Losing the fiduciary requirement for equitable tracing claims

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I. Introduction

Mr Matthew Newcomen was a clergyman who died in 1669. At his funeral he was described as "a solid, painful, pathetic, and perswaisive preacher". While nobody today would want to be called a "painful and pathetic" speaker, to Newcomen it would have been high praise. 'Pathetic', from the Greek πάθος which means happening, experience, or suffering, meant of deep feeling in the seventeenth century. Likewise, "painful" had a meaning closer to "painstaking" in modern English.

This anecdote shows that vocabulary can stay the same over hundreds of years, even as its meaning changes. This is certainly true of the language of the law. After all, lawyers were using the term "negligence" long before the emergence of "negligence" as a distinct tort. Likewise, the term "consideration" has shifted from a description of the reason that a contract was entered into, into a narrow technical requirement. The term "trust" too has shifted from a reference to "trusting" into a distinct institution for the holding of property.

Difficulties, however, can arise when lawyers presume that usage of legal terms has remained consistent. An example of one such difficulty is the "fiduciary requirement" for claiming assets traced in equity. In outline, the rule provides that only a principal in a fiduciary relationship, or one with an equitable property right, can assert title to assets traced in equity, and so assert title to assets traced through either clean substitutions and/or a mixed fund. Put the other way, the legal owner of property, unless he has been owed fiduciary duties, cannot assert a proprietary claim to the proceeds of his property if at any stage the property or its proceeds were mixed with property belonging to another. The rule has been criticised as illogical and unprincipled, but unimpeachable as a matter of authority.

This article will question whether the rule remains good law today, by showing that it first emerged in dicta of Lord Greene M.R. in *Re Diplock*:[1] dicta rooted in a misinterpretation of the use of the term "fiduciary" in earlier cases. It is therefore concerned with the question of *when* a person with property rights (legal or equitable) can bring a "tracing claim".[2] It is not concerned with the issue of when receipt of property by a fiduciary will create property rights for the first time,[3] the scope of the tracing rules once invoked, nor when the court will treat property rights as having arisen *de novo* under a constructive trust.

This analysis will be undertaken as follows. First, the scope of the rule (Part II) and an outline of its existing criticisms (Part III) will be set out. Secondly, the evolution of the term "fiduciary" in the Victorian period, and its range of potential meanings, will be examined. In order to do this, it will be necessary to examine the law of trusts and tracing in the eighteenth century (Part IV), and how changes in the relationship between agency and trusteeship in the Victorian period prompted the widespread use of the term "fiduciary" to re-rationalise cases which eighteenth century lawyers treated as concerning trusts (Part V). Thirdly, in light of this context, the use

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[1] [1948] Ch. 465; 2 All E.R. 318 (CA).

[2] The term "tracing claim" will be used throughout this article as shorthand for a claim following an exercise in tracing. It is not being used to reject the distinction between the evidential process of identifying a substitute asset through tracing and claiming the asset so identified, see text to (n37) and (n38) below.

[3] Under English law where the receipt is unauthorised the property will be held on trust *F.H.R. European Ventures L.L.P. v Cedar Capital Partners L.L.C.* [2015] UKSC 45; [2015] A.C. 250. Where the receipt is authorised the terms of the relationship will determine whether the property is held on trust upon receipt, or simply makes the fiduciary personally personally liable to his principal, *Paragon Finance v Thakerar* [1999] 1 All E.R. 400 at 415-416; (1998) 95(35) L.S.G. 36.

of the term "fiduciary" in *Re Hallett's Estate*[4] (Part VI), *Sinclair v Brougham*[5] (Part VII), and *Re Diplock*[6] (Part VIII) will be examined, as will contemporary perceptions of the effects of those cases. In Part IX the extent to which the fiduciary requirement is binding on the courts today will be examined, and in Part X the wider implications of the analysis discussed.

This will demonstrate that the fiduciary requirement for claiming assets traced in equity is the product of a complex historical development involving the shifting boundaries of trusts law and agency in the nineteenth century, the emergence of the ill-defined notion of a "fiduciary" to bridge this gap, and the failure of the Court of Appeal in *Re Diplock* to appreciate the sense in which the term was used in earlier tracing cases. It will also argue that courts today are not bound by the requirement as a matter of authority, and show the distorting effect of using unverified historical narratives to justify modern positions, and presuming that legal vocabulary and concepts remain static.

II. The requirement and its scope

The fiduciary requirement for tracing in equity is considered a long standing one. The earliest case which is seen as creating the rule is *Re Hallett's Estate*,[7] where the Court of Appeal ruled that any fiduciary relationship was sufficient to allow a tracing claim in equity, and so that the remedy was not exclusively available to the beneficiary of a trust. The "rule" was stated in more absolute terms in *Sinclair v Brougham*,[8] where Lord Parker and Lord Haldane L.C. are seen to have premised their reasoning on the notion that a fiduciary relationship was necessary to allow a tracing in equity. *Sinclair* was interpreted in *Re Diplock* as deciding that equitable tracing is only available in cases where "mixing takes place in breach of trust, actual or constructive, or in breach of some other fiduciary duty",[9] though Lord Greene M.R. made clear that the relevant breach need not be committed by parties to the suit. This ruling was followed in *Aluminium Industrie Vaassen v Romalpa Aluminium*, where Roskill L.J. treated the question of whether the plaintiff, as legal owner, could trace in equity as turning on whether he had been owed personal fiduciary duties.[10] The requirement was also affirmed in *Agip v Jackson*[11] by Fox L.J., who made it clear that a fiduciary relationship was necessary to call jurisdiction to allow equitable tracing claims into being. Finally, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* made clear that, although the House of Lords had overruled *Sinclair v Brougham* on the issue of when property rights arise, that the court "should not be taken to be casting any doubt on the principles of tracing as established in *Re Diplock*".[12] Accordingly, modern textbooks make clear that the basic English rule is that legal title holder can only trace if he is the principal in a pre-existing fiduciary relationship.[13]

However, the fiduciary requirement to claim assets traced in equity is qualified by a significant caveat. Courts have allowed tracing claims in all cases where the claimant has had an equitable property right, even where (i) there is no fiduciary relationship beyond that created by the existence of such rights and (ii) where any such fiduciary relationship or equitable property right did not predate the defendant's acquisition of possession of, or rights to, the asset being traced. In particular, equitable property rights arising from mistaken payment,[14] a

[4] (1880) 13 Ch. D. 696.
[5] [1914] A.C. 398; [1914-15] All E.R. Rep. 622.
[6] [1948] Ch. 465.
[7] (1880) 13 Ch. D. 696.
[8] [1914] A.C. 398.
[9] [1948] Ch. 465, 523.
[10] [1976] 1 W.L.R. 676, 687; [1976] 2 All E.R. 552.
[11] [1991] Ch. 547, 568; [1992] 4 All E.R. 451.
[12] [1996] A.C. 669, 714; [1996] 2 All E.R. 961.
[13] McGhee (ed.) *Snell's Equity* 33rd edn (London: Sweet & Maxwell, 2015), para 30-054; Heydon, Leeming, and Turner (eds.), *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* 5th edn (Chatswood, New South Wales: Lexis Nexis Butterworths, 2014) para 5-045; Glister & Lee (eds.) *Hanbury and Martin: Modern Equity* 20th edn (London: Sweet & Maxwell, 2015), para 26-008.
[14] *Chase Manhattan NA v Israel-British Bank* [1981] Ch. 105; [1979] 3 All E.R. 1025.

constructive trust imposed on a thief,[15] an equitable charge,[16] or a retrospectively vested equitable title following rescission,[17] create sufficient fiduciary relationships to allow tracing.

Accordingly, under the orthodox interpretation of the law, a legal owner of property cannot trace through a mixed fund unless (a) his property is held by a fiduciary or (b) he also has equitable property rights to the property. An instance of (b) is the example given by Lord Browne Wilkinson in *Westdeutsche*: his Lordship suggested that a thief, by taking possession of his victim's property, would acquire a possessory title to that property which, because of his fraud, he would hold on trust for his victim.[18] That victim would nevertheless also retain his legal title to that same property: there would be relativity of legal title between the victim and thief.[19]

The fiduciary requirement is thus most likely to matter in cases of non-fiduciary bailment[20] and cases of non-fraudulent taking, where there is no question of the sort of constructive trust which binds a fraudster arising. The rule might also matter to the victim of theft should later courts, like Rimer J. in *Shalson v Russo*,[21] reject Lord Browne Wilkinson's dictum in *Westdeutsche,* and take the view that a thief acquires no title to the property he takes, and therefore no interest which could be held on trust.

