

TRACING

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INTRODUCTION

Assume that I have an apple. If you take it from me, I will want it back from you. If you put that apple into a bag full of apples, I will still want my apple back out of the bag. If, instead, you had swapped my apple for an orange, I will still want something back, but I may want either my apple in the third hand, or the orange in yours. How do I get at the apple in your hand in the first example, or in your bag of apples in the second, or the apple in the third hand or the orange in your hand in the third example? The law of tracing is usually pressed into service to answer these questions.

Orthodox analyses of tracing are not entirely straightforward. Found usually in textbooks on equity,¹ the analyses tend to begin with a discussion of a limited form of tracing to be found at common law, supposedly easily lost and anyhow confined to personal claims, very much the poor relation of tracing in equity, to which analysis proceeds quickly and with no little relief, as it is supposedly not so easily lost and extends to more powerful proprietary claims. The common law analysis is shrouded in the mysteries of its purported inability to understand the realities of mixtures and bank accounts; while the equitable analysis is shrouded in the metaphysics of the fiduciary relationship. And both focus on the details of the transactions by which you got my apple and mixed it with other apples or swapped it for an orange. The result is a fog of unparalleled thickness in the law. But it doesn't have to be this way. Various recent strands of academic analysis have attempted to grapple with and resolve these complexities.

At one end of the spectrum lie those who would defend the orthodoxy predicated upon the distinction between tracing at law and tracing in equity, or an improved version of it.² Rotherham's recent work is an important example,

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1. See, e.g. Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 1999) [hereafter: Delany] chapter 18; Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, London, 1988) [hereafter: Keane] chapter 20.
2. See, e.g. Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64; Oakley, "Proprietary Claims and Their Priority in Insolvency" [1995] *C.L.J.* 377; Worthington,

focussing closely upon whether the transactions in question justify giving the plaintiff a proprietary claim against the defendant.³ Near the centre of the spectrum lie those, like Birks⁴ and Smith,⁵ who make two basic claims: first, that the tracing process proceeds in two stages, by which a plaintiff identifies his property or its exchange product in the defendant's hands and then makes a claim to it, and second, that there is a single set of identification rules which support claims at law and in equity.⁶ And at the other end of the spectrum lie those, like Evans,⁷ who would dispense with the current technical tracing rules in favour of a radical replacement which asks simply whether the plaintiff's property should be regarded as having caused an increase the defendant's assets thereby allowing the plaintiff a proprietary claim against the defendant.

Inevitably, of course, these positions shade into one another. In particular, the distinction between identification and claiming is one which is capable of being pressed into service as much by those who would maintain the general

Proprietary Interests in Commercial Transactions (O.U.P., Oxford, 1996) [hereafter Worthington, *Proprietary Interests*] pp. 133-144, 173-186; Worthington, *Personal Property Law. Text and Materials* (Hart Publishing, Oxford, 2000) [hereafter, Worthington, *Personal Property*] pp. 474-569.

3. Rotherham, "Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk" (1996) 19 *U.N.S.W.L.J.* 378; Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1997) 34 *Osgoode Hall L.J.* 321; Rotherham, "The Recovery of the Profits of Wrongdoing and Insolvency: When is Proprietary Relief Justified?" [1997] *C.J.L.R.* 43; Rotherham, "Conceptions of Property in Common Law Discourse" [1998] *L.S.* 41; Rotherham, "Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies" (2000) 1 *Theoretical Inquiries in Law* 205; Rotherham, "Tracing and Justice in Bankruptcy" in Rose, (ed.), *Restitution and Insolvency* (Mansfield/L.L.P., London, 2000) forthcoming.
4. Birks, *An Introduction to the Law of Restitution* (rev. ed., Clarendon Press, Oxford, 1988) [hereafter: Birks, *Introduction*] chapter XI; Birks, "Mixing and Tracing. Property and Restitution" (1992) 45 (2) *C.L.P.* 69; Birks "Proprietary Restitution: An Intelligible Approach" (1995) 9 *T.L.I.* 43; Birks, "Tracing Misused" (1995) 9 *T.L.I.* 91; Birks, "Overview: Tracing, Claiming and Defences" in Birks, (ed.), *Laundering and Tracing* (Clarendon Press, Oxford, 1995) [hereafter "Overview"] p. 289; Birks, "On Taking Seriously the Difference Between Tracing and Claiming" (1997) 11 *T.L.I.* 2; Birks, "The Necessity of a Unitary Law of Tracing" in Cranston, (ed.), *Making Commercial Law. Essays in Honour of Roy Goode* (O.U.P., Oxford, 1997) p. 239; Birks "Property and Unjust Enrichment: Categorical Truths" [1997] *N.Z.L.Rev.* 623, part IV.
5. Smith, *The Law of Tracing* (O.U.P., Oxford, 1996) [hereafter, Smith]; Smith, "Tracing, 'Swollen Assets' and the Lowest Intermediate Balance" (1994) 8 *T.L.I.* 102; Smith, "Tracing into the Proceeds of a Debt" [1995] *C.L.J.* 290; Smith, "Tracing and Electronic Fund Transfers" in Rose, (ed.), *Restitution and Banking Law* (Mansfield Press, Oxford, 1998) 120; Smith, "Tracing" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P., London, 2000) 233; Smith "Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial" (2000) 33 *Can. Bus. L.J.* 75.
6. Smith, pp. 120-130, 277-279, 342-347; Birks, "The Necessity of a Unitary Law of Tracing" in Cranston, (ed.), *Making Commercial Law. Essays in Honour of Roy Goode* (O.U.P., Oxford, 1997) p. 239.
7. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469.

distinction between tracing at law and tracing in equity⁸ as by those who would adopt a version of the swollen assets theory.⁹ Like many other truly powerful insights, once stated, it seems simple and elegant, not to say intuitively obvious. It is at the heart of much of Smith's recent work.¹⁰ On the first stage of the tracing process, by which a plaintiff identifies his property or its exchange product in the defendant's hands, Smith distinguishes between "following" the original thing or "tracing" its value into that of its exchange product.¹¹ Once identification (by following, and tracing strictly so called) has taken place, the plaintiff can then make his claim to the value so identified: Smith calls this "claiming".¹²

On this view, tracing is not a monolith; rather, since a plaintiff must first identify and then claim, it is a combination of initial identification (following and tracing) and consequent claiming.¹³ Furthermore, if identification and claiming are distinct, it follows that the process of identification alone does not create any claim to the value identified; in particular, it does not create any proprietary rights in or claims to the value identified. Any such rights and claims must have an independent justification.¹⁴

The separation between identification and claiming, though often in different language, is supported by the authorities. Smith finds it implicit in some of the classic authorities on the subject,¹⁵ and under the influence of his work, it

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8. See, e.g. Worthington, *Personal Property* pp. 474-476 (distinguishing between identification and claiming); 476-481 (distinguishing between tracing at common law and in equity); Band, "The Development of Tracing Rules in Commercial Cases" [1997] *L.M.C.L.Q.* 65.
 9. See, e.g. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469, 470.
 10. Above, n. 0.
 11. Smith, pp 6-8, 15-16, 67, 119-120. Though it has not been much in use in this context in recent times, the word "following" here is not necessarily new: see, e.g., Goode, "The Right to Trace and its Impact In Commercial Transactions" (1976) 92 *L.Q.R.* 360 (Part I) 528 (Part II) distinguishing between equitable tracing and the "common law right to follow" ((1976) 92 *L.Q.R.* 360, 360); see also Lyall, *Land Law in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin 2000), p. 135 (equitable tracing "more effective" than common law following. The words "tracing" and "following" have often been used interchangeably to describe a composite concept (indeed, many of the Irish cases referred to below certainly do so; (see e.g. *Shanahan's Stamp Auctions v. Farrelly* [1962] *I.R.* 386, 435, where Budd J. records that the investors claimed to be "entitled to follow or trace their money into stamps purchased with it ..."). Smith has noticed two elements of identification, and for the purposes of clarity and consistency, labelled one element "following" and the other "tracing".
 12. Smith, pp. 10-14, 283-284.
 13. *Cp.* Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths, London, 1989) [hereafter: Bell] pp. 462-474 making a similar separation; *cp.* Keane, p. 281, para. 20.05.
 14. See Smith, p. 320, making this point in the context of tracing (strictly so called, as distinct from following): "exercise of tracing never *creates* proprietary rights. What it does is allow them to asserted in different assets; ... The proprietary rights, though, must have an *independent* justification" (emphasis added). See also nn.52 and 197, below.
 15. See Smith, pp. 12-13 (*cp.* 126-127), discussing, *inter alia*, *Taylor v. Plumer* (1815) 3 *M&S*

is finding increasing judicial acceptance. For example, in *Boscawen v. Bajwa*,¹⁶ Millett L.J. in the Court of Appeal wrote that:

"Equity lawyers habitually use the expressions 'the tracing claim' and 'the tracing remedy' to describe the proprietary claim and the proprietary remedy which equity makes available to the beneficial owner who seeks to recover his property *in specie* from those into whose hands it has come. Tracing properly so-called, however, is neither a claim nor a remedy but a process. ... It is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and if necessary which they still retain) can properly be regarded as representing his property".¹⁷

He made the same point in the later *Trustees of the Property of F.C. Jones & Co. v. Jones*,¹⁸ observing that "tracing is neither a right nor a remedy but merely the process by which the plaintiff establishes what has happened to his property and makes good his claim that the assets which he claims can properly be regarded as representing his property".¹⁹ And in the recent House of Lords decision in *Foskett v. McKeown*,²⁰ Lord Millett (as he had by now become) was joined by two of his brethren in a more refined version of this analysis:

"The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is

562, 575; 105 E.R. 721, 727 *per* Lord Ellenborough C.J.; *Sinclair v. Brougham* [1914] A.C. 398 (H.L.) 419 *per* Viscount Haldane L.C. (though this case should now be treated with caution: see n.235 below); *Re Diplock* [1948] Ch. 465 (C.A.) 536-537. See also [1948] Ch. 465, 520-521, distinguishing the remedy from the prior identification, followed in Ireland in *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386, 436 *per* Budd J. Band, "The Development of Tracing Rules in Commercial Cases" [1997] *L.M.C.L.Q.* 65, 66 n. 5 purports to find further judicial support for the separation in *Cowan de Groot Properties Ltd. v. Eagle Trust Plc* [1992] 4 All E.R. 700, 767 *per* Knox J.; *Re Montagu's Settlement Trusts* [1987] 2 Ch. 264, 285 *per* Megarry V.C.

16. [1996] 1 W.L.R. 328; [1995] 4 All E.R. 769 (C.A.).

17. [1996] 1 W.L.R. 328, 334; [1995] 4 All E.R. 769, 776. The proximate influence on this passage seems to be Smith, "Tracing into the Proceeds of a Debt" [1995] *C.L.J.* 290. For comment, see Smith, p. 13; Worthington, p. 475.

18. [1996] 4 All E.R. 721 (C.A.).

19. [1996] 4 All E.R. 721, 729.

20. [2000] 2 W.L.R. 1299 (H.L.).

exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. ... [In the present case, having] completed this exercise, the plaintiffs claim a continuing beneficial interest in [money in the defendants hands]. ... Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property".²¹

Hence, Smith's is an increasingly influential analysis, the efficacy of which is tested in this article.²² But there is one prior point. Even accepting Smith's separations, the word "tracing" can be used either to mean the entire process of identification and claiming, as Smith seems to use it in the title of his book, *The Law of Tracing*, and to mean that element of identification which is not following (which might, inelegantly, be referred to as tracing strictly so-called). The first meaning is probably what Lord Millett had in mind at the end of above passage; the second meaning is plainly what he had in mind at the start. The legacy of history is such that it is probably too late now to displace "Tracing" as a compendious title for the whole process; it is in this sense that it is used as the title to the present article, but it will be used below to mean simply identification of substitute assets.

IDENTIFICATION

As to identification, where the enquiry is as to the history of a particular asset, it is concerned with following. On the other hand, where the enquiry is concerned with the acquisition of a new asset in substitution and exchange for the original asset, it is concerned with tracing.²³ Though both exercises in identification, tracing and following are nonetheless "completely different exercises".²⁴

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21. [2000] 2 W.L.R. 1299, 1324-1325. Lord Hoffmann concurred; and Lord Steyn took a similar starting point ([2000] 2 W.L.R. 1299, 1308-1329); but Lord Hope expressed no opinion (though his distinction ([2000] 2 W.L.R. 1299, 1315-1216) between the first question of evidence of whether the tracing exercise could locate the plaintiffs' value in the defendants and the second question of the plaintiffs' consequent entitlement amounts to the same thing); and Lord Browne-Wilkinson reserved the question ([2000] 2 W.L.R. 1299, 1305). On the issue before the House, see text after n.192 below.
22. This article began life as a book review of Smith, *The Law of Tracing* (O.U.P., Oxford, 1996) pp. xliv and 404, before mutating first into a review article of the book and then finally into an article on tracing generally in the light of the insights in the book.
23. Smith, p. 134.
24. Smith, p. 67; *cp.* Lord Millett, above n.21.

Following

As to following, when an asset (for example, my apple) is simply transferred from one person to another, its identity does not change, and it can thus be followed and identified relatively easily. Following in this case is simply a matter of fact and evidence. Where however an asset is transferred into a mixture (as for example where an apple is added to a bag of other apples) its identity does change, and following and identification can be much less straightforward. The apples might be indistinguishable; and in many less fanciful examples, such mixtures of grain or oil, the items mixed will be indistinguishable. It seems that the rules then to be applied depend on whether the mixing was wrongful or not. In the absence of wrongdoing, Smith²⁵ argues that the general rules in respect of mixtures²⁶ apply: first, that a party whose property has been mixed with that of another "can assert that her contribution exists in any part of the mixture, *subject to* the right of other contributors to do likewise";²⁷ second, that reductions in the mixture are borne in proportion to the original contribution;²⁸ and third, that "when a contributor withdraws from a mixture, his contribution is followed into his withdrawal; in other words, what he takes out is counted first against his contribution".²⁹

On the other hand, where the mixing is wrongful, Smith deploys the principle that "a person whose unlawful act brings about an evidential difficulty will have that difficulty resolved against him".³⁰ This principle is well established in the case-law. For example, in *In re Hallett's Estate*,³¹ upon the death of Hallett, an insolvent solicitor, his fraudulent sales of bonds from his marriage settlement and a client came to light. He had lodged the proceeds of the sales to his bank account. The Court of Appeal held that his sales of the bonds amounted to misapplication of trust funds, and that the settlement and the client could, in

25. Rejecting an analogy to tenancies in common by operation of law; though *cf.* Smith, pp. 89-105, on *consensual* tenancies in common.

26. On the general rules on mixtures, see also *e.g.* Bell, pp. 71-73; Matthews, "Proprietary Claims at Common Law for Mixed and Improved Goods" (1981) 34 *C.L.P.* 159; McCormack, "Mixture of Goods" (1990) 10 *L.S.* 293; Birks, "Mixing and Tracing: Property and Restitution" (1992) 45(2) *C.L.P.* 69; Birks, "Mixtures" in McKendrick and Palmer, (eds.), *Interests in Goods* (Lloyd's, London, 1993) p. 449. A feature of Smith's analysis is that it *prima facie* applies irrespective of whether the mixture is fluid or granular or is in the hands of a contributor or a wrongdoer (though in that last case, there are further modifications, see text with nn.30-42, below). To that extent, he has rejected the position advocated in Matthews in favour of a position not dissimilar to those taken in the other papers referred to in this footnote.

27. Smith, p. 73; emphasis in original.

28. *Ibid.*

29. Smith, p. 76; instancing, *inter alia*, *Re Hallett's Estate* (1880) 13 Ch.D. 696, 727. On the facts of *Hallett*, the mixing was wrongful, bringing it within the rules stated below.

