THE RECOVERY OF MONEY — RECOGNISING THE POTENTIAL OF THE CLAIM FOR MONEY HAD AND RECEIVED

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I AN OVERVIEW

I steal a $100.00 bank note from you. Few, if any, would disagree that the circumstances surrounding my acquisition of this money are such that, irrespective of whether I still retain that bank note, relief should be available to you; I should be ordered to pay you the value of the money so stolen. Few, if any, also would disagree that if I am insolvent, your right of recovery should remain but should you receive preferential treatment in the recovery of this money?

Views do differ in respect to the availability of preferential recovery in the context of an insolvency. But, to take a persuasive example in favour of preferential recovery, if the bank note remains in my possession and you can identify it (for instance through its serial number), why shouldn’t you recover that note (or its value) in priority to other claimants against my insolvent estate; are you not still the owner of that note? In this situation preferential recovery — at least to the extent that my possession of your money has not encouraged others to act to their detriment — does seem warranted.

The focus of this article is the so-called action or claim for money had and received — one of the common law “personal” remedies for the recovery of money. Irrespective of the merits of the arguments in the above example for preferential treatment, it is commonly assumed that “money had and received”, resulting as it does in a personal remedy, is unable to confer preferential recovery in the context of an insolvency — the “personal” nature of the remedy being contrasted with the so-called “proprietary” remedies.¹ This assumption, however, is incorrect; the claim for money had and received is in fact able to provide, “a result [which is] akin to priority”.²

The aim of this article is to reveal the potential of money had and received to provide such preferential recovery. For those who are sceptical of the potential so claimed for this “personal” legal remedy, Part II

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1 Remedies, usually equitable, which result in the recovery of property of which the plaintiff is regarded as the owner.
2 Khurshid and Matthews, “Tracing Confusion” (1979) 95 LQR 78 at 78. Or as the learned authors of Goff and Jones, The Law of Restitution, Jones Ed (4th ed 1993) (hereafter “Goff and Jones”) 78 note 34 describe it — a remedy which “may not be less effective than equity’s lien . . .”.
contains an examination of the history of this claim, the characteristics which provide it with the ability to confer preferential recovery and a number of the cases in which preferential treatment has been conferred.

As is displayed in respect to equitable proprietary remedies, preferential recovery is often associated with the ability to trace one's property — either to subsequent recipients and/or in to new forms. A similar association, between tracing and preferential recovery, applies in respect to money had and received. When compared to the present equitable tracing rules, however, the common law rules appear to be constrained by "quaint and artificial restrictions".\(^3\) In Part II the common law restrictions are examined and a case is made for their liberalisation.

II THE CLAIM FOR MONEY HAD AND RECEIVED

1 An overview of its historical development

The claim for money had and received is a "curious surviv[al] of past legal history".\(^4\) The following examination of the claim's development is important for revealing its potential; a potential which is to some extent "hidden" by layers of misconceptions which it has attracted over the last few centuries. The immediate origin of the claim (and the origin to which it owes most of its present form and misconceptions) is as one of the common pleadings or so-called common counts, derived from the writ of *Indebitatus Assumpsit*. Pursuant to this common count, the plaintiff alleged, in effect, that the defendant was indebted to him or her for a certain sum of money which the defendant had received to the plaintiff's use and that contrary to the defendant's promise to pay this sum, he or she had not so repaid it.\(^5\)

The form of this pleading does suggest that the claim was directed to the recovery of a consensually created debt and as such there would appear to be good grounds for being sceptical of the assertions as to its potential to confer preferential recovery which were made earlier. The history of the development of *Indebitatus Assumpsit* and its progeny, however, is a history of the use of fictions — particularly fictitious promises and fictitious debts. It is submitted that these fictions have been a significant factor in both camouflageging the true nature of money had and received and providing a foundation for the assumption that common law claims for the recovery of money (i.e. currency as distinct from the recovery of specific notes and coins) always take the form of the recovery of a debt.\(^6\)

