AN HISTORICAL SURVEY OF THE PROPRIETARY REMEDIES OF TRACING UNDER ENGLISH LAW

An earlier examination of the English proprietary remedies of tracing revealed that there were divergences between common law and equity, principally, that a right to trace will not be granted at common law if the property has become mixed with another's and that it will not be available to a claimant in equity unless a fiduciary relationship exists.[1] In this paper an attempt will be made to examine, historically, these remedies. We shall consider why the legal remedies became personal;[2] why they have remained personal; what the common law did in the 18th century when faced with the problem of an insolvent defendant; how the equitable remedies supplemented the legal remedies; whether the 'charge' has any pre-1880 root?

The above then is the line along which our historical survey will take. Apart from giving a brief historical outline only of the development of the legal remedies, we do not therefore intend to write the history of the remedies as such. It is however hoped that our historical survey here will if anything enable us to understand fully the root causes of the divergences between the two remedies.

A. *WHY DID THE LEGAL PROPRIETARY REMEDIES BECOME PERSONAL?*

The legal remedies which concern us here are the tortious actions of detinue and trover and the quasi-contractual action for money had and received.

(1) *Detinue*

The action of detinue, associated for sometime with the writ of Debt, was known in the time of Glanvill who gave the composite writ to be used by a person who sued in the King's Court for a 'debt which is due to him'.[3] This writ is closely similar to that form of the 'writ of right' for the recovery of land. In form, it was a *'praecipe quod reddat'* commanding the defendant to return the money or the chattel to the plaintiff or to answer in the Royal Court for his failure so to do and there was the same allegation that the plaintiff had been 'unjustly deforced'.[4] Not long, however, after Glanvill's day another form better suited to express the relation between a debtor and a

1 See Babafemi, "Tracing Assets: A case for the fusion of Common Law and Equity in English Law" (1971) 34 Modern Law Review at pp. 12-28; also Babafemi, "The Proprietary Remedies of Tracing: A comparative study of English and American Law" (1973) 2 The Anglo-American Law Review at pp. 198-218.

2 In other words why was only a personal liability to pay damages imposed upon the defendant?

3 Glanvill, Book X. Cap. 1, 2, 3, & 13.

4 See C.H.S. Fifoot, *History & Sources of the Common Law* p. 25.

creditor arose: the word 'deforces' was dropped; the debtor is to render to the creditor so many pounds or shillings which he owes and unjustly detains'. This was the formula of debt in the '*debet et detinet'*. At the same time the claim for a particular chattel is being distinguished from the claim for a certain quantity of money or of corn or the like. If a man claims a particular object he ought not to use the word 'debet'; he should merely say *'injuste detinet'*. This latter form is the new, separate writ of detinue.[5]

We have seen that in its original composite form it afforded a 'real' remedy. It, however, soon lost this 'real' nature of its youth and became personal, a personal liability being imposed on the defendant to pay damages, because the rule had grown up at this time that in detinue a tender of the value of the chattel was sufficient and specific restitution could not be claimed. Therefore, if B wrongfully detains C's sheep and refuses to deliver it on request he cannot be compelled to deliver it. In his count C will be bound to put some value upon the sheep: thus he will say B is detaining wrongfully from him a sheep worth 10 shillings. If he is successful the judgment will be that he recover his sheep or its value assessed by a jury and if B elects to pay the money rather than deliver up the sheep he will by so doing satisfy the judgment. In a passage, Bracton, the great medieval writer spoke of this matter thus:[6]

> At first sight it may appear that the action should be both real as well as personal, *tam in rem quam in personam,* since a particular thing is claimed, and the possessor is bound to give it up, but in truth it will be merely in *personam,* for he from whom the thing is claimed is not absolutely bound to restore the thing, but is bound in the disjunctive to restore the thing or its price, and by merely paying he is discharged, whether the thing be forthcoming or no. And therefore anyone who claims a moveable for whatever cause, be it as having been carried off, or as having been lent, is bound to state its price, and count thus "I demand that such an one restore to me such a thing, of such a price' or 'I complain that such an one detains from me, or has unjustly robbed me of such a thing of such a price' and if the price be not named the *vindicatio* of a moveable thing is bad.

Furthermore, if the defendant was still obstinate and refused to pay the value, the mode of execution at law[7] did not ensure that the particular goods were restored. What the common law did was to order the sheriff to sell enough of the defendant's chattels to make the sum awarded by the jury and hand it over to the plaintiff. Thus, under a writ of *fieri facias,* the sheriff would seize and sell goods owned by the defendant, or, under a writ of elegit,[8] he would put the plaintiff into possession of the defendant's land, so that he might obtain satisfaction out of the income or use of the land.

It would, therefore, appear from the foregoing that before the Common Law Procedure Act, 1854 (s. 78)[9] the defendant in detinue could elect to keep the goods and pay their value. Dr. Fifoot has,

5 It became clearly separated by the end of the 13th century see Fifoot *History and Sources* pp. 25-28.

6 Bracton, *De Legibus* fol. 102b.

7 See Kiralfy, *The English Legal System* at p. 298.

8 Abolished by Administration of Justice Act, 1956 s. 34 and replaced by a power to impose a charge on the land.

9 See *infra* p. 208.

however, suggested that there are indications that this principle was not universal.[10] He cites the case of *Kettle* v. *Bromsall*[11] and an anonymous case of 1479.[12] In the former case the plaintiff claimed in Detinue 'a handle of a knife with an old English inscription purporting it to be a deed of gift to the monastery of St. Alban's' and 'a ring with an antique stone with one of the Caesars' heads upon it' Chief Justice Willes said:

> In trover only damages can be recoverted, but the things lost may be of that sort as medals, pictures or other pieces of antiquity, that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves, which can only be done in detinue

In the latter case the plaintiff, in an *'action sur le cas'* declared that he bailed certain hanapers of silver to the defendant for safe keeping and that the defendant broke them open and 'converted' them to his use. Temayle, a counsel in that case argued that detinue should lie. Choke, J., was, however, of the contrary opinion but Chief Justice Brian was in no doubt that detinue ought to lie. The Chief Justice remarked, *inter alia:*

> It seems to me that he shall have an action of Detinue in this case and no other action And I put this question to you if I bail to you my hanaper to keep and you break it into four parts and you keep these in your chest, is the property changed or not? I think not, so it is clear that he shall have an action of Detinue, where the property is in him so that he can recover the thing itself And I take it for clear law that he shall not have any action *sur le cas* if he can recover the thing itself

