinct, and deposited as such with the defendants.[189]

And in 1853 in *Thompson's Appeal*,[190] Lewis J, referring to Story's *Commentaries on Equity Jurisprudence*, said (in terms clearly derived from *Taylor v Plumer*):

> Whenever a trust-fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified either as the *original property* of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.

His Honour observed that in the case under consideration, namely the misappropriation of funds by the executor and trustee of the deceased's estate, a mixture had taken place. Accordingly, it was "impossible for the chancellor to lay his hand upon a single article of property or on a single dollar of money … and say that any particular thing or sum of money" belonged to the estate of the deceased.[191]

In summary, the defining feature of common law tracing, namely that property when converted into money and mixed with other money cannot be traced, appears to be a rule which applied in equity. When Lord Ellenborough CJ referred to the mixing of funds as an example of when the means of ascertainment would fail, he was referring to the limitation on *equity's* capacity to trace the proceeds of the original property.[192]

Having discredited the historical basis for common law tracing, and the supposed inability at common law of tracing through a mixed fund, the only question that remains is whether, as a matter of principle, common law tracing ought to be recognised.

C Issues of principle with common law tracing

The basic rule of common law tracing which emerges from the English cases discussed in Part III is that where A disposes of B's legal property without B's authority, B can assert legal title to the substitute asset. The application of that rule raises a number of difficulties of principle, which we discuss in this section. Ultimately, we argue that these difficulties are another reason, in addition to the lack of a historical basis, why Australian law should not follow English law in recognising the existence of common law tracing.

The first issue is the conflict which arises between the ability at common law to trace into a substitute asset and assert full legal title to it on the one hand, and the existence of other legal rights in the substitute asset on the other. The conflict arises because full legal title to the substitute asset invariably vests in the person who carries out the substitution. Consider the following example. B bails his horse to A. A, without authority to do so, sells it to C for $500 cash. The $500 cash is the traceable product of B's horse. According to established legal principle, title to the $500 will depend

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189 *Kip v Bank of New York* 10 Johns 63 at 65 (1813), quoted in Paley, *A Treatise on the Law of Principal and Agent*, (1856) at 88 fn 6.

190 (1853) 22 Pa 16 at 17.

191 *Thompson's Appeal* (1853) 22 Pa 16 at 17.

192 See also Brian Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13(1) *University of Tasmania Law Review* 116 at 150.

on the intention of the transferor, C.[193] Assuming that C was unaware of B's existence (which is likely to be the case when A acted without authority), C will likely have intended that legal title to the $500 vest in A. At the same time, the cases on common law tracing suggest that in these circumstances B will be able to trace into the $500 and assert legal title to it. A conflict arises.

It is worth mentioning that the same problem does not arise when *following* an asset to which the claimant had legal title because it is not possible for a person to give better title than they themselves had: *nemo dat quod non habet*. In the above example A does not have title to the horse, other than a possessory title exercisable against all but the true owner, and so cannot good convey good title to C. B continues to have legal title to the horse and can likely make a claim based on that title.[194] A conflict between titles does not arise.

The conflict is also unique to common law tracing and would not arise if equitable principles applied. In the example above, the $500 cash belongs at law either to A or to B. In contrast, equity could recognise that while A held *legal* title to property, B held *equitable* title. This conflict is well illustrated by *Trustee of the Property of FC Jones & Sons (a firm) v Jones*,[195] the facts of which were set out in Part III. The Court of Appeal held that the trustee in bankruptcy could trace into, and assert legal ownership of, Mrs Jones' chose of action with Raphaels. Smith has referred to this as an "extraordinary suggestion",[196] and the editors of *Goff & Jones* have described the reasoning as "unsustainable".[197] The effect of the decision is that notwithstanding that the debt was owed at law to Mrs Jones, the claimant was somehow also the creditor of Raphaels - a creditor of whom Raphaels had no knowledge. However, as the account-holder, it must have been the case that Mrs Jones had legal title to the chose of action against Raphaels. The editors of *Goff & Jones* put forward two ways in which this could nonetheless be reconciled with the claimant's right to trace into the cause of action:

> Mrs Jones was the legal owner of the chose, and any right the trustee in bankruptcy held must have been some form of secondary right to Mrs Jones's right, which was either (1) some form of novel secondary inchoate legal title to the chose in action of which Mrs Jones remained legal owner; or (as Millett LJ denied, but which seems to be the best view in principle) (2) an equitable right, arising under a trust.[198]

Indeed, if the right were an equitable right arising under a trust, the difficulties of principle which we are discussing would disappear.

