

## THE RIGHT TO "TRACE" AT COMMON LAW

The right to "trace" property in equity is a right in rem in the sense that it allows the plaintiff to assert his claim against particular property, in which he claims an equitable title, and to appropriate that property, in whole or in part, to the satisfaction of his claim. It is to be distinguished from any right the plaintiff may have in personam against the defendant, where judgement will impose a personal liability on the defendant, enforceable, so far as property is concerned, against the defendant's property generally. The right to trace is gone once the res is gone; a right in personam, on the other hand, survives the disappearance of any res which may initially have founded the plaintiff's action.<sup>1</sup>

The importance—almost the only importance<sup>2</sup>—of the distinction lies where the defendant is insolvent. Then, if his property is insufficient to meet all claims, the claimant who can point to particular property as belonging to him in equity, or mark out a particular fund over which he is entitled to a charge, may recover his claim in full as against the unsecured creditors.

There are two distinct ways in which property may be "traced". First, the property in its original form may be traced from hand to hand. For example, given the necessary conditions, a cheque entrusted by *A* to *B* may be traced into the hands of *C*, and thence into the hands of *D*, and so forth.<sup>3</sup> Secondly, the property may be traced from

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<sup>1</sup> See Cook, *Powers of Courts of Equity*, 15 COLUM. L. REV. 37, 106 (1915), for an acute and useful analysis of the terms in rem and in personam. The right to trace is a right of action in rem under Cook's classification; the claim for restitution in equity a right of action in personam. What is here said concerning common law rights of action may be clearer if one remembers Cook's observation that rights of action in personam may be used to enforce either rights in rem or in personam; id. at 53.

<sup>2</sup> There are other factors, however. E.g. the periods of limitation may differ; and a claim in rem may carry interest where one in personam does not; Re Diplock, [1948] 1 Ch. 465, 506-507. The claim in rem is not necessarily as advantageous as the claim in personam, even where the defendant is insolvent. The depositors in *Sinclair v. Brougham*, [1914] A.C. 398, would have fared better had they been able to come in as general creditors, when they would have been paid in full.

<sup>3</sup> See *Banque Belge v. Hambrouck*, [1921] 1 K.B. 321.

its original form into a new form. A cheque entrusted by *A* to *B* may be converted by *B* into an exchequer bill, which in its turn may be used to pay for bullion; and *A* then "traces" in asserting his title to the bullion.<sup>4</sup> Commonly, the two modes of tracing are combined. *A* entrusts money to *B*, who purchases shares, which fall into the hands of *B*'s trustee in bankruptcy, *C*; then the property is traced (a) into its new form and (b) into new hands.<sup>5</sup>

These remarks are sufficiently obvious where the equitable tracing remedy is concerned. Judges and writers, concerned primarily with the equitable remedy, have, however, thrown out illuminating asides on the subject of a supposedly analogous tracing remedy at common law; illuminating, with respect, because misleading: because the attempt to disentangle their implications is capable of shedding much light upon the nature of common law remedies where they overlap with those of equity.

## I. THE TRADITIONAL APPROACH AND ITS DEFECTS

The following account of the parallels between the two systems, taken from the present edition of Nathan,<sup>6</sup> may furnish a convenient starting point, both because it is clear and explicit, and because it is based on the analysis in *Re Diplock*:<sup>7</sup>

Both common law and equity provided a remedy in rem in respect of following money or trust funds into the hands of a recipient, but the attitude of common law and equity differed in many important respects . . .

(1) 'The common law did not recognise equitable claims to

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<sup>4</sup> See *Taylor v. Plumer*, (1815) 3 M. & S. 562.

<sup>5</sup> See *Re Hallett's Estate*, (1880) 13 Ch. D. 696.

This duality of tracing, it may be noted in passing, gives rise to the possibility of a multiplicity of actions in rem against successive transferees, just as there can be a multiplicity of actions in personam. *A* entrusts a cheque to *B*, who in breach of trust transfers it to *C* (who takes with notice of the breach of trust) in return for bullion of a less value. *C* transfers the cheque to *D* in return for an exchequer bill. Then not only will *A* have his actions in personam against *B*, *C* and possibly *D*; he will also have rights of action (presumably alternative) to trace the bullion in *B*'s hands and the exchequer bill in *C*'s.

<sup>6</sup> NATHAN, *EQUITY THROUGH THE CASES* 483 (4th edition, 1961, ed. O. R. Marshall). To a like effect, KEETON, *LAW OF TRUSTS* 334 (8th edition, 1963); LEWIN, *TRUSTS* 651, n. 15 (16th edition, 1964); UNDERHILL, *LAW OF TRUSTS AND TRUSTEES* 564 (11th edition, 1959).

<sup>7</sup> [1948] Ch. 465.

property whether money or any other form of property.<sup>8</sup>

(2) 'Specific relief, as distinct from damages (the normal remedy at common law) was confined to a very limited range of claims as compared with the extensive uses of specific relief developed by equity. In particular, the device of a declaration of charge was unknown to the common law, and it was the availability of that device which enabled equity to give effect to its wider conception of equitable rights.'<sup>9</sup>

(3) The common law approached these questions in a strictly materialistic way. 'It could only appreciate what might almost be called the "physical" identity of one thing with another. It could treat a person's money as identifiable so long as it had not become mixed with other money. It could treat as identifiable with the money other kinds of property acquired by means of it, provided that there was no admixture of other money.'<sup>10</sup>

(4) The remedy in rem was lost if the property consisted of money or a negotiable instrument which came into the hands of a person who took in good faith and for value and without notice.

#### 1. THE COMMON LAW DID NOT RECOGNISE EQUITABLE CLAIMS TO PROPERTY

This proposition is either (a) patently incorrect, or (b) so patently correct as to be a truism, and (c) in either case dangerously misleading.

If it means that in the field of operation of the tracing order equity and the common law have no concurrent jurisdiction, it is clearly incorrect. The whole significance of the decision in *Re Hallett's Estate*<sup>11</sup> was that it confirmed the readiness of a court of equity to extend the tracing doctrine to cover, not only the trust relationship properly so called, but any other case where the court could find a fiduciary relationship. The plaintiff in equity could follow property which he had entrusted to an agent (such as a solicitor, a mercantile agent or a broker) or to a receiver or to a bailee. All these were relationships well known to the common law; in all these cases the common law fully recognised the title of the principal or the bailor to property in the hands of the agent or bailee. 'The truth of the matter is,' says Dr. Waters, 'that the constructive trust was coined as a term because Chancery was invited to adjudicate in disputes where the relationship of the parties was rooted in the common law.'<sup>12</sup>

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<sup>8</sup> Id. at 519.

<sup>9</sup> Ibid.

<sup>10</sup> Id. at 518.

<sup>11</sup> (1880) 13 Ch. D. 696.

<sup>12</sup> WATERS, *THE CONSTRUCTIVE TRUST* 39 (1964).

Does the proposition mean any more, then, than that the common law will not protect equitable claims to property unless they are also claims which the common law will protect?