III. Criticisms of the requirement

a. Principle

The rule that a fiduciary relationship is needed to trace in equity, and therefore through a mixed fund, has been widely attacked by both judicial and academic commentators.[22] Perhaps most notably it has been criticised by Lord Millett from the Bench as "capricious", "productive of the most extraordinary anomalies", and as having "no logical justification".[23]

This criticism is unsurprising. After all, in modern usage, the term "fiduciary" usually refers to an individual who owes particular types of personal duties, encompassing the no-conflict and no-profit rules, often described as duties of loyalty.[24] On the other hand, according to the House of Lords in *Foskett v McKeown*, tracing is about property rights.[25] It is therefore hard to justify the role of fiduciary duties in tracing claims. Of course, it must be true that the personal duties placed on a disponee of property shape the terms of the transfer to him, and in particular whether or not the transfer vests the property in him absolutely or as trustee for the disponor. It is also true that breach of personal fiduciary duties can give rise to equitable property rights, and that a principal could vindicate a newly acquired right of that type by bringing an equitable tracing

[15] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 715-16. This is also the case in Australia, see *Black v S Freedman & Co* (1910) 12 C.L.R. 105 at 110; 17 A.L.R. 541 at 543.
[16] *Dick v Harper* [2006] B.P.I.R. 20 at [40].
[17] *El Ajou v Dollar Land Holdings* [1993] 3 All E.R. 717; [1993] B.C.C. 698.
[18] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 715-16. Applied in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10; [2013] Ch. 156 at [274]–[275].
[19] Fox, *Property Rights in Money* (Oxford, Oxford University Press, 2008) paras 4.101 to 4.106.
[20] A bailee does not acquire the bailor's legal title to the assets, and is not seen as holding them on trust, nor as necessarily owing fiduciary duties to the bailor, see Palmer (ed.) *Palmer on Bailment*, 3rd edn (London: Sweet & Maxwell, 2009) paras 3-089, 32-001, 32-002.
[21] [2003] EWHC 1637; [2005] Ch. 281 at [109]-[111].
[22] E.g. Millett, "Tracing the Proceeds of Fraud" (1991) L.Q.R. 107; Birks, "Persistent Problems in Misdirected Money: A Quintet" [1993] L.M.C.L.Q 231; Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, Clarendon Press, 1996) pp. 184-85; Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) pp. 345-47; Calnan, *Proprietary Rights and Insolvency* (Oxford, Oxford University Press, 2010) paras 8.58 to 8.91; *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* 5th edn (Chatswood, New South Wales: Lexis Nexis Butterworths, 2014), para 5-045.
[23] *Foskett v McKeown* [2001] 1 A.C. 102 at 128; 2 W.L.R. 1299.
[24] E.g. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart Publishing, 2010).
[25] *Foskett v McKeown* [2001] 1 A.C. 102 at 109.

claim.[26] However, once a claimant has established a proprietary interest in an asset it is hard to see why the law governing his ability to vindicate that interest should be affected by the personal duties he is owed.

It is equally hard to justify why an equitable owner can trace through a mixed fund as of right, but a legal owner cannot. After all, a legal owner's right is more proprietary in the sense that it binds all the world, whereas an equitable owner cannot assert his right against a bona fide purchaser for value of legal title without notice. While it might be seen as undesirable to allow a legal owner to assert *legal title* to assets traced through a mixed fund, as such a claim (apart from in the cases concerning legal title to money[27]) would automatically bind all third parties who had no way of knowing about the substitution, it seems strange that legal owners should not be able to assert equitable title to such substitutes.[28] These concerns mean that the fiduciary requirement for tracing in equity is not applied in the US, and has been generally departed from in Canada and Australia,[29] and (as above) English courts have curbed the rule's operation.

Further, the rule is seen as having a distorting effect, in that it has caused judges in England to manipulate other areas of law to avoid the requirement. First, as above, the rule has caused judges to find the existence of fiduciary relationships in all cases concerning equitable property rights. The most extreme example of this is *Chase Manhattan NA v Israel-British Bank*, where a bank which mistakenly received payment from another bank, not only held the sum on trust, but was found to be a fiduciary for the purpose of allowing equitable tracing. Before the payment there was no fiduciary relationship, and the reasoning has been criticised as circular and fictitious.[30] Secondly, Lord Millett admitted in *Bristol & West Building Society v Mothew*[31] that he had felt bound by the fiduciary requirement in the earlier case of *El Ajou v Dollar Land Holdings*,[32] and had ruled that rescission in *El Ajou* retrospectively vested the claimants with equitable title to the money they had paid over, "to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing rules".[33] Thirdly, Lord Browne-Wilkinson's dicta that the thief of a bag of coins would hold them on constructive trust might be understood in the same vein: a decision designed to circumvent the fiduciary duty requirement for tracing.[34]

b. Authority

Although critics of the fiduciary requirement for equitable tracing have been vocal, most commentators have limited their criticism of the rule to principle rather than authority. As above, the cases seen as establishing the rule are *Re Hallett's Estate*, *Sinclair v Brougham*, and *Re Diplock*. There are two main exceptions to this trend.[35] First, Lionel Smith has argued that as a matter of authority there is no reason why a fiduciary duty or equitable

[26] *Boardman v Phipps* [1966] 2 A.C. 46; [1966] 3 All E.R. 721; *F.H.R. European Ventures L.L.P. v Cedar Capital Partners L.L.C.* [2015] UKSC 45.

[27] A claim by the legal owner of money to recover it from a third party can be defeated by the bona fide purchaser defence, see Fox, *Property Rights in Money* (Oxford, Oxford University Press, 2008) paras 8.20 to 8.26.

[28] A legal owner can trace at common law (albeit not through a mixed fund), and bring a personal claim or assert at least a modified form of legal title to the substitute asset, see *Trustee of the Property of Jones v Jones* [1997] Ch 159. This is not uncontroversial, see Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) pp. 320 to 339; Fox, *Property Rights in Money* (Oxford, OUP, 2008), paras 5.96 to 5.106.

[29] Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) p. 128; *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* 5th edn (Chatswood, New South Wales: Lexis Nexis Butterworths, 2014), para 5-045.

[30] Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, Clarendon Press, 1996) pp. 184-85; Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) p. 343; *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* 5th edn (Chatswood, New South Wales: Lexis Nexis Butterworths, 2014), para 5-045. See *LAC Minerals v International Corona Resources* [1990] 2 S.C.R. 574 (per Laforest J.).

[31] [1998] Ch. 1; [1996] 4 All E.R. 698.

[32] *El Ajou v Dollar Land Holdings* [1993] 3 All E.R. 717; [1993] B.C.C. 698.

[33] *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 22-23.

[34] See Fox, *Property Rights in Money* (Oxford, Oxford University Press, 2008) paras 4.93 to 4.95.

[35] A third exception is Calnan, *Proprietary Rights and Insolvency* (Oxford, Oxford University Press, 2010) paras 8.58 to 8.91. Calnan has rightly argued that there is no fiduciary duty requirement for equitable tracing, and that the misconception has arisen from a misunderstanding of the word "fiduciary'. However, the argument is only briefly made, and the material Calnan cites in support of his argument is exactly same material from which other commentators conclude that as a matter of authority there is a fiduciary requirement for tracing.

property right should be needed to engage the court's jurisdiction to trace. He rests this reasoning on the notion, accepted by the House of Lords,[36] that tracing is merely the process by which substitute assets are identified, and that the court has jurisdiction to do this whether or not a claimant has an equitable property right or is owed fiduciary duties.[37] However, Smith accepts that *Re Hallett* appears to create a fiduciary requirement for *claiming* assets traced in equity: though he sees that requirement as incoherent and on that basis suggests that the rule should not be treated as good law.[38]

Secondly, Anthony Oakley argued that as a matter of authority the courts have always allowed legal title holder to assert equitable title to property traced in equity.[39] The difficulty with his reasoning is that he rests it on the notion that the holder of legal and beneficial title to property is also owner of that property in equity. This proposition is historically inaccurate,[40] was roundly rejected by the House of Lords in *Westdeutsche,*[41] and so cannot explain the law today. A legal title holder has never been treated as having equitable title to his assets in his possession simply by virtue of his legal ownership.

This article seeks to go beyond existing commentary by arguing that the orthodox interpretation of the "fiduciary" requirement for equitable tracing rests on a misunderstanding. In particular, it will be argued that the term "fiduciary" had a range of meanings in the nineteenth century, that it was not confined to its modern sense of a duty of loyalty, and that in *Re Hallett's Estate* and *Sinclair v Brougham* the term was not being used in its modern sense. On that basis, it will be argued that the conclusion that equitable tracing requires a consensually created fiduciary relationship is the product of syllogism rooted in *Re Diplock*. In order to demonstrate this, it is necessary to show how the term fiduciary was used in *Re Hallett's Estate* and *Sinclair*, which in turn requires a brief explanation of changes in lawyers' understandings of trusts and fiduciary law between the latter half of the eighteenth century and the Victorian period.

IV. Trusts, factors, and bailment in the long eighteenth century

In modern law, cases concerning factors and bailees do not typically involve trusts. If A has legal title to property, and he simply hands that property over to B as bailee or agent, then a modern lawyer would not treat B as having acquired legal ownership of that property, and would not treat B as a trustee for A.[42]

This differs from the thinking of much of the long eighteenth century, in particular the period lasting from the beginning of Lord Hardwicke L.C.'s time on the woolsack, which started in 1737, to Lord Eldon L.C.'s retirement from that position in 1827. During this period, where A handed property over to B for a particular purpose, which he did not intend to be at B's free use, then B was treated as holding the assets on trust for A. Equity would recognise the "property"[43] in the asset as vested in A, who therefore had equitable title.[44] This appears to have been the case even when A had (and retained) legal title to the asset in question: B was treated as acquiring a legal title by his physical possession of the property which was held on trust for A. For this reason,

[36] *Foskett v McKeown* [2001] 1 A.C. 102 at 127.
[37] Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) 123-30.
[38] Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) 345-47.
[39] Oakley, "The prerequisites of an equitable tracing claim" (1975) 28 *Current Legal Problems* 64.
[40] Smith, *The Law of Tracing* (Oxford, Clarendon Press, 1997) p. 344. See also Jones, "Uses and "Automatic" Resulting Trusts of Freehold" [2013] C.L.J. 91.
[41] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 706.
[42] The bailiee acquires a "mere possessory title", rather than "general legal property", unlike a trustee, *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All E.R. 675 at 688 and 702; [1998] 2 B.C.L.C. 659. See also Palmer (ed.) *Palmer on Bailment*, 3rd edn (London: Sweet & Maxwell, 2009) paras 32-001; Fox, "Relativity of Title" [2006] C.L.J. 340-351 .
[43] For examples of the use of the proprietary language in this area see *Godfrey v Furzo* (1733) 3 P. Wms. 185, 24 E.R. 1022; *Ex p. Dumas* (1754) 1 Atk. 232, 26 E.R. 149; 2 Ves Sen 582, 28 E.R. 372; B 1/29, pp 199-203; *Tooke v Hollingworth* (1793) 5 T.R. 215, 101 E.R. 121; *Ex p. Sayers* (1800) 5 Ves. Jun. 169, 31 E.R. 528; *Joy v Campbell* (1804) 1 Sch. & Lef. 328, 345-347; *Ex p. Pease* (1812) 19 Ves. Jun. 25, 34 E.R. 428; 1 Rose 232; B 1/91, pp 180-83. Lewin described such assets as a "trust estate or fund", Lewin, *The Law of Trusts* (London, 1837) 254.
[44] Conversely, if A intended B to have free use of the asset, then the property passed to B, and A retained no property rights. See *Joy v Campbell* (1804) 1 Sch. & Lef. 328, 345-347.