That brings us to the second issue of principle: if it is accepted that the claimant has a legal interest in traceable proceeds which is less than full legal ownership, what is the nature of that interest? A great deal has been written in an attempt to define its precise attributes and features. The first possibility is that the claimant has some form of innominate right less than full legal ownership in the substitute asset (the "vested innominate right approach"). An alternative possibility, which has been suggested in discussions about *Lipkin Gorman*, is that the claimant has a power to vest legal title to the substitute asset in itself (the "power approach"). In that case, when Cass substituted the solicitors'

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193 *Commercial Banking Co of Sydney v Mann* [1961] AC 1; *Union Bank of Australia v McClintock* [1922] 1 AC 240.

194 Of course, if B decides to trace instead of follow, he elects to relinquish his title to the original asset.

195 [1997] Ch 159.

196 Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 *Law Quarterly Review* 338 at 347.

197 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff & Jones The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) at [8-89]. See also David Fox, *Property Rights in Money* (Oxford University Press, 2008) at [5.96]–[5.106].

198 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff & Jones The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) at [8-89]. Smith himself prefers the second possibility, noting that it would be much simpler to recognise that while the debt was owed at law to Mrs Jones, she held it on trust for the claimant: Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 *Law Quarterly Review* 338 at 347.

chose in action for the bank notes, he was the legal owner of those notes.[199] Yet at the same time, the reason why the action by the firm for money had and received succeeded, at least on one view, was because the Playboy Club had received money belonging to the firm. Commentators, most notably Peter Birks,[200] have argued that the firm had a *power* which, when exercised, would allow the firm to vest title in itself.[201]

However, this analysis suffers from several difficulties. As Smith has explained, it would seem that such a power operates retroactively, so that it could be said that the cash *belonged* to the firm for the purposes of the action for money had and received, but that same approach seems to be excluded for tort.[202] Lord Goff expressly rejected the possibility of a claim being brought for conversion of the money,[203] stating that tracing could not "be relied upon so as to render an innocent recipient a wrongdoer".[204] We would thus be left with the undesirable conclusion that "the power is retroactive for the purposes of unjust enrichment, but not for the law of tort".[205]

The third issue of principle is that, on either view of the nature of the interest, it appears to behave like an equitable interest. As noted above, it would seem that a good faith purchaser for value could not be made liable in conversion. In other words, the plaintiff's legal right or power "needs to yield to good faith purchasers for value without notice".[206] Furthermore, if the vested innominate right approach is accepted then it entails that at common law a legal right can be held *in another legal right*. That is distinctly equitable, and although it "is unremarkable in the law of trusts, where any kind of right can be held in trust and therefore be encumbered by the interest of a beneficiary ... it is unknown in the common law."[207]

The power approach has similar difficulties. It posits that by the exercise of the power a claimant can avoid another person's title at law which has been legitimately bestowed. The common law traditionally has not seen legal title as open to avoidance in this way.[208] As Fitzgerald has pointed out, the power approach advocates for "a notion of avoidance of title (and value) legitimately bestowed because the recipient of the title used some other person's money to buy the exchange product. That seems very much like a trust ... of the property interest legitimately acquired and should be acknowledged as such."[209]

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199 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573.

200 See, eg, Peter Birks, 'The English Recognition of Unjust Enrichment' [1991] *Lloyds Maritime and Commercial Law Quarterly* 473 at 478; Peter Birks, 'Mixing and Tracing' [1992] 45 *Current Legal Problems* 69 at 89-95.

201 See, eg, James Edelman, '*Marsh v Keating*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) 97 at 116. And see the discussion in Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 *Law Quarterly Review* 338 at 338-339.

202 Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 *Law Quarterly Review* 338 at 339.

203 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 570.

204 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573.

205 Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 *Law Quarterly Review* 338 at 339.

206 Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 *Law Quarterly Review* 338 at 339.

207 Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 *Law Quarterly Review* 338 at 340.

208 See Brian Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13(1) *University of Tasmania Law Review* 116 at 149.

209 Brian Fitzgerald, 'Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment' (1994) 13(1) *University of Tasmania Law Review* 116 at 149.