It is, however, submitted that Dr. Fifoot's suggestion is erroneous. Indeed the remarks of Willes and Brian, C.J.J , when carefully considered, can only be regarded as marking out the boundaries which divide trover and detinue. Thus while trover, as we shall later see, is an action upon the case to recover damages and is not brought to recover the goods *in specie,* in detinue the plaintiff looked forward either to the recovery of the things detained *in specie* or their value.[13] But he was not certain of obtaining the goods *in specie* because it was at the defendant's option to retain the goods or pay their value. Nevertheless, he could still hope for the recovery of the thing itself. Parke, B., in the case of *Phillips* v *Jones*[14] stated the old law in these words:

> Upon referring to the precedents, it appears that the plaintiff in detinue has a right to recover the goods *in specie,* and, in case of non-delivery, the value, and the option of giving up the goods or paying the value is in the defendant, who, by refusing to deliver the former, renders himself liable to pay the latter It was so laid down by Frowike, C J, Keilw Rep 646 He says, 'That the judgment is, that the plaintiff shall recover the goods or the value, then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and if he will not, then the value as it is taxed by the inquisition[15] And so it is in the election of

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10 See C H S Fifoot, *History and Sources* p 109 footnote 44

11 (1738) Willes, 118, 95 E R 1087

12 *Anon* Y B Jil 18 E D 4, f 23 pl 5

13 See 8 Viner, *Abridgment 25 Detinue* [B2] 10 Dr Fifoot had himself stated that 'in principle at least, a plaintiff in Detinue looked to the return of his goods, even if in practice he must be content with their value in Trover the claim was for damages only' — Fifoot, *History and Sources* p 109

14 [1850] 15 Q B 859, 867

15 This is exactly what Blackstone in his *Commentaries* (pp 151-2) to which we are referred by Dr Fifoot, also said But Dr Fifoot inadvertently suggested that this was an indication that the medieval law on detinue was not universal

> the defendant to deliver to the plaintiff the goods or the value. And the same law is laid down in YELV. 71 [*Paler* v. *Hardynan*] ....[16]

Why, then, was the defendant not obliged to return the chattel itself? We shall consider this question later.[17] It is, however, significant that the Common Law Procedure Act, 1854 s. 78 has now remedied this defect in procedure, for, by the provisions of this Act, the judge may order execution to issue for the return of a chattel detained without giving the defendant the option of paying the value assessed. Section 78 states:

> the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant, by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods, the damages, costs and interests in such action.

This Act is now followed by Rules of Supreme Court Order 45 [rule 4][18] whereby the plaintiff may either obtain a judgment or order for the delivery of the goods which does not give to the defendant the option of paying their assessed value or he may obtain a judgment or order for the delivery of the goods or the payment of their assessed value. In the case of a judgment or order in the first form, the method of enforcement is by a writ of specific delivery for the issue of which no leave of the Court is required. In the case of a judgment or order in the second form, the method of enforcement is by a writ of delivery to recover the goods or their assessed value, for which again no leave is required, but in the case of such a judgment, if it is desired to enforce it by a writ of specific delivery, that is, by depriving the defendant of the option of paying the assessed value of the goods, then the leave of the Court must first be obtained. The application is made *ex parte* to the Practice Master who may give leave by fiat or the *praecipe* without an affidavit to support the application, or in exceptional cases, he may direct a summons to issue.

This second formula, however, prevents us from asserting that the substantive law on detinue has been altered to any great extent. Indeed leave for specific delivery under this second formula will only be issued where the goods detained are irreplaceable or are of some special value to the plaintiff beyond their financial value, that is, unique. For the Court procedure on this matter we are referred by the Annual Practice [19] to the case of *Whiteley* v. *Hilt*[20] where Swinfen-Eady, M.R., stated that 'the power vested in the Court to order the delivery up of a particular chattel is discretionary and ought not to be exercised when the chattel is an ordinary article of commerce and of no special

16 See 8 Viner *Abridgment 41 Detinue* (E) 15, 17 to the same effect; see also *Whiteley* v. *Hilt* [1918] 2 K.B. 808 *per* Swinfen Eady M.R. at p. 815.

17 See *infra* p. 213 *et seq.*

18 Formerly Rules of Supreme Court Order 48 rule 1.

19 Supreme Court Practice 1976 at p. 158.

20 [1918] 2 K.B. 808.

value or interest, and not alleged to be of any special value to the plaintiff and where damages would fully compensate.[21] Furthermore, it is not possible to sign judgment in default in detinue for the goods alone but only for the goods or their value or for their value alone. Thus R.S.C. Order 13 rule 3 states:[22]

> Where a writ is indorsed with a claim against a defendant relating to the detention of goods only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing at his option enter either —
>
> (a) interlocutory judgment against that defendant for the delivery of the goods or their value to be assessed and costs; or
>
> (b) interlocutory judgment for the value of the goods to be assessed and costs.
>
> and proceed with the action against the other defendants if any.

The enforcement of a judgment in this form for the delivery of the goods is governed by Order 45 rule 4(2) viz. by writ of delivery to recover the goods or their assessed value or with the leave of the Court, by writ of specific delivery.

From the foregoing discussion it is clear that detinue does not afford as such a real remedy. Although, under the old law, the defendant could himself elect to retain the goods and pay their value, what the 1854 Act s. 78 and Rules of Supreme Court Orders 13(3) and 45(4) now appear to do is to vest in the Courts themselves a discretionary power to grant or refuse this option. Indeed under Order 45(4), as we have seen,[23] if the Court refuses to grant a judgment under formula 1 but grants it under formula 2 then if the plaintiff wants a writ of specific delivery he will still have to apply to the Court for leave so to do and it is at the discretion of the Court whether or not it will grant the leave.