On either interpretation the proposition is misleading. It is misleading, first, because it tends to conceal the very pertinent fact that the great majority of "tracing" cases are cases arising out of common law relationships. Psychologically this is perhaps not surprising. The common lawyer may well avert his eyes with some embarrassment from the sad spectacle of the two overlapping systems of quasi-contract and the constructive trust, which the conservatism of our judiciary, nearly a century after the Judicature Acts, has so conspicuously failed to weld into a uniform set of principles of the kind which our American cousins have achieved with such a large measure of success.<sup>13</sup> It is misleading, secondly, because it suggests that the common law here is necessarily defective, and narrower in scope than equity. It is hoped to show that this is not so, that often the common law can offer a remedy where equity cannot, and that a common law remedy can sometimes be more efficacious than an equivalent equitable remedy.

## 2. SPECIFIC RELIEF, AS DISTINCT FROM DAMAGES, WAS CONFINED TO A VERY LIMITED RANGE OF CLAIMS AS COMPARED WITH EQUITY

Something has gone badly wrong here. Let us suppose that that admirable but uncomfortable paragon, the zealous and intelligent student, having duly pondered this observation and read all the prescribed references, approaches that equally admirable, though possibly less zealous, paragon, the conscientious tutor. The dialogue might run somewhat as follows:

Z.I.S. The right to specific relief in equity is what you mean by a right in rem? A right to get at a particular piece of property?

C.T. Yes, exactly. Corresponding to the right in rem as I have defined it is the remedy, the specific relief.

Z.I.S. But did the common law ever afford specific relief?

C.T. Oh yes. Take ejectment, for example.

Z.I.S. But that is just the one field where no-one has ever suggested that the common law could trace. If, for example, you try to trace money into land which has been purchased with it, it is clear you

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<sup>13</sup> RESTATEMENT, RESTITUTION ch. 1; Seavey and Scott, *Restitution*, 54 L.Q.R. 29 (1938); LORD WRIGHT, *LEGAL ESSAYS* Ch. 2 (1939).

must go to equity. The common law looks only to the name on the conveyance, as it were.

C.T. True. I was merely giving an example. Then take detinue. That was a claim for the return of specific chattels.

Z.I.S. But in detinue the defendant had the option of retaining the goods and paying their value, so that it can hardly be called a remedy in rem; indeed, it has never been classified as such.<sup>14</sup>

C.T. The Common Law Procedure Act<sup>15</sup> altered all that; and you will find that now, under the Rules of the Supreme Court, Order 48 rule 1, the court may, on the application of the plaintiff, order the return of chattels without giving the defendant any option in the matter.

Z.I.S. I see. But it's a matter for the discretion of the court, is it not?

C.T. Yes.

Z.I.S. Well, I've been looking at the cases, and as far as I can see the court exercises its discretion in precisely the same way as if it were entertaining a bill for specific delivery before the Judicature Acts; that is, it will not grant the order where damages are an adequate remedy. The contention that the plaintiff has any absolute right to the return of property was specifically rejected by a unanimous

<sup>14</sup> See *Phillips v. Jones*, (1850) 15 Q.B. 859, 867.

<sup>15</sup> Common Law Procedure Act, 1854, s. 78. The procedure at common law was that judgment issued for the recovery of the thing or its value. A *distringas* then issued to the sheriff, who was to distrain the defendant by all his goods *ad deliberanda bona*; but if the goods detained were not delivered then the sheriff inquired into the damages, and execution issued for these or the amount claimed, whichever were the less; VINER, ABRIDGMENT, Detinue (E) 15; *Phillips v. Jones*, (1850) 15 Q.B. 859.

The procedure at the present day is somewhat different. It is no longer necessary for the value to be assessed by the plaintiff who may therefore endorse his writ for the chattel alone, without giving the defendant an option; *Hymas v. Ogden*, [1905] 1 K.B. 246. This does not alter the substantive law, however, for while entry of judgment in detinue gives the plaintiff the right of issue *a fi. fa.* without leave, a writ of delivery issues only by leave of the court; R.S.C. (England) Order 48, rule 1; and, as our student goes on to point out, the court will give leave only upon grounds which would have induced a court of equity to grant an order for specific delivery. Similarly it is not possible to sign judgment in default in detinue for the goods alone, but only for the goods or their value, or for their value alone; R.S.C. (England) Order 13, rule 3; Order 19, rule 4.

In cases where the plaintiff wishes to claim specific delivery, he probably ought not to claim in the alternative for the value of the goods, for 'in equity, where a plaintiff alleged and proved the money value of the chattel, it was not the practice of the Court to order its specific delivery': per Swinfen Eady, M.R., *Whiteley v. Hill*, [1918] 2 K.B. 808, 819; see also *Dowling v. Betjemann*, (1862) 2 J. & H. 544.

court of appeal in *Whiteley v. Hill*.<sup>16</sup> Swinfen Eady, M.R., said that 'the power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate.'<sup>17</sup> And Duke, L.J., said of the plaintiff's contention: 'I am satisfied that the rules do not give a plaintiff in detinue the alleged absolute right. A plaintiff had not that right at common law or in equity before the Judicature Act.'<sup>18</sup>

C.T. Well, let us put it this way, then. Never mind the origins of the law on the matter; the plaintiff in an ordinary common law action of detinue has the right, at the present day, provided the necessary conditions are fulfilled, to recover a chattel *in specie*.

Z.I.S. Such cases are few and far between, are they not, sir? Is this really all that people mean when they talk about the right to trace? Is it, indeed, what they mean at all? Besides, we keep hearing about coins tied up in a bag and the like, and we are told that the common law can trace these; but surely no court would order the specific delivery of coins or notes.

C.T. Just a minute, you're going too fast. I've not said that this is the *only* remedy available. But since you raise the question of the specific delivery of money, I think you will find the judgment in *Dowling v. Betjemann*<sup>19</sup> very suggestive. That was a case concerned with the specific delivery of a picture, which in the event was refused. But one of the factors which Wood, V.C., took into account was the solvency of the defendants. His remarks seem to suggest that had the defendants been insolvent, so that there would have been a danger of the plaintiff failing to enforce a judgment for the value of the picture, he might have been prepared to order specific delivery.<sup>20</sup> Now take the case of money, might it not be—I do not say it would be, but might it not be—that if the defendant were insolvent, and if the plaintiff could point to the very coins he owned, the court would order specific delivery? That would be a true case of tracing.

Z.I.S. (*smugly*) How would the plaintiff get over the wording of Order 48,<sup>21</sup> which specifically excepts claims for money from its operation?

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<sup>16</sup> [1918] 2 K.B. 808.

<sup>17</sup> *Id.* at 819.

<sup>18</sup> *Id.* at 824, citing DAY, COMMON LAW PROCEDURE ACTS 324 (4th edition).

<sup>19</sup> (1862) 2 J. & H. 544.

<sup>20</sup> *Id.* at 553-4.

<sup>21</sup> R.S.C. (England). The W.A. equivalent is O. 46.

C.T. Ah yes, of course, Replevin . . . .

Z.I.S. For money?

C.T. Just a minute, I was simply turning matters over in my mind. Debt, of course, is out of the question—a straightforward action in personam. Then let us consider the action for money had and received to the use of the plaintiff—note those significant words, “to the use of”. This is what Lord Denning says:

The action for money had and received was and is an effective remedy for the recovery of money. Wherever money was wrongfully taken from the true owner, this action lay to recover it back. It applied to money in all its tangible forms, such as coins or banknotes which the owner had in his possession, or cheques which he held payable to himself or bearer. He might be deprived of such money by thieves or forgers, by fraudulent agents or merely by losing it. It might change its form from coins to cash at bank, or from cheques to notes, or in any way whatsoever. It might come into the hands of persons innocent of any fraud. Nevertheless, *so long as it could be traced*, then whatever its form and into whosoever hands it came, the plaintiff to whom it belonged had this action to recover it back unless and until it reached the hands of one who received it in good faith and for value and without notice of the misappropriation.<sup>22</sup>

That, I think, expresses very aptly what is meant by “common law tracing”.