It might be said that in other, rare, contexts the common law has recognised such innominate rights or powers. In the context of proprietary rescission, for example, it is possible to avoid the legal title of a third-party transferee of an asset by the exercise of a right less than ownership, namely, the right to rescind. Consider an example where A sells an asset to B pursuant to a contract which is voidable at law. B then sells the asset to C, who has knowledge of the vitiating factor.[210] In such a case, A can rescind the contract with B and assert a legal proprietary claim to the asset in C's hands. While this is undoubtedly an example of a right less than ownership being exercised by a non-owner against a third-party transferee of an asset, there are two features which distinguish this type of case from the type of case with which we are concerned.

First, in the proprietary rescission context, the right to rescind is "a personal right or power to obtain title to the property when rescission occurs".[211] It is "an imperfection in the title" of the transferee and, because of the *nemo dat* principle, an imperfection in the title of the third-party transferee.[212] To that extent, the title has been *illegitimately* bestowed. In the type of case with which we are concerned, however, there is no imperfection in the transferee's title. We are concerned with *legitimately* bestowed legal title to an asset, which is then overtaken by the legal title of the person seeking to trace into that asset at law. Secondly, as we noted above, even assuming this analysis to be the preferable one, there is still the issue of explaining how the exercise of the power can be retroactive for the purposes of the law of restitution, but not for the law of tort.

Ultimately, while it is possible to speculate as to the precise nature and characteristics of the legal interest which the claimant is said to have in the traceable proceeds, the simple fact is that such an analysis has never been undertaken by an Australian or English court. Moreover, to speculate as to what the interest *might* be "seems artificial and reactionary – fashioned as a reply to common law tracing, rather than a rationale for it".[213] In this respect, the onus is not on those who seek to demonstrate that this interest (which owes its existence, if at all, to a mistaken reading of *Taylor v Plumer*) should not be recognised to explain why the interest which common law tracing purports to recognise cannot be a legal interest. The onus is on those who seek to argue that, notwithstanding its lack of historical basis, common law tracing confers a legal interest in substitute assets to explain, and justify, the nature of that interest. In any event, in the Australian context, where common law tracing has not been authoritatively recognised, there is no need to engage in such a contrived analysis. It is much simpler, and consonant with principle, to recognise that the only rights which are conferred in a substitute asset are equitable rights. As the editors of *Goff & Jones* have noted:

> It is strongly arguable that ... the law would be made significantly simpler and more coherent if the courts were to hold instead that the only title that may be generated to an unauthorised substitute is an equitable title arising under a trust.[214]

Indeed, not only does such an approach have the signal benefit of being sound in principle, it is also consistent with the history of tracing which, for the reasons given above, was exclusively equitable.

D Conclusion

As a matter of history, precedent, and principle, there is no reason for Australian law to recognise the existence of common law tracing; indeed there are reasons for it *not* to do so. First, the decided cases do not provide historical support for the existence of the ability to trace at common law. Secondly, the defining feature of common law tracing, based upon Lord Ellenborough CJ's judgment in *Taylor v Plumer*, was a limitation which applied in equity. Thirdly, there are several difficulties of principle

210 Alternatively, C is a volunteer.

211 Dominic O'Sullivan, Rafal Zakrzewski and Steven Elliott, *The Law of Rescission* (Oxford University Press, 2nd ed, 2014) at 429.

212 Dominic O'Sullivan, Rafal Zakrzewski and Steven Elliott, *The Law of Rescission* (Oxford University Press, 2nd ed, 2014) at 429.

213 Eli Ball, *Enrichment at the Claimant's Expense* (Hart Publishing, 2016) at 158.

214 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff & Jones The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) at [8-81]. See also Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 *Law Quarterly Review* 338.

with recognising the ability to assert legal title to substitute assets. As was demonstrated in Part IV, Australian law has not gotten as far as English law in its treatment of common law tracing. It is not the case, as it is in England, that it must be said following *Taylor v Plumer* that "[t]oo much water has since passed under the bridge".[215] In these circumstances, we submit that the better approach would be to deny the existence of common law tracing, and to recognise that the only tracing rules are those which developed in equity.