30. Smith p. 77, see also pp. 88-89, (preferring it to the principle that the wrongdoer is to be presumed to have intended to appropriate the assets to the plaintiff, pp. 78, 139).

31. (1880) 13 Ch.D. 696 (C.A.).

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principle, claim the proceeds of the misapplied bonds identifiable in the bank account. Furthermore, Jessel M.R. held that "[w]henver an act can be done rightfully the man who has done it is not allowed to say, as against the persons entitled to the property or the right, that he has done it wrongfully. That is the universal law".³² On the basis of this principle that a wrongdoer will have resolved against him an evidential difficulty caused by his wrongdoing, Smith argues, first, that where the wrong renders it evidentially impossible to determine the amounts of the initial contributions to the mixture, the wrongdoer's "contribution is assumed to be zero";³³ second, that "if a wrongfully created mixture is reduced, all of the loss is counted against the contribution of the wrongdoer";³⁴ and, third, that if "a contributor who intentionally causes a reduction or loss to the mixture is subordinated to the claims of the other contributors; the loss will come first out of the contribution of the loss-causing contributor".³⁵

An important point in respect of this third rule is that the loss is to come first from the wrongdoer's share; thus, if a wrongdoer makes a withdrawal which is still identifiable,³⁶ it is not lost, and each innocent contributor is given "a choice as to where his contribution is";³⁷ that is, in the mixture as reduced, or in the wrongdoer's withdrawal. Orthodoxy has it that a wrongdoer (for example, a tortfeasor, or an errant fiduciary) is presumed to have withdrawn his money before that of the beneficiaries. This is how it is stated in *Hallett*: after he had lodged the proceeds of the sales of the bonds, Hallett had made withdrawals from his account, but, for Jessel M.R., it was "perfectly plain that he [Hallett] cannot be heard to say that he took away the trust money when he had a right to take away his own money".³⁸ Since the account at all times had sufficient credit to meet the claim both of the trustees and of the client, their claims succeeded.³⁹ However, when faced with an identifiable withdrawal suc-

32. (1880) 13 Ch.D. 696, 727. Again, "where a man does an act which may be rightfully performed, he cannot say that the act was intentionally and in fact done wrongly" (*ibid.*).

33. *Ibid.*, instancing, *inter alia*, *Lupton v. White* (1808) 15 Ves. 432; 33 E.R. 817; but only where the wrong brings about this evidential impasse; as opposed to other statements of the penal rule which tend to the proposition that a wrongdoer can assert no interest in the mixture.

34. Smith, p. 79.

35. Smith, p. 87.

36. Whether by following or by tracing.

37. Smith, p. 79; *cp.* pp. 87-88.

38. *Ibid.* See also *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386 (H.C.) 425-429, 443 *per* Budd J.; *Carroll Group Distributors Ltd. v. G. and J.F. Bourke Ltd.* [1990] 1 I.R. 481, 484 *per* Murphy J.

39. On other aspects of *Re Hallett's Estate*, see Smith at p. 182 (in the context of tracing through a mixed substitution), pp. 123-125 (arguing that it does not support the supposed rule that a fiduciary relationship is a necessary precondition to tracing in equity), and pp. 278-279 (arguing that it shows that, before *Sinclair v. Brougham*, there was no division of tracing into tracing at law and tracing in equity). See also, text with and in nn. 46-51 (discussing *In re Irish Shipping* [1986] I.L.R.M. 518 (H.C.)), 69, 184 and 243 below.

cessfully invested and a subsequently depleted fund, for orthodoxy, it is equally clear that the investor cannot maintain that the investment represents his own money. This is how it was stated in *Re Oatway*.⁴⁰ Smith's restatement – that any loss is to come first from the wrongdoer's share, but that if the mixture and withdrawal are both still identifiable, each innocent contributor is given a choice as to where his contribution is – deftly combines the essence of both *Hallett* and *Oatway* on this point. It would have greatly simplified the analysis of Budd J. in one aspect of *Shanahan's Stamp Auctions v. Farrelly*⁴¹ in which he held that investors in a stamp investment scheme whose money was mixed in the bank account could choose that their contributions inhered in the account and not in the withdrawals. Though he purported to follow *Hallett* on this point, his reasoning is quite tortured,⁴² and the simple assertion that the investors could have chosen that their contributions inhered in the bank account would have been a much simpler route to the same conclusion.

The rules so far discussed turn on the continued identity of an asset, for example an apple, which can be followed for so long as it exists. If, however, it is eaten, it can no longer be followed and identified. An asset in a mixture – the apple in the bag – can be followed for so long as the mixture exists. But, if all of the apples are eaten, it again can no longer be followed and identified. These simple examples demonstrate that following ends when the subject-matter is destroyed;⁴³ Smith demonstrates that it likewise ends when the relevant asset ceases to have an independent identity and become submerged into another thing (by accession, as a fixture upon land, or by specification⁴⁴).

There is an important example of such failure of identification: assume that a thief steals from me a bag of 15 apples, and eats 5 of them; it is clear that identifiably, only 10 of my apples remain. If the thief now adds a further 5 apples to the bag so that it again contains 15 apples, it is still the case that only 10 of my apples remain. Thus, at least so far as that bag of apples is concerned, any claim which I may have is limited to the 10 identifiably remaining apples. Though there were 15 apples in the bag at the beginning and end of the story, nonetheless, my claim is limited to the lowest intermediate balance⁴⁵ of 10 apples.

40. *Re Oatway*. *Hertslet v. Oatway* [1903] 2 Ch. 356 (Joyce J.).

41. [1962] I.R. 386 (H.C.); for detailed discussion, see nn.64-83, 190, 226-231, 242-247, below.

42. [1962] I.R. 386, 438-439.

43. Smith, p. 104; *cp.* "if the subject matter is destroyed, then so is the right" (Smith, p. 51); "... even if Carrolls had obtained a charge over Bourkes number one bank account in accordance with a right to trace the proceeds of sale of its goods into that account, such a right was necessarily defeated when and to the extent that the monies in that account were dissipated and not replaced by any other asset" *Carroll Group Distributors Ltd. v. G. and J.F. Bourke Ltd.* [1990] 1 I.R. 481, 486-487 *per* Murphy J.

44. Smith, pp. 105-112. But though following must end, the accession or specification can be seen as substitutions, through which the plaintiff may be able to trace (Smith, p. 115).

45. See Smith, pp 80-85; *Bishopsgate Investment Management v. Homan* [1995] Ch. 211 (C.A.)

The rules as to following assets, especially into, through and out of mixtures, which Smith distils from the case-law, have the great merit of being logical and internally consistent, as well as consistent with and capable of explaining a great deal of intractable case law, and they provide a stable set of rules for application in future cases. But they have not always been coherently applied. Take for example the (mis)treatment of *Hallett* in the judgment of Carroll J. in *In re Irish Shipping*.⁴⁶ On July 16, 1984, the Korean Exchange Bank (KEB) mistakenly doubled-credited Irish Shipping's account with Citibank. Irish Shipping was wound up on November 14, 1984. On these facts, there is no wrongdoing, so the appropriate rules for following into mixtures are those which apply in the absence of wrongdoing. However, once it discovered its mistake on December 5, 1984, KEB relied on *Hallett* for the proposition that "where a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers and mixes it with his own money and afterwards draws out sums by cheques in the ordinary manner, ... the drawer must taken to have drawn out his own money in preference to the trust money";⁴⁷ and sought to trace its payment into the bank account and claim it on the basis of a constructive trust. Carroll J. agreed. On the *Hallett* point,⁴⁸ she was satisfied that

"the rule is the appropriate rule to apply even though it is based on the assumption that the trustee knows he has trust moneys co-mingled with his own moneys. In this case the account holder [Irish Shipping] did not know of the lodgement made in error [by KEB] but equally did not utilise the moneys by reducing the balance of the account below the amount of the mistaken lodgement. In my opinion, the principle is basically the same".⁴⁹

This cannot be right. Carroll J. recognised that she was dealing with a case in which the mixing was not wrongful, but nevertheless applied the rules appropriate to the context in which the mixing is wrongful. The principles which

has reaffirmed the rule (see also nn.124-126 and 213 below). Note however that a defendant may have *consensually* transferred to the plaintiff rights in mixture above the lowest intermediate balance (*cp.* Smith, pp. 91-104; for an example of such consensual creation of rights, see n.62 below (*In re Hughes* [1970] I.R. 237 (H.C.)). Note also that a plaintiff may be able to show (by following and tracing) that the portion withdrawn from the mixture was later added back (as in the example in text with nn.125-126 below). In both such cases, whilst the plaintiff's total claim is greater than the lowest intermediate balance, the claim is composed of two parts, that represented by the lowest intermediate balance, and that part above it to which there is an independent claim.

46. [1986] I.L.R.M. 518 (H.C.).

47. [1986] I.L.R.M. 518, 521.

48. As to the constructive trust point, see O'Dell, "Bricks and Stones and the Law of Restitution" (1998) 20 *D.U.L.J.* (n.s.) 101, 168-180.

49. [1986] I.L.R.M. 518, 523.

apply as against wrongdoers are much more powerful than those which apply where there is no wrongdoing, and the reason isn't very far to seek. The more powerful rules apply because they are appropriate against a wrongdoer, whose very wrong has often made the ordinary rules inadequate to the task and thus render the more powerful rules necessary. Since Irish Shipping was not a wrongdoer in the matter of the mixing of KEB's payment in its bank account, the more powerful rules appropriate to the context of wrongdoing should not have been applied. Instead, those applicable in the absence of wrongdoing should have been. In which case, KEB's right to assert that its payment identifiably subsisted in the bank account would have been subject to the right of Irish Shipping (and the liquidator) to do likewise, a principle which can be traced to *Hallett*.⁵⁰ Furthermore, although the evidence was that the balance on the account was never below the amount of KEB's mistaken payment, there is little else in the judgment relevant to the operation of the account, but since the account continued in use until Irish Shipping was put into liquidation, then presumably the balance was reduced after KEB's lodgement; if so, then any such reductions would have been borne in proportion to the original contribution, which would have had the effect of reducing what KEB could identify in the bank account.⁵¹ Any consequent claim by way of constructive trust would have been limited to that identifiable amount.

The rules as to following, summarised above, do no more than identify the plaintiff's assets; they do not state a cause of action in respect of them: following is "an inquiry about identity" and thus independent of any consequent assertion of proprietary or rights to or in the asset identified.⁵² It is the same with tracing.

50. See n.29, above.

51. It may be objected that Carroll J.'s approach, if not principled, was at least equitable to KEB. If so, note Lord Browne-Wilkinson's recent withering attack on such untrammelled notions of equity: "If, as a result of tracing, it can be said that certain of the policy moneys [in the defendants' hands] are what now represent part of the assets subject to the trusts of the [plaintiff] purchasers trust deed, then as a matter of English law the [plaintiff] purchasers have an absolute interest in such moneys. There is no discretion vested in the court. There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense 'equitable' for the [plaintiff] purchasers to be so entitled. ... It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights" (*Foskett v. McKeown* [2000] 2 W.L.R. 1299, 1304-1305). Lord Millett agreed: "Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend on what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property" (*Foskett v. McKeown* [2000] 2 W.L.R. 1299, 1322-1323).

52. Smith, p. 71.

Tracing

Take again the example of the transfer of an apple from one person to another. This time, assume that the recipient has, with a third party, swapped the apple for an orange. The plaintiff can follow the apple into the third hand; but suppose that he cannot (the apple might have been eaten) or that he simply wishes not to. Here, the plaintiff would like to be able to argue that the value which once inhered in the apple in the recipient's hands now inheres in the orange. The rules of tracing perform that function. "Tracing is an exercise which allows us to say that one asset stands in the place of another, for certain legal purposes. Like following, it is a process of identifying assets so that claims can be made. The difference between following and tracing is that following concentrates on a single asset, while tracing leads to new, substitute assets".⁵³ In the example, following concentrates on the original apple, while tracing leads to the orange.⁵⁴

As to tracing, it based upon a new asset, acquired, in exchange for the original asset, by the person who gave up the original asset from the person who gave up the new asset.⁵⁵ Thus, there must be a direct exchange of the original asset for its substitute⁵⁶ or exchange product. If there is such a direct exchange, then so far as the law⁵⁷ is concerned, the value inherent in the new asset flows identifiably from the proceeds of the original value.

Hence, for one asset to be the traceable proceeds of another, there must be a direct exchange of the original asset for its substitute or exchange product. Therefore, if a thief steals an apple from me, and then, with a third party, exchanges an apple of his own for an orange, the orange is not the traceable proceeds of my apple. More pertinently, if a thief steals £500 from me, and then uses £500 of his own money to buy a stereo, even though he might regard himself as having bought the stereo with the stolen money, I cannot trace my money into the stereo.⁵⁸ In these examples, as a matter of fact, there was no exchange of the original asset. "The exercise of tracing depends on showing that some value was acquired with some other value",⁵⁹ and the necessary

53. Smith, p. 227.

54. Thus, where trust money is misapplied to the purchase of property, the trust can trace the money into the property: *Joy v. Campbell* (1804) 1 Sch.&Lef. 328; *Carson v. Sloane* (1884-1885) 13 L.R. (Ir.) 139 (Porter M.R.) (though on the mechanism by which the value in apple is transmitted to the orange, or that in the money is transmitted to the land, see *Re Sloane's Estate* [1895] 1 I.R. 146; n.145 below).

55. Smith pp. 134-135; *cp.* p. 161.

56. The proof of the substitution is a matter of fact, on which see Smith, pp. 262-274 (proving substitutions). But if the new asset was not obtained in exchange for the original asset, the former is not the traceable proceeds of the latter: see *e.g. Bishopsgate Investment Management v. Homan* [1995] Ch. 211, 221 *per* Leggatt L.J.; *cp. Foskett v. McKeown* [2000] 2 W.L.R. 1299, 1323-1324 *per* Lord Millett.

57. Meaning by this both the common law and equity in this context.

58. Smith, p. 136.

59. *Ibid.*

direct exchange of the original asset (my original apple, or the £500) for its putative substitute (the orange, or the stereo) is absent. "Tracing attaches significance to those substitutions which *were* made with the plaintiff's value, as opposed to any substitution which could possibly have been made with the plaintiff's value".⁶⁰ This is so, despite the thief's intention: "no intention of the thief can allow [me] to trace into the stereo; regardless of his intention, he did not use the stolen money".⁶¹ On the other hand, even if a plaintiff cannot trace into a particular asset, and therefore have a claim against a particular defendant, a particular defendant's intentions in respect of that asset might generate another ground for the plaintiff's claim; thus, where a solicitor dissipates trust funds and makes up the difference, all without the knowledge of the beneficiaries, the beneficiaries' claim to the reconstituted trust fund arises not because they can trace into it, but because the solicitor intended them to have it.⁶²

Furthermore, it is also possible that "both sources of rights [tracing and claiming on the one hand, and intention on the other] can be relevant on the same facts; but they must not be conflated".⁶³ In *Shanahan's Stamp Auctions v. Farrelly*,⁶⁴ subscribers invested money in a stamp investment scheme by which the scheme would receive the money and apply it generally to the purchase of stamps, which would then be allotted to syndicates of investors, the stamps would be auctioned off, and the proceeds (substantially) applied to the members of the relevant syndicate. The "whole operation was bogus"⁶⁵ and became insolvent. At the date of insolvency, the claims of the investors totalled some £1.8m; the liquidator had approximately £140,000 in cash, and stamps worth almost £300,000, of which roughly one third had been allocated to syndicates and two thirds had not. For Budd J., since each "investor's money was entrusted to the Company for a specific purpose, namely, the purchase of stamps and their re-sale, the capital proceeds and profits to be then remitted to the investor ... [it followed that] a fiduciary relationship was created between the

60. *Ibid.*, emphasis in original.