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3 *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218 (HC) at 238 per Blanchard J.
4 *In re Cleadon Trust* [1939] Ch 286 (CA) at 314 per Scott LJ.
Although its form may be derived from the writ of *Indebitus Assumpsit*, the researches of legal historians have shown that money had and received can trace its origins to a period earlier than that associated with the rise of the writ of *Assumpsit*, back to the writ of *Account*;\(^7\) a writ which appears to have been premised on a different view of "legal" interests in money than we are accustomed to. Reflecting these older origins, the essence of the claim is that the defendant has received money and while he or she may have acquired some rights in respect to that money, the circumstances surrounding its payment and/or receipt are such that the law imposes an obligation upon him or her to pay an equivalent sum of money to the plaintiff.

a) The Writ of Account

What is significant about this writ and its important legacy for the claim for money had and received is the evidence which it provides that the common law has recognised that a monetary relationship between two parties does not have to be either one of bailor-bailee or creditor-debtor, but can be of an intermediary nature. Indeed, Professor Milsom suggests that "[t]he hypothesis behind [this writ] was that one could have something like a property right in money in another's hands".\(^8\)

Developed originally to regulate the relationship of the manorial bailiff with his lord, the writ of *Account* was, as Professor Milsom has observed, "of great practical importance in the middle ages".\(^9\) In essence, the writ set in motion a procedure by which the bailiff was required to supply to independent auditors details of the money which he had received and the payments which he had made on behalf of his lord's landed interests. In the 13th century a process began by which the writ of *Account* became available in other situations in which there was a pre-existing relationship between the parties, for instance as against "all manner of receivers".\(^10\) This process of extension in availability continued into the 14th century when, as Professor Stoljar's researches have revealed, the writ became available in situations in which the defendant "was technically a stranger

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7 Indeed Professor Ames has suggested that "the action of account is [the] father of the count for money had and received". J B Ames, *Lectures in Legal History* (reprint edition 1986) (hereafter "Ames, Lectures") 121.


9 Idem.

10 Legal historians are divided both as to the significance of the extension to receivers and the distinction between "bailiffs" and "receivers". Although Professor Milsom suggests that the receiver's origins may have been independent from that of the bailiff (and if so they were probably mercantile), he acknowledges that "receiver" may have originally referred to "the mere collector of money rents, ecclesiastical dues and so on". Ibid at 280. Support for this latter interpretation is provided by Professor Langdell, "A Brief Survey of Equity Jurisdiction" (1889) 2 Harv LR 241 at 244. Irrespective of the origins of the "receiver", the researches of Professor Stoljar suggests that it came to encompass mercantile transactions, "in which (for example) a plaintiff (P) g[ave] to the defendant (D) goods to sell but D later omit[ed] to hand over the profits or proceeds to P, or P g[ave] money to D to buy goods for P which D then neglect[ed] to do...". S J Stoljar, "The Transformations of Account" (1964) 80 LQR 203 at 206.
to [the plaintiff]"\(^{11}\) — for instance where he or she had received money from a third party which he or she was to transfer to the plaintiff.\(^{12}\) In essence, it became the circumstances surrounding the payment and not the parties relationship which created the obligation to account and the plaintiff's legal interest in the money so received by the defendant. Freed from the need to establish a direct relationship between the parties, the writ of Account was poised to become available in many new situations. As Professor Stoljar observed:

> "Thus there was little difficulty in applying account 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. Nor was there difficulty in extending account to what was virtually a constructive trust, as where D acting as agent was guilty of some sharp practice\(^{13}\) or dishonesty."\(^{14}\)

So what happened whereby the common law’s recognition of the "accounting" relationship and extended ideas of ownership associated with the writ of Account became forgotten by the practitioner of the common law? In essence it is submitted that this is a product of the assimilation of this writ, first by the writ of Debt and then by the writ of Assumpsit.

b) The decline in the recognition of the accounting relationship

(i) Absorption by the writ of Debt

While the writ of Account commenced a procedure whereby the state of the parties accounts were determined, it did not order the payment of

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11 Stoljar, “The Transformations of Account” ibid at 208. The extension in the availability of the writ of Account to “receivers” appears to have been the catalyst for this extension.

12 See Stoljar, “The Transformations of Account” ibid at 209-210. Professor Ames observes that, “[o]riginally [the action of account] was the only remedy where A delivered money to B for C. There was no debt because that presupposed a contract between the debtor and creditor, and in this case C was no party to this transaction.” Ames, Lectures, supra n7 at 118.