VI CONSEQUENCES

If the central thesis of this article were accepted, the result would be that the only tracing rules are the equitable rules. Common law tracing would "simply retire from view".[216] The argument has traditionally been unpopular because it was thought that its adoption would lead to the destruction of all common law claims to traceable proceeds, and that it would, "failing any generalization of the equally strict *Diplock* claim in equity, allow only equity's fault-based restitutionary claim for 'knowing receipt'."[217] That view rests on the assumption that only common law tracing rules can be used to support an action for money had and received, and that it is impermissible to resort to equity's more liberal rules. While that may be the view taken in England, fortunately Australian law has been the subject of unique developments which mean that, in certain circumstances, equitable tracing can be used in support of actions for money had and received.[218]

The leading case is the decision of the New South Wales Court of Appeal in *Heperu Pty Ltd v Belle*.[219] In that case, Allsop P (with whom Campbell JA and Handley AJA agreed) held that the claim for money had and received in *Banque Belge v Hambrouck* "can be seen … to be based, at least in part, on a recognition at law of the equitable ownership of the fund".[220] His Honour referred to the case as "authority for an action at law being available for moneys had and received, or an order for payment, in a sum representing the value of the property held by a volunteer defendant and owned in law or equity by the plaintiff".[221] His Honour also noted that the focus was on the measure of value surviving in the hands of an innocent voluntary recipient when notice of the claim is received,[222] which was consistent in his view with the approach taken by Lord Templeman in *Lipkin Gorman*.[223] His Honour thus concluded:

> [T]he approach of the Court of Appeal in *Banque Belge* and of Lord Templeman in *Lipkin Gorman* … is entirely supportive of an obligation *at law* to restore, in money terms, the *value of the retained proprietary benefit* derived … from the receipt of funds *traceable in equity* ...[224]

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215 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) at 124.

216 Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 245.

217 Peter Birks, *The Necessity of a Unitary Law of Tracing*, in Ross Cranston, *Making Commercial Law* (Oxford University Press, 1997) 239 at 249.

218 In English law, see the tentative suggestion by Millett LJ in *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1997] Ch 159 at 170.

219 (2009) 76 NSWLR 230.

220 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 263 [143].

221 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 263-264 [144].

222 As opposed to the measure of the value received.

223 See *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 264-265 [146]-[152].

It should be noted that insofar as Allsop P relied on the speech of Lord Templeman rather than the speech of Lord Goff, this was because his Honour considered that Lord Templeman saw *Lipkin Gorman* as a retention-based case, while Lord Goff saw it as a receipt-based case. Allsop P expressly refrained from considering the applicability of Lord Goff's approach in Australian law.

His Honour's reasoning has been subsequently endorsed by a differently constituted bench of the New South Wales Court of Appeal,[225] and also draws support from the more recent work of Smith.[226] The effect of it is to recognise that an action for money had and received is available to restore the value of the proprietary benefit retained by a volunteer where the proprietary benefit is traceable in equity from misappropriated funds. As such, in Australian law at least, there are notionally[227] four possible types of actions for money had and received in respect of traceable proceeds:

Claim No.	Type of action for money had and received	Type of tracing used
Type 1	Receipt-based	Common law tracing
Type 2	Receipt-based	Equitable tracing
Type 3	Retention-based	Common law tracing
Type 4	Retention-based	Equitable tracing

If our thesis is *rejected* and it is accepted that common law tracing *does exist* then the result is as follows:

1. Type 1 claims would not be available in any event. In his judgment at first instance in *Agip (Africa) Ltd v Jackson*, Millett J held that an action in money had and received can only succeed against a subsequent recipient who received traceable proceeds of the claimant's money where it can be shown that the defendant still retains some or all of those proceeds.[228] The mere fact of receipt is not enough. The same conclusion was reached by the New South Wales Court of Appeal in *Russell Gould*,[229] and it is consistent with the characterisation in *Heperu* of *Lipkin Gorman* as a retention-based case.
2. Type 2 claims are also not available in Australian law because of the decision of the High Court in *Farah Constructions v Say-Dee*.[230]
3. Type 3 claims would be available – this was the type of claim which was considered in *Russell Gould*, which ultimately failed because the respondent did not retain any traceable proceeds of the company's money.
4. Type 4 claims would also be available – this is the *Heperu*-type claim.

If our thesis that common law tracing *does not exist* is *accepted*, then the only difference is that Type 3 claims are not possible. Type 1 and 2 claims were already unavailable in Australian law, and Type 4 claims are not affected. The result is that the Type 4 *Heperu*-type claim becomes the only type of action for money had and received in respect of traceable proceeds that is available in Australian law. Thus, the effect of our thesis may be summarised as follows:

Claim No.	Type of action for	Type of tracing used	Available if common	Available if common law

224 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 265 [153] (emphasis added).

225 *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at 739 [31].

226 Allsop P noted that such an obligation is supported by Smith: see Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 *Law Quarterly Review* 338 at 340.

227 We say "notionally" because, for the reasons given below, only two of these claims are available on the current state of the law.

228 *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 286-288. The Court of Appeal did not address the point.