(2) *Trover*

The action of trover[24] is an offshoot of case, which, though originally associated with the writ of trespass, had become clearly separated from trespass by the second half of the 14th century.[25] As we have seen, the old personal action which lay in cases where the claimant sought to retrieve from the defendant identifiable goods which belonged to him or their value, was the action of detinue,[26] but this action was originally very limited in its application, for it appears to have lain only in a case where the goods had come into the possession of the wrongdoer with the consent of the plaintiff, as by a bailment, and were still in his possession when he refused to return them. It did not, therefore, cover an unlawful taking by the defendant, nor, originally, an appropriation by the defendant of goods which he had found, or a destruction or sale by him of the plaintiff's goods lawfully in his possession. Later, however, by the middle of the 15th century a loser of goods was allowed to bring the action of detinue *sur* trover

21 *Ibid* at p. 819.
22 Supreme Court Practice 1976 at p. 118.
23 See *supra* p. 208.
24 For the detailed history of this action see C.H.S. Fifoot, *History & Sources* p. 102; Ames, Lectures on Legal History pp. 80-7.
25 See Maitland, *Forms of Action* pp. 359-360.
26 *Supra* p. 205.

against a finder. But the other defects still remained unremedied. Thus an owner was not protected in detinue where a bailee or other possessor destroyed or misused the goods, whereby a diminution in value arose, but nevertheless returned them to the owner on demand. The owner's only remedy in such a case was 'a special action on the case' to recover damages for the injury to the goods. Furthermore, if a bailee destroyed the chattel, the owner, as we have shown, could recover its value in detinue.[27] But if a possessor other than the owner's original bailee destroyed the chattel, there does not appear to be any clear authority as to whether the owner could have recovered the value of the chattel in detinue. The new possessor in such a case never agreed with the owner to deliver the chattel on request. In a case in 1472[28] 'A' bailed goods for safe custody to 'B' who bailed them over to "C". "C" so used them that he destroyed their value. In an action *'sur le case'* to recover damages Brian, C.J., gave judgment for "C" since he was a stranger to the first bailment but the other judges found for the plaintiff. One can infer from this case that the plaintiff brought the action *sur le case* because he could not sue in detinue.

During this period, however, trover had not yet emerged as a distinct species of case. The cases cited above were instances of case as a generic writ, although it is noteworthy that in 1479, in an anonymous case, a bailor complained that a bailee had broken open certain hanapers of silver and 'converted them to his use'.[29] Towards the second half of the 16th century, however, trover came into use. In the words of the writ the plaintiff 'casually lost the chattel from his hands and possession and afterwards it came to the hands and possession of the defendant by finding[30] who nevertheless put and converted it to his own use.' The absence of wager of law from this action, and the less degree of certainty required in describing the goods, however, ensured for it a great advantage over the action of detinue that in time the allegations of loss and finding became fictitious and untraversable by the defendant and the action without change of form was enlarged to cover cases of trespass, detinue, destruction or sale of the goods.

We have seen that in the instances in which the parent action of case lay, the claim was for the recovery of damages alone.[31] When, in the second half of the 16th century, trover emerged as a separate species judgment also gave a successful claimant only the value of the goods converted. Thus, in the case of *Olivant* v. *Berino*[32] a defendant, sued in trover for the value of certain pictures, expressed the desire to return the pictures to the plaintiff but the Court refused this option saying, 'this action is for damages and you cannot oblige the plaintiff to accept the thing itself.' Also in the case of *Isaack* v. *Clark*[33] Chief Justice Coke stated that the judgment in Trover 'changed

27 i.e., if he did not return the chattel.

28 Anon, Y.B. NICH. 12 Ed. 4, f. 13 pl. 9 (A.D. 1472).

29 Anon Y.B. 18 Ed. 4, f. 23 pl. 5.

30 The allegation of a trover (finding) was made to obviate the risk of a charge of felony being implied from the pleadings in which case the Crown after a successful prosecution could seize the goods.

31 See *supra.*

32 (1743) 1 Wilson, 23.

33 (1614) 2 Bulstrode, 306.

the property' from the plaintiff to the defendant. One can indeed infer from the above judicial statements that the judgment imposed only a personal liability on the defendant to pay damages[34] the interest of the plaintiff in his goods being transferred to their value. It is, however, significant that nowadays it is not the judgment itself but the satisfaction of the judgment which operates to transfer the property.[35]

(3) *Money had and received*

When the plaintiff brings this action the substance of his right is said to be quasi-contractual, that is, it arises neither from contract nor tort but *quasi ex contractu.* While the forms of action were in existence the procedure whereby the plaintiff asserted his right was *indebitatus assumpsit:* 'the defendant being indebted then promised.[36] In its original form it was known as Assumpsit. Assumpsit itself was, like Trover, an offshoot of Case which, though in its early days was associated with the writ of Trespass had become separated from Trespass by the second half of the 14th century.[37] Assumpsit was alleged in cases where the defendant had taken upon himself [assumpsit] to do something in relation to the person or property of the plaintiff and had done it badly.[38] We have here the seeds of a contractual action although it was not until the 16th century that assumpsit was extended from misfeasance to non-feasance and held to lie where the defendant had failed completely to do an act which he had undertaken to do.[39] Assumpsit could not, however, be alleged in cases where debt[40] was available. The action of debt was still the only remedy for the recovery of a liquidated sum owing to the plaintiff [e.g. loan of money, rents, price of goods sold]. Through the 16th century Assumpsit arose only upon an actual express agreement and therefore if Assumpsit is to lie for a debt, for example for the payment of money lent, a new promise to pay that debt must be alleged and proved. However, in 1602 it was decided in *Slade's case*[41] that Assumpsit could be brought where Debt would lie and thus Assumpsit replaced Debt as a means for recovering liquidated sums. The King's Bench said: 'Every contract executory imports in itself an assumpsit for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it'.[42] The necessity for proof of the new promise is thenceforth dispensed with. This form of Assumpsit becomes known as *Indebitatus Assumpsit* as opposed to 'special assumpsit' which lay in other cases. A few years later this

34 See also *per* Willes, C.J., in *Kettle* v. *Bramsall,* 95 E.R. 1087 at p. 1088.

35 This seems a 19th century innovation — see *per* Willes, J. in *Brinsmead* v. *Harrison* (1871) L.R. 6 C.P. 584.

36 For a detailed historical account see Jackson, *History of Quasi-Contract;* Holdsworth, *History of English Law,* III pp. 424-454; Winfield, *Province of the Law of Tort* pp. 116-143; Fifoot, *History & Sources* pp. 358-389; Ames, pp. 149-166.

37 See Maitland, *Forms of Action* pp. 359-360.

38 Maitland, *Forms of Action* at p. 363 gives an example where the defendant is a surgeon and has unskilfully treated the plaintiff or his animals so that he or they have suffered some physical harm. In such cases we find an assumpsit alleged.

39 *Ibid* at p. 363.

40 For detailed historical account of Debt see Fifoot, *History and Sources* pp. 217-254.

41 (1602) 4 Coke Rep. 91a, 92b.