13 An example which Professor Stoljar gives in support of the availability of the writ of Account where there had been “sharp practice” is Harrington v Deane (1613) Hob 36; 1 Br & Gold 26. As noted by Professor Stoljar, in that case P asked D to collect £200 from C that C owed to P. Apparently C had no money and therefore asked D to borrow the £200 “for him [C’s] of anybody”, and to pay this money over to P. D succeeded in borrowing the money but then kept it for himself. The decision was that D was accountable to P, and this because (as the court explained) when D borrowed the money for C, “it became first [C’s] money and by him it was delivered over unto [D] to be paid unto [P] for his debt (though it never came to [C’s] own hand actually), and so it became (P’s) money received by the hands of [C]).”

14 Stoljar, “The Transformations of Account”, supra n10 at 210-212. Professor Ames, “The History of Assumpsit” (1888) 2 Harv LR 1 and 53 at 66, suggests that the idea underlying the writ of Account was that “[o]ne who received money from another to be applied in a particular way was bound to give an account of his stewardship”. Professor Stoljar, “The Transformations of Account”, supra at 211, however, regarded these extensions as important for emphasising proprietary ideas or theory which he suggested underlay this writ. “The theory essentially was that a person became accountable for a sum of money to which, as regards the particular plaintiff, he himself could maintain no firm title or proprietary right.”
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any balance found due by the defendant. The recovery of any money found to be due to the plaintiff was facilitated through the writ of Debt.\textsuperscript{15}

The involvement of the writ of Debt in the recovery process has had an important consequence for the 20th century lawyer's understanding of the claim for money had and received. By its very name, the writ of Debt provides support for the assumption that what was being recovered was a consensually created debt.\textsuperscript{16} The role of this writ in the accounting process, however, was subsidiary to that of the writ of Account which determined the rights of the respective parties; the writ of Debt merely provided the means by which the recovery of the plaintiff's "money" could be achieved.

As was noted earlier the writ of Account is important for its recognition that a monetary relationship between two parties does not have to be either one of bailor-bailee or creditor-debtor, but can be of an intermediary nature. The intermediary nature of this relationship is reinforced by the fact that although the defendant was "handling [money which] was in some sense not his",\textsuperscript{17} his or her obligation to restore this money to its rightful owner was satisfied by restoring the value of that money and not the particular money so received. As Professor Milsom has observed,

\textsuperscript{15} Until the late 14th century, when the availability of the writ was restricted to parties in established relationships — principally the manorial lord against his bailiff — it appears that if on the completion of this process it was found that the accounts were in favour of the Lord, the defendant could be committed to the King's nearest prison until he accounted for the appropriate sum of money. Stoljar, "The Transformations of Account", supra n10 at 205.

\textsuperscript{16} Although in some situations this writ was available for the recovery of a consensually created obligation to pay, there is evidence to support Professor Baker's conclusion that medieval lawyers "saw [D]ebt as [being] ... more like property than breach of promise". See generally J H Baker, \textit{An Introduction to English Legal History} (3rd ed 1990) at 365-366. Interestingly, the writ of Debt appears to have been available not only to recover money but also in some situations fungibles.

\textsuperscript{17} Milsom, \textit{Historical Foundations}, supra n6 at 278.
"[a]lthough the underlying idea [of the writ of Account] was that the accountant had been handling money 'belonging' to the claimant, there were of course no actual coins that he owned, so that [the finding that the plaintiff was required to pay a sum of money] was the only possible outcome".18 Or as Professor Langdell explained:

"If the property received consists of money, the defendant [accountant] must not be bound to restore to the plaintiff the identical coin received by him; for, if he is, he will be a mere bailee, e.g. if the money be sealed up in a bag. [He also must not] . . . have a right to appropriate the money received to his own use, for then he can only be a debtor. But he must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received."19

In essence, a right which was premised on some extended ideas of ownership of money was enforced through an order that the defendant accountant pay the value of that money to the plaintiff.20

In the 16th century the writ of Debt began playing a more important and direct role in the recovery of money from the defendant "accountant". Plaintiffs began successfully persuading the courts that in some situations it was unnecessary for them to commence both the writ of Account and the writ of Debt. As Professor Birks has observed, "[a]fter some hesitation the law accepted that, if [the plaintiff] knew what sum was due . . . and did not need to take an account in order to ascertain it, [the plaintiff] could go straight to the action of debt".21 Thus began a process by which the writ of Account was absorbed into the writ of Debt; a process which was to end with the absorption of that writ into the writ of Indebitatus Assumpsit.