Z.I.S. But surely, sir, from the remedial point of view there is not the slightest difference between an action for a debt and an action for money had and received. They are both *indebitatus assumpsit*. Both are actions in personam, claims for damages.

C.T. Yes, that must be admitted. I think, perhaps, Professor Marshall<sup>23</sup> was being a little incautious in using the term “remedy in rem”; he should have qualified it.

Z.I.S. By adding that he meant “in personam”?

C.T. Please don’t interrupt. What I mean, of course, is that no-one ever suggested that money could be recovered at common law *in specie*.

Z.I.S. Viscount Haldane suggested it. ‘If money in a bag is stolen, it can be recovered *in specie* . . . . This is a principle not merely of equity, but of common law.’<sup>24</sup>

C.T. Homer nodded.

<sup>22</sup> Denning, *The Recovery of Money*, 65 L.Q.R. 37 (1949). (Author’s italics).

<sup>23</sup> I.e. in his capacity as editor of *NATHAN, EQUITY THROUGH THE CASES* (4th ed. 1961).

<sup>24</sup> *Sinclair v. Brougham*, [1914] A.C. 398, 418-419.

Z.I.S. This is my difficulty. In *Re Diplock*,<sup>25</sup> as I understand it, there were two distinct kinds of claim against the charities. There was the claim in rem against their bank accounts, property they had purchased, and so forth; and there was the direct claim in personam simply for the repayment of the money they had received. That second claim, in turn, was presented in two ways: first, as a claim at common law for money had and received to the use of the plaintiffs, which failed because the money was paid under a mistake of law; and secondly as a direct claim in equity, which succeeded. Now if in my examinations I were to describe the direct claim in equity as a claim to "trace" the money (let alone a claim in rem or a claim to recover the money *in specie*) I might reasonably expect a corresponding diminution in my marks. When, therefore, the Court of Appeal, in dealing with the claim in rem, drew this comparison between tracing in equity and tracing at common law, they cannot, despite Lord Denning's use of the word "trace", have meant to refer to the action for money had and received, for this action was analogous not to equitable tracing but to the direct action in equity for the recovery of the money wrongfully paid. To what, then, did they refer?

What an odious young man! Let us pass, then, to the third proposition.

3. THE COMMON LAW APPROACHED THESE QUESTIONS IN A STRICTLY MATERIALISTIC WAY. IT COULD ONLY APPRECIATE WHAT MIGHT ALMOST BE CALLED THE "PHYSICAL" IDENTITY OF ONE THING WITH ANOTHER

The picture so often drawn in this context of that 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, is testimony rather to the isolation of the Chancery bar than to the deficiencies of the common law. The system which produced the contingent remainder and the doctrine of lineal and collateral warranties may have been pedantic; it was not unsubtle. In fact, it is submitted, what may conveniently be termed the "coins in a bag" cases are concerned, as so often happens, not so much with the substantive law as with the choice of an appropriate form of action.

Where property belonging to *A* passed into the possession of *B* the common law recognized three distinct situations which might result, with corresponding forms of action:

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<sup>25</sup> [1948] 1 Ch. 465.



(a) The property being money or other chattels, the property might remain in *A* though the possession passed to *B*. That was so where there was a bailment, or where the chattels came into the possession of *B* wrongfully, that is, without the authority of *A*. *A*'s action lay in detinue or in conversion.

(b) The property being money, *B* becomes the owner of the money, and the debtor of *A* to a like amount. *A*'s action lay in debt or its successor, *indebitatus assumpsit*.

(c) The property being money or other chattels, *B* became accountable at common law to *A* for the money and for the proceeds of the goods, on a fluctuating account. In that case the money still belonged to *A*, so that *B* was not *A*'s debtor; but at the same time *B* was not under an obligation to return the very coins which had been handed to him, so that he was not a bailee. *A*'s action lay for an account or when, and only when, the account had been rendered in debt, for it was only then that a debtor-creditor relationship was constituted. Later *indebitatus assumpsit* became an alternative to debt; later still, *indebitatus assumpsit* lay even without the taking of an account; *A* sued, in fact, for money had and received to his use.

In a brilliant article published in 1888, the main thesis of which subsequent researches have done little to impair, Langdell described the common law action of account and emphasised its importance for a proper understanding of equitable remedies.<sup>26</sup> More recently Professor Stoljar has pointed out the wide scope and the flexibility of common law remedies which trace their lineage to this action.<sup>27</sup>

In its classic form account was available only against two types of persons—bailiffs and receivers. A receiver was one to whom money was entrusted solely for the purpose of paying it over to its owner. A bailiff was one to whom property was entrusted with a superadded obligation to do something other than simply keep it safely (for then he would be a mere bailee). One who received money with an obligation to deal with the money in commerce was in law a bailiff—every received *ad merchandisandum* was a bailiff. There are some remarkable features of this relationship.

In the first place, it indicates quite clearly that the common law was very well able to grasp the concept of continuing ownership of a fluctuating fund of money, or of money and goods. Langdell put it this way:

<sup>26</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, Part IV, (1889) 2 HARV. L. REV. 241; reprinted in LANGDELL, *A BRIEF SURVEY OF EQUITY JURISDICTION* (1905).

<sup>27</sup> Stoljar, *Transformations of Account*, 80 L.Q.R. 203 (1964).

He [the bailiff or receiver] must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received. For money cannot possibly be employed so as to yield a profit or income, without losing its identity; and though it may be so kept as to preserve its identity, yet the duty of so keeping it will, as has been seen, make the keeper a mere bailee. Moreover, such a mode of keeping money is very unusual, and such a mode of keeping another person's money would presumptively be very improper, for the recognized mode of keeping money is to deposit it with a banker; and yet by so depositing its identity is lost, for the moment it is deposited it becomes the property of the banker, the latter becoming indebted to the depositor in the same amount.<sup>28</sup>

Secondly, the relationship between accountor and accountee was independent of contract; it was imposed by law once a particular set of facts was given. It followed that it was easy to extend the action from the case where *A* entrusted property to *B*, so that *B* became accountable to *A*, to the case where *B* received property from *C* in order to hand it over to *A*—very nearly the trust situation.

Thirdly, though at first the courts required what we should call a fiduciary relationship, and what they called a "privity", between *A* and *B*, yet, as Professor Stoljar has shown,<sup>29</sup> the courts, though reluctant to abandon the traditional terminology, were later able to extend the action to cover the case of a complete stranger, so as to hold a person liable to account for any property in his possession which was not his own but the plaintiff's.<sup>30</sup>

Finally, there came the development whereby account was superseded by *indebitatus assumpsit* for money had and received to the use of the plaintiff. As Langdell points out,<sup>31</sup> the name of the action is a contradiction in terms, for one who receives money to the use of another is not indebted to him; and this is more than a quibble. For, as Stoljar says:

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<sup>28</sup> Langdell, *op. cit.*, n. 26, at 246.