A could bring a suit for account against B to investigate what had happened to the property.[45] Furthermore, whether or not an accounting was needed for the purpose,[46] A could bring a direct equitable proprietary claim requiring B (or his estate, where he was bankrupt or had passed away) to deliver the property in specie, unless B had disposed of it in accordance with the terms on which it was entrusted to him.[47] Likewise, although the tracing rules of the period were different to those of today[48]—most notably due to the uncertainties concerning tracing money[49]—the existence of this trust allowed A to a proprietary claim in equity to the proceeds of the original property.[50] The closest modern law analogy is to Lord Browne Wilkinson's thief-trustee in *Westdeutsche*.[51]

There are a number of scenarios in which A became the beneficiary of a trust by handing property to B for a specific purpose, and though a full analysis is beyond the scope of this piece,[52] for present purposes the following summary will suffice. First, where bills of exchange (which were not yet due) were deposited with a bank, the bank would be treated as holding the bills on trust where it was not intended to have free use of the bills.[53] Secondly, goods entrusted to a factor for the purpose of sale were treated as held on trust for the principal until sale:[54] there was direct authority providing that a factor was a trustee.[55] The same principle applied where money was advanced to another for the specific purpose of supplying an army camp[56] or purchasing exchequer bills,[57] or gold bullion.[58] Last, but by no means least, money or property entrusted by A to B, (B would usually be a factor), for the purpose of paying debts owed by B and A, was treated as held on trust for A until B discharged the debt: this is clear from the rulings of the courts of equity[59] and common law,[60] as well as contemporary treatise literature.[61] That such cases were seen by contemporaries as concerning trusts is indicated by the wording in the case law, treatises, and the way the cases were pleaded.[62] In particular, in *Ex p Dumas*, Lord Hardwicke made clear that A retaining legal title to assets handed to B was

[45] See *Foley v Hill* (1848) II Clark's H.L. Cas. 28; 9 E.R. 1002.
[46] An account would only be ordered where needed to ascertain what happened to the property, Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery* 1st edn (London 1815) 70.
[47] For examples of such claims see *Ex p. Dumas* (1754) B 1/29, 199-203 at 203; *Ex p. Oursell* (1756) B 1/31, 311-12 at 312; *Ex p. Cramer* (1815) B 1/133 45-48 at 48; and *Ex p. Ogden* (1815) B 1/133 42-45 at 44-45.
[48] Although the treatises of the time seem to presume that A could assert title to the substitutes, e.g. see Lewin, *The Law of Trusts* (London, 1837) 254–256, the matter received no proper judicial consideration until *Re Hallet* (1880) 13 Ch. D. 696, where it was stated that A would have only a charge on substitute assets where B had mixed the property with his own. The modern rule that A can claim the full value of any substitute only arose later, see *Foskett v McKeown* [2001] 1 A.C. 102.
[49] Discussed below at (n101).
[50] *Scott v Surman* (1742-43) Willes 400, 125 E.R. 1235; *Ex p. Dumas* (1754) 1 Atk. 232, 26 E.R. 149; 2 Ves Sen 582, 28 E.R. 372; *Ex p. Sayers* (1800) 5 Ves. Jun. 169, 31 E.R. 528; *Taylor v Plumer* (1815) 3 M.&S. 562, 105 E.R. 721; *Ex p. Rowton* (1810) 17 Ves. Jun. 426, 34 E.R. 165; *Tooke v Hollingworth* (1793) 5 T.R. 215, 101 E.R. 121.
[51] Note that a thief who acquires possession of property in modern law acquires a relative *ownership interest* in the asset which is held on trust, whereas the trustee in these cases held a more limited interest on trust, see (n71) below.
[52] See Televantos, *Third party rights and the priority of claims against commercial funds: partnership, trusts, agency and insolvency in the era of Lord Eldon, 1790-1827* (University of Cambridge PhD Thesis), Part II, Section 4.3; Part III, Section 2.1.
[53] *Ex p. Sargeant* (1810) 1 Rose 153; *Ex p. Pease* (1812) 19 Ves. Jun. 25, 34 E.R. 428; 1 Rose 232; B 1/91, pp 180-83; *Ex p. Lunn* (1815) B 1/128, pp. 186-189.
[54] *Garratt v Cullum* (1706) Buller's N.P. (1817) 42; *Whitcomb v Jacob* (1710) 1 Salk. 160, 91 E.R. 149; *Godfrey v Furzo* (1733) 3 P. Wms. 185, 24 E.R. 1022; *Scott v Surman* (1742-43) Willes 400, 125 E.R. 1235. Also see *Ryall v Rolle* (1749) 1 Atk. 165, 26 E.R. 107; 1 Wilson K.B. 260, 95 E.R. 607.
[55] *Burdett v Willett* (1708) 2 Vern. 638, 23 E.R. 1017.
[56] *Smith v Everett* (1792) 4 Brown. 64, 29 E.R. 780.
[57] *Taylor v Plumer* (1815) 3 M.&S. 562, 105 E.R. 721.
[58] *Ex p. Sayers* (1800) 5 Ves. Jun. 169, 31 E.R. 528.
[59] *Copeman v Gallant* (1716) 1 P. Wms. 314, 24 E.R. 404; 1 Com. Dig. 533; *Ex p. Dumas* (1754) 1 Atk. 232, 26 E.R. 149; 2 Ves Sen 582, 28 E.R. 372; *Ex p. Oursell* (1756) Amb. 297, 27 ER 200; *Hassall v Smithers* (1806) 12 Ves. Jun. 119; 33 E.R. 46; C 33/541, 321r-322r (Sir William Grant MR); *Ex p. Rowton* 17 Ves. Jun. 426, 34 E.R. 165; *Ex p. Cramer* (1815) B 1/133, pp. 45-48; *Ex p. Rayner* (1825) B 1/171, pp. 193-209, pp. 205-06; *Ex p. Ogden* (1815) B 1/133, pp. 42-45 (Sir Thomas Plumer V-C).
[60] *Tooke v Hollingworth* (1793) 5 T.R. 215, 101 E.R. 121; *Bolton v Puller* (1796) 1 B.&P. 539, 126 E.R. 1053.
[61] Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery* (London 1815) 511; William Cooke, *The Bankrupt Laws*, 8th edn (London 1823) 382 ff.; Lewin, *The Law of Trusts* (London 1837) 254.
[62] Televantos, *Third party rights and the priority of claims against commercial funds: partnership, trusts, agency and insolvency in the era of Lord Eldon, 1790-1827* (University of Cambridge PhD Thesis), Part III, Section 2.1.1.

no bar to him having an equitable title to those same assets,[63] and in *Tooke v Hollingworth*[64] the King's Bench allowed A to recover from B on the basis of equitable title to assets of which he appears to have been legal owner. This supports Lionel Smith's argument that the trusts language in cases of this type in this period needs to be taken seriously.[65]

The use of trusts in these cases was significant in that it circumvented contemporary statutory restrictions on non-possessory security. Under 21 Jac. 1 c. 19, s. 10, all property in a bankrupt's "order and disposition" would vest in his estate: this section would take effect even if the bankrupt had had no rights to the property when solvent, provided that the real owner consented to his possession of the property. Following judicial decisions early in the eighteenth century, which built on Lord Nottingham's treatment of trust assets as separate from those of the trustee, trusts were exempted from this requirement.[66] This is what allowed arrangements of the type outlined above to be effective.

Further, there is good reason for thinking these same principles would have applied in a case where B took possession of A's property without A's consent. In all the above cases, the court allowed A to recover the property and its traceable proceeds on the basis of his *property right*, not due to any personal rights created by his interaction with B. A's title was what allowed him to recover: the terms of his disposition to B were only relevant in determining whether A had fully divested himself of property in the asset. The question was effectively one of conveyancing. In cases of non-consensual taking, there would be no question of A having passed his property rights to B, and so A would have been able to recover exactly as in the cases outlined above. Although there appear to be no non-consensual taking cases in the reported cases or the court record of Chancery or the Bankruptcy Court in this period, this is explicable on the basis of (i) the availability of statutory tracing and following claims in cases of criminal theft,[67] (ii) the difficulty generally in tracing money in this period[68] and (iii) the fact that the above cases concerned bankruptcy which was only available to traders, and so encompassed only commercial situations.