229 *Russell Gould Pty Ltd v Ramangkura* (2014) 87 NSWLR 552 at 558 [29].

230 (2007) 230 CLR 89.

	money had and received		law tracing exists?	tracing doesn't exist?
Type 1	Receipt-based	Common law tracing	No	No
Type 2	Receipt-based	Equitable tracing	No	No
Type 3	Retention-based	Common law tracing	Yes	No
Type 4	Retention-based	Equitable tracing	Yes	Yes

Although this is not the place to canvass the entirety of the circumstances in which equitable tracing can be invoked, equitable tracing can fill most of the gaps left by the removal of the Type 3 claim. The Type 4 *Heperu*-type claim will be available in any case which would otherwise have been the subject of a Type 3 claim where there is a sufficient basis to attract the operation of equitable principles. However, there will arguably still be a gap which will remain if our thesis is accepted. In *Heperu* the funds were traceable in equity as being the proceeds of fraud. There is no doubt in Australian law that a thief holds stolen property on trust[231] and therefore that it is possible to trace in equity. But the position is arguably different if the circumstances which resulted in the proceeds coming into the hands of the third party did not involve theft, breach of fiduciary duty, or any other form of equitable wrongdoing. An example of such a case is *Russell Gould* (discussed in Part IV above), where property was transferred by a company director in circumstances where it was not alleged that there was a breach of fiduciary duty, only a lack of authority. In such cases, on the existing authorities, a *Heperu*-style claim would not succeed.

Although such claims are not possible on the current state of the law, we *tentatively* suggest that there is no strong reason why the subsequent discovery of the position by the innocent recipient could not be sufficient to enliven the equitable tracing rules, and thus allow such claims to succeed. First, as *Heperu*[232] makes clear, the obligation in equity to restore to the plaintiff the fund identified and remaining in the volunteer's hands "arises from the later discovered position, not from wrongful conduct." The "extent of the personal equity involved, created by the circumstance in question, is the touching of the conscience of the volunteer recipient to deal with the property of another conformably with the interests of the owner, now discovered."[233] Secondly, it is clear that if a person knows he or she is not entitled to certain funds, for example, because the error of a bank in failing to cancel an "auto-transfer replenishment facility" (a computer glitch) allows him or her to continue to draw cheques over a seven-month period, then the person is "in the eyes of the law to be regarded as having 'stolen'" the money and therefore holds it on trust.[234] It is but a small step to say that a person who receives the traceable proceeds of property, who subsequently becomes aware that the original property was transferred without authority, would similarly have his or her conscience bound such that from *that* point he or she holds the proceeds on constructive trust. And of course, that knowledge may arise from the bringing of a claim at law for money had and received by the owner of the original property.

We recognise, however, that this would be an extension of the existing cases and is not yet a proposition which is accepted in Australian law. This is not the place to explore in detail the merits of such an approach or the implications of adopting it, and we offer it only as a tentative suggestion which might be worthy of further consideration.

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231 See *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at 741 [39] and the authorities there cited. This principle is not just confined to stolen money, as in *Black v S Freedman & Co* (1910) 12 CLR 105, but extends to stolen property: *Creak v James Moore* (1912) 15 CLR 426.

232 (2009) 76 NSWLR 230 at 265-266 [154]. See also *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at 738-739 [30].

233 *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at 265-266 [154]. See also *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at 437 [40].

234 *Westpac Banking Corp v Ollis* [2007] NSWSC 956 at [31].

VII CONCLUSION

In this article we have sought to show that common law tracing owes its purported existence to a historical error: the misreading of *Taylor v Plumer*. In England, that mistake has been recognised by both the judiciary and the academy. Nonetheless, it is accepted that it is now too late to turn back and correct the error. That is not the position in Australian law. As a matter of precedent, the Australian authorities do not require the recognition of common law tracing. As a matter of history, its foundations are weak. And, as a matter of principle, there are serious difficulties with common law tracing. In contrast, to assert that the only tracing rules are the equitable rules is supported by history and principle, and, due to developments in Australian jurisprudence, does not prevent the bringing of claims at law based upon tracing in equity. There are thus good reasons to recognise that common law tracing does not exist.

When at last the charade of the Emperor's new clothes was uncovered and the whole town cried out, "but he hasn't got anything on!", the Emperor chose to soldier on. That is the approach which has been taken in English law. It is our hope that Australian courts will choose the wiser option, and authoritatively recognise that common law tracing is nothing more than an illusion.