42 Rep. 4 at p. 94(a).

action was extended to cases of contract to be implied from the conduct of the parties, for example, if A employs C to do some work for him the law will imply an undertaking by A to pay C the reasonable value of the work [*quantum meruit*].[43]

Finally, between 1673 and 1705, a wider extension of *Indebitatus Assumpsit* occurred when it was allowed by the Courts in cases where there was no contract, executory or otherwise between the parties. 'These included cases where the plaintiff had intentionally paid money to the defendant e.g. claims for money paid on a consideration which wholly failed and money paid under a mistake — cases where the plaintiff had been deceived into paying money, and cases where money had been extorted from the plaintiff by threats or duress of goods. They also included cases where money had not been paid by the plaintiff at all, but had been received from third persons, as where the defendant had received fees under colour of holding an office which in fact was held by the plaintiff, and, finally, cases where the defendant had been wrongfully in possession of the plaintiff's goods, had sold them, and was in possession of the proceeds.[44] The action of Account had already provided a remedy in some of these cases. Thus, where D had received money from a third party (C) to transmit to P account was the nearest remedy for failure so to do.[46] Account was also the remedy where money was paid by mistake, as where money intended for C was paid to D, or P had mistakenly paid D a larger sum than D was entitled to.[47] Later Debt was also held to lie because at an early period debt became concurrent with account in cases where the object of the action was to recover the exact amount received.[48] As we have, however, seen earlier on, *indebitatus assumpsit* had become concurrent with debt by means of the fiction of a promise implied in law and was then also felt capable of lying in certain cases where account lay. Professor Stoljar, in a scholarly article, has explained this development in these words:[49]

> This particular transition, however, was somewhat circuitous. As first the new actions were styled 'on the case in assumpsit', thus suggesting a link with special assumpsit, although the action clearly depended on the *indebitatus* type, since it was concerned with the recovery [as in debt] of a fixed amount and not [as in special assumpsit] with the recovery of damages. For example, in *Babington* v. *Lambert*[50] P sued in 'case' or 'assumpsit' to recover money that D had received from a third hand. In *Cavendish* v. *Middleton*[51] P again sued on the 'case' where D obtained the money by fraud, an action which succeeded in spite of D's objection that the proper remedy was account 'as for money unduly received'. Yet once such recovery by assumpsit seemed more firmly assured, the new actions begin to declare their correct [that is, *indebitatus*] membership. So in *Bonnet* v. *Foulke*,[52] where the action

43 See Maitland, *Forms of Action* at p. 364.
44 *Per* Lord Atkin, *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 27.
45 For a detailed history of Account see Stoljar's 'The transformation of account' (1964) 80 L.Q.R. pp. 203-224; Fifoot, *History and Sources pp.* 268-288.
46 See Stoljar, "The Transformation of Account" (1964) 80 L.Q.R. pp. 209-210.
47 See *Framson* v. *Delamere* (1595) Cro. Eliz. 458; *Hever* v. *Bartholomew* (1597) Cro. Eliz. 614 — discussed by Jackson, *History of Quasi-Contract* (1936) p. 6.
48 See Y.B Pasch. 41 Ed. III f. 10 pl. 5.
49 Stoljar, "Transformation of Account" (1964) 80 L.Q.R. at p. 216.
60 (1611) Moo. K.B. 854; 1 Roll Rep. 391.
51 (1628) Cro. Car. 141; W. Jones 196.
52 (1657) 2 Sid. 4.

> is for money paid by mistake, the court now refers to 'assumpsit, viz. *indebitatus assumpsit';* while a little later, it is stated even more frankly: 'wherever the plaintiff may have an account an indebitatus will lie'.[53] It is this species of *indebitatus assumpsit* which not only soon becomes better known as the count for money had and received, but because of certain procedural advantages proved a spectacular success.

We have attempted in the foregoing to give a brief historical outline of the development of *indebitatus assumpsit* for money had and received. Like the actions of detinue and trover before it, however, this action became personal, a personal liability being imposed on the defendant, because when judgment was given to a successful plaintiff, it lay for the payment of equivalent coins and not for the recovery of identical coins.[54] Indeed, in those cases where *indebitatus assumpsit* had become concurrent with the action of debt [that is, claims for a fixed sum of money or loans due, rents owed, price of goods sold etc.], judgment imposed only a personal liability on the defendant, the rule having been recognized that the defendant was not obliged to return the actual coins.[55] It is, therefore, hardly surprising that when *indebitatus assumpsit* was extended to lie in some of the cases where the action of account lay, these cases being also concerned with the recovery, as in debt, of a fixed amount, its form of judgment was not altered.

The main classes of property which the above personal rights of action protected were movable chattels and money. Detinue and trover were available to recover movable chattels; trover and money had and received lay to recover money. In each case, as we have seen, only a personal judgment was imposed against the defendant to pay damages. Why, then, one is impelled to ask, was the defendant not obliged to return the movable chattel itself or the identical coins?

(i) *Why was the defendant not obliged to return the particular movable chattel?*

From what is revealed in the opinions there are probably two main reasons. First, the medieval chattels were of a perishable character. Thus Pollock and Maitland, after stating that the typical medieval chattel was a beast, went on to say:[56]

> ... this typical chattel was perishable; the medieval beast, horse, ox, sheep, had but a short life, and in this respect but few chattels departed far from the type. With the exception of armour, those things that were both costly and permanent were for the mere part outside the ordinary province of litigation; books, embroidered vestments, jewelled crowns and crucifixes, these were safe in sanctuary or in the King's treasure house; there was little traffic in them.

It is, therefore, not incorrect to say that because of the above reason the court could not accept the task of returning it to the owner. Secondly, the chattels of the middle ages were of a type the value of

53 *Arris* v. *Stukeley* (1677) 2 Mod. 260, 262.

54 See Stoljar *Law of Quasi-Contract* (1964) p. 7.

55 See Maitland, *Forms of Action* p. 357.

56 See Pollock and Maitland II pp. 150-1; see also Blackstone's Commentaries where he said at p. 145 'things personal [i.e movable chattels] are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor.'

which could be easily estimated.[57] If the value of the chattel is paid to the plaintiff, this is deemed sufficient and the defendant may retain the chattel. Pollock and Maitland commented on this rule thus:[58]

> Absurd as this rule might seem to us now-a-day, it served Englishmen well enough until the middle of the nineteenth century; it showed itself to be compatible with peace and order and an abundant commerce. In older times it was a natural rule because of the pecuniary character of chattels.