To summarise, according to the legal thinking of the long eighteenth century, a legal owner could always bring claims against traced assets to the same extent as a beneficiary of a trust. This is because whenever his property was in the hands of a third party, that third party was treated as holding the asset on trust for the legal owner, who could use his equitable title to claim the asset or its proceeds. In such a case the legal owner's equitable title as the beneficiary of a trust brought him automatically within equity's exclusive jurisdiction,[69] though (as above) in some instances relief was also allowed by common law courts.[70]

V. "Fiduciaries" and the Victorian re-rationalising of the earlier cases

From the mid-nineteenth century onwards, there was a shift in legal thinking away from the "specific purpose trust" reasoning of the eighteenth century. Lawyers stopped treating *any* situation in which A advanced property to B for a specific purpose as creating a trust: on the basis that if A did not transfer legal title to B, B

[63] *Ex p. Dumas* (1754) 1 Atk. 232, 26 E.R. 149; 2 Ves Sen 582 at 583; 28 E.R. 372 at 372.
[64] *Tooke v Hollingworth* (1793) 5 T.R. 215, 101 E.R. 121.
[65] Smith, 'Tracing Confusion: Equity in the Court of King's Bench' [1995] L.M.C.L.Q. 240.
[66] D.E.C. Yale, *Lord Nottingham's Chancery Cases,* vol II (79 Selden Soc) (1961) xci-xciii. Why this development ocurred has not yet been adequately explained, but this was clealry the eighteenth position, see Cooke *The Bankrupt Laws* (8th edn. London 1823) 382–398.
[67] 21 Hen VIII c.11 (1529) as interpreted in *Isack v Clarke* (1614) 1 Rolle. 126, 131; 81 E.R. 377, 380; 2 Bul. 306, 310; 80 E.R. 1143, 1146.
[68] Discussed below at (n101). The cases considered above mostly concerned money being paid on bills of exchange or other securities, and claims to the proceeds thereof. The substitution was easy to prove as a matter of evidence.
[69] Fonblanque (ed.) *Ballow's Treatise of Equity* 5th edn (London 1820) vol. 1, pp. 11, 23; Jeremy, *A Treatise on the Equity Jurisdiction of the High Court of Chancery* (London 1828) 1; Story, *Commentaries on Equity Jurisprudence* (Boston 1836) vol. 2, p. 279.
[70] Applying principles of equity, *Tooke v Hollingworth* (1793) 5 T.R. 215, 101 E.R. 121.

had no sufficient interest which could be held on trust. In such a case B was treated merely as an agent for A. He was no longer treated as acquiring a title by his possession which he held on trust.[71]

This development is best seen as part of the hardening of the conceptual boundaries between trusts, agency, and partnership which occurred in the nineteenth century. In the eighteenth century the boundaries between these areas had been quite fluid: partners were understood to hold property under a trust for sale;[72] factors were seen as trustees;[73] and all were seen as owing similar personal duties.[74] In the nineteenth century these areas of law came to be seen as distinct, owing in part due to the fact each area became the subject of separate treatises.[75] "Agency" came to be seen as a distinct area of law, principally as a result of the influence of civilian-inspired treatises which sought to rationalise what had been the disparate English law of factors, servants, and stewards as a coherent law of agency.[76] Further, the law of trusts and the law of agency came to be more distinct, and the notion of "intention to declare a trust', rather than create legal relations of other kinds, evolved.[77] Finally, lawyers of the early nineteenth century were incentivised to litigate in common law courts, and therefore encouraged to frame disputes as concerning agency rather than trusts, due to the immense delays Chancery litigation of the period involved.[78]

However, this conceptual re-categorisation created difficulties. In particular, Victorian lawyers were left with a dilemma regarding the eighteenth century authorities which had treated cases of agency as involving trusts. How could the exemption of factors from the doctrine of reputed ownership be justified if a factor was not a trustee?[79] Did Chancery have the jurisdiction to allow a principal to trace assets in the hands of his factor?

It is in the context of these changing legal categories, and the problems these shifts created, that the term "fiduciary" first gained routine use amongst English lawyers.[80] Although a number of cases which modern lawyers understand as concerning fiduciaries were decided in the eighteenth century, most famously *Keech v Sandford*,[81] the term "fiduciary" was seldom used in the period. Indeed, when it was used, it usually referred to the duties owed by a tenant in possession to the holder of a reversion or remainder.[82] Although there are early examples of the term being used in counsel's argument,[83] the first reported judicial use of the term in Chancery in the nineteenth century was in 1820: Sir Thomas Plumer M.R. ruled that a mortgagee was not a

[71] The change in thinking seems to relate to the type of interest which could be held on trust, rather than the nature of the common law interest acquired by consensual possession. Regency era cases concerning factors show that, where A gave B property for a specific purpose, B was not treated as acquiring "general property" (ie an ownership interest) in the asset itself, but a more limited interest (a possessory title, or "special property"), Televantos, *Third party rights and the priority of claims against commercial funds: partnership, trusts, agency and insolvency in the era of Lord Eldon, 1790-1827* (University of Cambridge PhD Thesis) Part III, Section 3.2. This interest was treated as capable of being held on trust during the long eighteenth century, though it could not be the subject of equitable title according to Victorian thought.

[72] See *Ripley v Waterworth* (1802) 7 Ves. Jun. 425, 32 E.R. 172.

[73] *Burdett v Willett* (1708) 2 Vern. 638, 23 E.R. 1017.

[74] Televantos, *Third party rights and the priority of claims against commercial funds: partnership, trusts, agency and insolvency in the era of Lord Eldon, 1790-1827* (University of Cambridge PhD Thesis) Part III Section 2 and Conclusion.

[75] Sealy, "Fiduciary Relationships" [1962] C.L.J. 69 at 70–71.

[76] McGaw, "A History of the Common Law of Agency with Particular Reference to the Concept of Irrevocable Authority Coupled with an Interest" (DPhil, Oxford 2005).

[77] The "declaration of trust" as a means of a settlor constituting himself trustee was first recognised in *Ex p. Pye, Ex p. Dubost* (1811) 11 Ves. Jun. 140; 34 E.R. 271. The distinction between intention to declare a trust and transfer legal title was most famously emphasised later in *Milroy v Lord* (1862) 4 De G. F. & J. 264, 45 E.R. 1185 and *Richards v Delbridge* (1874) L. R. 18 Eq. 11. Also see Sealy, "Fiduciary Relationships" [1962] C.L.J. 69 at 70–71.

[78] See Polden, "The Court of Chancery, 1820-1875" in *The Oxford History of the Laws of England, Volume XI* (2010) at 641-691.

[79] See Lloyd (ed.) and Paley, *A Treatise on the Law of Principal and Agent* (London 1833) 83.Lloyd struggles to identify the origin of the rule that property in a factor's possession would not vest in his estate upon bankruptcy, but treats the law on point as settled.

[80] Sealy, "Fiduciary Relationships" [1962] C.L.J. at 71–72.

[81] (1726) Sel. Cas. Ch. 61, 25 E.R. 223.

[82] *Bishop of Winchester v Knight* (1717) 1 P. Wms. 406, 24 E.R. 447; *Garth v Sir John Hind Cotton* (1750) 1 Ves. Sen. 546, 27 E.R. 1196; (1753) Dickens. 183, 21 E.R. 239.

[83] *Woodhouse v Meredith* (1820) 1 Jac. & Walk. 2014, 37 E.R. 353; *Gardner v Rowe* (1825) 2 S&S 346, 57 E.R. 378.

"fiduciary" because the mortgage was for his own benefit.[84] The earliest use in a treatise appears to be Maddock's 1815 treatise on equity, where the term was used to refer to the restrictions on when trustees and agents could purchase property from beneficiaries and principals.[85]

The use of the term became more widespread in the second half of the nineteenth century, and it emerged essentially to mean "trust-like': it could be used to describe (if not explain) when rules of trusts law would be applied to parties who were not trustees, and therefore to reconcile the legal thinking of the eighteenth century with that of Victorians. This meant that the term "fiduciary" could have different meanings in the nineteenth century.[86] It was at times used to describe personal duties of loyalty of the sort owed by a trustee, in particular the rules prohibiting unauthorised profits, and those restricting agents and trustees purchasing from their principals and beneficiaries respectively.[87] However, the term was also used to refer to the holder of powers, usually over property, who was not allowed to use his rights freely for his own benefit,[88] as in the context of legacies[89] and company directors.[90] In particular, where A handed property to B for a specific purpose, then to say that B was a "fiduciary" was to acknowledge that A had not fully divested himself of rights in the assets. If A had transferred legal title to B, then A could be beneficiary of a trust but, even if A retained his legal title, B would still be a "fiduciary" with an obligation to delivery up the property unless disposed of in accordance with his powers and authority. The term "fiduciary" in this context did *not* refer to the existence of personal duties of loyalty or to account for profits per se, though consensual non-beneficial receipt would usually give rise to such duties, but was short-hand for whether A retained a proprietary interest in the asset given to B.

The point is borne out by the decision in *Foley v Hill*.[91] A bank customer brought a bill in Chancery to recover sums deposited with a bank. The claims would have been time barred at common law under the Statute of Limitations, and so the customer sought to bring the claim in Chancery. The accounts were too simple to trigger Chancery's jurisdiction to deal with accounting problems too complicated for a jury, and so counsel for the claimant argued that the bank was a trustee or agent for its depositors, and so was within equity's exclusive jurisdiction. Counsel contended that the duties owed to depositors in respect of their funds (to pay interest, honour cheques, hand over the balance on request), meant that the funds were not at the bank's free use, and so that the bank was within Chancery's jurisdiction, much like a factor or trustee.

The depositors' claim was rejected by the House of Lords. The leading judgment was given by Lord Cottenham L.C., who ruled that the bank's duties in respect of depositor funds were not so great as to prevent property in the deposits vesting in the bank. Accordingly, the relationship between bank and customer was that of creditor and debtor, rather than trustee and beneficiary or principal and agent, in that the property in the deposits

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[84] *Cholmondeley v Clinton* (1820) 2 Jac. & Walk. 1, 185; 37 E.R. 527, 594.