61. Smith, p. 136, discussing at pp. 136-137 *In Re Tilley's Will Trusts* [1967] Ch. 1179, 1193 *per* Ungood-Thomas J.

62. See *Re Hughes* [1970] I.R. 237 (H.C.) where "the only possible inference [was] that Mr. Hughes intended the £863 to be a replacement of moneys which he had wrongfully withdrawn from the client account" ([1970] I.R. 237, 242 *per* Kenny J.). See, generally, Smith, p. 137, discussing *Re Dodds* (1891) 60 L.J.Q.B. 599; *Middleton v. Pollock* (1876) 2 Ch.D. 104; compare Smith, pp. 202-203 referring, *inter alia* (in n.155) to *Roscoe v. Winder* [1915] 1 Ch. 62. More generally, that which transfers ownership is usually simply the intention of the giver to give (see, e.g., Worthington, *Personal Property* p. 229) and this is simply a particular example of that more general proposition.

63. Smith, p. 137.

64. [1962] I.R. 386 (H.C.).

65. [1962] I.R. 386, 409 *per* Budd J. The principal of the firm was thereafter convicted, but his conviction was subsequently quashed: *People (A.G.) v. Singer* 1 Frewen 214 (C.C.A., 1961).

investor and the Company".⁶⁶ This finding of a fiduciary relationship⁶⁷ was the key which unlocked the door to the solution of the problem in the case,⁶⁸ since it allowed Budd J. to deploy the presumption, which he derived from *Hallett*,⁶⁹ that it will be presumed that a fiduciary "who does an act which may be rightly performed cannot say that it was done wrongly".⁷⁰ In respect of the syndicated investors, though the contracts between them and the company did not give them title to any of the particular stamps *in specie*,⁷¹ nevertheless, the contracts did provide that stamps allocated to syndicates would be "treated" as

66. [1962] I.R. 386, 424. He went on to hold that the "monies invested were thus imbued with a trust" ([1962] I.R. 386, 424-425). It may be questioned whether it necessarily follows that money held by a fiduciary is held on trust, but nothing turned on that point in the case. The question of whether the mere entrusting of the money for a specific purpose is sufficient of itself to generate a fiduciary relationship, divided judicial opinion at various levels in the *Goldcorp* litigation (see, e.g., [1993] 1 N.Z.L.R. 257 (N.Z. C.A.)); but in the Privy Council ([1994] 3 N.Z.L.R. 385; [1995] 1 A.C. 74 (P.C.)) Lord Mustill advised that such a trust or fiduciary duty would be inconsistent with the practicalities of the scheme on the facts.
67. Similarly easy findings of fiduciary relationships are to be found in n.237 below, and in *East Cork Foods v. O'Dwyer Steel* [1978] I.R. 103 (S.C.) and *P.M.P.S. v. P.M.P.A.* High Court, unreported, June 27, 1994, Murphy J. (as a necessary stage of the argument that equity should award interest on the sums claimed; though a fiduciary relationship was found in both cases, interest was not awarded in *East Cork Foods* but it was in *P.M.P.A.* in circumstances in which the equitable claim was subsequently doubted in the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669 (H.L.)) and in some of the Irish retention of title cases: e.g. *Re Stokes and McKiernan* High Court, unreported, 12 December 1978, McWilliam J.; *Sugar Distributors v. Monaghan Cash and Carry* [1992] I.L.R.M. 399 (H.Ct., Carroll J.); *S.A. Foundries du Lion M.V. v. International Factors (Ireland) Ltd.* [1985] I.L.R.M. 66 (H.Ct., Barrington J.); all of which are criticised on this point in Pearce, "Reservation of Title on the Sale of Goods in Ireland" (1985) XXIr *Jur.*(n.s.) 264, 288; see also *Carroll Group Distributors Ltd. v. G. and J.F. Burke Ltd.* [1990] 1 I.R. 481 (H.C., Murphy J.) noted Maguire "Romalpa Misinterpreted" (1989) 11 *D.U.L.J.* (n.s.) 40. This case contrasts with the rejection of a similar claim in the English case of *Compaq Computer Ltd. v. Abercorn* [1991] B.C.C. 484 (Mummery J.); noted Maguire "Retention of Title in the 1990s: The Disowning of Romalpa Continues" (1994) 16 *D.U.L.J.* (n.s.) 40.
68. Budd J. held first, that there was a fiduciary relationship between the investors and the company, and, second, that the authorities demonstrated that, as a consequence the investors could trace and claim. This is important. He did not say that a fiduciary relationship was necessary; only that since it was made out tracing could occur. In other words, his judgment by its structure stands for the proposition that it is sufficient; but does not say whether it is necessary. (Indeed, it would be odd if he did so, since, at one point, Budd J. said of the speech of Lord Haldane L.C. in *Sinclair v. Brougham* [1914] A.C. 398 (H.L.) that "his judgment may be said to carry the principle of following property outside the range of fiduciary relationships"! [1962] I.R. 386, 430, *cp.* p. 433; an extension of which Budd J. did not disprove).
69. See text with n.32 above.
70. [1962] I.R. 386, 443.
71. [1962] I.R. 386, 414, 443; again, "it was not the essence of the contract that the investor became the full beneficial owner of any specific stamps at any stage of the transaction" ([1962] I.R. 386, 418; *cp.* [1962] I.R. 386, 439-441, discussing *Sealy v. Stawell* (1868) I.R. 2 Eq. 326, where Budd J. accepts that in principle such a contractual appropriation could transfer property, but rejects the proposition that it was the only means by which this might occur).

the investors' property⁷² (who had a right under the contract to receive the proceeds of sale).⁷³ Since it would be presumed against a fiduciary that he has acted lawfully, the company must have acted properly in relation to the allocation, so that the "syndicated owners therefore have a particular equity as regards the syndicated stamps".⁷⁴ Thus, the actions of the company were sufficient to transfer an equitable title in the allocated stamps to the syndicated investors.⁷⁵ In respect of the unsyndicated investors, Budd J. held that they were in a like position in respect of the unsyndicated stamps: ⁷⁶ "the overwhelming portion of the investors' moneys was withdrawn from the bank account",⁷⁷ and applying the presumption that a fiduciary is presumed to have acted properly, their money must have been used to buy stamps,⁷⁸ so that the unsyndicated investors' money was identified in – traced into – the purchased (and unallocated) stamps.⁷⁹ Therefore, the syndicated investors' claim to the stamps allocated⁸⁰ to them arose because the company's actions passed the property in the stamps to them;⁸¹ whereas the unsyndicated investors' claim to the unallocated stamps arose because they could trace their money into the unallocated stamps and claim on the basis of a pre-existing and continuing equitable proprietary interest.⁸² "What the case shows is that often a claimant will want to consider whether he has acquired any rights through an intentional transfer, as well as considering whether he can establish any rights through tracing".⁸³

The analysis of following and tracing so far has considered two situations: first, the case where my apple is mixed in a bag of apples, where I can follow

72. [1962] I.R. 386, 443.

73. [1962] I.R. 386, 418.

74. [1962] I.R. 386, 443. This equity allowed the sale of the stamps and distribution of the proceeds *pro rata* to the syndicated investors (see [1962] I.R. 386, 448).

75. It is true that Budd J. went on to state that the syndicated investors had that equity as regards the syndicated stamps, so that they were entitled *prima facie* to a charge over those stamps "to which their money has been traced in equity" ([1962] I.R. 386, 443) but on this leg of the case, it was not necessary to go further than the conclusion in the text that an equitable title in the stamps was transferred to the investors by the actions of the company.

76. [1962] I.R. 386, 448.

77. [1962] I.R. 386, 439.

78. *Ibid.*

79. Thus, as with the syndicated investors, the "unsyndicated investors would *prima facie* be entitled to at least a charge over the property in the shape of the unsyndicated stamps", given effect to by their sale and *pro rata* division of the proceeds. ([1962] I.R. 386, 441-442).

80. The allocation allowed identification of the relevant property to be claimed. *Cp. Boscawen v. Bajwa* [1996] 1 W.L.R. 328; [1995] 4 All E.R. 769 (C.A.), where ledger cards allowed identification of allocation of withdrawals and lodgements from a lawyers' client account.

81. *Cp. Smith*, pp. 91-104 (on following into and through consensual substitutions; *cp. Smith*, p. 186, n. 82); pp. 140-142 (on intention, reservation of title clauses, and tracing); *Smith* "Bailment With Authority to Mix - And Substitute" (1995) 111 *L.Q.R.* 10.

82. *Smith*, pp. 137-139; *cp. pp.* 232, 372-396.

83. *Smith*, p. 139.

my apple into the mixture; and second, the case where my apple is swapped for an orange, where the orange represents the traceable proceeds of my apple. The first is following; the second is case of tracing through a clean substitution.⁸⁴ There is a third case, where my apple is mixed in a bag of apples; and that bag is swapped for a melon. That is a mixed substitution.⁸⁵ The defining feature of a mixed substitution of one asset for a share (or shares) in another asset (or other assets) is that there are many sources – including the plaintiff's value – which together have been exchanged for the value inherent in the output(s).⁸⁶ Smith argues that "[t]racing in this situation is ... best conducted by analogy to the established rules for *following* through physical mixtures of indistinguishable things"⁸⁷ set out above.⁸⁸ In the example of my apple being mixed in a bag of apples which is then swapped for a melon, the melon represents the traceable proceeds of the bag of apples, and if I could follow the value of my apple into the bag of apples, I should be able to follow its value into the melon as the traceable proceeds of the bag of apples.

Although this is the proper position in principle, the common law is reputed to have difficulty in achieving this position. In particular, in respect of mixtures of funds such as bank accounts, it is often stated that though equity can trace through such mixed funds, the common law cannot. So if instead of an apple being mixed in a bag of apples which is then swapped for a melon, let the example be of my £100 being added to an account containing £900, and the full £1000 being used to buy a car, equity can say I can follow the £100 into the bank account and trace into the car, but the common law cannot. This is often justified on the basis that at law, "the means of ascertainment fail",⁸⁹ that is, that the identification process cannot be carried out; but the logic of the previous paragraph is that it can. Indeed, Smith argues that there is no reason in principle why the common law should be fettered in this way.⁹⁰ In the manner of the common law then, the only possible reason is precedent; and this unaccountable inability on the part of the common law is thought to flow from

84. Smith, chapter 4.

85. Smith, chapter 5; on how such mixtures can arise, see Smith, p. 176. This mixed substitution raises another very important practical question, that of whether a plaintiff who identifies the value of her property in a mixture in the hands of the defendant and then claims in equity should have charge over the mixture for the value of her input or for a proportionate share of the mixture: see nn.192-195 below.

86. Smith, p. 162.

87. Smith, pp. 160, emphasis in original; *cp.* pp. 174-183.

88. Text to nn.25-45.

89. *Taylor v. Plumer* (1815) 3 M&S 562, 575; 105 E.R. 721, 726 *per* Lord Ellenborough C.J. *Cp. Banque Belge pour l'Etranger v. Hambrouk* [1921] 1 K.B. 321, 335 *per* Atkin L.J. And see, purportedly following *Taylor v. Plumer* on this point, *Re Diplock* [1948] 1 Ch. 465, 518 *per* Lord Greene M.R. (*aff'd sub nom Ministry of Health v. Simpson* [1951] A.C. 251 (H.L.)), *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 264, 285 *per* Millett J., *aff'd* [1991] Ch. 547 (C.A.).

90. Smith, pp. 162, 165-168.

Taylor v. Plumer,⁹¹ but this conclusion is now open to very serious doubt. First, though many judges and academics have treated *Taylor* as about tracing at law, many others have treated it as embodying rules as to equitable tracing.⁹² Second, it is now accepted that *Taylor* really turned on the contemporary understanding on tracing in equity and not at law.⁹³ Third, as a consequence, it has now been judicially accepted that *Taylor* states no rule about or limit upon common law tracing.⁹⁴ Fourth, it is therefore open to a common law court to hold that it can trace into and through a mixed fund, such as a bank account.⁹⁵ If it can, and since equity can, the consequence is that there is a single unified set of identification rules at law and in equity,⁹⁶ an outcome that can only be welcomed and is in the process of being adopted. For example, in *Jones, Millett L.J.* held that there "is no merit in having distinct and differing tracing rules at law and in equity",⁹⁷ and in *Foskett v. McKeown*, he held that, given "its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough".⁹⁸ In the same case, Lord Steyn concurred.⁹⁹ It is true that, as a matter of history, there has been a separate and parallel development of rules of following and tracing at common law¹⁰⁰ and

91. (1815) 3 M&S 562; 105 E.R. 721; on its contemporary history, see Smith "The Stockbroker and the Solicitor General: The Story Behind *Taylor v. Plumer*" (1994) 15 *J.Legal.Hist.* 1.

92. These references are usefully collect in Matthews, "The Legal and Moral Limits of Common Law Tracing" in Birks, (ed.), *Laundering and Tracing* (O.U.P., Oxford, 1995) p. 23, at pp. 50-51, nn. 144-150.

93. See, e.g. Pearce, "A Tracing Paper" (1976) 40 *Conv. (n.s.)* 277; Kurshid and Matthews, "Tracing Confusion" (1979) 95 *L.Q.R.* 78; Fitzgerald, "Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13. *U. Tasmania L. Rev.* 116; Smith, "Tracing in *Taylor v. Plumer*: Equity in the Court of King's Bench" [1995] *L.M.C.L.Q.* 240; Matthews (above) pp. 50-55; and Smith, pp. 162-165, 168-174.

94. *Trustees of the Property of F.C. Jones & Co. v. Jones* [1996] 4 All E.R. 721, 729 *per* Millett L.J.; a conclusion which may already have been reached in Ireland, without reference to this debate; see: *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386, 419 *per* Budd J. (at least in so far as he treated the case as an authority relating to the existence of an equitable fiduciary relationship; *cp.* [1962] I.R. 386, 426); and Bell, pp. 464-465; though the common law reading is advanced in Keane, para.20.01, p.279 and in Delany, p.631.

95. *Jones v. Jones*, *ibid.*

96. Smith, p. 278; ("there appears to be a single set of rules for tracing value"); see generally the references in n.6 above. See also Babafemi, "Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law" (1971) 34 *M.L.R.* 12.

97. [1996] 4 All E.R. 721, 729.

98. [2000] 2 W.L.R. 1299, 1324, relying upon and agreeing in particular with Smith, n.6 above, on this point.

99. [2000] 2 W.L.R. 1299, 1308-1309 relying upon and agreeing in particular with Birks, n.6 above, on this point.

100. Scott, "The Right to 'Trace' at Common Law" (1966) 7 *U.W.A.L.R.* 63 and Fox, "Common Law Claims to Substituted Assets" [1999] *R.L.R.* 55 are excellent discussions of the historical evolution of the common law rules, the independence of which from the equitable rules is elegantly defended in Matthews, "The Legal and Moral Limits of Common Law Tracing" in Birks, (ed.), *Laundering and Tracing* (O.U.P., Oxford, 1995) p. 23.

in equity,¹⁰¹ but when the common law's myopia in respect of mixtures such as bank accounts is corrected, as it ought to be, then the rules will be the same and ought to be treated as a single unified set.