<sup>29</sup> Stoljar, *op. cit.*, n. 27.

<sup>30</sup> Dr. Waters points out how nearly equity, via the concept of the constructive trust, has come towards a similar position; for, as he says, 'when the law recognizes that the offence itself may give rise to the aspect of fiduciary relationship which is breached by the offence, we are not far away from conceding finally that there is no logical distinction between the passing of property as a result of mistake or because of fraud, and the loss of it by theft': WATERS, *op. cit.*, n. 12, at 72.

<sup>31</sup> *Op. cit.*, n. 26, at 255.

Not only was account largely superseded but the principle of accountability was being forgotten too. Because of its ties with *assumpsit* money had and received was creating the impression that all its applicable instances were strictly contractual . . . . Indeed, this contractualisation of money had and received not only obscured its historical connection with account, it did much worse, it obscured the whole doctrine that account had evolved: the doctrine that money could be recovered quite independently of debt or contract, that money was thus recoverable on a theory of trust or accountability, that is, recoverable wherever a defendant was in possession of a sum of money that could be said to belong to the plaintiff, to be his rather than the defendant's property.<sup>32</sup>

Turning now to detinue, there is some eminent authority for the proposition that detinue will not ever lie for money. Blackstone says 'it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked.'<sup>33</sup> Bacon's Abridgment is to a like effect,<sup>34</sup> citing, amongst other authorities, a note in Noy's Reports: 'Note, that it hath been many times adjudged, that trover lies for money although it be not in a bag, but otherwise of detinue; for by that the plaintiff shall have judgment to recover the thing itself, if, etc., and if not then damages, and therefore the thing ought to be known.'<sup>35</sup> Nevertheless, it is submitted, this view is mistaken. If we admit, as surely we must, that the common law recognized that a person might be made a bailee of specific coins, clearly detinue (and certainly not debt) was an appropriate remedy upon a refusal to redeliver.

<sup>32</sup> Op. cit., n. 27, at 218.

<sup>33</sup> BLACKSTONE, COMMENTARIES, VOL. 3, at 152 (15th edition).

<sup>34</sup> BACON, ABRIDGMENT, Detinue (B), citing Core's Case, (1537) 1 Dyer 20a, where it is said (22b): 'If I bail twenty pounds to one to keep for my use, if the twenty pounds were not contained in a bag, coffer, or box, an action of detinue doth not lie, because the twenty pounds could not be discovered or known to be mine, but debt and account lie at my pleasure there.' More appositely, however, the report adds: 'Fitzjames thought in the case here, that the property of the twenty pounds was in the bailee, because he had liberty by the bailment to make an exchange of the twenty pounds' (i.e. because it was not a bailment!). See also Isaack v. Clarke, (1614) 2 Bulst. 306, 1 Ro. 59, and Banks v. Whetstone, (1595) Moo. 394, both of which cases turn on pleading, and assert merely that a plea in detinue for a sum of money, rather than for specific coins, is not a good plea. Co. Litt. 286b, also supports his text. Cro. Eliz. 457 and Litt. Rep. 242, appear to be misreferences; I have not found it possible to trace the references intended.

<sup>35</sup> Noy, 12.

The fallacy in the contrary argument may be demonstrated as follows. Suppose that in the cricket pavilion I am called out to bat, and I turn out my pockets and hand the contents, my keys, a pound note and 3/7d in coins, to a friend to look after. He becomes the bailee of the property; he ought not to mix the money with his own. Inadvertently he slips the money into a purse which contains notes and coins of his own. The argument runs, then: 'The process of execution in detinue begins with the issue of a *distringas* to the sheriff, who is thereby directed to distrain the goods of the defendant until he returns the chattel of the plaintiff or pays its value. The sheriff must, therefore, be able to identify the chattel. In this case, you can have detinue for the keys; and you can possibly also have detinue for the banknote, because a banknote is specifically identifiable by its number.<sup>36</sup> But you cannot have detinue for the coins, for they have no earmark.' A curious consequence if only because as a matter of fact, as distinct from law, I am probably no more able to help the sheriff identify the note than to help him identify the coins. But suppose that I had been in the habit of keeping my money and my keys in a purse, and I had handed the purse to my friend to keep, everyone is agreed that I might have had an action of detinue. Can it be contended that my right of action would be destroyed if my friend wrongfully took the money out of the purse and mixed it with his own? Indeed, if the quandary of the sheriff is the material factor in the argument it would have to be contended further that after the issue of the writ the action might abate if the defendant at that stage mixed the money with his own.

The fallacy, once again, is that of mistaking the character of the action. Detinue is not a real action. The *vindicatio* of Roman law was the unequivocal assertion of the title to a thing. Detinue, based though it is on a property right in the plaintiff, is the assertion that the defendant has committed a wrongful act, that he has refused to give back the goods. It cannot matter in the least that the failure to redeliver is due to the defendant's inability to do so, because he has mixed the property with his own and it can no longer be distinguished from his own. The defect of the "tracing" analogy is evident. It does not make sense to talk about a *vindicatio* against one who no longer

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<sup>36</sup> See *Miller v. Race*, (1758) 2 Keny. 189; cf. *Ford v. Hopkins*, (1701) 1 Salk. 283, 284. Banknotes, of course, rapidly came to be treated as a species of currency not differing in kind from coins; but if identifiability in the defendant's hands were the issue, a banknote is much more readily identifiable than, say, a key-ring.

has the property to be vindicated. It does not make sense to talk about an equitable tracing or charging order if the defendant has no property which can be traced or charged. But it makes perfect sense to talk about a judgment in detinue against one who no longer has the chattel in an identifiable form, or at all.<sup>37</sup>

On the other hand, the question whether money was handed to the defendant tied up in a bag or otherwise was, and is, a highly relevant circumstance, as a matter of evidence, to determine whether it was intended to make the defendant a bailee, or a debtor, or one liable to account. So Viner, after explaining that detinue lies 'for money in a bag' and 'for a bag sealed and £100 in eadem бага contenta, without saying the bag was sealed' goes on: 'So detinue lies for money not in a bag, though in this action the individual thing is to be recovered, and the money may be known . . . ; and . . . it lies if the money was in the view of another, and the defendant took it. If a man lends a sum of money to another, detinue lies not for it, but debt . . . Detinue lies of a piece of gold of the price of 22s. though it does not lie of 22s. in money, for here he demands the particular piece.'<sup>38</sup> Again, under the heading 'Account': '16. If one receives to my use money sealed up in a bag, as my servant, account does not lie against him . . . 18. If £40 is delivered to render account, account lies well; but if it is delivered to rebail when the defendant is required, account does not lie, but detinue, per Martin, quod curia concessit.'<sup>39</sup>

Yet another aspect of the "materialism" accusation which is made against the common law is the allegation that the common law, unlike equity, will not allow you to trace once a debtor-creditor relationship has supervened. One interpretation of this is expressed in *Re Diplock* as follows:

If *B*, a principal, hands cash to *A*, his agent, in order that it may be applied in a particular manner, the cash, in the eyes of the common law, remains the property of *B*. If, therefore, *A*, instead of applying it in the authorised manner, buries it in a sack in his garden or uses it for an unauthorised purpose, *B* can, in the former case, recover the cash as being still his own property and, in the latter case, affirm the purchase of something bought with

<sup>37</sup> Of course the fact that the defendant has parted with possession *may* afford him a defence; in detinue *sur trover* it is always a defence that possession was lost before demand made; in detinue *sur bailment*, the defendant may plead loss without negligence on his part.