[85] Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery* (London 1815) 91-94. For other early examples see Jeremy, *A Treatise on the Equity Jurisdiction of the High Court of Chancery* (London 1828); Story, *Commentaries on Equity Jurisprudence* (Boston 1836); Lewin, *The Law of Trusts* (London 1837).

[86] For an overview see Sealy, "Fiduciary Relationships" [1962] C.L.J. 69.

[87] Lewin, *The Law of Trusts* (London 1837) 203–204, 261, 290, 382, 438–39; Michael Lobban, "Restitutionary Remedies", *The Oxford History of the Laws of England, Volume XII* (2010) 564–65.

[88] E.g. *The Mayor of London v A.G.* (1848) 1 Clark's H.L. Cas. 440, 463; 9 E.R. 829, 837 (a keeper of a royal forest who cut down timber or did "any other act of ownership" committed a breach of fiduciary duty); *Mersey Docks Trustees v Gibbs* (1866) XI H.L. Cas. 686, 702; 11 E.R. 1500 , 1507 (Toll collectors owe duties in respect of the harbour regardless of "whether the tolls were received for a beneficial or a fiduciary purpose"); *Carrow v Ferrior* (1868) L.R. 3 Ch. App. 719 , 730, (the Court will not allow a person who obtains possession in a fiduciary character to use that possession for his own benefit); *Marris v Ingram* (1879) 13 Ch. D. 338 (the son of a deceased mortgagor, who had managed the mortgaged property, was treated as a fiduciary for the mortgagee for the purposes of the Debtors Act 1869, s4(3)). For an earlier example see *Coare v Giblett* (1803) 4 East. 85, 94; 102 E.R. 762, 765.

[89] Henry Theobald *A concise treatise on the construction of wills* (London, 1876) 175.

[90] Michael Lobban, "Joint Stock Companies" in William Cornish and et al (eds.), *Oxford History of the Laws of England*, vol XII (Oxford 2010) 661–667.

[91] (1848) II Clark's H.L. Cas. 28, 9 E.R. 1002.

vested in the bank absolutely and "cease[d] altogether to be the money of the principal".[92] The reasoning is of interest in that Lord Cottenham sought to explain the reason why a factor was within the jurisdiction of Chancery, and the cases from the long eighteenth century which treated a factor as a trustee. He stated that cases concerning factors had:

> "…always been held to be within the jurisdiction of a Court of Equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, *and though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction for which he is engaged;* and therefore in these cases the Courts of Equity have assumed jurisdiction."[93]

In the above passage, Lord Cottenham recognised the logic of the factors and bank deposit cases considered above, but moved away from the "trusts" analysis adopted in those cases. In particular, he emphasised that Chancery's jurisdiction in such cases did not relate to trusts in "the strict technical meaning of the word", and indeed that the factor obtained "no interest himself in the subject matter" handed to him by his principal, and thus had no right which he could hold on trust. This interpretation is hard to reconcile with the eighteenth century cases themselves: if there were no trust in those cases it is not clear why the claims were allowed on the basis of equitable title by courts of equity *and* common law, why references to factors as trustees were so common, nor why the doctrine of reputed ownership did not apply.

Instead, Lord Cottenham refers to a factor as a "quasi trustee" in respect of a particular transaction and, later in his judgment, as dealing with his principal's assets in "a fiduciary character. In other words, a factor was a "fiduciary" because he had control of property to which his principal had legal title: legal title did not pass to the factor because he was not given free use of the property. His Lordship's reasoning was echoed by the other judges.

Accordingly, under the ruling in *Foley*, Chancery's jurisdiction to grant relief was said to be triggered in cases where A gave property to B in a "fiduciary character", that is to say non-beneficially. Such a term referred of course to a true trustee, who held legal title on trust, but also to a factor or bailee. This explains why contemporary treatises saw A's remedies as the same regardless of whether he had equitable or legal title.[94] A could therefore bring a suit for an account to ascertain what had happened to his property, a point supported by the availability of equitable accounting rules to unscramble mixtures of assets owned by different parties at common law.[95] Further, A could always assert equitable title to the traceable proceeds of the assets and recover them with priority upon B's bankruptcy. This was made clear in *Ex p Cooke*,[96] where the Court of Appeal in Chancery ruled that trustees could assert equitable title to the proceeds of bonds they had handed to a broker, and that he had mixed in his bank account. The majority of the court, led by Bramwell J.A., made clear that the basis of relief was the legal title of the trustees. They retained this legal title as they did not intend the broker to have free use of the bonds, which were therefore handed to the broker "in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal."[97] The

[92] (1848) II Clark's H.L. Cas. 46, 9 E.R. 1005.
[93] (1848) II Clark's H.L. Cas. 35-36, 9 E.R .1006. Emphasis added.
[94] Lloyd (ed.) and Paley, *A Treatise on the Law of Principal and Agent* (London 1833) 86–95; Story, *Commentaries on Equity Jurisprudence* (Boston 1836) ss 1258, 1259; Joseph Story, *Commentaries on the Law of Agency* (Boston 1839) ss 229-230; George Spence, *Equitable Jurisdiction of the Court of Chancery*, vol 2 (London 1846) 298; Russell, *A Treatise on Mercantile Agency* 2nd edn (London, 1873) 219–220.
[95] See Fox, "The Reception of Roman law in the common law of mixtures of goods" (forthcoming).
[96] (1876) 4 Ch. D. 123.
[97] (1876) 4 Ch. D. 128.

same judges sitting in the Court of Appeal reached the same result in *Birt v Burt*.[98] The reasoning mirrors that of Lord Cottenham in *Foley v Hill*.

VI. *Re Hallett's Estate*

It was against this background that *Re Hallett's Estate*[99] was decided. The facts of the case are well known. Hallett was a solicitor who held a number of bonds, some on behalf of trustees of his marriage settlement, and some belonging to a client, Mrs Cotterill. He did not have legal title to the bonds belonging to Mrs Cotterill, and so did not hold them on trust. The bonds were sold, and mixed with Hallett's own money. Hallett died, and his estate was insolvent. The trustees and Mrs Cotterill claimed the money in the bank account as the traceable substitutes of the bonds, seeking priority over Hallett's general creditors. One of the questions before the court was whether Mrs Cotterill's tracing claim could be allowed given that the solicitor was not a trustee for her.

The main difficulty for Mrs Cotterill's counsel was Fry J.'s decision in *Ex p. Dale & Co*[100] that a legal title holder could not trace money. He based this ruling on statements in the eighteenth century cases concerning factors to this effect,[101] and argued that only trust beneficiaries could trace through a mixed fund. As above, this was mistaken as a matter of legal history in that lawyers of the long eighteenth century saw the factors cases simply as involving trusts. In *Re Hallett's Estate*, the reasoning was used to argue that Mrs Cotterill could not trace into the bank account, as she was not the beneficiary of a trust.

Mrs Cotterill's tracing claim in *Re Hallett* was successful at both first instance and the Court of Appeal. In the Chancery Division of the High Court, Fry J. allowed Mrs Cotterill's tracing claim. He distinguished his ruling in *Dale* on the basis that Hallett was a solicitor and, unlike a factor, was not authorised to mix his funds with his client's. For this reason, while a factor mixing his principals goods with his own would destroy the principal's property right, a solicitor who did so would not destroy his client's property rights, and thus a tracing claim could be brought.

The Court of Appeal dismissed Hallett's estate's appeal against Fry J.'s judgment, but went to great lengths to show that they also rejected Fry J.'s reasoning in both *Ex p. Dale* and at first instance. The leading judgment was given by Jessel M.R., who ruled as follows:

> "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...*It can have no foundation in principle, because the beneficial ownership is the same, wherever the legal ownership may be.* If you have goods bargained and sold to a man upon trust to sell and hand over the net proceeds to another, that other is the beneficial owner; but if instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, can it be supposed, in a Court of Equity, that the rights of the beneficial owner are different, he being entire beneficial owner in both cases? I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because the moment you get into a Court of Equity, where a principal can sue an agent as well as a cestui que trust can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you

[98] (1877) reported in (1879) L.R. 11 Ch. D. 773 (at note 7).
[99] (1880) 13 Ch. D. 696.
[100] (1879) 11 Ch. D .772.
[101] It is unclear whether the statements to which Fry J. referred showed that eighteenth century lawyers refused *as a matter of principle* to allow tracing of this sort, or simply referred to difficulties of proving that money was the traceable proceeds of the claimant's property. See *Re Hallett's Estate* (1880) 13 Ch. D. 696 at 713-719 (per Jessel M.R.).

> establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply."[102]

In this passage, Jessel M.R. rejected the distinction drawn by Fry J. between tracing cases concerning factors and those concerning trustees. He was keen to emphasise that the rights of principals (with legal title) and trust beneficiaries to assert equitable title to the traceable proceeds of their property was the same.

This reasoning sheds light on a number of features of the judgment. First, it explains the significance of the statement that the location of legal ownership was irrelevant to the question of whether property could be traced (italicised above). Secondly, it explains Jessel M.R.'s emphasis throughout his judgment on *beneficial* ownership rather than equitable title. Thirdly, it explains why Jessel M.R. ruled that a tracing claim could be brought against a pure bailee who mixed his principal's assets with his own. A bailee would not automatically owe fiduciary duties to subordinate his interests to those of the bailor, or to account for profits: whether he did so would depend on the type of bailment. This would not be the case where the property was bailed for the benefit of the bailee, as where the bailment was a loan for use.[103] Fourthly, it also explains Jessel M.R.'s definition of a fiduciary relationship as "one in respect of which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust"*.[104] He set out this definition in the context of examining tracing claims against eighteenth century factors, cases in which factors were treated as trustees: he saw the fact they were "fiduciaries" as justifying such relief, mirroring Lord Cottenham C.'s reasoning in *Foley v Hill*. It should also be noted that Thesiger L.J. in *Hallett* reached the same conclusion as Jessel M.R., through an application of the reasoning of Bramwell J.A. in *Ex p. Cooke*, cited above.