Conducting the tracing identification exercise with respect to value in a bank account may prove very difficult as a matter of fact, but that is no justification for a rule (such as that discussed in the previous paragraph) which says it can never be attempted. A similar point may be made in respect of the rule which is understood to preclude tracing through a debt. If I buy an apple for £1, it is quite clear that the apple is the traceable proceeds of the £1. If I buy the apple on credit, so that I get the apple today, and pay the £1 tomorrow, there is no reason in principle why matters should be any different: the apple is still the traceable proceeds of the £1. Therefore, Smith argues that the value used to pay a debt is traceable into what was acquired in exchange for incurring that debt.¹⁰² Thus, in Smith's view, it is possible to trace into and through a debt,¹⁰³ including an overdraft,¹⁰⁴ since the money lodged to the account is traceable into what was acquired in exchange for the debt or overdraft.¹⁰⁵ Nevertheless, it often happens that what was acquired in exchange is not identifiable *as a matter of fact*;¹⁰⁶ in which case, tracing fails, not because of a rule of law that says that one cannot trace into a debt or overdraft but simply because the exchange-product cannot be identified as a matter of fact.¹⁰⁷

101. Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64 is an excellent discussions of the historical evolution of the equitable rules.

102. Smith, pp. 146-152, 252, and 353-356; applied in specific contexts: pp 152-154 (reviving subrogation), 154-155 (basically, money laundering), 215-217 (overdrafts), and 237-239, 362-363 (set-off); see also Smith, "Tracing into the Payment of a Debt" [1995] *C.L.J.* 290.

103. One consequence of which is that Smith can construct, from first principles, a simple, elegant and logically compelling explanation of tracing (which he calls "tracing in transit, see Smith, p. 243) in the difficult factual context of bank payments clearing systems (Smith, pp. 243-261; see, in particular, his discussion (at pp. 250-252) of *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 264, *aff'd* [1991] Ch. 547)). And see also Smith, "Tracing and Electronic Fund Transfers" in Rose, (ed.), *Restitution and Banking Law* (Hart Publishing, Oxford, 1998) 120; cf. Kretzheim, "Tracing Electronic Cash: Fraud and the Electronic Transfer and Storage of Value" (1999) 27 *A.B.L. Rev.* 112; Rotherham, "Tracing and Justice in Bankruptcy" in Rose, (ed.), *Restitution and Insolvency* (Mansfield/L.L.P., London, 2000, forthcoming).

104. The orthodoxy is otherwise: *Bishopsgate Investment Management v. Homan* [1995] Ch. 211 (C.A.); *P.M.P.S. v. P.M.P.A.* High Court, unreported, June 27, 1994, Murphy J.

105. As between debts or overdraft, the debt might be a clean substitution, but the overdrawn bank account is always a mixed fund with all of the additional complications that brings, including more ways for tracing to fail.

106. Of course, as above (text with nn.30-32), this evidential impasse, if created by wrongdoing, can be resolved against a wrongdoer (Smith, p. 216). But there are limits even to this, and in many cases, there will simply not be evidence as to what was acquired; all the more so in the complex context of tracing through the mixed fund of the overdrawn bank account. But evidential failure of following or tracing is not peculiar to debts or overdrafts, and should not mandate a special rule in this context.

107. This explanation seems at least latent in *In re Ulster Land, Building and Investment Co.* (1890-1891) 25 L.R.Ir. 24, 29 *per* Chatterton V.C; and has recently attracted Scott V.C. in

Bank accounts raise other identification issues. As between banker and customer, a bank account¹⁰⁸ is regarded by the law as a series of debts, which operates as a queue so that first in is first discharged by incoming credits, unless the parties had expressly intended otherwise. This is the rule in *Clayton's Case*,¹⁰⁹ which presumes – in the absence of a contrary intention¹¹⁰ – that the parties intend this first in, first out appropriation of credits to debts.¹¹¹ That intention (expressed by the parties, or presumed on the basis of *Clayton's Case*) determines where the value in the credit has gone. However, from the outside looking in, the bank account more resembles a uniform mixture of value. In the case of a plaintiff seeking to trace, whose perspective is that of the outside looking in rather than one of the parties, Smith argues that *Clayton's Case* can have no application; instead, the better analogy is with physical mixtures.¹¹² In which case, the bank account becomes the classic mixed fund, and, in the end, the rules applicable to tracing into and through bank accounts are simply those applicable to mixtures generally.¹¹³ Though *Clayton's Case* has been followed

the Court of Appeal in *Foskett v. McKeown* [1998] Ch. 265, 283-284; but the matter was not discussed on appeal to the House of Lords: [2000] 2 W.L.R. 1299 (H.L.).

108. Smith, pp. 183-218.

109. *Devaynes v. Noble*; *Clayton's Case* (1816) 1 Mer. 529, 572; 35 E.R. 767, 781. See, generally, McConville "Tracing and the Rule in *Clayton's Case*" (1963) 79 L.Q.R. 388.

110. *In re Hallett's Estate* (1880) 13 Ch.D. 696 (C.A.) 728 per Jessel M.R., holding the rule inapplicable as a consequence, and overruling Fry J. on this point.

111. "The rule in *Clayton's Case* is a rule of evidence. It amounts to this, that in the absence of any other evidence of intention the parties must be presumed to have intended that the earliest payments in should be applied in discharge of the earliest items on the debit side. This presumption can be rebutted by proof of an express contract, or by proof of circumstances that warrant the inference of a different intention." *In re Chute's Estate* [1914] 1 I.R. 180, 185 per Ross J.; *cp. Re Hughes* [1970] I.R. 237, 243 per Kenny J. applying *Clayton's Case* to the running of a solicitor's client account.

112. Smith, pp. 189-194, *cp. pp.* 209-210, 212, 220-222. Irish law may be about to achieve just such a position. In *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386, although Budd J. began from the proposition that the rule in *Clayton's Case* "would appear to apply" as between the beneficiaries (that is, the investors) ([1962] I.R. 386, 428), nonetheless when he came to apply it, he preferred to hold that the investors ranked *pari passu* so that the reductions in the company's funds be borne *pro rata* ([1962] I.R. 386, 441). He distinguished *Clayton's Case* in part because the difficulties of fact arising two separate mixings (first in the bank account, then in the stamps) made it all but impossible to apply it ([1962] I.R. 386, 442). Thus, Budd J. held that the "unsyndicated investors would *prima facie* be entitled to at least a charge over the property in the shape of the unsyndicated stamps", given effect by sale of the stamps and *pro rata* division of the proceeds. Budd J.'s reason for distinguishing *Clayton's Case* demonstrate inappropriateness of the rule to a tracing context; and although his distinguishing of the case does not amount to Irish law reaching the position which Smith advocates, nonetheless it makes it clear that Irish law is certainly well on its way.

113. This would seem to have been assumed in *Re Reynolds*; *McMahon v. Fetherstonehaugh* [1895] 1 I.R. 83, 85 per Chatterton V.C. and in *In re Nolan and Stanley* [1949] I.R. 197 (H.C.). In the latter case, the applicant company had paid £385 by cheque to an undischarged bankrupt who cashed it, and lodged £380 into his current account, which was now in the hands of the Official Assignee. Kingsmill-Moore J. held that the applicant could trace the proceeds of the cheque into the hands of the Assignee.

in Ireland¹¹⁴ in a tracing context, the tide now – as elsewhere in the common law world¹¹⁵ – seems to be running strongly against it.¹¹⁶ Smith's analysis here provides both the necessary justification for its displacement and a consistent alternative.

It was seen above that the rules of following depend upon logic. Many rules of tracing are derived by analogy from those on following, the logic compelling the similar result in the analogous situation. Hence, Smith quite properly argues in favour of applying the rules for following into and out of mixtures to the context of tracing into and through mixed substitution.¹¹⁷ These rules are very important in practice, since, on foot of them, where one party has sold¹¹⁸ goods to another, but retained possession of the goods in a mixture of similar goods, that other can follow the goods or trace their proceeds into and out of that mixture;¹¹⁹ and the position is the same if, instead of purchasing the inter-

114. *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386, 442 (where, though he cited it with apparent approval, on the facts Budd J. declined to follow it); *Carroll Group Distributors Ltd. v. G. and J.F. Bourke Ltd.* [1990] 1 I.R. 481, 484 per Murphy J. (same); cf. *Re Hughes* [1970] I.R. 237, 243 per Kenny J. (following it). See also *Re Daniel Murphy* [1965] I.R. 1 (Kenny J.); *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd. (No. 1)* [1991] 1 I.R. 19 (Barron J.); on which, see Doyle, "Statutory Interpretation of the Rule in *Clayton's Case*" [1992] *Gazette I.C.S.I.* 115.
115. See e.g. *Re O.S.C. and Greymac Credit Corp.* (1988) 52 D.L.R. (4th) 767 (Supreme Court of Canada refused to apply *Clayton's Case* to tracing); *Law Society of Upper Canada v. Bank of Montreal* (1998) 169 D.L.R. (4th) 353 (Ont. C.A.); *Re Securitabank* [1978] 1 N.Z.L.R. 97; *Re Registered Securities* [1991] 1 N.Z.L.R. 545 (New Zealand Court of Appeal likewise); *Keefe v. Law Society N.S.W.* (1998) 44 N.S.W.L.R. 45 (New South Wales Court of Appeal likewise); *Barlow Clowes v. Vaughan* [1992] 4 All E.R. 22 (Court of Appeal limited the scope of the application of the rule); Handley (1999) 115 *L.Q.R.* 186.
116. See e.g. *In re Money Markets International* [1999] 4 I.R. 267 (H.C.); see also Delany, pp. 638-642; Keane, para. 20.13, p. 286.
117. Smith, p. 174; on the rules relating to following through mixtures, see text with nn.25-45, above; a summary: as between innocent contributors, a plaintiff can follow or trace into a mixture subject to right of other contributors to do likewise, and reductions in the mixture are borne proportionately. As between an innocent contributor and a wrongdoer, the wrongdoer will have evidential difficulties resolved against him, and if the mixture so followed or traced is reduced, any loss is counted against the wrongdoer's contribution, though if a withdrawal is not lost but is still identifiable, the innocent contributor has a choice as to whether his contribution is in the mixture or in the withdrawal. For a statement of these rules as a matter of Irish law as they apply in the context of tracing, see *In re Ulster Land, Building and Investment Co.* (1890-1891) 25 L.R.Ir. 24, 29 per Chatterton V.C.
118. On whether such sale, and if necessary, appropriation has taken place, see, e.g., *Dublin City Distillery v. Doherty* [1914] A.C. 823 (numbers on casks identified the goods appropriated); *Re London Wine* (1986) P.C.C. 121 (no appropriation of bottles of wine in a warehouse); *In re Castlemahon Poultry Products Ltd* (1963-1993) Ir.Co.Law.Rep. 477 (Barrington J., May 3, 1985) (frozen chickens identifiable in the hands of the insolvent seller); *Re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.) (no appropriation of gold).
119. And then claim on foot of the property interest obtained by the appropriation or contract of sale. On claiming, see section 3 below. Examples of such tracing and claiming are provided by the claim of the syndicated investors in *Shanahan's Stamp Auctions v. Farrelly* to whom stamps had been allocated, and the Walker & Hall claimants in *Re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.) to whom gold had been allocated.

est in the goods under a contract of sale, the plaintiff's money was nonetheless traceably applied to the purchase of the goods in the mixture,¹²⁰ which can then be followed or traced. Again, since following and tracing rules are all about identification, if the asset is no longer identifiable, it cannot be followed; hence the rule above that following ends when the subject-matter is destroyed. Similarly, in the context of tracing, if the asset is no longer identifiable, it cannot be traced.

Assume that the plaintiff's apple has been swapped for an orange.¹²¹ Perhaps because of an evidential difficulty (for example, the plaintiff cannot locate the orange now) or perhaps because the subject matter has been destroyed (for example, the orange has been eaten) "tracing to the current moment is impossible, because there simply is no longer an asset held by the defendant which stands in the place of the plaintiff's asset".¹²² In such cases, tracing fails. There are several motives for tracing,¹²³ which predicate liability upon receipt and/or retention at a particular point in time; but if there is, at that relevant time, no asset held by the defendant which stands in the place of the plaintiff's asset, then there is nothing identifiable in respect of which a plaintiff can claim.

Again, there is the special case of partial failure of identification which generates the lowest intermediate balance rule, of particular relevance in the context of bank accounts,¹²⁴ which is applicable as much to tracing as to following. However, there can here be a further twist. Recall the example above of my bag of 15 apples which is stolen by a thief who eats five of them so that only 10 of my apples survive. Let it now be that, instead of eating them, the thief swaps the 5 apples for a melon and still has the other 10 apples. Here, I can follow the 10 of my original apples still remaining in the bag in the thief's hands, and I can follow the other 5 apples out of the bag and trace them into the substituted melon; hence, any consequent claim on my part would be to the 10

120. The difficulty here simply that it may not be possible as a matter of fact to show which money bought which gold (as in *Re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.)); though such evidential difficulties are greatly lessened if the application of the cash or the mixing of the goods was wrongful, since then the presumptions against wrongdoers will apply, and make it easier for the plaintiff to trace his money into the mixture, as in *Shanahan's Stamp Auctions v. Farrelly*, where the unsyndicated plaintiffs successfully traced into unappropriated stamps.

121. So that, according to the rules of tracing discussed here and in vastly more detail in Part III of Smith, the orange is the traceably identifiable exchange product of the apple.

122. Smith, p. 145; see, generally, pp. 144-145; thus in a particular context, if "we do not know what a person did with some money, it cannot be traced into its proceeds. The tracing trail is lost" (Smith, p. 148).

123. See text with nn.196-203, below.

124. *In re Ulster Land, Building and Investment Co.* (1890-1891) 25 L.R.Ir. 24, 29 *per* Chatterton V.C. See, generally, above n.45, and, in the context of the lowest intermediate balance and tracing through bank accounts, Smith, pp. 201-202 (single claimant), p. 203 (multiple claimants); see also pp. 265-270 (problems of proof and multiple claimants).

apples identifiably mine in the bag *and* to the melon.¹²⁵ Further, if the thief later swaps the melon for 5 further apples, these 5 new apples are the traceable proceeds of the melon and of my 5 apples before them; and if these 5 new apples are then added back into the bag, I can now both follow the 10 apples which represent the remainder of my initial apples and trace the 5 new apples which are the traceable proceeds of the 5 apples initially removed from the bag. In that case, all 15 apples are identifiable as mine, even though the lowest intermediate balance in bag was 10 apples. As this analysis makes clear, however, there is no breach of the lowest intermediate balance bar: indeed, it is respected in the case of the 10 original apples, but the other original 5 are traceable out of the mixture and into the melon and then into the new 5 apples and back into the mixture again. Thus, where money was lodged to a bank account, a portion was later withdrawn to purchase shares, the shares were later sold and the proceeds lodged back into the account, tracing into and through this account was not limited to the lowest intermediate balance because the withdrawal was traceable into the later lodgement.¹²⁶

What makes tracing so powerful, though, is not so much that the proceeds of one asset can identifiably be located in another as that the value inherent in the one is identifiably located in the value of the other because the value has been transmitted from one to the other. However, the proper legal explanation of the precise mechanism by which the value inherent in one asset is traceably transmitted to the other is still a matter for debate.

The mechanism of transmission of value to traced assets

Assume that you have taken my apple, and then swapped it with a third party for an orange. This is a simple substitution, and, on the above rules, I can follow the apple into a third hand, or it trace its value into the orange. If I choose not to follow but to trace, by what mechanism does any value inherent in the apple get transmitted to the orange so as to give me a claim against it, and what happens then to my claim in respect of the apple?¹²⁷

125. Cp. Smith, p. 202.

126. *Ibid.*, p. 202 n.154; and p. 221; *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1994] 4 All E.R. 980, 939 *per* Hobhouse J. at first instance, and more generally, Smith "Tracing" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P., London, 2000) p.233, pp.238-239. In *Carroll Group Distributors Ltd. v. G. and J.F. Bourke Ltd.*, Murphy J. held that tracing would have been "... necessarily defeated when and to the extent that the monies in that account were dissipated *and not replaced by any other asset*" ([1990] 1 I.R. 481, 486-487, *emphasis added*) suggesting that he would have traced into other asset had it been possible.