<sup>38</sup> VINER, ABRIDGMENT, Detinue A, ss. 4, 5, 6.

<sup>39</sup> VINER, ABRIDGMENT, Account A, s. 6. See also COMYNS, DIGEST, Detinue (B), (C), and Accompt (A).

his money by his agent. If, however, the relationship of *A* and *B* was not one which left the property in the cash in *B* but merely constituted a relationship of debtor and creditor between them, there could, of course, have been no remedy at law under this head, since the property in the cash would have passed out of *B* into *A*.<sup>40</sup>

More than one criticism might be made of this passage. The most important in this context, however, is this: If *B* hands money to *A* so as to make him his debtor, equity will no more allow *B* to "trace" his property than will the common law. If, for example, *B* puts money to the credit of his current account with his banker, *A*, equity cannot possibly allow, and does not allow, a charge against any of the assets of *A*. In equity *B* comes in, as he does at common law, as a general creditor. The primary question, under both systems, is whether the relationship is a debtor-creditor relationship, or some other relationship. The judgment of Jessel, M.R., in *Re Hallett's Estate*<sup>41</sup> has been so important for the equitable tracing doctrine that this fairly straightforward point has been largely overlooked. For example, the judgments in the early cases of *Whitecomb v. Jacob*<sup>42</sup> and *Scott v. Surman*<sup>43</sup> were criticised by Jessel, M.R., upon the ground that they appeared to indicate that, in equity, money could not be followed if it had become mixed with other money. But, as Thesiger, L.J., pertinently observes, these cases, and others like them, form 'not a real exception, but an apparent exception, for all cases where it has been held that moneys mixed and confounded, but still existing, in a mass cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent.'<sup>44</sup>

More usually the proposition that the common law will not allow you to trace once a debtor-creditor relationship has supervened is

<sup>40</sup> [1948] Ch. 465, 519.

<sup>41</sup> (1880) 13 Ch. D. 696.

<sup>42</sup> (1710) 1 Salk. 160.

<sup>43</sup> (1742) Willes 400.

<sup>44</sup> *Re Hallett's Estate*, (1880) 13 Ch. D. 696, 723. As late as 1876, in *Ex parte Cook*, (1876) 4 Ch. D. 123, the Registrar in Bankruptcy thought the relationship between a broker and his client was a debtor-creditor relationship.

given quite another meaning. It means that if *A* entrusts money to *B*, and then *B* puts that money into his bank account with *C* so as to make *C* his debtor, *A* can no longer trace the money. 'If in 1815 the common law halted outside the bankers' door, by 1879 equity had the courage to lift the latch, walk in and examine the books.'<sup>45</sup> This proposition must be examined in due course. But once again let it be emphasised that if we concern ourselves only with the state of affairs between *A* and *B*, the relationship between them, and the form of action *A* has against *B*, are quite independent of whether *B* as a matter of fact puts *A*'s money into a bank; though the question whether *B* has a right to put the money in the bank may well be relevant.

4. THE REMEDY IN REM WAS LOST IF THE PROPERTY CONSISTED OF MONEY OR A NEGOTIABLE INSTRUMENT WHICH CAME INTO THE HANDS OF A PERSON WHO TOOK IN GOOD FAITH AND FOR VALUE AND WITHOUT NOTICE

This is what Lord Denning said of the action for money had and received in the passage quoted above. It is, indeed, a cardinal principle of our law. Yet at the risk of seeming pedantic, it must be pointed out that a close attention to the forms of action shows that this principle, too, in the case of an action for money had and received, admits of an exception. Suppose that a chattel, in fact belonging to *A*, is sold by *B* to *C*, who purchases it for value in good faith without notice of *A*'s right. *C* sells the chattel to *D*, conferring upon *D* (as he may, for example, by a sale in market overt) a good title. He has thereby committed an innocent conversion of *A*'s property, and is liable to an action at the suit of *A*. But *A* has always been able to waive the tort of conversion, and sue instead for the price received by *C*, as money had and received to the use of *A*. *C* could not set up his wrong in defence. Yet *C* received the money in good faith and for value and without notice.

## II. THE PROPER SCOPE OF COMMON LAW TRACING

We have now considered some aspects of the conventional account of "common law tracing", and trust we may have shown that account was not quite as pellucid as a cursory reading of the textbooks might lead the reader to suppose. Why, then, does the term occur so often? Why has it passed unchallenged? Is it a useful term?

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<sup>45</sup> *Banque Belge pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321, 335.

In the first place, the word "trace" is commonly used, as it is by Lord Denning in the passage cited, as meaning no more than "identify". For of course the fact that the common law could not give a remedy in rem to trace property does not mean that the common law did not recognize a right in rem to a particular piece of property; and so in order to found a common law action, it may often be necessary to identify a particular chattel as having passed at some stage into the possession of the defendant.

(1) *A*'s watch is bailed to *B*, or *A*'s watch is stolen from *B*. In either case, if *A* is to have an action of detinue or conversion against *B*, one thing he must show is that he can identify his watch as having passed into the hands of *B* (whatever may have happened to it thereafter).

(2) *B* in turn purports to sell the watch to *C*. In like manner, if *A* is to have an action of conversion or detinue against *C*, he must, *inter alia*, identify his watch as having passed into the hands of *C*.

(3) *A* hands money to his agent, *B*, in order to purchase a watch on his behalf. *B* purchases the watch; or else, without any authority, purchases a diamond ring. In either case, *A* may assert his title to the chattel purchased with his money. Thereafter the situation is as in (1) or (2). It is to be observed that in no case of this kind is it suggested that *A* must identify the particular coins or notes with which the property was purchased. Such an identification would be relevant if the action were one for detinue or conversion of the coins or notes; but it is not relevant where it is for detinue or conversion of goods purchased with a sum of money.

(4) A chattel identifiable as belonging to *A* in one of the foregoing ways passes into the hands of *B* (or *C*), and *B* (or *C*) exchanges it for, or uses it to purchase, another chattel. (For example, the chattel being an exchequer bill entrusted to *B*, or purchased with *A*'s money, *B* uses the bill to purchase bullion.) *A* may assert his title to the chattel in its new form, and so found an action for conversion or detinue.

(5) A chattel, identifiable as belonging to *A*, has come into the hands of *B*, or into the hands of *C*, in one of the foregoing ways. *B* or *C*, as the case may be, "sells" the chattel and receives a sum of money in return. *A* may waive the tort, and sue *B* or *C* for money had and received to his use. It is not necessary for *A* to identify the coins or notes received; but it is necessary to identify the chattel as having been the subject-matter of the sale.

These methods of "tracing" resemble equitable tracing as we first described it. In (1) and (2), *A* traces his property into new hands; in (3) he traces his property into a new form; in (4) and (5) he does



both. They differ from equitable tracing in *that* (a) the consequent right of action at common law is in personam, but in equity in rem, and (b) the common law right of action can thus survive the loss or destruction of the res, while the equitable right of action depends upon its continued possession by the defendant.