In sum, the court in *Re Hallett's* estate made clear that where A had handed property to B, provided that the terms of the disposition meant that A had legal *or* equitable title, A would be able to trace the assets and assert a proprietary claim to its substitutes. The term "fiduciary" in the case simply referred to a party who had been given control of property to which he was not beneficially entitled. The *only* significance of this fiduciary relationship was as shorthand for the question of whether the A had retained property rights in the assets handed to the B, and therefore had a property right which could form the basis of an equitable tracing claim.

Indeed, this emphasis on the question of whether A had retained a proprietary interest in *Hallett*, as in the earlier cases, pointed to a broader idea: the right to claim traced assets was an incident of title, whether equitable or legal. This supposition is supported by Jessel M.R.'s emphasis on the significance of beneficial ownership and the irrelevance of the location of legal title. The idea was not a new one: in 1836 Joseph Story wrote that "wherever property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*".[105] Indeed, on this basis, links were drawn between the right to trace and the right of the former owner of money to claim assets purchased with that money under a resulting trust.[106] Likewise, John Russell's treatise on mercantile agency stated that "the reason that [a principal can trace] is that property of a principal, intrusted by him to his agent for any special purpose, is still taken to belong to the principal,—notwithstanding any change which it may have undergone in point of form,—so long as such property is capable of being identified, and distinguished from other property".[107] This reasoning makes perfect sense, in that the significance of the "fiduciary" relationship in the nineteenth century cases, and the trust in the eighteenth century ones, was simply to determine whether A retained a proprietary interest in the asset. This

[102] (1880) 13 Ch. D. 709-710. Emphasis added.
[103] See Story *Commentaries on the law of bailments* (London, 1939) Chapter IV; Jones *An essay on the law of bailments*, 4th edn (London 1833) 63-85.
[104] (1880) 13 Ch. D. 712-713*,* the definition was taken from Fry J. in *Ex p. Dale.*
[105] Story, *Commentaries on Equity Jurisprudence* (Boston, 1836) s 1258.
[106] *Docker v Somes* (1834) 2 Myl. & Kn. Rep. 655 at 664-65; 39 ER 1095 at 1098 (Ch). Also see Story, *Commentaries on Equity Jurisprudence* (Boston, 1836) ss1258, 1259.
[107] Russell, *A Treatise on Mercantile Agency* 2nd edn (London, 1873) 220.

is what allowed him to trace. Logically, then, where B had taken property from A without A's consent, then B would have no acquired right in that property from A to use the asset, and so A would have been able to bring a tracing claim in respect of the property.

This emphasis on tracing as an incident of title, whether legal or equitable, was echoed in the reasoning of the cases decided in the wake of *Re Hallett*. In *Kikham v Peel*,[108] Jessel M.R. made expressly clear that a proprietary claim to traced assets could only be brought by a claimant who had retained a property right in the property handed to his agent: regardless of the personal duties he may have been owed. Furthermore, in *New Zealand Land Company v Watson*, Bramwell L.J. agreed that "the plaintiffs [were] the owners of th[e] property, and [could] therefore follow it into the hands of any person to whom they [could] trace it".[109] Finally in *Re Oatway*, Joyce J. affirmed that "There is no conflict between different fiduciary owners or sets of cestuis que trust. It is a principle settled…whatever alteration of form any property may undergo, the *true owner* is entitled to seize it".[110] The fact that Joyce treated "true owners" as encompassing trust beneficiaries and "fiduciary owners", suggests that the latter term was being used to describe a legal owner whose property had been placed in the control of another.

This analysis was echoed by the treatises written after *Re Hallett.* For instance, the English 1892 edition of Story's treatise on equity repeated verbatim the assertion in earlier editions that the right to trace was an incident of title.[111] Likewise, the 1888 edition of Lord Lindley's treatise on partnership stated that "The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. *His right is incidental to his ownership*".[112] The same point was made in Ashburner's *Principles of Equity*.[113] Ashburner wrote that in cases concerning factors "the principal has rights against the agent both at law and in equity, which are analogous to the rights of a cestui que trust against his trustee; but these rights are not based in any way upon the existence of the trust relation…Equity enables the principal to follow the goods in his agent's possession *simply because the law enables the principal to follow them. The goods are the principal's at law as well as in equity*".[114] In other words, Ashburner saw that a principal could claim assets traced through a mixed fund to the same degree as a trust beneficiary, and argued that his legal title was recognised by equity for the purpose of tracing.

VII. *Sinclair v Brougham*

The preceding analysis has shown that in the eighteenth and nineteenth centuries, lawyers thought that tracing claims through mixed funds were available to both holders of equitable and legal title. We now turn to the major twentieth century authorities on point, and how *Re Hallett* and the earlier cases came to be interpreted.

The first is *Sinclair v Brougham*.[115] The case has been much discussed and criticised elsewhere,[116] and its discussion in this article will be confined to the issue of whether a legal owner could bring an equitable tracing claim. It is of interest that counsel actually argued that:

> "The principle of that case [*Re Hallett*] is really based, not upon trusteeship in the narrow sense, but upon ownership. That is to say, if property of B is found in the hands of A, then prima facie A is in a

[108] (1880) L.T. Rep. 171 (Ch).
[109] (1881) 7 Q.B.D. 374 at 381-382. (CA)
[110] [1903] 2 Ch.D. 356 at 359 (Ch). Emphasis added.
[111] Grigsby, *Story's Equity Jurisprudence* 2nd English edn (London, 1892) S 1258.
[112] Lindley, *A treatise on the law of partnership* 5th edn (London, 1888), 162. Emphasis added.
[113] (London, 1902) 115-117.
[114] (London, 1902) 117. Emphasis added.
[115] [1914] A.C. 398.
[116] See *Re Diplock* [1948] Ch. 465 at 518 ("we find the opinions in *Sinclair v Brougham* in many respects not only difficult to follow but difficult to reconcile with one another") and *Westdeutsche* (1996) A.C. 669 at 713 ("As has been pointed out frequently over the 80 years since it was decided, *Sinclair v Brougham* is a bewildering authority").

> wide sense in a fiduciary relationship towards B, because equity affects his conscience with regard to that particular property, and B can follow it and take it out of the hands of A."[117]

The point was contested by counsel for the other side, who argued instead that *Re Hallett* was confined to cases where there was a valid transaction creating a fiduciary relationship or where the court had found that the claimant was the beneficiary of a constructive trust.

The leading judgment on point was given by Lord Haldane L.C.. Although many judges and commentators have seen the judgment as affirming the fiduciary duty requirement for equitable tracing claims,[118] it is submitted that this conclusion does not fully take into account the context of the decision, and is at odds with how *Sinclair* was received by contemporaries. On the tracing issue, Lord Haldane began by setting out that tracing at common law did not require a fiduciary relationship, but that legal title could not be traced through a mixed fund. He then asserted that it was possible to trace at equity through a mixed fund, but that a fiduciary relationship was needed to do so. For that reason, he is seen as creating for the first time a distinction between common law and equitable tracing, and as juxtaposing the fact that the latter only required a pre-existing fiduciary relationship.[119] The passage in which Lord Haldane is seen to have done this is as follows:

> "…as Jessel M.R. pointed out in Hallett's Case, this equity [the right to trace] was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think*, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction*, wherever money was held to belong in equity to the plaintiff."[120]

It is submitted that this passage in fact illustrates that Lord Haldane *did not* see a pre-existing consensual fiduciary relationship as a pre-condition of an equitable tracing claim, but was using the term "fiduciary relationship" to refer to any case where B had possession of property belonging beneficially to A, and so argued that tracing claim was available to a legal owner as of right. In the statement, Lord Haldane explained how equitable tracing claims were wider than common law tracing claims, in that they allowed a claimant to assert equitable title to assets traced through a mixed fund. The key phrase here is "auxiliary jurisdiction", in the final sentence of the quote. This is a technical term for Chancery's jurisdiction in "those cases where the matter is most properly cognizable at law; but courts of law, from deficiency of administrative power, or machinery, or defects in their procedure, were unable to procure that evidence which a court of equity could obtain".[121] In other words, the "auxiliary jurisdiction" of Chancery referred to when, before the Judicature Acts, the Court of Chancery would have made an order to enforce a *common law right* rather than a specifically equitable one. The point is that, in cases of mixed funds, a common law court would have been unable to establish as a matter of evidence that any given item of property was the traceable substitute of another. This is because common law courts could not make a reference to a Master to take accounts in the way Chancery could have done. Accordingly, Chancery would make its accounting machinery available to a legal owner, in exactly the same way as it would to a legal owner whose property had become mixed with another's.[122] In the context of tracing, the result of such a claim would be to allow the legal owner to assert equitable title to assets traced through a mixed fund: both *Cooke* and *Hallett* made this clear. Lord Haldane thus ruled that a legal owner could therefore trace in equity as of right, regardless of the personal duties he was owed.

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[117] [1914] A.C. 404-05.

[118] *Re Diplock* [1948] Ch. 465, discussed below. Also see Heydon, Leeming and Turner (eds), *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* 5th edn (Chatswood, New South Wales 2015) 5–045; Virgo, "Re Hallett's Estate (1879-1880)", *Landmark Cases in Restitution* (2012) 380–381; O'Dell "Sinclair v Brougham (1914)", *Landmark Cases in Restitution* (2006) 241–243 242–243.

[119] Smith, *The Law of Tracing* (Oxford 1997) 172.

[120] [1914] A.C. 421.