127. There will, therefore, often be "a web of potential routes for tracing and following. Every substitution offers a choice between tracing into a new asset in the same hands, or following the old asset into new hands" (Smith, p. 131). The important question of whether any personal or proprietary rights thereby arise is a question of *claiming*, not of tracing or follow-

Many of the cases seem to proceed on the unarticulated assumption that the transmission of this value is a consequence of identification. This cannot be generally correct; certainly it does not even properly deal with the simplest cases. If identification alone were enough to transmit value, not only could I follow the apple, but I could *also* assert that the value inherent in the orange represented the value of the original apple, and having identified both the apple and the orange, make a claim to both. Plainly, if I had merely an apple at the outset, it would be absurd to give me claims at the end both to the apple in the third hand and to the orange in yours.

The problems increase where there have been multiple substitutions, so that after the apple has been swapped for an orange, the orange is then swapped for a lemon. In this story, all of the subsequent assets (the orange and lemon) are identifiably – traceably – derived from the original asset (the apple). If identification alone were enough, not only could I follow the apple, but I could also assert that the value inherent in *both* the orange and the lemon represented the value of the original apple, and having so identified, make a claim to all of them.

This can be complicated in two further ways. First, let the chain of swaps be lengthened, so that you have not only swapped my apple for an orange, and then the orange for a lemon, but you then swap the lemon for a lime, and the lime for a kiwi, and so on. Second, there may be many chains of swaps: you swap my apple for an orange from B; B then swaps the apple in his hands for a pear from C, while you swap the apple in your hands for a peach from D; now you C and D each swap your fruit for other fruit with other parties; and so on. Again, if identification alone were enough, not only could I follow the apple, but could also assert that the value inherent in *all* of the subsequent assets (in the first example, the orange, lemon, lime, kiwi, and so on down the single chain; in the second example, the orange, pear, peach, and other fruit down the many chains) represented the value of the original apple, and, having so identified, again make claims to all of them.

As these examples make clear, there must be some mechanism by which value is transferred, so that once I have identified the fruit against which I want to claim, so that the value comes to inhere in that fruit and no other claims arise against any of the others in the stories. The law could have solved this “geometric multiplication”¹²⁸ problem by deciding that it would only be upon the destruction or loss of the original asset that its value would come to be represented by the subsequent asset. But the law seems not to have so decided;¹²⁹ in

ing (*ibid.*). Although a successful claim to a followed or traced asset precludes a similar claim arising out of the same facts (Smith, pp. 131 n. 44) the question of the precise mechanism as to why this is so is the work of the present section.

128. Birks, “Mixing and Tracing: Property and Restitution” (1992) 45(2) *C.L.P.* 69, 95; Birks, *Introduction*, pp. 92, 304.

129. Smith, pp. 332-333.

particular, automatically and involuntarily to become an owner of the substitute asset upon the destruction of the original one might cause practical problems¹³⁰ which the law is understandably reluctant to impose upon the plaintiff.

To solve this, Birks has argued that the authorities both at law¹³¹ and in equity¹³² support the view such a plaintiff holds a *power* to invest a traced asset with the status of the traceable proceeds of another, but that the traced asset does not acquire that status until the power is exercised¹³³ (analogous to a floating charge, or the power to revest title under a voidable contract¹³⁴). Burrows seems to agree.¹³⁵ In this way the geometric multiplication and the problems of involuntary ownership are avoided. In the alternative, such geometric multiplication might be tolerated, provided that the plaintiff is compelled to *elect* which asset he will eventually choose. Smith argues that the power in equity is "arguably too weak",¹³⁶ and seems strongly to favour the election mechanism.¹³⁷ *Pace* Smith, it is not that the power mechanism is too weak an explanation, rather it is that the election mechanism is too strong. Subsequent claims to traced assets are dependant upon the mechanism by which the value is transmitted from the original asset to its ultimately traceable proceeds. This is especially true in the context of proprietary claims, in which context, it is much more palatable to contemplate a single claim vesting when the power is exercised rather than a plethora of claims existing to be barred when one is elected.¹³⁸

130. "In *Dexter Motors Ltd. v. Mitcalfe* [1938] N.Z.L.R. 804 (C.A.), Fair J. noted some of the consequences that could flow from this: it would mean that a plaintiff could become the owner of something without knowing about it. It might be a car obstructing the highway, or corporate shares which are liable to capital calls, or a lion; all examples of things which can attract liabilities to their owner" (Smith, pp. 322-323). In terms of the swap of the apple for the orange, an equivalent case would be making the plaintiff involuntarily the owner of the orange, where it is poisoned and is then eaten by another with fatal consequences. The longer the change of relevant substitutions, the greater these problems become.

131. *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 546 (H.L.) 573 *per* Lord Goff: tracing "involves a decision by the owner of the original property to assert his title to the product in place of his original property". This is followed in *Trustee of the Property of F.C. Jones & Sons (a firm) v. Jones* [1996] 4 All E.R. 721 (C.A.), see text with nn.159-170, at n.163, below.

132. *Re ffrench's Estate* (1887) L.R. Ir. 283 (C.A., Ir.).

133. Birks, *Introduction*, p. 394; Birks, "Mixing and Tracing: Property and Restitution" (1992) 45(2) *C.L.P.* 69; "Overview", pp. 307-315; *cp.* though for a different conception of tracing, Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1997) 34 *Osgoode Hall L.J.* 321, 328-329 also referring to tracing as the exercise of a power.

134. Revesting title upon rescission is ably described (for another purpose) by Smith at pp. 365-367; and analysed in detail in chambers, *Resulting Trusts* (Clarendon Press, Oxford, 1997) chapter 7.

135. Burrows, pp. 57-76.

136. Smith, p. 359.

137. See Smith, pp. 324-325 (claims at law); 358-360 (claims in equity); 377-383 (generally).

138. Compare the unease at the abatement of proprietary rights as a consequence of electing for another claim in *Foskett v. McKeown* [2000] 2 W.L.R. 1299 (H.L.) 1313 *per* Lord Hope, with whom all of their Lordships concurred.

As a matter of Irish law, the leading case in equity on the mechanism by which such title is passed from each asset to the next is *Re ffrench's Estate*.¹³⁹ Settlement trust money had been misapplied to the purchase of land, which was then used as security first for a legal mortgage then for an equitable mortgage. The beneficiaries under the settlement trust claimed priority over the equitable mortgagee who had no notice of the trust. The land clearly represented the traceably identifiable proceeds of the misapplied trust money; if the beneficiaries had a proprietary interest in the land from the date of the misapplication, then, since first in time, they would prevail over the equitable mortgagee; if, on the other hand, they had a power to vest such an interest in themselves which had not been exercised at the date upon which the equitable mortgage was created, this latter would be first in time, and would prevail over the beneficiaries. The Court of Appeal held in favour of the mortgagee; only Porter M.R. expressly addressed the issue in these terms, and held that the beneficiaries' "right to follow a trust fund into an improper investment ... is a right hardly distinguishable from a right to sue, and that only ...".¹⁴⁰ It is "a right to do something – to take steps to alter the existing, open, notorious enjoyment of property ... as against the purchased property, the right is ... incomplete till steps are taken to assert it; and in the meantime, I regard the right as rather in the nature of a chose in action rather than an estate – an equity as distinguished from an equitable interest ...".¹⁴¹ Despite contrary high English authority,¹⁴² this reasoning has been followed in a number of later cases.¹⁴³ For example, in *Scott v Scott*,¹⁴⁴ after the death of the deceased, his widow operated the busi-

139. (1888-1889) 21 L.R. (Ir.) 283 (C.A., Ir.).

140. (1888-1889) 21 L.R. (Ir.) 283, 311.

141. (1888-1889) 21 L.R. (Ir.) 283, 312. FitzGibbon and Barry L.J.J. focussed on the delay incurred by the beneficiaries, their irresponsibility in choosing a negligent or fraudulent trustee, and the deceit worked on the mortgagee to conceal the prior equity. These considerations too weighed heavily with Porter M.R. On the effect of delay in such circumstances, see also *Leahy v. De Moleyns* [1896] 1 I.R. 206; *Welwood v. Grady* [1904] 1 I.R. 388 (special circumstances disentitling a plaintiff to trace assets distributed to legatees under a will; cf. *Re Diplock* [1948] Ch. 465 (C.A.)).

142. E.g. *Cave v. Cave* (1880) 15 Ch.D. 639; *Shropshire Union Railways and Canal Co. v. R.* (1875) L.R. 7 H.L. 496. *Cave* was expressly doubted on this point in *Re ffrench's Estate* (1888-1889) 21 L.R. (Ir.) 283, 308, 312 per Porter M.R., 319 per FitzGibbon L.J., 338 per Barry L.J.; and the *Shropshire* case, if it is cited at all in the later Irish cases, is not followed on this point: see, e.g. *Scott v. Scott* [1924] 1 I.R. 141, 149-151 per O'Connor M.R.

143. *Re Sloane's Estate* [1895] 1 I.R. 146, 160-166 per Moore J.; *Bank of Ireland v. Cogry Flax Spinning Co.* [1900] 1 I.R. 219; *Bourke v. Lee* [1904] 1 I.R. 280, 283 per Porter M.R.; *Re Bobbett's Estate* [1904] 1 I.R. 461, 472-473 per Ross J.; *Scott v. Scott* [1924] 1 I.R. 141, 149-151 per O'Connor M.R. On the nature of such a "mere equity" as a matter of Irish law, cf. *Bank of Ireland v. Glynn* [1973] I.R. 188, 192 per Kenny J., followed on this point in *In re Lynch, Monahan and O'Brien Ltd* (1963-1993) Ir.Co.Law.Rep. 486, 494 (Costello J., October 14, 1986); on such equities generally, see Everton, "'Equitable Interests' and 'Equities' – In Search of a Pattern" (1976) 40 *Conv.* 209.

144. [1924] 1 I.R. 141.

ness, from which money was misdirected by their son into the purchase of shares, which he then pledged as security to the bank for a loan. Following *Re French's Estate*, O'Connor M.R. considered that the estate had merely "a right of action, the assertion of which may result in the capture of property for a particular trust"¹⁴⁵ which did not prevail against the bank's equitable mortgage over the shares, so that the shares were the property of the estate subject to the bank's mortgage. Some commentators consider this to be the proper state of the law in Ireland¹⁴⁶ though the majority view seems to be the other way.¹⁴⁷ The question rarely arises in this manner of course, since a particular case is more likely¹⁴⁸ to be concerned with whether a particular plaintiff has a sufficient connection with particular value in the defendant's hands,¹⁴⁹ and so the matter cannot be regarded yet been fully resolved. Nevertheless, the *re French* analysis of a power, analogous to a floating charge, to vest the value of the original asset in an identified exchange product or exchange products is an excellent explanation of the mechanism of transmission of traced value, and it ought to be affirmed and adopted at the first opportunity.

CLAIMING

If you take an apple from me, and mix it with other apples, or swap it for an orange, the following and tracing identification rules allow me to identify my apple in your hand or in the third hand, or its value in the mixture or the orange. Having so identified I now want to make a claim against it. Smith calls this "claiming".¹⁵⁰

Assume, first, that you have taken my apple; I can follow my apple into your hands and may therefore have a claim in tort the tort of detinue¹⁵¹ against

145. [1924] 1 I.R. 141, 151 *per* O'Connor M.R.

146. Delany, "Equitable Interests and 'Mere Equities'" (1957) 21 *Conv.* 195; Keane, para. 4.06, p. 48; para. 5.05, pp. 52-53; para. 20.10, pp. 283-285(1) (*semble*).

147. Collins, "Tracing into a Vanishing Asset: High Expectations and Equitable Remedies" (1994) *Commercial L.P.* 211, 214-215; Coughlan, pp.68-69.

148. Though note the pair of cases arising out the misappropriation of trust money from the marriage settlement of one James Sloan, in the first of which (*Carson v. Sloane* (1884-1885) 13 L.R. (Ir.) 139) Porter M.R. held that the plaintiffs could trace, and in the second of which (*Re Sloane's Estate* [1895] 1 I.R. 146) Moore J. held ([1895] 1 I.R. 146, 165) that any consequent claim was based upon a *Re French's Estate* mere equity.

149. In the examples given above, only one piece of fruit may remain uneaten.

150. Smith, pp. 5, 10-12, 283-285. However, his approach to claiming in the book is - sensibly - not to attempt to set out the entire of the law of tort, or property, or restitution (which is a job for the many splendid texts on those areas of the law), but instead to analyse and explain the various rules from those branches of the law which are most immediately relevant to claims to a traced asset. Some of those rules are the subject matter of this part of the present article.

151. See, e.g. *Webb v. Ireland* [1988] I.R. 353; [1988] I.L.R.M. 565 (H.C. and S.C.). In the High Court, Blayney J. held that the plaintiffs, the finders of a hoard of early Christian artefacts, had title in the hoard, and could maintain a claim in detinue against the defendants to whom

you. If you pass my apple to a third party, I can follow it into the hands of the third party, against whom I may also have a similar claim. And if you had sold my apple to the third party, I can trace my apple into the proceeds, and have a claim in the tort of conversion against you.

Assume, second, that you have not my apple but my money; I can follow it into your hands and may therefore have a claim in money had and received¹⁵² or in (knowing) receipt of trust funds,¹⁵³ that is to say, they can be relied upon to help establish that a defendant's enrichment is at a plaintiff's expense. If you pass my money to a third party, I can follow it into the hands of the third party, against whom I may also have a similar claim.¹⁵⁴ And if you had used my money to purchase something, I can trace my money into its exchange product, and still have a similar claim against you.¹⁵⁵

The claims in tort and unjust enrichment are personal claims. As such, they are susceptible to a defendant's bankruptcy or insolvency. Where I can follow my apple or money or trace their value into an insolvent defendant's hands, the personal actions are no good to me. Instead, I want to argue that as I had a property right in my apple or my money, I should be able to make a proprietary claim to it or its proceeds in the defendant's hands; if successful, such an argument would give me a priority in the insolvency.¹⁵⁶ Such a property right or proprietary interest could be either legal or equitable.

the hoard had been delivered and who refused to return it. The Supreme Court held the defendants had title to the hoard, so that the detinue point did not arise. The tort of detinue still exists as a matter of Irish law, but it has been abolished and replaced in England by the Torts (Interference With Goods) Act, 1977, in which case, the identification rules can be used to support a claim to trespass to goods under the Act (see Worthington, *Personal Property*, p. 482). The plaintiff may also be able to rely on the tort of replevin in those jurisdictions in which it has not been abolished (see Smith, p. 27).

152. *Banque Belge pour l'Etranger v. Hambrouk* [1921] 1 K.B. 321 (C.A.); *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 264, 285 per Millett J., *aff'd* [1991] Ch. 547 (C.A.); *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 546 (H.L.).

153. E.g., *Agip (Africa) Ltd. v. Jackson*, above. On the proper nature of the action for knowing receipt, see the analysis in O'Dell, "Restitution" in Byrne and Binchy, (eds.), *Annual Review of Irish Law 1997* (Round Hall Sweet & Maxwell, Dublin, 1998) p.607, at pp. 625-646.

154. *Miller v. Race* (1758) 1 Burr. 452; *Clarke v. Shee and Johnson* (1774) 1 Cowp. 197; *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 546 (H.L.).

155. *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 546 (H.L.).