There is a further difference. In equity the right to trace property into a new form where the change was unauthorised depends upon an adoption by the principal of the act of his agent. That is necessarily so. The agent is regarded as a fiduciary; his position is equated with that of a trustee; and in a trust proper a breach of trust can only be waived by consent of all the beneficiaries. Underhill states the rule thus: 'If *all* the beneficiaries are *sui juris*, they can collectively elect to adopt the breach, and take the property as it then stands; but if one of them objects to do so, he may require it to be converted.'<sup>46</sup>

At common law, however, no fiduciary relationship needs to be postulated between the owner of the property and the person who converts it; and the right to "trace" the property does not, and never did, rest upon any supposed ratification.

It should not be necessary at this date to argue this last point; and within the limits of this article it is scarcely possible, without wading into the morass of academic controversy as to whether the basis of the action for money had and received lies in an implied promise or in unjust enrichment.<sup>47</sup> *Grammatici certant et adhuc sub iudice lis est.*<sup>48</sup> Despite dicta in *Sinclair v. Brougham*<sup>49</sup> and in *Re Diplock*,<sup>50</sup> however, it ought surely to be conceded that the weight of authority, as well as of logic, lies against the ratification doctrine. In *Taylor v. Plumer*<sup>51</sup> counsel for the assignees argued that in order to trace his property the principal must ratify his agent's act, and could not so ratify to the prejudice of the agent's creditors. The argument was emphatically rejected by Lord Ellenborough: 'The argument . . . that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and

<sup>46</sup> UNDERHILL, *op. cit.*, n. 6, at 560.

<sup>47</sup> A brief chronological bibliography of the controversy is to be found in STOLJAR, *THE LAW OF QUASI-CONTRACT* 2, n. 4.

<sup>48</sup> Horace, *Ars Poetica*.

<sup>49</sup> [1914] A.C. 398, 418-9.

<sup>50</sup> [1948] 1 Ch. 465.

<sup>51</sup> (1815) 3 M. & S. 562.

supported by no authorities of law.<sup>52</sup> And later: 'If this case had rested on the part of the defendant on any supposed adoption or ratification on his part of the act [of wrongful conversion], we think it could not have been well supported on that ground.'<sup>53</sup> And in our own day Lord Wright in *United Australia Ltd. v. Barclays Bank Ltd.*: 'If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them and I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him.'<sup>54</sup>

The expression "common law tracing", then, is used to describe the process of identification necessary at common law to support actions for conversion, detinue or money had and received. There is, however, a second reason why the use of the term is appropriate. In the case where the defendant is insolvent—and it was suggested at the start that this is practically the only case where it is important to distinguish between claims in rem and claims in personam—the common law is able to achieve, by means of purely personal rights of action, an effect which is closely similar to the effect of a tracing order in equity. It does this in the following way. Suppose that *B*, the agent of *A*, becomes bankrupt. Then whatever rights of action *A* may have against *B* at common law will abate along with the claims of other unsecured creditors; and this applies just as much to *A*'s rights of action in detinue, conversion or for money had and received as it does to his rights of action in debt. Suppose, however, that *A* can identify particular chattels of his as having passed into the possession of *C*, *B*'s trustee in bankruptcy, and can show that the property in these had never passed to *B*, then if *C* refuses to return the chattels *A* has a right of action against *C*, this time not in his representative capacity, but, because he had no title to the chattels in that capacity, in his personal capacity. This is, as it were, the sanction which permits *A* to recover his property *in specie*. Further, the common law affords a somewhat wider remedy than equity in these circumstances, for the disposal of the chattels by *C* to a bona fide purchaser would render impossible any subsequent equitable remedy in rem, but would not affect at all *A*'s remedy against *C* for conversion.

Exactly the same reasoning applies where *A* can show that he entrusted a sum of money to *B*, and *B*, either with or without *A*'s

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<sup>52</sup> Id. at 574.

<sup>53</sup> Id. at 579.

<sup>54</sup> [1941] A.C. 1, 29.

authority, used the money to purchase a chattel, and the chattel falls into the hands of *B*'s trustee in bankruptcy, *C*. The identification of the chattel gives *A* an action of detinue or conversion against *C*.

Again, suppose that *A* can identify a particular chattel as having been entrusted to *B* and then sold by *B* to *X*; and then after *B* has gone bankrupt *X* pays the money to *C*. The common law will allow *A* to bring an action against *C* for money had and received to the use of *A*. The chattel has come to be represented by the sum of money.

Let us consider some of the cases in the light of this analysis.

*Taylor v. Plumer*,<sup>55</sup> so often cited out of context as if it laid down invariable principles of the substantive common law, is in fact, significantly, a case which turns on recaption—the one common law remedy which is unequivocally a remedy in rem. In that case a broker was given by his principal a draft for £22,200 on the principal's bankers, and he was instructed to use the money in the purchase of exchequer bills. The broker went to the bankers and was paid in the form of twenty-two Bank of England notes for £1,000 and one for £200. The principal did not authorise the broker to apply the draft, or the money to be received for it, to any other use than the purchase of the exchequer bills. The broker fraudulently used eleven of the £1,000 notes to purchase certain American stock and shares and some bullion. He was apprehended, in possession of this property, at Falmouth, while waiting to embark for America, and the property was seized and handed to the principal. The broker's assignees in bankruptcy brought trover against the principal to claim the property. In a now famous judgment, Lord Ellenborough, C.J., found for the defendant:

It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*,<sup>56</sup> or into other merchandise, as in *Whitecomb v. Jacob*,<sup>57</sup> for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.<sup>58</sup>

The principal was allowed to retain the property as against the

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<sup>55</sup> (1815) 3 M. & S. 562.

<sup>56</sup> (1710) 1 Salk. 160.

<sup>57</sup> (1742) Willes 400.

<sup>58</sup> (1815) 3 M. & S. 562, 575.

assignees.<sup>59</sup>

Suppose the case had been otherwise, and it had been the assignees who caught up with the broker, and seized the property. The result would have been the same. They would not have been allowed to retain it as against the principal; and had they refused to deliver it to him, would have been *personally* liable in detinue or conversion. The principal would have "traced" his property

- (a) by identifying the exchequer bills as belonging to him (method (3) above);
- (b) by identifying the stock and shares and the bullion as belonging to him (method (4) above);
- (c) by identifying the stock and shares and the bullion as specific property which has passed into the hands of the assignees (as the watch passed into the hands of *C* in method (2) above).

*Scott v. Surman*<sup>60</sup> was an action for money had and received to the plaintiffs' use. The plaintiffs had consigned a quantity of tar to *F* as their factor. *E* received the bill of lading and sold the tar to *G*, receiving as part of the payment for the tar promissory notes to the value of £200. He then became bankrupt, and subsequently the defendants, *F*'s assignees in bankruptcy, duly received payment on the notes. The plaintiffs claimed that the money had been received to their use, and succeeded. The tracing here, then, is from the tar in the hands of *F* into its new form, the promissory notes; then the promissory notes are traced into the hands of the defendants. The defendants receive payment, but since the notes were impressed with the plaintiffs' ownership, the money they receive ought to be paid over to the plaintiffs. Consequently the plaintiffs were able to receive the money representing the notes in full as against the general creditors of *F*, which is the object of a claim in rem in equity. They attained this object, however, not by a claim to recover money *in specie*, nor even by a claim against *F*, or the assignees as representing *F*, but by a direct claim against the assignees in their *personal* capacity, because in their *representative* capacity they had no right to keep the money. The fact that the assignees may have, and presumably did, mix the money with other moneys, did not, of course, affect the issue.