[121] Snell, *Principles of Equity* (1868) 11. See also *A Treatise on the Equity Jurisdiction of the High Court of Chancery* (London 1828) 255–56; Story, *Commentaries on Equity Jurisprudence* (Boston, 1836) 732.

[122] See Fox, "The Reception of Roman law in the common law of mixtures of goods" (forthcoming).

This also explains Lord Haldane's statement that equitable tracing would be allowed "wherever money was held to belong in equity to the plaintiff".[123] The statement refers to the nature of the right an owner could assert *to the traced asset*: an equitable right rather than a legal one. In other words, Lord Haldane's distinction between common law and equitable tracing claims seems to be based on when equitable, rather than legal, title could be asserted to traced assets. He was not asserting that a legal owner could not trace in equity in the absence of a pre-existing fiduciary relationship or an equitable property right.

This was how *Sinclair* had been understood by contemporary lawyers. Although *Banque Belge v Hambrouck* concerned a bank tracing through unmixed funds into a bank account, the Court of Appeal accepted that the claimant could have asserted an equitable claim to assets traced through a mixed fund,[124] even though the claimant had no equitable property right, and had never been owed fiduciary duties. The same argument was made by academic commentators. The Law Quarterly Review took the view in "Notes" section that in *Sinclair*, "[t]he fullest exposition of the doctrine [in *Re Hallett*] is in Lord Haldane's judgment, which is careful to point out that it does not depend on the existence of any fiduciary relation".[125] Likewise, in the 1930 edition of Ashburner's *Principles of Equity*, the new editor cited Lord Haldane's judgment in *Sinclair* as authority for the proposition that a legal owner could claim property traced through a mixed fund, on the basis that equity had extended the remedy that was available to him at common law.[126] Sir William Holdsworth specifically noted the point in a 1933 book review of the treatise: he emphasised that it was equity which gave a legal title holder the right to trace through a mixed fund, rather than the common law.[127] Similarly, writing in the CLJ in 1938, Lord Wright saw both Lords Haldane and Parker as having argued that, while different rules governed when legal or equitable title could be asserted to the proceeds of an asset, both legal and equitable title holders could trace in equity as of right.[128] The view was also echoed in Harold Hanbury's *Modern Equity*.[129]

VIII. *Re Diplock*

Re Diplock[130] appears to be the first case which caused lawyers to think that a fiduciary relationship was a pre-requisite for a legal owner seeking to trace assets in equity. The rule stems from Lord Greene M.R.'s re-interpretation of the judgments in *Sinclair,* in particular the judgment of Lord Parker, which was reasoned as follows:

> "At law, therefore, the lender [by tracing at common law] can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money."[131]

In this passage, Lord Parker set out his understanding of legal and equitable tracing, and was seen in the wake of *Sinclair* as simply echoing Lord Haldane's reasoning set out above. However, it was a later section of Lord Parker's reasoning that Lord Greene M.R. focussed on in *Diplock*, a passage which read on its own terms is ambiguous:

> "Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the

[123] [1914] A.C. 421.
[124] [1921] 1 K.B. 321, 328, 330, 335-36.
[125] [1914] 30 L.Q.R. 263
[126] Browne (ed.), *Ashburner's Principles of Equity* 2nd edn (London, 1930) 87.
[127] (1933) 49 L.Q.R. 576-582. 578.
[128] Lord Wright, *Sinclair v Brougham* [1938] 6 C.L.J. 305, 309.
[129] Hanbury, *Modern Equity*, 5th edn (London, 1949) 730–735.
[130] [1948] Ch. 465.
[131] [1948] Ch. 441-42.

misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognized as such by the common law."[132]

There are two ways of reading this passage. On the first interpretation, Lord Parker ruled that wherever B had possession of property to which A was legally or equitable entitled, that equity recognised that it would always be unconscionable for B to keep the property or its traceable proceeds in his hands. After all, whether A had entrusted the property to B for a specific purpose, or B had taken the property without A's consent, B would not be able to plead purchase for value without notice as a defence to a claim brought by A. This reading seems to have been that which held favour in the wake of *Sinclair*, echoes counsel's argument in that case, and harmonises Lord Parker's reasoning with Lord Haldane's.

The second interpretation is that adopted by Lord Greene M.R. in *Re Diplock*. His Lordship treated "[s]tarting from a personal equity" as a reference to a *consensually* created fiduciary relationship. This was a change of focus. Where A handed property to B, the courts in the nineteenth century asked whether B was a fiduciary as shorthand for the issue of whether A retained a proprietary interest in the asset handed over (whether legal or equitable). If A did still have proprietary interest, then A could bring an equitable tracing claim, and presumably the same reasoning would have applied if B had taken A's property without A's consent. In both scenarios A would retain property rights to the asset, and B would have no rights vis-à-vis A to use freely the asset for his own benefit. However, Lord Greene M.R. saw the fact that A had handed the property over *voluntarily* as creating a "personal equity", out of which equity would create equitable proprietary rights. In other words, he saw the consensual creation of B's duties, rather than their content, as determinative. On this basis, it was made clear that A could not trace in the absence of a consensually created "fiduciary or quasi-fiduciary relationship or…a continuing right of property recognized in equity".[133] Further, Lord Greene emphasised that in his view "neither Lord Parker nor Lord Haldane suggest[ed] that the equitable remedy [ie tracing in equity] extends to cover all cases where A becomes possessed of money belonging to B".[134] It should also be noted that Lord Greene M.R. seemed to think this reasoning was not just rooted in *Sinclair*, but in *Re Hallett* itself.[135]

The critical and academic reaction to Lord Greene MR's judgment on this point was not uniform. Writing in the Law Quarterly Review in 1950, Denning J. argued that a legal owner had the same entitlement to trace in equity as an equitable owner. He justified his view by adopting a similar history of tracing to Lord Haldane in *Sinclair*, but argued that after the Judicature Acts the equitable remedy had to be available to the legal owner.[136] He cited *Diplock*, *Sinclair*, and *Re Hallett*, without going into the details of the judgments, and simply said that the result of the rulings was that a legal owner could always trace in equity. The argument was cited and adopted in the second and final edition of Powell's treatise on agency.[137]

Echoes of this view can be found in the decades after *Re Diplock*. In 1962, Len Sealy would argue that where B took property to which A had legal title, that A's property right would always be "sufficient to invoke the doctrine of tracing" even though there would be "not, without more, a fiduciary relationship".[138] Sealy saw A's legal title as a property right which equity would always recognise, thus as providing a foundation for equitable tracing.[139] Likewise, as above, Anthony Oakley argued in 1975 that a legal owner could always trace, in that his property right would be recognised by equity. [140] However, this reasoning could not be used to explain Lord Greene MR's judgment in *Re Diplock.* This is because the logical corollary of Sealy and Oakley's view is that

[132] [1948] Ch. 441-42.
[133] [1948] Ch. 520-21.
[134] [1948] Ch. 540.
[135] [1948] Ch. 518.
[136] Denning, 'The Recovery of Money' (1949) 65 L.Q.R. 37, 48.
[137] Powell, *The Law of Agency* 2nd edn (London, 1952) 170–72.
[138] Sealy, "Fiduciary Relationships" [1962] C.L.J. 72, note 23.
[139] Sealy, "Fiduciary Relationships" [1962] C.L.J. 74-75.
[140] Oakley, 'The prerequisites of an equitable tracing claim' (1975) 28 C.L.P. 64.

wherever a legal title holder's property is in the possession of another, they should be able to trace in equity: Lord Greene M.R. explicitly stated the contrary.

The current orthodox view that a legal owner could only trace if owed personal fiduciary duties, seems to make its way first into the equity treatises. The fifth edition of Harold Hanbury's *Modern Equity*[141] was published in 1949, just after *Re Diplock* was decided in the Court of Appeal. The text thus considers the High Court judgment in the body of the treatise but, shortly before publication, an addendum was added to the end to take into account the Court of Appeal judgment. Interestingly, in the main text Hanbury argued that *Sinclair* made express a legal owner could bring an equitable tracing claim as of right, even in the absence of a consensually fiduciary relationship. On this basis, Hanbury argued that the first instance judgment in *Re Diplock*,[142] where it had been held that a consensually created fiduciary relationship was needed to allow equitable tracing, was mistaken.[143] However, the consideration of the Court of Appeal judgment is more deferential, and while Hanbury repeats his objections as to the reasoning, he appears to accept it as authority.[144] The 1952 edition of the text reproduces this analysis and the acceptance of the rule.[145]

The requirement for a consensually created fiduciary relationship was less reluctantly adopted in the 1954 edition of Snell's Equity.[146] Although editions of the treatise published in the wake of *Sinclair* did not mention the case in relation to tracing,[147] following *Re Diplock* the treatise provided that:

> "Unless a fiduciary relationship exists at some stage, no equitable interest arises and so there is no right to trace in equity: the equitable right to trace is based on there being a beneficial owner who has an equitable proprietary interest in property in the hands of a trustee or of the fiduciary agent. This initial fiduciary relationship is essential: it is not sufficient merely to show that one person has acquired some benefit by using the money of another[.]"[148]

This seems to be the genesis of the modern acceptance of the rule which has seemed to be of unquestionable authority to modern judges and commentators.