156. *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386, 444-445, 448 per Budd J. See, e.g., Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 *L.Q.R.* 432; Oakley, "Proprietary Claims and Their Priority in Insolvency" [1995] *C.L.J.* 377 (discussing such (equitable) proprietary claims and the means by which tracing can support them); Smith, pp. 57-58. For example, in *In re Nolan and Stanley* [1949] I.R. 197 (H.C.), the applicant company had paid £385 by cheque to an undischarged bankrupt to purchase from him a station wagon which to which he had misrepresented that he had title. The bankrupt cashed the cheque and lodged £380 into his current account. Kingsmill-Moore J. held that "[a]part from the bankruptcy, the company could have sued the bankrupt for the money under the heading of money received to its use and the money was also impressed with a trust in favour of the company of such a nature that the company would have been entitled

Take the case where the plaintiff asserts legal ownership. The common law "is peculiarly ill-equipped to provide what logic suggests is an appropriate remedy: the legal owner has no *right* to recover possession of the property".¹⁵⁷ So that, if I had a legal proprietary interest in the apple or money, and I can follow it or trace its proceeds into the defendant's hands, I do not have any proprietary claim at law against the defendant, instead I have – by and large¹⁵⁸ – only my personal claims in tort and unjust enrichment.

In *Trustee of the Property of F.C. Jones & Sons (a firm) v. Jones*,¹⁵⁹ £11,700 belonging to a bankrupt potato-growing firm had been paid by a partner to Mrs. Jones, his wife. She invested it in potato futures and received £50,760 in return. She lodged it to a bank account, in which £49,860 remained. The trustee in bankruptcy claimed that Mrs. Jones never acquired any title to the £11,700 and that title to the £49,860 in the bank account was vested in him. Millett L.J.¹⁶⁰ held that when Mrs. Jones paid the £11,700 to her brokers, she received in return a chose in action, the contractual right to payment of the balance on her account with them after they had traded on the potato futures market on her behalf. On foot of this, she received the £50,760 which she lodged to the bank. In other words, the £11,700 was swapped for a chose in action, which in turn was swapped for the £50,760, of which £49,860 identifiably remained.

Millett L.J. held that "the bankrupts had been divested of all title by statute" so that the partner "could confer no title on Mrs. Jones";¹⁶¹ the effect was to put Mrs. Jones in possession of funds to which she had no title.¹⁶² Instead, the trustee had title to the initial £11,700, and on the basis of *Lipkin Gorman*,¹⁶³ Millett L.J.¹⁶⁴ held that the trustee could trace it into the chose in action and assert title in that, and trace that into the £50,760 and assert title to that. As the bank had interpleaded and paid the remaining £49,860 into court, the court could simply make a declaration that the trustee had title and make an order for payment.

to follow it so long as it could be traced. ... Accordingly, as the bankrupt had, at no time, any right to retain the money, it must now be repaid by the Official Assignee ..." ([1949] I.R. 197, 201-202).

157. Worthington, *Proprietary Interests*, p. 123; Smith, pp. 320-331; Birks, "Property and Unjust Enrichment: Categorical Truths" (1997) *N.Z. L. Rev.* 623, Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 *K.C.L.J.* 1, 4-5.

158. There are also some limited self-help remedies: Worthington, *Proprietary Interests*, p. 123; *cp.* Osborough, "The Irish Custom of Tracts" (1997) XXXII *Ir. Jur.(n.s.)* 439 on the Brehon law self-help remedy of following the tracks of stolen cattle to recover them.

159. [1996] 4 All E.R. 721 (C.A.).

160. [1996] 4 All E.R. 721, 729-730.

161. [1996] 4 All E.R. 721, 724.

162. [1996] 4 All E.R. 721, 727; *cp.* Pearce, "A Tracing Paper" (1976) 40 *Conv.* 277, 278-280 discussing, *inter alia*, *Scott v. Surman* (1743) Willes 400, 402 *per* Lord Willes C.J. followed in *Winch v. Keely* (1787) 1 T.R. 619, 623 *per* Buller J.

163. Above, n.131.

164. [1996] 4 All E.R. 721, 728-730. Beldam and Nourse L.JJ. also followed *Lipkin Gorman* on this point: [1996] 4 All E.R. 721, 731

Counsel for Mrs. Jones had submitted that any claims at law made by the trustee in bankruptcy could only be personal claims to the £11,700, but Millett L.J. rejected this submission.¹⁶⁵ It would, in his view,

“be absurd if a person with no title at all were in a stronger position to resist a proprietary claim by the true owner than one with a bare legal title. In the present case equity has no role to play. The trustee must bring his claim at common law. It follows that, if he has to trace his money, he must rely on common law tracing rules, and that he has no proprietary remedy. But it does not follow that he has no proprietary claim. His claim is exclusively proprietary. He claims the money because it belongs to him at law or represents profits made by the use of money which belonged to him at law”.¹⁶⁶

This passage is difficult, partly because of the elusive nature of the word “remedy”.¹⁶⁷ But it seems to amount to this. Because the trustee had title to the money, he had various claims, and these claims were proprietary in the sense that they vindicated his proprietary rights in the money. But to vindicate these proprietary claims, he had no proprietary remedy in the sense that there was no mechanism at law by which he could have expropriated the money to which he had title from an unwilling defendant. But the absence of such a proprietary remedy in that sense was not fatal, since – exceptionally – all that was necessary in this case was simply a declaration in respect of the ownership of monies lodged in court.

There are two peculiarities about this case which render it an exceptional example of tracing and claiming at common law. The first concerns the fact that title to the money always remained with the trustee. At law, title to money usually passes in currency, and the original owner will have no claim against a *bona fide* purchaser for value.¹⁶⁸ But here, the doctrine of relation back in bankruptcy law kept title in the trustee in bankruptcy at the crucial time.¹⁶⁹ The second peculiarity arises from the exceptional fact of the interpleader, easily

165. [1996] 4 All E.R. 721, 724.

166. [1996] 4 All E.R. 721, 727-728.

167. Birks has therefore argued that the law would be much better off eschewing the ambiguous language or remedies: see Birks, “Rights, Wrongs and Remedies” (2000) 20 *O.J.L.S.* 1; Birks, “Personal Property: Proprietary Rights and Remedies” (2000) 11 *K.C.L.J.* 1. On the other hand, the prescription need not be so radical if the ambiguity were removed by stability of meaning, in which case a distinct remedial focus could yield important insights into the nature of vindicated rights; see Barker, “Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right” [1998] *C.L.J.* 301.

168. *Miller v. Race* (1758) 1 Burr. 452; *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 548, 572 per Lord Goff; Fox, “*Bona Fide* Purchase and the Currency of Money” [1996] *C.L.J.* 547, 547-548, 558-565.

169. [1996] 4 All E.R. 721, 724-726 per Millett L.J.

demonstrated by asking what would have happened had Mrs. Jones withdrawn the £49,860, and refused to pay it to the trustee. In Millett L.J.'s language, although the trustee would have had a proprietary claim against her based on his title at law, he would have had no proprietary remedy at law to vindicate that claim, and he would have been confined to an action for money had and received, a personal claim in restitution, for the £11,700. Hence, although Millett L.J. was able to reject Mrs. Jones' argument that the trustee was confined to the action for money had and received, he was able to do so only because of the fortuitous combination of the doctrine of relation back and the interpleader proceedings. Outside of this very specific context, with a defendant less compliant than the bank, *Jones* does nothing to cure the common law's lack of a mechanism to recover possession of the property. On the contrary, the approach of Millett L.J. is predicated upon it.¹⁷⁰

This weakness of the common law is curious. Many ways around it have been tried. Since equity is not so limited,¹⁷¹ a legal owner might first argue that he must also have a beneficial title, and seek to rely on that. However, Lord Browne-Wilkinson held in *Westdeutsche* that

"A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title".¹⁷²

If this is correct,¹⁷³ a legal owner has no separate beneficial interest and cannot for that reason make an equitable proprietary claim. But, as a second way around the lack of a common law mechanism to recover possession, it may be that equity might, – perhaps in the exercise of what would historically have been described as its auxiliary jurisdiction, by which equity "helped ensure that common law rights were enforced"¹⁷⁴ – nonetheless allow an equitable proprietary

170. On this reading of the case, compare Smith, pp. 328-330; Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 *K.C.L.J.* 1, 4, 13-14. See also Andrews and Bratton, "Common Law Tracing: Springboard or Swansong?" (1997) 113 *L.Q.R.* 21.

171. See paragraph with n.181, below.

172. [1996] A.C. 669, 706 citing, *inter alia*, *Commissioner of Stamp Duties v. Livingston* [1965] A.C. 694 (P.C.); which has been followed in Ireland in *Gleeson v. Feehan* [1997] 1 I.L.R.M. 522 (S.C.) 534 *per* Keane J. See also *DKLR Holdings (No. 2) Pty. Ltd v. Commissioner for Stamp Duties (NSW)* (1982) 149 C.L.R. 431 (H.C.A.).

173. *Cp.* Chambers, *Resulting Trusts* (Clarendon Press., Oxford, 1997) 51-55; Hackney, *Understanding Equity and Trusts* (London, 1987) 25, 153-154; Meagher, Gummow and Lehane, *Equity. Doctrines and Remedies* (3rd, Butterworths, Sydney, 1992) pp. 104-111, paras. 403-414; Gray "Equitable Property" (1994) 47(2) *C.L.P.* 157; Worthington, *Proprietary Interests*, pp. ix-x; *cf.* Swadling, "Property" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P, London, 2000) 242, 265-267.

174. Keane, p. 17, para. 2.13; *cp.* Meagher, Gummow and Lehane, pp. 9-10, paras. 118-122.

claim in support of a purely legal right. The problem with this is the traditional view that to trace in equity there must be a fiduciary relationship.¹⁷⁵ But even if this requirement were abandoned, it only leaves the way open for this development, it does not compel it and it might not occur.¹⁷⁶ If it does not, then, as a last resort, the common law might simply itself choose to develop a jurisdiction to order the return of the property. This is not currently available in the tort of detinue, where any order for the return of the property is a little-used discretionary alternative to damages.¹⁷⁷ Instead, it is a claim to the return of the property as of right.

It might be thought that, in rejecting the submission in *Jones* that any claims at law made by the trustee in bankruptcy could only be personal, and in making an order in favour of the trustee's claim to the credit in the bank account, Millett L.J. took a step in that direction, though this was as a result of the fortuitous combination of the doctrine of relation back in bankruptcy and the interpleader proceedings initiated by the bank. Some Irish judges seem to have gone rather further. In *Flannery v. Dean*,¹⁷⁸ Costello P. held that the plaintiff was entitled to the return of her horses in the defendant's possession. Again, in *Whitehead v. Garda Commissioner*, the appellant claimed that he had given £160,000 to third parties from whom the respondent had seized it, and Hamilton C.J. held that if "the appellant had been in a position to satisfy the learned trial judge of his ownership of the monies, then he would have been entitled to an order for the return of the money".¹⁷⁹ And in *Fitzpatrick v. Criminal Assets Bureau*, Shanley J. in the High Court held that "the right of maintaining and recovering possession from all other persons" is one right in bundle "which together merge into one general right of ownership in goods".¹⁸⁰ In the end, it is difficult to see why it should not be so. But the real test will come when a plaintiff with a purely legal right successfully traces and then seeks to make a legal proprietary claim.

175. See text after n.235, below.

176. Though in an important and controversial series of cases, the New Zealand Court of Appeal has held that the full range of legal and equitable remedies should be available in support of rights, whether the source of those rights be at common law, equity, or statute: *Day v. Mead* [1987] 2 N.Z.L.R. 553; *Elders Pastoral v. Bank of New Zealand* [1989] 2 N.Z.L.R. 180; *Aquaculture Corporation v. New Zealand Green Mussel Co Ltd* [1990] 3 N.Z.L.R. 299. On this logic, there should be no difficulty with allowing an equitable proprietary claim based for example on a constructive trust to support a purely legal proprietary right.

177. *General And Finance Facilities v. Cooks Cars (Romford) Ltd.* [1963] 2 All E.R. 314, 318-319 per Diplock L.J.; *Webb v. Ireland* [1988] I.R. 353 (H.C. and S.C.) 370-371; [1988] I.L.R.M. 577, 581-582 per Blayney J. in the High Court.

178. [1995] 2 I.L.R.M. 393 (H.C.).

179. Supreme Court, unreported, February 27, 1997, at pp. 11-12 of the transcript. He had not so satisfied the trial judge, and the claim failed on the facts.

180. High Court, unreported, February 27, 1998, at pp. 21-22 of the transcript. Shanley J. held that as the plaintiff had paid for the car, though its put into a company's name, the company held it on resulting trust for the plaintiff. On appeal ([2000] 1 I.L.R.M. 299 (S.C.)) the Supreme Court upheld on the ground that that the plaintiff always had title to the car.

Equity, however, knows no such limitation. Indeed, it is one of the consequences of equitable ownership that an equitable owner can compel a legal owner to transfer the *res*. This is of the essence of the trust. Furthermore, the owner of an equitable proprietary interest can assert this title against all except a *bona fide* purchaser for value without notice. This is so where there is a pre-existing and continuing equitable proprietary interest, as where you hold the apple on trust for me, and then misapply it to another, I can follow the apple or trace into its proceeds, and make a consequent claim on the basis of my initial equitable proprietary interest in the apple. Less fancifully, it is likewise with money, or other choses in action or personal or real property held on trust. The claim then arises from the law of property (whether real or personal).¹⁸¹

It may be that, although I did not *initially* have a property right in the apple or the money, your wrongdoing¹⁸² or unjust enrichment *subsequently* generated one.¹⁸³ If so,¹⁸⁴ then again I should be able to make a proprietary claim to it or its proceeds in the defendant's hands. In either case, whether a plaintiff is seeking to vindicate a purely proprietary title or an equitable proprietary title, he must first identify the relevant property, and the identification rules in the so-called tracing cases can intelligibly¹⁸⁵ be used to support both purely proprietary claims and restitutionary proprietary claims.¹⁸⁶

At least since *In re Hallett's Estate*,¹⁸⁷ the most common equitable proprietary claim consequent upon tracing is the charge. Jessel M.R. held that if misappropriated trust funds are applied to a purchase, the beneficial owner "is

181. *E.g.* Bell, pp. 3-17.

182. See, *e.g.*, *Attorney General for Hong Kong v. Reid* [1994] A.C. 324 (P.C.) (bribes received by the defendant held on constructive trust); the vogue in the Commonwealth for the imposition of proprietary liability by means of a constructive trust to remedy unconscionability provides another example (on the status of that trust as a matter of Irish law, see, *e.g.*, O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 D.U.L.J. (n.s.) 101, 168-180).

183. See, *e.g.*, *Chase Manhattan Bank. NA v. Israel-British Bank (London) Ltd.* [1981] Ch. 105 (mistaken payment held on constructive trust); *In re Irish Shipping* [1986] I.L.R.M. 518 (H.C.) (same).

184. And I leave this fraught question aside in this paper.

185. Though the identification rules can intelligibly be used to support a restitutionary proprietary claim, the separate question whether the law of restitution in fact does so generate a proprietary claim is left aside here.

186. On the distinction between pure and restitutionary proprietary claims, see Bell, pp. 16-18; Birks, pp. 49-73; Burrows, *The Law of Restitution* (Butterworths, London, 1993) [hereafter: Burrows] pp. 35-45; 362-375; Goff and Jones, *The Law of Restitution* (5th ed., Sweet & Maxwell, London, 1998) (hereafter Goff and Jones) chapter 2. Coughlan "Equitable Liens for the Recovery of Booking Deposits" (1988) 10 D.U.L.J. (n.s.) 90, 90-91, 100-104. On the nature of a restitutionary proprietary claim, see Smith, pp. 293-303, 308. It might be stated that the difference between a purely proprietary claim and restitutionary, remedial, or other, proprietary claims is the difference between my claiming property on the basis that "That is mine, give it back" and my claiming it on the basis that "Although that is not mine, I ought to have it anyway, for this very good reason".