<sup>59</sup> The criticism by Jessel, M.R., of the last part of the sentence quoted as being incorrect 'because Lord Ellenborough's knowledge of the rules of Equity was not quite commensurate with his knowledge of the rules of Common Law' and because he did not know of the equitable device of a charge, is therefore not entirely fair. The case before him was one of trover, and on its particular facts no question of a charging order could have arisen.

<sup>60</sup> (1742) Willes 400.

The plaintiffs "traced" their property

- (a) by identifying the tar as having passed into the (constructive) possession of their factor (method (1) above);
- (b) by identifying the promissory notes as received in exchange for the tar (method (4) above);
- (c) by identifying the promissory notes as having passed into the possession of the assignees (analogously with method (2) above);
- (d) by showing that the assignees received money for the promissory notes (analogously with method (5) above).

In fact, *Scott v. Surman*, contrary to the general supposition, is a clear authority for saying that the common law will allow a plaintiff to trace his property into money, even though the coins and notes are not identifiable!

Nevertheless the case has been taken to be one of those which indicate that it is impossible ever to trace money at common law when it has been mixed with other money. This is what Willes, C.J., says:

We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action [i.e. in the action against the assignees personally] but must have come in as creditors under the commission . . . . But the reason of this is so very plain that I need not cite any other, because money has no earmark and therefore cannot be followed.<sup>61</sup>

The question which has never been squarely faced, however, is whether in these circumstances equity would, or possibly could, have taken any different view.

In the first place it would appear that the court considered that the nature of the contract of agency was such that the factor, handling merchandise for his principal, was a bailee of the goods, but a debtor whenever the goods were turned into money. It is not apparent that equity would have taken a different view; as we have seen in *ex parte Cook*,<sup>62</sup> as late as 1876 the Registrar in Bankruptcy was prepared to decide that in equity a stockbroker-client relationship was one of debtor and creditor. Doubtless, so far as the common law was concerned, this was strictly speaking an unwarrantable construction of the contract; the factor was not a debtor, but liable to account.

<sup>61</sup> Id. at 403-404.

<sup>62</sup> (1876) 4 Ch. D. 123.

But since in either case the appropriate form of action *against the factor* at this date was *indebitatus assumpsit*, this had become largely an academic point.

But if we allow that the factor would be considered by equity as a fiduciary, even though no more were shown than that he received money which he afterwards treated as his own and mixed with his own, the same reasoning is not applicable to an action *against the assignees*; in such a case, there is no more possibility in equity than there is at common law of tracing the money into their hands. The money has gone to swell the factor's assets; but if we except some remarks of Lord Dunedin in *Sinclair v. Brougham*,<sup>63</sup> specifically disapproved in *Re Diplock*,<sup>64</sup> this is not sufficient. It is necessary to show more; that the money was paid into a particular account, used to purchase a particular asset, or perhaps, exceptionally, kept apart in the form of notes and coins.

We are now in a position to examine the contention that if money belonging to *A* is paid by his agent *B* into a bank account with *B*'s banker, *C*, *A* cannot at common law "trace" his property any longer, because a debtor-creditor relationship has supervened.

But why not? Surely the decision in *Scott v. Surman*<sup>65</sup> gives one every reason to suppose that *A* *can* trace in this way. In that case the factor sold his principal's tar and took promissory notes from the purchasers. There became vested in him a chose in action—the debt due from the purchasers. And Willes, C.J., says: 'But as money has no earmark, it cannot be distinguished. Otherwise to be sure in reason the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt it is equally distinguishable.'<sup>66</sup> If, then, the factor had received the money for the tar and paid it into a bank account, there would, in precisely the same way, have been a chose in action vested in him—the debt due from the banker. How could it have been denied that money paid subsequently by the banker to the assignees was money paid to the use of the principal?

This is precisely the point made by Atkin, L.J., in *Banque Belge v.*

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<sup>63</sup> 'I think it [equity] can always, in the exercise of the same jurisdiction, help the common law by tracing, and can say that if the proceeds of property of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form.' [1914] A.C. 398, 437.

<sup>64</sup> [1948] Ch. 465, 543.

<sup>65</sup> (1742) Willes 400.

<sup>66</sup> *Id.* at 404.

*Hambrouck*.<sup>67</sup> Whether or not his assertion that 'in 1815 the common law halted outside the bankers' door'<sup>68</sup> is justified, he proceeded at once to repudiate any such limitation. 'I see no reason why the means of ascertainment so provided [i.e. in *Hallett's case*] should not now be available both for common law and equity proceedings . . . . On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received.'<sup>69</sup>

Nor, it is conceived, can we even assert that in every case where *A's* money is "mixed and confounded" with *B's*, in a bank or otherwise, the common law is powerless to trace into the hands of *C*. If all that can be shown is that the money was received by *B*, so that at some stage it formed part of his assets, neither equity nor the common law can trace. But if the money is put into a particular fund of money belonging to *B*, and this fund passes by an involuntary assignment or otherwise to *C*, *A* may be able to trace at common law as well as in equity.

If, for example, to take the stock instance, *A* entrusts particular coins to *B* as a bailee, and *B* places these in a bag which contains coins of his own, and then disposes of the bag with its contents intact to *C*, logically *B* must have converted the particular coins, and if *C* disposes of the bag in turn, he too must be guilty of a conversion. True, the coins cannot be identified, but since the whole amalgam of coins has been converted, any given part of them must also have been converted. Thus in *Jackson v. Anderson*<sup>70</sup> *F* advised the plaintiffs that he had remitted to them 1,969 dollars consigned to *L*. The full consignment to *L* was 4,700 dollars, and *L* fraudulently pledged the bill of lading to the defendant. The defendant sold the dollars to the Bank of England, where they were deposited for safe keeping. He was held liable in conversion to the plaintiffs; and might alternatively have been held liable for money had and received. Counsel for the defendant argued that 'if the Defendants had desired them to point out which dollars were their property, they could not possibly have

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<sup>67</sup> [1921] 1 K.B. 321.

<sup>68</sup> *Id.* at 335.

<sup>69</sup> *Ibid.* And see *Re Diplock*, [1948] Ch. 465, 519: 'If it is possible to identify a principal's money with an asset purchased exclusively by means of it we see no reason for drawing a distinction between a chose in action such as a banker's debt to his customer and any other asset.'

<sup>70</sup> (1811) 4 Taunt. 24.

ascertained them, which shows that neither trover nor detinue will lie.<sup>71</sup> Lord Mansfield, C.J., said: 'It appears that no separation was ever made from the whole quantity of 1,969 dollars belonging to the Plaintiff; and an objection has been taken on that ground against the form of action. But we think that there is no difficulty in that point. The Defendant has disposed of all the dollars; consequently, he has disposed of those which belong to the Plaintiff.'<sup>72</sup>

If in a case of this kind *B* removes some of the coins from the bag before it passes to *C* we can only conjecture what the attitude of the common law would be. Perhaps no action would lie. But the case of money put into a bank account is much more straightforward. The successive deposits of money in a bank account create several and distinct choses in action, with corresponding distinct causes of action.<sup>73</sup>

However, the common law never developed a comprehensive set of rules to determine just when an action for money had and received would lie against assignees where a mixed fund of money in a bank account formed part of the bankrupt's assets. That was simply because, as equitable principles of tracing developed, it became generally unnecessary to consider what the plaintiff might have got at law, particularly after the fusion of the two systems; and because for this reason, as has been suggested, the basis upon which the common law "traced" money came to be misconceived. It is certain, however, that there is nothing in the nature of the action for money had and received which makes it unsuitable for "tracing" money in a mixed fund at bank.