IX. What is the law today?

This analysis also shows that modern courts are not bound as a matter of authority by the fiduciary requirement. The statements in *Re Diplock* concerning the rights of legal owners to trace in equity were unorthodox *obiter* statements of the Court of Appeal. These were seen by contemporaries as contrary to the House of Lords' reasoning in *Sinclair,* though Lord Greene M.R. claimed he was applying that decision. The reasoning also departed from the emphasis on beneficial ownership in *Re Hallett*—which actually concerned a claim by a legal title holder—and the cases decided in its wake. After all, the reasoning in *Cooke*, *Hallett*, and *Sinclair* is of high authority, has never been overturned, and makes the best sense: if tracing is about vindicating property rights, there is no justification for requiring a claimant bringing an equitable tracing claim to do anything more than prove the existence of a property right and the fact of the substitution. In the absence of the bona fide purchaser for value without notice defence, such claims should be allowed to succeed whenever property belonging to the holder of legal or equitable title has been disposed of without their authority. This would include cases where (i) A gives B powers over A's property for a particular purpose,

[141] Hanbury, *Modern Equity*, 5th edn (London, 1949) 730–735.
[142] [1947] Ch. 716.
[143] Hanbury, *Modern Equity*, 5th edn (London, 1949) 730–735.
[144] Hanbury, *Modern Equity*, 5th edn (London, 1949) 740–742.
[145] Hanbury, *Modern Equity*, 6th edn (London, 1952) 710–16.
[146] Meggary and Baker (eds.) Snell, *Principles of Equity* 24th edn (London, 1954) 230–231.
[147] Fountaine and Rivington (eds.) Snell, *Principles of Equity*, 17th edn (London, 1920).
[148] Meggary and Baker (eds.) Snell, *Principles of Equity*, 24th edn (London, 1954) 230–231.

and B disposes of the property beyond the scope of those powers and (ii) B takes A's property without A's consent.[149]

In addition, it should be noted that even if Lord Greene M.R.'s dicta were accepted as a good law, that they would plainly cover cases where A hands property to B consensually, and B disposes of it beyond the terms of his authority. In particular, they would cover cases of bailment, even in which the bailee owed no duties of loyalty to account for profits or avoid conflicts of interest. Such a bailment would create a relationship which was "fiduciary" within Lord Greene M.R.'s meaning.

X. Wider Implications

The examination of these legal developments also sheds light on bigger issues relating to private law methodology and how modern lawyers should deal with changes in legal thinking over centuries of development.

First, lawyers should not presume that legal categories and vocabulary remain static over centuries, especially in the context of "fiduciaries'. The Victorians used the term to refer to cases which were "trust like', but used the same term in determining whether a disponor had retained a property right, as when considering the scope of a disponee's personal duties, and indeed the personal duties of those who were in some sense "like trustees" despite not having been given property. Although modern lawyers do at times use the term fiduciary duty in a "broad sense', the term is almost always used to refer to personal duties arising out of a consensually created relationship. Lord Greene MR's error in *Re Diplock* was to presume that the term "fiduciary" as used in the earlier cases was being used as anything more than shorthand for the question of whether the claimant retained a proprietary interest in the property he had handed to the defendant. This mistake was facilitated by the fact that the term "fiduciary" could have a range of specific meanings with different remedial consequences, and in 1948 had received no comprehensive treatment in treatises or cases.[150] As Fletcher Moulton L.J. put it: "the danger of trusting to verbal formulae" is that one may "conclude that every kind of fiduciary relation justifies every kind of interference. Of course that it is absurd. The nature of fiduciary relation must be such that it justifies the interference".[151]

Secondly, the development of the rule is also an interesting example of the way lawyers in the twentieth century sought to justify and explain doctrinal positions by reference to unverified narratives about the relationship between law and equity. After all, Lord Greene M.R. justified the fiduciary requirement in tracing by arguing that Chancery's jurisdiction to allow equitable tracing had been based historically on the presence of a consensually related fiduciary relationship and the personal duties that gave rise to, which justified the court making a tracing order: without such a relationship the defendant's conscience would not be bound. In other words, as Fox L.J. would state in *Agip v Jason*,[152] a fiduciary relationship or equitable property right were needed to trigger equity's jurisdiction to allow tracing claims. As above, this was incorrect as a matter of legal history, in the eighteenth and nineteenth centuries the focus of the courts' analysis in tracing cases had been on whether the claimant had a property right, and the question of whether a defendant had received property in a fiduciary capacity was only relevant insofar as it determined that issue. It had never been hinted that a legal property right would not suffice to bring an equitable tracing claim.

[149] In other words, where custodial duties have been breached, see Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv. 215.
[150] Sealy, "Fiduciary Relationships" [1962] C.L.J. 73–74. In 1954, Snell refers to a fiduciary as either a party liable to account for profits or one with a relationship of "trust and confidence" for the purpose of undue influence, Meggary and Baker (eds.) Snell, *Principles of Equity* 24th edn (London, 1954) 507–510, 196–200. Underhill narrowly refers to a "fiduciary person" as one who holds profits or sums received on behalf of another on constructive trust for them, Underhill, *The Law Relating to Private Trusts & Trustees* 8th edn (London, 1926) 173–76.
[151] *Re Coomber* [1911] 1 Ch. 723 at 728-729.
[152] [1991] Ch. 547 at 568.

Further, while it has caused fewer later problems for the law, Lord Haldane L.C.'s judgment in *Sinclair* was based on unverified legal history to the same degree as Lord Green MR's ruling in *Re Diplock.* Lord Haldane's exposition of the relationship between legal title and equitable tracing in *Sinclair*, which was adopted by contemporary commentators, suggested that equity first allowed legal title holders to bring equitable tracing claims as part of its *auxiliary jurisdiction*. An examination of the evolution of the doctrine in the eighteenth century shows that this was false as a statement of legal historical development: the reason a legal title holder in the eighteenth century was allowed such a remedy is because he was treated as having an interest in a trust when his property was in the hands of a third party. As discussed in Part IV above, he was seen as having distinctively equitable rights in addition to his common law title, which were justiciable under equity's exclusive jurisdiction over trusts. This explains why even the common law courts in the Regency era treated cases where a legal title holder's property was in the hands of a third party, and he sought to trace, as concerning trusts. Lord Haldane's statement mirrors the Victorian rationalisation of earlier cases, according to which a legal title holder whose property was in the hands of another was not seen as a trust beneficiary, though his common law title was recognised by equity for the purposes of allowing a tracing claim. This historical availability of equitable tracing to a legal owner also falsifies Denning's argument that the availability of the remedy was a consequence of the Judicature Acts. It appears that in the early twentieth century, after the Judicature Acts, judges imagined a gulf between the principles of law and equity which would have surprised their forebears. Indeed, Lord Haldane's reasoning in *Sinclair* for the first time created the notion of common law tracing as distinct from equitable tracing: this explains why *Banque Belge*, decided in the wake of *Sinclair*, is the first reported case which purported to concern common law tracing as if distinct from tracing in equity.[153]

Thirdly, the above analysis shows the problems that can be caused by the unprincipled mixing of the personal and proprietary aspects of fiduciary law and trusteeship. Lord Greene's historical narrative was used as a justification for introjecting the notion of personal conscience into tracing claims which were, and always had been, simply concerned with property rights. This created a rule which makes no sense in policy terms. This mixing of questions of property rights with issues of conscience remains problematic today. This can be shown by three clear examples.

First, in *Westdeutsche*, Lord Browne ruled that a mistaken payee could not hold sums he was paid on trust until he was aware of the mistake for otherwise his conscience would not be bound.[154] While it is right that the personal duties a mistaken payee should owe should take his knowledge into account, it is not clear how or why knowledge could turn personal claims into proprietary ones.[155] It is this concern which lies behind Lord Sumption J.S.C.'s dicta in *Angrove's Property Ltd v Bailey*[156] concerning when constructive trusts arise. Lord Sumption emphasised that, in cases of mistaken payment, "settled principles" rather than conscience in the sense of "fairness" determine whether a constructive trust arises, and that any such trust would arise upon receipt by the payee. This reasoning is to be welcomed.

Secondly, in the *Binion v Evans,*[157] *Ashburn Anstalt v W.J. Arnold & Co.*,[158] and *Lloyd v Dugdale*[159] line of cases, the courts seem to have presumed that where B sells land to C, and C undertakes to respect the *personal* right of A, "that [if] the conscience of [C] is affected"[160] C will acquire an interest under a constructive trust. It is not clear why the content of B's personal undertaking to A should result in C acquiring a *property* right, if the right

[153] *Taylor v Plumer* (1815) 3 M.&S. 562, 105 E.R. 721, though decided in the King's Bench, is now rightly recognised as concerning equitable tracing. See *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch. 159 at 169.
[154] [1996] A.C. 669 at 705.
[155] See Swadling "Property and Conscience" (1998) 12(4) Trusts Law International 228 at 231-236; Penner, "Distinguishing fiduciary, trust, and accounting relationships" [2014] Journal of Equity 202 at 214-216.
[156] [2016] UKSC 47; [2016] 1 W.L.R. 3179 at [28].
[157] [1972] Ch. 359; [1972] 2 All E.R. 70.
[158] [1989] Ch. 1 (CA); [1988] 2 All E.R. 147.
[159] [2001] EWCA Civ 1754; [2002] 2 P. & C.R. 13.
[160] *Ashburn Anstalt v W.J. Arnold & Co.* [1989] Ch 1 at 25.

B undertook to respect was personal.[161] Thirdly, the ruling in *Williams v Staite*[162] that a contractual licence which arises through a proprietary estoppel binds third parties as a property right is equally difficult. If A has promised B a personal right, then even if it would be unconscionable for A to go back on the promise and B has relied on it, it makes little sense for the court to grant B a property right. This would be to give him *more* than he had been promised. Like Lord Greene's ruling in *Re Diplock*, this reasoning attributes remedial significance to the manner in which rights are created, rather than their content.

[161] McFarlane, "Constructive Trusts Arising on a Receipt of Property Sub Conditione" (2004) 118 L.Q.R. 667; Bright, "The Third party's Conscience in Land Law" [2000] Conv. 398.
[162] [1979] Ch. 291; [1978] 2 All ER 928.