Indeed the medieval chattel had a certain fungibility. Formerly oxen served as money. Beasts, however, lost their pecuniary character gradually. Therefore, if the plaintiff got the precium of his ox he got what would do as well as his ox. This option, no doubt, led Bracton to say and conclude that there is no real action for chattels.[59]

(ii) *Why was the defendant not obliged to return the actual coins?*

From what is revealed in the early cases the reason is believed to lie in the fact that the property in the actual coins was deemed to have passed on delivery because one coin could not be distinguished from another or as some of the early cases put it, 'money has no earmark'. Therefore, if one gave money to another to deal with in a certain way [for example, for the purchase of merchandise] or by way of loan, his ownership in the particular coins was looked upon as having passed to the transferee so that he is compelled to seek not the actual coins delivered but only the equivalent amount. Thus in an anonymous case of 1573 the unanimous Court said:[60]

> if a man delivereth money to another man to buy cattle, or to merchandise with, although that the money be sealed up in a bag, yet the property of the money is to the bailee, and the bailor cannot have an action for the money, but only an account 61 against the bailee, although that he never buyeth the cattle or other things for the auditors upon the account shall allow him the sum and such other allowances as they shall think fit.

Again, in the case of *Higgs* v. *Holiday*[62] where the court had held on the facts that trover will not lie for money received by a servant on sale of his master's goods Anderson said:

> The property of the money was never in the master but in the servant; for if a man delivers money to another, the property thereof is in the bailee, because it cannot be known, and he can maintain account only; ... for the writ of account proves the property of the money to be in him; for it supposeth that he is receptor donariorum of the plaintiff....

Moreover, where the coins were deposited with a bailee to be returned on request the bailee was not required to surrender the identical coins. Thus in *Core's case*[63] Chief Justice Fitzjames said:

> And besides if I bail twenty pounds to one to keep for my use, if the twenty pounds were not contained in a bag, coffer or box an action of detinue doth not lie, because the twenty pounds could not be discovered or known to be mine, but debt and account lie at my pleasure.

57 See Maitland, *Forms of Action p.* 356.
58 Pollock and Maitland II p. 178.
59 See *supra* p. 206.
60 Anon, (1573) 3 Leon. 38.
61 It should be noticed that the action for money had and received [discussed ante] came to supersede account and also debt.
62 (1600) Cro. Eliz. 746.
63 (1537) Dyer 20a, 226.

Pollock & Maitland have explained this point thus:[64]

> When we speak of money being 'deposited', we almost always mean that money is 'lent', and when we speak of money being 'lent', we almost always mean that the ownership of the coins has passed from the lender to the borrower; we think of *'mutuum'* not of *'commodatum'*. But more than this can be said. True 'bailments' of coins do sometimes occur; coins may be deposited in the hands of one who is bound not to spend them but to keep them safely and restore them; they may even be *'commodated'* that is, lent for use and return, as if one lends a sovereign in order that the borrower may perform some conjuring trick with it and give it back again. In these cases our modern criminal law marks the fact that the ownership in the coins has not been transferred to the bailee, for it will punish the bailee as a thief if he appropriates them. But then, this is the result, sometimes of a modern statute, sometimes of the modern conception of delivery for a strictly limited purpose not being a bailment at all; and if we carry back our thoughts to a time when the bailee will not be committing theft or any other crime in appropriating the bailed chattel, then we shall see that a bailment of coins hardly be distinguished for any practical purpose from what we ordinarily call a loan *[mutui datio]* of money. In the one case the ownership in the coins has been, in the other it has not been transferred; but how can law mark this difference? The bailee does all that can be required of him if he tenders equivalent coins, and those who, dealing with him in good faith, receive from him the bailed coins, will become owners of them. Some rare case will be required to show that the bailee is not the owner of them.

B. *WHY DID THE LEGAL PROPRIETARY REMEDIES REMAIN PERSONAL?*

Obviously, where a person has given money to another to deal with in a certain way or by way of loan or under mistake it is clear that the particular coins cannot be reclaimed. What the early law said in such cases was that since one coin could not be distinguished from another the property in the coins was deemed to have passed on delivery so that the plaintiff is compelled to seek only the equivalent coins.[65] Indeed, even if one coin can be distinguished from another it is clear that if money is to serve as a medium of exchange, which purpose it has now served for several centuries, once it is paid out as currency, it cannot, be specifically owned any longer so as to be recoverable in specie. Thus as Lord Haldane said:[66]

> In most cases money cannot be followed. When sovereigns or banknotes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or banknote be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason for this is that chattels of such kind form part of what the law recognises as currency, and treats as passing from hand to hand in point not merely of possession but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.[67]

Other cases can arise, however, where the plaintiff does not intend to pass his ownership in the particular coins. Thus, as Pollock and Maitland have shown,[68] a case may arise where coins are deposited in the hands of one who is bound not to spend them but to keep

64 Pollock and Maitland *History of English Law* II p. 179.

65 See *supra* p. 214.

66 *Sinclair* v. *Brougham* [1914] A.C. 398, 418.

67 Viscount Haldane emphasised, however, at p. 420, that notwithstanding its normal function as currency money can be followed so long as it can be traced into assets acquired with it.

68 Pollock and Maitland *History of English Law* II p. 178.

them safely and restore them. It appears such coins can be recovered *in specie* for, although the early law did not have our developed machinery of criminal law to punish the bailee who appropriated the coins, nowadays our criminal law[69] marks the fact that property in the coins has not passed by punishing the bailee as a thief and could thus enable the bailor to recover the coins. Similarly, if a current coin is stolen from me and sold to a collector as a curiosity it appears my ownership in the coin will be recognised as not having passed for the purposes of an order of restitution under the Larceny Act.[70] These are, admittedly, very rare cases and the claimant is here invoking the aid of the criminal law. Indeed, in the majority of the cases, the property in the money is intended to pass on delivery and the action for money had and received which, as I have shown lies in such cases[71] will only lie as a personal action for an equivalent amount.[72] The action of trover also lies for the recovery of money but this again as we have shown, is purely a claim for damages[73] and is not brought to recover a *'res' in specie.*

In cases where movable chattels are concerned we have seen that in the early law [that is, before 1854] the actions of detinue and trover became personal because a tender of the value of the chattel was sufficient and specific return could not be claimed.[74] Indeed, the defendant himself elected whether he would return the chattel or pay damages. This was justified on the grounds that the medieval chattel was of a perishable character and that its value could be easily estimated. This rule, however, worked obvious injustice as the time went on. Obviously, it is not in all cases that a plaintiff would desire damages. Where, for instance, the thing retained was of a unique nature or of peculiar value to the true owner [e.g. an heirloom] he would be unwilling to accept damages only. Nothing was, however, done to remove this injustice until the 17th century when another branch of our legal system, Equity, laid it down that in cases where the chattel had a special value to its owner, it would decree its specific return. Thus, in *Pusey* v. *Pusey*[75] the specific restitution of the Pusey horn was decreed to the Pusey heir since the horn had a special value to the heir which could not be assessed in terms of money. The same remedy was decreed for an ancient alter piece with a Greek inscription in the case of *Duke of Somerset* v. *Cookson*[76] and for a unique tobacco-box in *Fells* v. *Read?*[77] The failure of the Common Law to change its rule and the injustice it could work was expressed by Lord Loughborough in *Fells* v. *Read* in these words:

> The Pusey horn, the *patera* of the Duke of Somerset were things of

69 Larceny Act, 1916 s. 45(i) & (ii).

70 See *Moss* v. *Hancock* [1899] 2 Q.B. 111.

71 See *supra* p. 211 and see particularly *per* Ld. Aktin, *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 27.

72 See Waters "Constructive Trust" (1966) Vanderbilt Law Review Oct. 1215 at p. 1238 where he said 'It is well established that the reason for the action for money had and received being a personal action is that property in the money has passed from the claimant or was never in the claimant, so that he is compelled to seek an equivalent sum'.