187. (1880) 13 Ch.D. 696; see text with and in nn.31-39, above.

entitled at his election either to take the property or to have a charge on the property for the amount of the trust money",¹⁸⁸ and that if the misappropriated trust funds are mixed with the trustee's own funds for the purchase, the beneficial owner is "entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase, and that charge is quite independent of the amount laid out by the trustee".¹⁸⁹ *Hallett* was followed on these points by Budd J. in *Shanahan's Stamp Auctions v. Farrelly*.¹⁹⁰ And in *Re Tilley's Will Trusts*,¹⁹¹ Ungood-Thomas J. held that where the fund had increased in value, the plaintiff's charge was not limited to the amount of the funds misappropriated but extended to a proportionate part of the increased value of the fund, though on the facts, he held that trusts funds had not in fact been misapplied into the purchase of the appreciating asset (a house) and he hinted that the proportionate charge would not have been appropriate anyway since Mrs. Tilley was not a wrongdoer. Whether the charge is limited to the amount misapplied or extends to a proportionate share in an increase value divided the House of Lords in *Foskett v. McKeown*.¹⁹² The majority¹⁹³ held that, where a trustee wrongfully misdirected trust funds to pay for premia on a life assurance policy, the beneficiaries were entitled to trace the funds into the life assurance payout, and claim either the amount misdirected or a *pro rata* share. Hence, it is clear that liability for a proportionate share turns on wrongdoing. But this is a wholly different order of presumption against a wrongdoer than that encountered in the context of identification.¹⁹⁴ There, the presumption is deployed simply to identify the location of the plaintiff's value; here, it is deployed to increase the amount of the claim. Notwithstanding the protestations of Lords Browne-Wilkinson and Millett that proprietary claims do not turn on discretionary considerations,¹⁹⁵ it is difficult to avoid the conclusion that by visiting such consequences upon wrongdoing, they did precisely that against which they had protested so much.

A plaintiff who has successfully deployed the rules of following or tracing so far discussed may therefore make at least five basic claims, personal claims in tort and unjust enrichment, and proprietary claims arising from a pre-existing and continuing proprietary interest (in equity if not at law), from a wrong and from unjust enrichment.¹⁹⁶ These claims are consequent upon the identification exercise, but that exercise is neutral as to the consequent claims.¹⁹⁷ In-

188. (1880) 13 Ch.D. 696, 709.

189. *ibid.*

190. [1962] I.R. 386, 428; see text with and in nn.64-83, above.

191. [1967] 1 Ch. 1179 (Ch. D.).

192. [2000] 2 W.L.R. 1299 (H.L.).

193. Lords Browne-Wilkinson, Hoffmann and Millett; Lords Steyn and Hope dissenting.

194. Text with nn.30-35, above.

195. See n.51, above.

196. Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 *K.C.L.J.* 1, 3-4, 18.

197. Smith, n.14, above; see also Birks, *Introduction* p. 358; Birks, "Mixing and Tracing: Prop-

deed, there are many other motives for deploying the identification rules.¹⁹⁸ They have been relied upon to found a claim in subrogation,¹⁹⁹ and to prove that value received was applied for the purposes of a defence of change of position;²⁰⁰ and they can be relied upon to establish or impugn relevant legal status of assets, for example as to proceeds of crime,²⁰¹ to establish that funds were in fact dishonestly dealt with by the defendant in breach of trust,²⁰² and they can perhaps be relied upon to identify the proceeds of goods sold pursuant to an effective retention of title clause.²⁰³

But this entire characterisation of the tracing process as comprising initial and neutral identification and then subsequent claiming (or other application) has been challenged as misconceived by Rotherham.²⁰⁴ In his view, tracing "is a remedy that establishes substantive rights or, to put it another way, its remedy is substantive rights. The remedy conferred in tracing is ownership (legal or equitable)".²⁰⁵ Consequently, he denies Smith's view of the tracing process,²⁰⁶

erty and Restitution" (1992) 45(2) *C.L.P.* 69, 86; Birks, "The Necessity of a Unitary Law of Tracing" in Cranston, (ed.), *Making Commercial Law. Essays in Honour of Roy Goode* (O.U.P., Oxford, 1997) p. 239, 242-243.

198. Smith, pp. 24-47, 303.

199. *Boscawen v. Bajwa* [1996] 1 W.L.R. 328; [1995] 4 All E.R. 769 (C.A.).

200. *Hilliard v. Fox* 735 F.Supp. 674 (1990).

201. See, e.g. The Proceeds of Crime Act, 1996 which permits the State to seize property which "constitutes directly, or indirectly, [the] proceeds of crime" (ss. 2(1)(a)(i) and 3(1)(a)(i)) or which "was acquired, in whole or in part" by such proceeds (ss. 2(1)(a)(ii) and 3(1)(a)(ii)), provisions which one commentator argues "find an echo in the traditional law of restitution which permitted the injured party in civil proceedings to trace the proceeds of fraud ..." (Murphy, "Tracing the Proceeds of Crime. Legal and Constitutional Implications" in McCutcheon and Walsh, (eds.), *The Confiscation of Criminal Assets. Law and Procedure* (Round Hall Sweet & Maxwell, Dublin, 1999) 36, 38. The Act has survived repeated constitutional challenge (see e.g. *Gilligan v. Criminal Assets Bureau* [1998] 3 I.R. 185 (H.C.); *M. v. M.* High Court, unreported, June 4, 1999, O'Higgins J.). A spectacular example of tracing proceeds of crime into payments received by a law firm acting for the client subject to forfeiture is provided by the U.S. case of *Re Moffitt, Zwerling & Kerler, PC* (No. 1) 83 F3d 660 (4th Cir., 1996); cp. *M.F.M. v. W.J.B.* [1999] 1 I.R. 122; [1999] 1 I.L.R.M. 540 (H.C.).

202. *Cp. Agip (Africa) Ltd. v. Jackson*, above. This possibility is stated by Millett L.J. in *Boscawen v. Bajwa*, text with n.17 above, and in *Foskett v. McKeown*, text with n.21 above; on the elements of such liability on liability for dishonest assistance in a breach of trust, see *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378 (P.C.). Tracing the misdirected funds could help to identify those people through whose hands they passed and dishonestly dealt with them (though such conducting is only one way in which such dishonest dealing may occur)

203. See, e.g., *Carroll Group Distributors Ltd. v. G. and J.F. Bourke Ltd.* [1990] 1 I.R. 481 (H.C.); as to whether they can be relied upon to identify the product of any manufacturing process, and indeed as to whether a retention of title clause extending to such products is effective, see, e.g. *Borden (U.K.) Ltd. v. Scottish Timber Products Ltd.* [1981] Ch. 25 (C.A.).

204. See the references in n.3, above.

205. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1997) 34 *Osgoode Hall L.J.* 321, 328.

206. Rotherham, "Tracing and Justice in Bankruptcy" in Rose, (ed.), *Restitution and Insolvency* (Mansfield/L.L.P., London, 2000) forthcoming.

in particular because it turns "on a confusion as to a preliminary stage supposedly involved in the tracing process". For him, where a plaintiff examines the facts to determine whether the law provides a recourse, it is simply a factual process of identifying legal options; tracing on the other hand "takes place only when [the plaintiff] elects to assert rights to a substitute by bringing a claim". Consequently, he argues that we "do not trace things and we do not trace value. If anything is transferred from the first asset to the new asset it is rights" and he concludes that the "notion of 'tracing' is a metaphoric description of the legal process in question, rather than a justification for this process".²⁰⁷ But it is hard to reconcile this view with his acceptance that tracing can confer a number of advantages, not only a proprietary remedy, but also an action in conversion or money had and received.²⁰⁸ Furthermore, though he purports to treat "tracing" as the remedy, in the detail of the argument, the remedy is provided variously by constructive trusts and liens and not by tracing at all. It is submitted, therefore, that Rotherham's analysis is insufficient to displace Smith's.²⁰⁹

Enough has been said to demonstrate that identification (following and tracing) on the one hand and claiming on the other are separate functions; and that the rules to be found in the cases serve one or other of those functions. Nevertheless, that separation is not always made in the cases, which often conflate into a single enquiry the separate identification and claiming questions, so that in many cases the tracing exercise seems to be about both such functions. This conflation is particularly clear in the context of claims at law, but is not quite so pronounced in equity. To take one example, if equity gives a charge over "swollen assets",²¹⁰ referring to the assets so swollen is the identification element, the charge is the basis of the plaintiff's equitable proprietary claim.

The term "swollen assets"²¹¹ is often used as a "shorthand for approaches which de-emphasise the necessity for a claimant to trace beyond the point of

207. *Ibid.*

208. See *ibid.*, section III.1 headed "Reasons for Giving Proprietary Remedies".

209. In *ibid.*, section I.4 headed "Tracing Value", Rotherham argues that little regard is paid to the question of value in tracing cases, and points to outcomes in cases like *Foskett v. McKeown* [2000] 2 W.L.R. 1299 (H.L.) (text with nn.192-195, above) in which a plaintiff gets more than the original value of the misapplied asset as inconsistent with the Smith's view that the plaintiff traces value. But in tracing value, the plaintiff is not tracing the monetary value of the original asset, but is rather demonstrating that the value inherent in the new asset was acquired with the value inherent in the old asset (Smith, p. 119; whatever the market monetary values of those assets happens to be).

210. See, e.g., the excellent Moriarty, "Tracing, Mixing and Laundering" in Birks, (ed.), *Laundering and Tracing* (Oxford, 1995) p. 73 and Collins, "Tracing into a Vanishing Asset: High Expectations and Equitable Remedies" (1994) *Commercial L.P.* 211.

211. Oesterle, "Deficiencies in the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306" (1983) 68 *Cornell L.Rev.* 172; Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469; cf. Moriarty, "Tracing, Mixing and Laundering" in Birks, (ed.), *Laundering and Tracing* (Oxford, 1995) p. 73.

receipt by the defendant" so that a "successful plaintiff can show proprietary rights without pointing to a particular asset in which they are held",²¹² and in the process overcome evidentiary breaks in the identification chain as a consequence of a low intermediate balance or the like.²¹³ Smith discerns three versions: a "weak version" where showing the defendant's receipt imposes upon him a burden to prove that he no longer retains the proceeds; a "strong version" where showing the defendant's receipt is enough to make him liable, whether or not he still retains the proceeds; and, an intermediate version by which the plaintiff demonstrates that the assets of the defendant were augmented by the plaintiff's value.²¹⁴ The weak version is an identification rule,²¹⁵ which, Smith argues, is a "straightforward evidentiary rule" reversing the burden of proof and properly applicable only where there is "a genuine evidentiary difficulty" to be resolved against a wrongdoer.²¹⁶ The other two go beyond evidentiary issues into matters of substantive law: Smith argues that the strong version²¹⁷ would amount to the proposition that proprietary rights are "indestructible" which is "not the way property is generally understood to operate, in equity or at common law";²¹⁸ he is followed in this by Evans,²¹⁹ who, however, seeks to defend the augmentation version as a logical development of a causal theory of tracing²²⁰ which simply requires "a causal connection between initial and surviving enrichments".²²¹ However, such an approach to tracing is misconceived: the law of restitution provides no support for it,²²² and it runs into significant problems in identifying the asset to be claimed.²²³ With Smith, we must recognise that the reality of separate physical identity must be respected, even in respect of claims against financial institutions, so that the normal rules on mixtures apply,²²⁴ though with quite dramatic effect if the institution wrongfully mixes.²²⁵ Thus, for example, although an unsyndicated investor's claim against all of the unallocated stamps in *Shanahan's Stamp Auctions v. Farrelly*²²⁶ might look like a claim against 'swollen assets', Smith argues that, in fact "the ability

212. Smith pp. 270-271.

213. Smith, "Tracing, 'Swollen Assets' and the Lowest Intermediate Balance" (1994) 8 *T.L.I.* 102.

214. Smith, p. 271; *cp.* Smith, p. 311.

215. Smith, pp. 227-234.

216. Smith, pp. 270-274.

217. Smith, pp. 311-315.

218. Smith, p. 313.

219. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469.

220. (1999) 115 *L.Q.R.* 469, 492, 504.

221. (1999) 115 *L.Q.R.* 469, 492; *cp.* Rotherham, "Tracing and Justice in Bankruptcy" in Rose, (ed.), *Restitution and Insolvency* (Mansfield/L.L.P., London, 2000) forthcoming.

222. Text with nn.251-257, below.

223. Smith, pp. 315-320.

224. See Smith, p. 232.

225. Smith, pp. 232-233; the result is not very far away from a "swollen assets" view.

226. [1962] I.R. 386.

of all claimants to trace into the mass of stamps depended ... only upon the fact that the claimant's value had already been mixed up in the bank account".²²⁷ It seems to follow, though Smith does not make it explicit, that the bank account constituted an "indistinguishable mixture"²²⁸ in respect of which "it is impossible to say which part is any claimant's"²²⁹ so all can trace out if it and into another mixture,²³⁰ here the unallocated stamps; and any loss will be borne by contributors in proportion to their contribution;²³¹ so all of the claimants could trace into the stamps in proportion to their contributions. Therefore, although Lord Templeman in the Privy Council in *Space Investments*,²³² flirted with the swollen assets view, its effective rejection by the Court of Appeal in *Homan*²³³ is entirely welcome.

It is therefore evident that making the separation between identification and claiming leads to clarity of analysis. There are at least three other important consequences. First, once that separation is made, the source of the title rules which are being applied in proprietary claims is clear. Take the equitable rules. Certainly, many of equity's rules as to title relate to a pre-existing and continuing equitable title which is vindicated by the law of property, and when a title claim is made in "equitable tracing", property is identified, and title to it is usually claimed arising from that pre-existing and continuing equitable title. However, if the title is not pre-existing and continuing but is instead raised *de novo* to remedy, for example, an unjust enrichment this can still be supported by a tracing identification exercise.²³⁴ If it is clear that the claim is based upon the law of property, then considerations from other substantive areas of the law, such as the law of restitution, can have no impact upon the property claim. And, conversely, if it is clear that the claim is based upon the law of restitution, considerations from the law of property can have no relevance. Thus, claiming rules applicable to a purely proprietary claim based upon a pre-existing and continuing equitable title are by definition not applicable to a restitutionary claim, even a restitutionary proprietary claim based upon a title raised to reverse an unjust enrichment. For example, orthodoxy would seem to suggest that the requirement of a fiduciary relationship is a necessary element of an equitable proprietary claim. The Court of Appeal in *Re Diplock* concluded

227. Smith, p. 232.

228. *Ibid.*

229. Smith, p. 195.

230. Smith, pp. 179-181.

231. *Cp.* Smith, p. 73 on following, applied by analogy here.

232. *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.* [1986] 1 W.L.R. 1073 (P.C.) 1074; see Jones, "Tracing Claims in the Modern World" (1984) 37 *King's Counsel* 15.

233. *Bishopsgate Investment Management Ltd. v. Homan* [1995] Ch. 211 (C.A.) (*cp. Re Goldcorp Exchange* [1995] 1 A.C. 74); Smith, "Tracing, 'Swollen Assets' and the Lowest Intermediate Balance" (1994) 8 *T.L.I.* 102.