In *Banque Belge v. Hambrouck*<sup>74</sup> *H* fraudulently became possessed of cheques to the amount of some £6,000 purporting to be drawn in his favour by his employers on the plaintiff bank. These cheques he paid into his account with the *F* bank, who obtained payment of them. He then drew cheques on this account in favour of his mistress, *S*, who in turn paid them into her account with the *L* bank. The plaintiffs claimed a declaration that a sum of £315 remaining to *S*'s credit was their property, and an order that it should be paid out to them. Before action the bank paid the money into court and the action was therefore stayed as against them.

Salter, J., at first instance, treated the claim as one for money had

<sup>71</sup> *Id.* at 28.

<sup>72</sup> *Id.* at 29-30. *Wiles v. Woodward*, (1850) 5 Exch. 557, is a rather similar case involving a quantity of paper.

<sup>73</sup> The rule in *Clayton's case*, (1816) 1 Mer. 572, presupposes this.

<sup>74</sup> [1921] 1 K.B. 321.



and received against *S*, and gave judgment in favour of the plaintiffs. *S* appealed. The Court of Appeal dismissed the appeal, all three members of the Court concurring in rejecting her defence that once the money had passed into currency it could not be recovered. That doctrine applied only to one who had received money in good faith and for value; and *S* was either a volunteer or received the money for an immoral consideration.

Scrutton, L.J., decided the case on equitable grounds. So far as the common law claim was concerned, he considered the defence that the payment into *H*'s bank and the drawing out of other money in satisfaction had changed the identity of the money. 'I am inclined to think,' he said, 'that at common law this would be a good answer to a claim for money had and received, at any rate if the money was mixed in Hambrouck's bank with other money.'<sup>75</sup>

Banks and Atkin, L.JJ., on the other hand, like Salter, J., decided the case on the basis of a claim for money had and received, and both asserted that the claim was sustainable because the money in the bank and the money in court were identifiable, in the words of Atkin, L.J., 'as the product of the original money.'<sup>76</sup>

The problem is, however, why they should have thought that this was relevant to the claim *against S*. If she had cashed the cheques she received from *H* over the counter at the latter's bank and spent the money, she would still have been just as much liable for money had and received. What she did with the money she received, whether she put it in her bank or spent it or simply threw it away, could not affect her liability in the least.

Conversely, why should a judgment against her in this form of action entitle the plaintiffs to recover against any particular asset rather than against her property generally? As Atkin, L.J., pointed out, the plaintiffs were claiming something more than a money judgment (which is all that the plaintiff in an action for money had and received is entitled to); but on what basis?

The answer, it is suggested, is to be found in the last paragraph of the judgment of Atkin, L.J.: 'So far as it is contended that the bankers are entitled to retain possession where they have not given value, I think that has been concluded by what I have already said as to valuable consideration.'<sup>77</sup> This, surely, is the point. If no valuable

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<sup>75</sup> *Id.* at 329-330.

<sup>76</sup> *Id.* at 335.

<sup>77</sup> *Id.* at 336.

consideration had been given either by *S* or by her bankers, a direct action for money had and received lay against the bankers themselves with respect to the balance left to *S*'s credit. The circumstance that the bank had in fact paid the money into court did not really affect the matter either way. Even had the bank refused to pay into court, the action would have lain against them—subject, of course, to any special defence they might have raised if in the event they had contested the action. The case, in other words, is yet another instance of the common law achieving, by a personal action against an assignee of the defendant (the assignee here being the defendant's bank), very much the same effect as would be achieved in equity by an action in rem against the defendant himself.<sup>78</sup>

One final point. The cases we have considered as illustrations of the suggested analysis are, as it happens, all cases of agency; but nothing turns on this. Equity, indeed, has always insisted that for *A* to be able to trace his money the money must initially have been entrusted to *B*; there must have been a fiduciary relationship between *A* and *B*.<sup>79</sup> It was a natural insistence when first the equitable auxiliary jurisdiction was invoked, but is scarcely logical at the present day. If taken literally, it leads to the curious paradox that apparently if, without any fault on my own part, money is taken from me by a thief, who hands it to a volunteer, I cannot follow the money into the volunteer's hands; but if I imprudently entrust the same money to a dishonest broker who gives it to a volunteer, then I can follow it. Had courts of equity only recognized that in cases where there was no express trust their power to make tracing orders was a part of their auxiliary jurisdiction, in aid of basically common law relationships and situa-

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<sup>78</sup> Of course the explanation here given will not do where a banker becomes holder in due course of his customer's cheques, as where he agrees to credit his customer before collection. In such a case he cannot be made liable for money had and received. But it is conceived that should the customer become bankrupt, so that the banker becomes liable to pay to the trustee in bankruptcy the balance in the account, the identity of the fund would be sufficiently preserved to render a payment out to the trustee a payment to the use of the principal, by analogy with *Scott v. Surman*, supra, n. 60 and accompanying text.

<sup>79</sup> 'Such a view [that of Lord Dunedin in *Sinclair v. Brougham*] would dispense with the necessity of establishing as a starting-point the existence of a fiduciary or quasi-fiduciary relationship or of a continuing right of property recognized in equity. We may say at once that, apart from the possible case of Lord Dunedin's speech, we cannot find that any principle so wide in its operation is to be found enunciated in English law': *Re Diplock* [1948] Ch. 465, 520. (The expression "continuing right of property recognized in equity" surely begs the whole question.)

tions, such a paradox might have been avoided. At any rate, the common law knows no such limitation. All that it is necessary to show is that the transaction between *A* and *B* was such that property did not pass; and then to identify the property at a later stage in the hands of *C*.

### SUMMARY

While the common law recognizes and protects proprietary rights in rem, there is no action at law which gives a remedy in rem for the recovery of money or other property. There is nothing at common law to correspond with the equitable tracing order. To "trace" at common law means no more than to identify property, in a changed form and in new hands, in order to found a personal action in support of a proprietary right.

The word "tracing", however, is apposite because where money or other property belonging to *A* can be identified as having passed into the hands of *B* and thence into the hands of a third party *C*, this may give rise to a personal right of action against *C* in conversion or in detinue or for money had and received; and in the specific case of an insolvency of *B*, this action against *C* (whether he be the banker of *B*, the trustee in bankruptcy of *B*, one to whom *B* has consigned the goods of *A*, or the personal representative of *B*, etc.) will enable *A* to recover in full as against the other creditors of *B*, and so to recover all he would have done by tracing order in equity.

Whatever deficiencies the common law remedy may have, it is in three respects wider than that of equity. It does not depend upon a fiduciary relationship; it does not depend upon any adoption by the plaintiff of an agent's acts; and since it operates strictly in personam it does not depend upon the continued existence or identifiability of the res.

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