73 See *supra* p. 213.

74 See *supra* p. 210. The action of trover was, however, brought as we have seen purely for damages.

75 (1684) 1 Vern. 273.

76 (1735) 3 P. Wms. 390.

77 (1796) 3 Ves. 70. Also for a masonic regalia in *Lloyd* v. *Learing* (1802) 6 Ves. 773.

> that sort of value that a jury might not give two pence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it.[78]

So Equity supplemented the common law by decreeing specific restitution in cases where the chattel was of a peculiar nature or value. Moreover, by the 19th century it had appeared clear that a fiduciary relationship was of itself sufficient to invoke the remedies of Chancery. In the case of *Wood* v. *Rowcliffe*[79] the court said: "The cases which have been referred to [cases involving unique chattels] are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the court will interfere."

With all this development in Equity the Common Law was not, however, prepared to be left behind. Thus, almost 60 years after the opinion of Lord Loughborough in *Fells* v. *Read,* the Common Law Procedure Act was passed in 1854 and by section 78 the discretionary power was transferred from the defendant to the judges.[80] Like Equity the judges exercise this discretion in favour of a plaintiff only in cases where the article is of a peculiar nature or value. In other cases damages will still be awarded. Therefore the legal actions of trover and detinue which lie to recover movable chattels are still personal. There appears indeed no reason why specific return should be decreed if the article is not unique. Damages, after all, is an easier order to enforce. It is obviously easier to get the money, if he fails to pay, by selling his goods if he has any. In fact the only question which can arise here is whether the test of the uniqueness of the chattel should not be subjective. In other words ought not the plaintiff himself to be given the discretionary power to decide whether it is the chattel[81] or its value that he wants? Obviously, if a thief steals jewels belonging to X, X is the only person who can say whether or not they have any sentimental value to him.

So far we have made enquiries into why the legal remedies became and remained personal. It is, however, significant that though they were purely personal rights of action, yet, in the specific case of an insolvency of the defendant when it is obvious that the defendant would not have enough funds to meet all claims and liabilities and a plaintiff would therefore want to bring a claim *'in rem'* rather than a claim *'in personam',* the Common Law, as we shall see, was able to achieve, by means of these purely personal rights of action, an effect which is closely similar to the effect of a tracing order in equity.[82] We shall now proceed to find out how this was done by examining what the Common Law did in the 18th century when faced with the problem of an insolvent defendant.

78 (1796) 3 Ves. at p. 71.
79 (1844) 67 E.R. 397 affirmed (1847) 41 E.R. 990.
80 See *supra* particularly the recent 'Orders'.
81 i.e., if in his opinion it is unique.
82 For treatment in Equity see *infra* p. 220 *et seq.*

C. *WHAT DID THE COMMON LAW DO IN THE 18TH CENTURY WHEN FACED WITH THE PROBLEM OF AN INSOLVENT DEFENDANT?*

On looking into the cases it appears that the plaintiff's right of action against the wrongdoer, whether in detinue, or trover or money had and received abated along with the claims of the other unsecured creditors except where the plaintiff could identify particular chattels of his as having passed into the possession of the wrongdoer's assignee or trustee in bankruptcy[83] and could show that the property in these had never passed to the wrongdoer. In this particular instance if the assignee or trustee in bankruptcy then refused to return the chattels, the plaintiff had a personal right of action in detinue, trover or money had and received against the assignee or trustee in bankruptcy not in their representative capacity but in their personal capacity because they had no title to the chattels and were committing a wrong by retaining them. In this way, the Common Law, by thus recognising and protecting proprietary rights *'in rem',* was able to achieve by means of purely personal rights of action an effect which is closely similar to the effect of a tracing order in equity. Thus, in the case of *L'apostre* v. *Le Plaistrier*[84] where an action of trover for a parcel of diamonds was brought against the defendant as an assignee under the commission of bankruptcy awarded against one Levi, to whom before the bankruptcy, the plaintiff had delivered the diamonds to sell, it was held, *per* Chief Justice Holt, that the jewels being originally the plaintiff's and the bankrupt having no more than a bare authority to sell them for the use of the plaintiff, were not available as assets in the bankruptcy. Another case is *Scott* v. *Surman*[85] an action for money had and received to the plaintiff's use. In that case the plaintiffs had consigned a quantity of tar to their agent, who received the bill of lading but sold the tar to another person, receiving as part of the payment for the tar promissory notes worth £200. He then became insolvent and the defendants, the agent's assignees in bankruptcy received payment on the promissory notes. The plaintiffs succeeded in their claim that the money had been received to their use. It is true the defendants had received payment on the promissory notes but since the notes were impressed with the plaintiff's ownership, the money which they received ought to be paid over to the plaintiffs. As a result, the plaintiffs were able to receive the money representing the notes in full as against the general creditors of their agent. This is in fact, as we shall see,[86] the object of a claim *'in rem'* in equity. The plaintiffs attained this object, however, not by a claim to recover money in *specie,* nor even by a claim against the agent, but by a direct claim against the assignees in their personal capacity, because in their representative capacity they had no right to keep the money.

As we have, however, stressed earlier on it was an essential prerequisite to recovery in this claim that the plaintiff was able to identify his property. If it was goods that the plaintiff sought to recover there was no difficulty in identifying them if they had remained in specie. If it was, however, money the courts held that it must not just have been held by the bankrupt. It must have been laid out in something specific to distinguish it from the rest of his property, the reason being

83 Or the wrongdoer's banker or one to whom he had consigned the goods.
84 (1708) Cited 1 P. Wms. 314, 318.
85 (1742) Willes 400.
86 See *infra* p. 220.

that since money has no earmark it cannot be specifically distinguished. In *Scott* v. *Surman*[87] itself Willes, C.J., explained this point thus:[88]

> We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action [that is, in the action against the assignees personally] but must have come in as creditors under the commission .... But the reason of this is so very plain that I need not cite any other, because money has no earmark and therefore cannot be followed .... We are likewise all agreed that if the goods had remained in specie unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover and that they could not be applied to pay the bankrupt's debts.... For why are goods considered still as the owners? Because they remain *in specie,* and so may be distinguished from the rest of the bankrupt's estate. But as money has no earmark, it cannot be distinguished ....