234. See text with nn.183-185, above.

from the earlier House of Lords decision in *Sinclair v. Brougham*²³⁵ that "the existence of a right of property recognised by equity ... depends on there having existed at some stage a fiduciary relationship of some kind ...".²³⁶ Since it is plainly a nonsense to speak about a fiduciary relationship in the context of identification, which is merely a question of fact, this precondition must apply to claiming. It is often treated as little more than an annoying formality.²³⁷ Smith²³⁸ and Oakley²³⁹ argue that this constitutes a fundamental misunderstanding of *Sinclair*, and since that has been formally overruled in England,²⁴⁰ it cannot be long before *Re Diplock* is revisited on this point.²⁴¹

It is often argued that the fiduciary requirement forms part of Irish law as a consequence of the decision of Budd J. in *Shanahan's Stamp Auctions v. Farrelly*.²⁴² But a careful reading of that decision demonstrates that Budd J. is concerned only with the effect of *In re Hallett's Estate*,²⁴³ and in particular

235. [1914] A.C. 398 (H.L.). The case has been picked over many times and almost always found wanting; see, e.g., Lord Wright of Durley, "*Sinclair v. Brougham*" in *Legal Essays and Addresses* (C.U.P., Cambridge, 1939) p. 1 (reprinting (1938) 6 *C.L.J.* 305); Stoljar, "Re-Examining *Sinclair v. Brougham*" (1959) 22 *M.L.R.* 21; Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 *L.Q.R.* 240; Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64; O'Dell, "The Case that Fell to Earth. *Sinclair v. Brougham* (1914)" in O'Dell, (ed.), *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, Dublin, 2000) p. 28.
236. *Re Diplock*; *Diplock v. Wintle* [1948] Ch. 465, 540. On the genesis of this point in *Diplock*, contrast Pearce, "A Tracing Paper" (1976) 40 *Conv. (n.s.)* 277, 288-289 (arguing that it is the result of an inaccurate headnote) with Smith, pp. 120-130.
237. See, e.g., *Chase Manhattan Bank N.A. v. Israel British Bank (London) Ltd.*, [1981] Ch. 105 (Goulding J.); *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265 (Ch.) 280 per Millett J. (a point not taken on appeal: [1991] Ch. 547 (C.A.)); *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1994] 4 All E.R. 890, 937 per Hobhouse J.; [1994] 4 All E.R. 890, 964 per Dillon L.J.; [1994] 4 All E.R. 890, 969 per Leggatt L.J. (the matter did not arise in the House of Lords: [1996] A.C. 669); *cp.* the similar ease with which it is satisfied in other contexts, n.67, above.
238. Smith, pp. 120-130, 340-347.
239. Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64; *cp.* Pearce, "A Tracing Paper" (1976) 40 *Conv. (n.s.)* 277.
240. *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669 (H.L.).
241. Jones, "*Ultra Vires* Swaps: The Common Law and Equitable Fall-Out" [1996] *C.L.J.* 432, 435, notwithstanding the comments of Lord Browne-Wilkinson to the contrary in *Westdeutsche*: [1996] A.C. 669, 714. Indeed, the rug may be further out from under the *Diplock* feet than that. In *Westdeutsche*, Lord Browne-Wilkinson accepted that the owner of a stolen bag of coins lodged in a bank account could trace into the bank account, *i.e.*, identify the coins in their exchange product and claim accordingly, notwithstanding the necessary absence of a fiduciary relationship between plaintiff and thief, ([1996] A.C. 669, 716) thereby undercutting the fiduciary requirement: see Smith, "Tracing" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/LLP, London, 2000) 233, 234-235).
242. [1962] I.R. 386 (H.C.). See, e.g., Keane, pp. 284-285: Budd J. in *Shanahan's* "held that the principles in *Sinclair v. Brougham* and *Diplock's* case were applicable". This view of Budd J.'s decision has been taken by Kenny J. in *In re Shannon Travel* (1963-1993) Ir.Co.Law.Rep. 374, 379-380 (May 8, 1972) which in turn is followed in Delany, pp.634-647.
243. (1880) 13 Ch.D. 696.

with the presumption that it will be presumed that a fiduciary "who does an act which may be rightly performed cannot say that it was done wrongly".²⁴⁴ He derives that from *Hallett*,²⁴⁵ and then, having considered what was said about it in *Sinclair v. Brougham* and *Re Diplock*, he was confirmed in that interpretation,²⁴⁶ which he proceeded to apply. He did not consider *Sinclair v. Brougham* and *Re Diplock* for what they themselves might have held but only for whether they supported that interpretation of *Re Hallett's Estate*. Furthermore, in the High Court in the *Bricklayers' Hall* case, the younger Budd J. commented that "[i]t is questionable whether *Sinclair v. Brougham* is authority for the proposition that a fiduciary relationship is essential before property can be followed in equity".²⁴⁷

Hence, the fiduciary requirement is on shaky ground. But even if it is correct as an element of an equitable purely proprietary claim, it does not follow from this that it must also be an element of a restitutionary proprietary claim to reverse unjust enrichment. Indeed, quite the contrary, since pure proprietary claims and restitutionary proprietary claims are distinct, the elements applicable to one need not be to the other.²⁴⁸ Thus, even if a fiduciary relationship is necessary to the former, that does not make it necessary to the latter. It would be like saying that since both apples and oranges are fruit, since an apple can be green, all oranges must be green.

In *Foskett v. McKeown*, Lord Millett observed that there is "no logical justification for allowing any distinction between [tracing rules at law and in equity] to produce capricious results ... by insisting upon the existence of a fiduciary relationship as a precondition for applying equity's tracing rules"²⁴⁹ or – since he had earlier held that there is a unified set of tracing rules at law and in equity – for applying tracing rules generally. Removing the fiduciary requirement from the identification leg of the process must be right. However, he immediately qualified this with the further comment that the existence of a fiduciary relationship "may be relevant to the nature of the claim which the plaintiff can maintain".²⁵⁰ If, as seems more than likely, this amounts merely to an observation that there can be equitable claims in which it is necessary to establish a fiduciary relationship, rather than an observation that all equitable proprietary claims require such a relationship, then this too is unexceptional.

A second consequence of the separation between identification and claim-

244. [1962] I.R. 386, 443.

245. [1962] I.R. 386, 428.

246. [1962] I.R. 386, 438.

247. High Court, unreported, 6 March 1996, at p. 41 of the transcript. The point did not arise on appeal: [1996] 1 I.R. 468; [1996] 2 I.L.R.M. 547 (S.C.).

248. However, this does not preclude a fiduciary relationship being required as a consequence of the unjust enrichment claim, but it is difficult – to say the least – to conceive how this could be the case.

249. [2000] 2 W.L.R. 1299, 1324.

250. *Ibid.*

ing is that, where it proves necessary, the identification rules can be deployed to support *personal*²⁵¹ (as opposed to proprietary) claims. The law of restitution provides one possible category of such personal claims in which the identification rules may be deployed. For a plaintiff to succeed in a personal action for restitution, four enquiries must be successfully answered: whether there was (i) an enrichment to the defendant (ii) at the expense of the plaintiff, (iii) in circumstances in which the law will require restitution (i.e. the "unjust" phase of the enquiry), (iv) where there is no reason why restitution will be withheld (i.e. defences).²⁵² The second enquiry, as to whether a defendant's enrichment is at the plaintiff's expense, is the equivalent of a causation requirement, linking in any given case this particular defendant with this particular plaintiff. It is arguable the identification rules could be deployed to identify simply that the defendant is in receipt of the plaintiff's property,²⁵³ so that a plaintiff could follow the value of the benefit he has conferred or trace its exchange product into the defendant's hands. But relying on following and tracing identification rules may be only one way in which the defendant's enrichment at the plaintiff's expense can be established;²⁵⁴ that is, the rules of tracing – even though they may not be necessary for this purpose²⁵⁵ – are merely one way by which the causal connection between the plaintiff and the defendant can be demonstrated. This point is entirely missed by Evans, who distinguishes between a traditional transactional approach to tracing and a causal approach which he purports to derive from or ascribe to the law of restitution.²⁵⁶ Whatever about the merits *per se* of the causal approach²⁵⁷ and its consequences,²⁵⁸ it is an error to discern support from it in this aspect of the law of restitution.

If the identification rules are deployed in this way, they need only identify the defendant's receipt, and not his continuing retention, of the identified asset. In cases where a plaintiff wishes to make a *proprietary* claim, the identification

251. See, e.g., Smith, chapter 9; and nn.151-155, above.

252. See the case concerning the *Bricklayers' Hall* case: *Dublin Corporation v. Building and Allied Trades Union* [1996] 1 I.R. 468 (S.C.) 484; [1996] 2 I.L.R.M. 547, 558 *per* Keane J.; see O'Dell, "Restitution and *Res Judicata* in the Irish Supreme Court" (1997) 113 *L.Q.R.* 245; O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 *D.U.L.J. (n.s.)* 101.

253. Smith, pp. 29-30, 47, *cp.* p. 247; see, e.g., *Agip v. Jackson Agip (Africa) Ltd. v. Jackson* [1990] Ch. 264, 285 *per* Millett J. *aff'd* [1991] Ch. 547 (C.A.); *Lipkin Gorman v. Karpnale* [1991] A.C. 532, 553 (H.L.).

254. Consider *Kleinwort Benson v. Birmingham City Council* [1997] Q.B. 380; [1996] 4 All E.R. 733 (C.A.) and *Brennan v. Brighton B.C. (No.2)* (Court of Appeal, *The Times*, 15 May 1997).

255. Smith, "Tracing and Electronic Fund Transfers" in Rose, (ed.), *Restitution and Banking Law* (Mansfield Press, Oxford, 1998) 120, pp. 121-131.

256. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 *L.Q.R.* 469; see also Yeo Tiong Min, "Tracing and Three-Party Restitution" [1993] *Singapore J.L.S.* 452.

257. Oesterle, "Deficiencies in the Restitutionary Right to Trace Misappropriate Property in Equity and in UCC § 9-306" (1983) 68 *Cornell L.Rev.* 172, 217-218.

258. Text with nn.219-221, above.

process must demonstrate not only that the plaintiff received the property but also retained it to the moment when the claim is made; the identification process draws the link between the plaintiff and the defendant's receipt and retention of the claimed property.²⁵⁹ The essence of proprietary liability is not only that the defendant received the property, *but also that he still has it*, which in the end is what the identification rules are designed to achieve. Rules that a plaintiff's claim is limited to the lowest balance in the defendant's bank account, or that it fails when identification fails by virtue of the destruction of the property in the defendant's hands, are rules which assert that though the defendant received the plaintiff's property, he no longer identifiably retains it. That being so, there is no longer identifiable property against which the plaintiff can make his proprietary claim. On the other hand, in cases in which a plaintiff pursues a restitutionary *personal* claim, the identification process need only show the defendant's receipt of the relevant value; in such cases, *subsequent*²⁶⁰ failure of tracing by the destruction of the property itself or of its identity, or a subsequent lowest intermediate balance, are irrelevant. Hence, in *Lipkin Gorman v. Karpnale*,²⁶¹ where Cass had gambled at the Playboy Club with money belonging to the firm of solicitors in which he was a partner, the firm succeeded in an action for money had and received, a personal claim to restitution at common law, against the club. The firm were able to trace the withdrawal from their bank account through Cass's account²⁶² to the club, and that was sufficient to establish the club's enrichment at the firm's expense. It was not necessary for the personal claim to go further and identify the enrichment remaining in the club.

The third consequence of the separation between identification and claiming arises in the context of identification. The separation allowed Smith to derive consistent identification rules based upon logic and to conclude that there is a single unified set of identification rules for both law and equity. Consequently, if the identification rules are just that, identification rules, which apply irrespective of whether the plaintiff's original claim was legal or equitable, then they will always identify the same asset. If the rules of identification fail, they fail whether the plaintiff would have had a legal or equitable claim. If they succeed, they succeed whether the plaintiff has a legal or equitable claim. Against that background, assume that the plaintiff has a legal proprietary interest in one asset – A, and identifies its traceable proceeds in another – B, and chooses either to exercise his power to claim B or to elect in favour of B, so as to claim that he has a legal proprietary interest in B. From the perspective of identifiability,

259. Hence, in cases in which a plaintiff pursues a restitutionary proprietary claim, the tracing identification process demonstrates that the defendant's enrichment is *proprietary* at the plaintiff's expense, because the defendant both received and *retained* the property.

260. That is, subsequent to the receipt.

261. [1991] 2 A.C. 548 (H.L.).

262. Though this step occurred as a result of an extraordinary concession by counsel for the club.

such a plaintiff would seem never to want or need to claim an equitable interest in B. Nevertheless, the possibility of such a plaintiff having such an equitable claim was often canvassed when it was thought that the plaintiff's claim at law was easily lost – and more easily lost than a claim in equity would be – on the basis of the presumed different rules of identifiability. But if the rules as to identification are the same at law and in equity, if a possible claim is lost on the basis of identifiability, it is lost both at law and in equity. Conversely, if a claim is available on the basis of identifiability, then it is available both at law and in equity. From the perspective of identifiability, therefore, claims at law and in equity are equally (un)stable. In which case, the traditional reason for switching to equity, that identifiability at law has failed, is seen as misconceived: if the law has failed on the question of identifiability, then so will equity. On the other hand, there can be many case in which a plaintiff has a legal proprietary base, and can trace into property in the defendant's hands, but – as we have seen above²⁶³ – due to the nature of common law property rules, he has no common law proprietary claim. In just such a case, if the common law does not amend its property rules, such a plaintiff may wish to invoke the (unified) tracing rules to identify the same property and then make an *equitable* proprietary claim. In such a case, the plaintiff has switched to equity, not because identification failed, but because there was no claim at law.²⁶⁴

CONCLUSION

The application here of Smith's analysis to some traditional tracing issues and to some of the leading Irish cases on the issue cannot do justice to the quality and clarity of Smith's scholarship and depth of his insight. Tracing is often presented as a cause of action in its own right, a separate head of claim, and in that context, usually as a proprietary remedy; and speaking of a right to trace helps to maintain and perpetuate that view.²⁶⁵ However, it is clear from Smith's book that what has heretofore been described tracing is not a monolith but rather serves many functions (following, tracing, and claiming). It is not itself a cause of action, a claim or a remedy. Rather, it is the process by which identification of property occurs and within which a plaintiff can make various personal or proprietary claims.

263. Text with nn.157-170, above.

264. In the context of purely proprietary claims, if a fiduciary relationship is a pre-requisite to such a claim in equity, then the plaintiff in the text, having only a legal proprietary base, may not be able to make his claim in equity either (text with nn.175 and 235 above). As argued above, the manifest injustice in such a situation calls out for remedy, either by amending the elements of the claim at law (text with nn.176-180, above), or in equity by the abolition of the fiduciary relationship (text with nn.235-247, above).

265. An excellent recent example of such analysis is provided by Mountfort, "Tracing: An Examination of the Applicability of Tracing Principles Today" (1996) 70 *A.L.J.* 54.

Upon foundations constructed from these separations, Smith has erected a stunning edifice. The Common Law world has waited long for a book on tracing which would patiently, and brick by brick, disassemble a confusing and technical mass of cases and rules, and then – equally patiently, and brick by brick – reassemble them into a logical, coherent, clear and defensible pattern. The publication of Smith's book means that the long wait is now over. The book is an object lesson in elegance and patience, in the breaking down of complex problems into essential elements, and in careful and logical step by step argument from those elements to a compelling solution in a wide variety of formerly difficult scenarios

As Smith himself put it in the preface,²⁶⁶ the need was for an analysis which would attempt patiently to unravel – rather than to attempt to sever – the Gordian knot that was the law of tracing before his endeavours. Upon his promise so to do, Smith has more than admirably delivered. His patient picking at the Gordian knot conjures up images of a patient watchmaker; for almost three centuries, for ships at sea, Harrison's timepieces provided the only reliable method for the calculation of longitude;²⁶⁷ Smith's reassembly of the law of tracing will do likewise in the shoals for which it is the definitive guide.

266. Smith, p. viii.

267. Sobel, *Longitude* (Fourth Estate, London, 1996).