It was this view about identifying money which continued to prevail. The case of *Scott* v. *Surman* was itself later fully expounded in the 19th century case of *Taylor* v. *Plumer*,[89] a landmark case in the whole development. In that case an agent received from his principal a draft for £22,200 on the principal's bankers and he was instructed to use the money to buy exchequer bills. The bankers paid the agent in the form of 22 Bank of England notes for £1,000 and one for £200. Instead of applying the money in accordance with his principal's instructions, the agent fraudulently used 11 of the £1,000 notes to purchase certain American stock and shares and some bullion. He was, however, apprehended in possession of this property at Falmouth while waiting to embark for America and the property was then seized and returned to the principal. The agent's assignees in bankruptcy now brought trover against the principal to claim the property. The counsel for the assignees contended that the property could only enure to the benefit of the principal only so long as the property remains identically the same. In counter-argument, however, the principal's counsel, citing many Equity cases, said that the true rule was not whether property had remained unchanged but whether it could be specifically distinguished and ascertained to belong to the principal. This counter-argument was approved in his judgment by Lord Ellenborough, C.J., who emphasised that it did not matter into what form the money may have been turned and that the right to trace could only cease if the money had become mixed with the wrongdoer's money. In what may be termed as the *'locus classicus'* of the extent of the right to trace property at common law he said:[90]

> It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal as in *Scott* v. *Surman*[91]... or into other merchandise as in *Whitecomb* v. *Jacob*[92]... for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and con-

87 (1742) Willes 400.
88 *Ibid.,* at 404.
89 (1815) 3 M. & S. 562.
90 *Ibid.,* at 575.
91 (1742) Willes 400.
92 (1710) Isalk. 160.

> founded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law and the dictum that money has no earmark must be understood in the same way, i.e. as predicated out of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas or other coin marked [if the fact were so] for the purpose of being distinguished, are so far earmarked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains [as the property in question did] in the hands of the factor or his general legal representatives ....

This qualification therefore means that at common law a plaintiff can trace property whether money or goods into other property for which it may have been exchanged but the right ceases where the claimant seeks to trace money into a mixed fund or other property which has been bought with a mixed fund belonging to both himself and the wrongdoer. There is no legal proprietary remedy in such cases and the plaintiff's claim has to abate, in the event of the wrongdoer's insolvency, proportionately with the claim at law of other unsecured creditors of the wrongdoer. Such a result is no doubt curious. Why, indeed, should the fact of an admixture defeat the plaintiff's proprietary claim? Ought, indeed, the legal remedies to have been so restricted?[93]

D. *HOW DID THE EQUITABLE PROPRIETARY REMEDIES SUPPLEMENT THE LEGAL REMEDIES?*

We have seen above that at common law a claimant can trace his property in cases where the property has remained in its original state or is represented by other property obtained in its place by its sale or exchange, but that once the claimant's money has become mixed with money of another person, even the money of the defendant himself, then the right to trace ceases, for the property being mixed was regarded as being no longer identifiable. Indeed the problem of an admixture would not have mattered had the wrongdoer been solvent because then the claimant would have brought a personal claim against the wrongdoer but the real need of protecting the claimant arises in cases where the wrongdoer is insolvent. The common law, as established in *Taylor* v. *Plumer,*[94] refused to protect the claimant in such cases. Equity, however, had itself developed its own motion of 'following' long since not as part of a separate doctrine as such but particularly to give effect to equitable interests.[95] In equity, therefore, a beneficiary under a trust, express or otherwise, could claim that property purchased solely with his money was his and that the trustee must convey it to him. It is true that where the substitute asset acquired was land, Equity at first refused to permit the beneficiary to follow his money into land. The obstacle to tracing into land was the Statute of Frauds 1677 but in the 18th century doubt as to whether property could be traced into land was laid to rest by Lord Hardwicke in *Lane* v. *Dighton.*[96] The beneficiary could also claim that trust property sold to a purchaser with notice was his in equity and that the *mala fide* purchaser should be declared a trustee of the property. Tracing here was done by means of the constructive trust and in effect produces

93 See Babafemi, "Tracing Assets: A case for the Fusion of Common Law and Equity in English Law" (1971) 34 Modern Law Review at pp. 15-17.

94 (1815) 3 M. & S. 562.

95 See Ames, Lectures, 253; Maitland, Equity 113, 117.

96 (1762) 1 Amb. 409.

the same effect in equity as the right to follow property produced at common law. Equity, however, went farther than the common law for in cases where the proceeds of sale are mixed with money of the fiduciary or other property bought with money which is partly the proceeds of sale and partly the fiduciary's, although the claimant cannot have the whole mixed sum of money or the property as the case may be, yet, Equity would impose a charge on the mixed fund or property which has been purchased with it for the amount of the claimant's money which has been laid out in the purchase. The requirement of identifiability is, therefore, no obstacle in Equity. An early case is [that of] *Lane* v. *Dighton*[97] where certain estates had been purchased with trust money and other money of the wrongdoer the court, in this action by the wrongdoer's creditors, decreed thus [per Lord Hardwicke]:

> It appearing by the Master's report that the sum of £4,010:10: Id part of the trust moneys, or funds, being part of the portion of the defendant Elizabeth Dighton, agreed to be secured by her marriage articles... was invested by John Dighton, her husband, together with other money of his own, in the purchase of the Shorborne Woods Estate, declare that the same ought to be considered in the same plight and condition as if the same had not been invested, and to be subject to the trusts and limitations in the said articles.

Again in the case of *Pennell* v. *Deffell*[98] one George Green, as an official assignee in bankruptcy was a trustee for various persons and purposes. In the course of his performance of the trusts he received from time to time on account various sums of money which he deposited in to banks, the Bank of England and the London Joint Stock Banking Company. On the account with the Bank of England there was a balance in his favour at his death of £1,988:11: 8d and at London Joint Stock Bank he had £2,174:0:10d also in his favour. In this action against his executors the beneficiaries under the trusts claimed that of these two sums the whole of the former and the greater part of the latter belonged specifically to the trusts exclusively of his general creditors. The Master of the Rolls before when the case first came had held that the balances of both accounts formed part of the general estate of the testator. On appeal, however, this was reversed and the moneys in both accounts were held to belong to the trusts. Lord Justice Knight Bruce said *inter alia:*

> Let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been [that is to say, that the very coins and the very notes received by him on account of the trusts respectively had been] placed by him together in a particular repository — such as a chest-mixed confusedly together as among themselves; but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain, that after his death the coins and notes thus circumstanced would not have formed part of his general assets .... Suppose the case that I have just suggested to be varied only by the fact, that in the same chest with these coins and notes Mr. Green placed money of his own [in every sense his own] of a known amount — had never taken it out again — but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted could not be pointed out — could not be identified. What difference would that make? None, as I apprehend, except [if it is an exception] that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the

97 *Ibid.*
98 (1853) 4 Deg. M. & G. 372 [Ct. App. in Ch.].

> other money. But not in either case, as I conceive, would the blending together of the trust monies, however confusedly, be of any moment as between the various *cestius que trustent* on the one hand, and the executors as representing the general creditors on the other.

The above case was cited with approval a few years later in the case of *Frith* v. *Cartland*[99] where the claimants had entrusted bills to the bankrupt to discount for them and he mixed the proceeds with his own. Giving judgment for the claimants Page-Wood, V.C., said *inter alia:*[1]

> The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted that remains subject to the trust. A second principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, that is, that trust property conies first________ Then he says: 'If a man has £1,000 of his own in a box on one side and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the Court will not allow him to say that that money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box'....

These cases however, like many other pre — *Re Hallett* cases, discussed the remedy without referring to it as a lien or charge. This, the cases imply is to be understood. It was Sir George Jessel, M.R., in *Re Hallett*[2] who later expounded fully the extent of the right to follow property in equity. He said:[3]

> There is no distinction . .. between a rightful and wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust money.... In that case, according to the well established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property,[4] or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed money with his own, there is this distinction, that the *cestui que trust,* or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still 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 fact of the amount laid out by the trustee.

These equitable remedies thus existed as concurrent remedies to the legal remedies. It is, however, doubtful whether the equitable remedies could be invoked at this period by a legal owner in cases where no fiduciary relationship existed between himself and the wrong-

99 (1865) 2 H. & M. 417.
1 *Ibid.*, at 420.
2 [1879] 13 Ch. D. 696 [C.A.].
3 *Ibid.*, at 709.
4 This is the case of a constructive trust.

doer because, the common law and Chancery Courts existed, until their fusion in 1873 by the Judicature Act, as separate and distinct courts and the fiduciary relationship, it appears, was then the means historically of conferring jurisdiction upon the Court of Chancery. But it would in fact appear that even a legal owner whose fiduciary agent committed a breach of duty was not without some hesitation allowed to invoke the remedies of Chancery. Thus, in the case of *Ex Parte Dale,*[5] a bank which was employed as agent to collect money and to remit it to their employers received the money in cash, placed it with the other cash of the bank and informed their employers that the money had been remitted. Before the money was actually remitted, however, the bank went into liquidation. Dismissing part of the plaintiff's claim Sir Edward Fry an eminent Equity lawyer, considering himself to be bound by a series of common law decisions, reluctantly held that the equitable tracing rules could not be applied unless the fiduciary duty had been derived from an orthodox trustee — *cestui que trust* relationship. That same year, however, in the case of *Re Hallett,*[6] another eminent Equity judge, Sir George Jessell, M.R., differed from Fry, J. In that case itself an agent had paid moneys due to his principal to whom he owed a fiduciary duty, into the agent's banking account, where they became mixed with the agent's own moneys. Before the agent died he had made various withdrawals from the account and applied them for his own purposes. However, although the bank balance was not sufficient to pay all the deceased agent's creditors in full, it was more than enough to cover a restitution of the principal's moneys that had been paid into it. Obviously all that was necessary was to give the principal a charge upon the account enabling her to rank as a secured creditor in the administration of the deceased's estate, since common law would not grant her a remedy, the property having become mixed with the wrongdoers property. Sir George Jessel examined the question as to whether the equitable charge was confined to deprived beneficiaries under an orthodox trust or whether it extended to all cases in which a fiduciary duty has been established. After a careful consideration of the decision of Fry, J., the common law cases cited therein and of the authorities in equity Sir George Jessel concluded that there is no distinction, and never has been a distinction, between persons occupying one fiduciary position or another fiduciary position as to the right of the beneficial owner to follow the trust fund in equity. The declaration of charge was therefore granted to the deprived beneficiary. Sir George Jessel said:

> Has it ever been suggested, until very recently that there is any distinction between an express trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested.... Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply....

Thesiger, L.J., also spoke to the same effect. He said: 'it has been established for a very long period... that the principles relating to the following of trust property are equally applicable to the case of a trustee... and to the case of factors, bailees, or other kinds of agents.'[8]

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[5] (1879) 11 Ch.D. 772.
[6] (1879) 13 Ch.D. 696.
[7] *Ibid.*, at p. 709
[8] *Ibid.*, at p. 722.

It is, therefore, clear from the above judicial statements that where any kind of fiduciary duty is involved Equity's tracing rules would be applicable. What is, however, not clear is whether *Re Hallett* itself established a limit to the right to trace? In other words, was the right to trace in equity intended to be limited only to cases where a fiduciary relationship existed? As an earlier study[9] of the current law of the legal and equitable proprietary remedies has shown this question was answered in the affirmative by Wynn-Parry, J., at first instance in the case of *Re Diplock*[10] and, when the case went on appeal, three well-reputed Chancery judges could draw no other opinion than that *Re Hallett* was in fact only one manifestation of a wider principle.[11] It is indeed this requirement that has posed in modern times the greatest problem to the relationship between the legal and equitable proprietary remedies.[12]

F.O.B. BABAFEMI*

9 See Babafemi, "Tracing Assets: A case for the Fusion of Common Law and Equity in English Law" (1971) 34 Modern Law Review at p. 13.

10 [1947] 1 Ch. 749-50.

11 [1948] Ch. 465 at 530.

12 See Babafemi, "Tracing Assets: A case for the fusion of Common Law and Equity in English Law" (1971) 34 Modern Law Review at pp. 17-22 where it was argued that the fiduciary relationship element could either be circumvented or jettisoned.

* LL.M., Ph.D.(London), Senior Lecturer, Department of Jurisprudence and Private Law, University of Ife, Ile-Ife, Nigeria.