(ii) Absorption by the writ of Assumpsit

Although the availability of the writ of Assumpsit was initially restricted to those situations in which the writ of Debt was unavailable,22 the 16th century also saw its triumph over that writ as plaintiffs sought to avail themselves of the two significant advantages which it offered — the non-
availability of “wager of law” as a means of determining issues of fact and simplified pleading requirements. It was through the use of pleading devices and fictions (whose object was to conceal the fact that the plaintiff was seeking to use Assumpsit in a situation in which the writ of Debt was available) that Assumpsit became the dominant action. Noted by Professor Lücke as “the most important and the most elusive of all the pleading devices”, Indebitatus Assumpsit was premised on an assumption that the defendant had promised to pay an existing debt; this promise providing the means by which the writ of Debt could be circumvented.

Originally an actual promise, Slade’s Case held that it would suffice if this promise to pay could be implied from the facts constituting the indebtedness. Subsequently, this promise became “a pure fiction” and with this development the writ of assumpsit became available for all of those situations for which the writ of Debt had been available, including those situations in which the “debt” had arisen from an accounting relationship. As Professor Birks has observed:

“[t]he effect of Slade’s Case should have been limited to allowing assumpsit to be used instead of [the writ of Debt in those cases in which the facts constituting the indebtedness did include an express or tacit promise to pay . . . Nevertheless, during the 17th century the courts accepted that a plaintiff could use assumpsit to recover any debt [recoverable by the writ of Debt]. The plaintiff’s action would allege the debt facts and would go on to say that the defendant had promised to pay, but he would win by proving only the debt facts.”

As was noted above, one of the advantages of Assumpsit over Debt was the more relaxed pleading requirements. As the focus of the assumpsit action was on the promise, the plaintiff was only required to plead in a general way the circumstances which gave rise to the debt. Although Professor Lücke argues that Slade’s Case reintroduced to Indebitatus Assumpsit the requirement that full particulars of the debt had to be pleaded, the 17th century witnessed the successful experimentation with amended versions of the former general indebitatus declarations in which it was simply “assert[ed] that the defendant was indebitatus in the amount demanded for money lent, for the price of work and materials or of goods sold and delivered or the like”. These experiments culminated in the de-

23 See Lücke, “Slade’s Case”, ibid at 425-6 for a discussion of these advantages. In respect of the pleading advantage, Professor Milsom observes, “[i]n the old trespassory basis [underlying assumpsit] . . . the transaction creating the debt was not relevant to the claim notionally being made. If the action had really been about damage suffered by reliance on a separate promise to pay, all that would have mattered was that at the beginning of the story the defendant was indebitatus to the plaintiff; and often that was all that was alleged. How the debt had arisen would not emerge until evidence was given at the trial.” Historical Foundation, supra n6 at 354-5.
24 Lücke “Slade’s Case”, supra n22 at 548.
25 (1602) 4 Co Rep 92b; 76 ER 1074.
27 Birks, supra n5 at 35.
28 Lücke “Slade’s Case”, supra n22 at 86-91.
29 Milsom, Historical Foundations, supra n6 at 354-5.
velopment of the common counts. As one of these common counts, the action for money had and received provided the shorthand formula for those situations which had been indirectly inherited from the writ of Account.

While the development of the action for money had and received may have simplified the pleading requirements, the reference in the pleadings to the indebtedness and the promise to repay has had the unfortunate result of obscuring its inheritance of the accounting relationship and the extended ideas of ownership in money underlying the writ of Account. As Professor Langdell observed:

"Undoubtedly, the distinction between a debt and an obligation to account is one which there is some danger of losing sight of, and this danger has been much increased by the disuse of the action of account. Moreover, this distinction has been much obscured by the prevalence of the indebitatus count in assumpsit for money had and received. That count, indeed, seems to have been framed in entire forgetfulness that any such distinction existed, for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant to the plaintiff's use. If, in truth, the defendant is indebted to the defendant for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it."30

Throughout this article reference has been made to money had and received. While this is just a shorthand reference to the claim and the ideas underlying it, this reference omits the fundamental characteristic of the claim, that the money was received by the defendant to the plaintiff's use. To reflect this fundamental characteristic, the claim should really be referred to as one for "money had and received to the plaintiff's use". Nevertheless, the claim is not commonly referred to in this extended shorthand formula. As Professor Langdell further observed:

"Less mischief [in the inconsistency in the language of the claim] ... has resulted from it than might have been anticipated; for English lawyers, acting with their usual practical good sense, have treated the count as alleging an indebtedness for money had and received, and the words "to the plaintiff's use" have been disregarded."31

In a similar vein Professor Stoljar lamented:

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

30 Langdell, "A Brief Survey of Equity Jurisdiction" supra n10 at 254-5.
31 Idem.
(iii) The expansion of money had and received beyond the "accounting" relationship

Despite the impression conveyed in the last paragraphs, the development of the claim for money had and received was not all negative. One positive aspect was the continuation in the expansion of the situations in which the law would impose an obligation upon the recipient of money to repay the value of that money. As Professor Ames observed, "[a]lthough Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action". Given the history of Indebitatus Assumpsit it may not be surprising that this expansion arose through the use of further fictions — this time it was the turn of the "debt" — i.e. the underlying obligation to account or repay. As Professor Birks observes:

"the circumstances which would make a man a constructive receiver to the plaintiff's use were multiplied so that, whenever the facts were such that the law held that a man ought to give up a payment, he was said, whatever his actual intention, to have received on behalf of the plaintiff. These constructive receivers were not only unappointed but also unaware of receiving other than to their own use. . . [T]he result of this extension [can be seen] in the generalisation achieved in Moses v Macferlan."  

It will be recalled that in that case Lord Mansfield considered that the law implies the debt so as to facilitate the bringing of the claim for money had and received if the defendant was, "under an obligation, from the ties of natural justice, to refund" the money. Examples given by Lord Mansfield as to circumstances in which such an obligation would arise were:

"money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances."

A significant aspect of this expansion is that the action is becoming available (i.e. the "debt" is being implied) so as to provide a remedy in contractual situations, for instance where there had been a total failure of consideration; a situation which is quite different from the earlier "accounting" situations.

33 An expansion which has continued in the 20th century, two recent examples being the use of the claim for money had and received to recover money paid pursuant to an ultra vires tax regulation — Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2) [1992] 3 WLR 366 (HL), and the recovery of money paid pursuant to a causative as opposed to a fundamental mistake — Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd [1980] 1 QB 677. See also the judgment of Hobhouse J and Dillon LJ in Westdeutsche Landesbank Girozentrale v Islington LBC (1993) 91 LGR 323 and [1994] 1 WLR 938 (CA) respectively, in respect to the development of the idea of recovery for absence of consideration as opposed to a total failure of consideration.  
35 Birks, supra n5 at 78-80.  
36 Moses v Macferlan (1760) 2 Burr 1005; 97 ER 678 at 1008, 678.  
37 Idem.
The implied contract theory

Confronted with both an expansion in the situations in which money had and received was becoming available and a fear that Lord Mansfield was introducing to English law, that "vague jurisprudence which is sometimes attractively styled 'justice as between man and man' ", the common law sought a rationale which would provide a theoretical foundation for the claim. In hindsight, given the claim's immediate origins, the attractiveness of "requests" for justifying the imposition of liability and the fact that the aim was to justify the imposition of liability upon the immediate recipient of the money (as opposed to subsequent recipients), it is not surprising that the "implied contract theory" was advanced during the 19th and early 20th centuries as the rationale. It will be recalled that pursuant to this theory it was considered that the claim "was in principle one which rested on a promise to pay, either actual or imputed by law". Attributed with such an underlying rationale it is not surprising that money had and received became regarded as a remedy for the recovery of money as if it were a consensually created debt. At the close of the 20th century, there is of course increasing acceptance that the underlying "rationale" for this claim is that of remedying unjust enrichment, but how many of the "assumptions" associated with the implied contract theory remain?

c) Misconceptions

One hundred and fifty years ago Messrs Bullen and Leake described the action for money had and received as "the most comprehensive of all the common counts . . . [being] applicable wherever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff'. Like all generalisations, this description captures some of the essence of the claim, for instance that the circumstances surrounding the receipt and/or retention of the money is an important aspect of the claim. Like all generalisations, however, this description is also in some respects misleading; the reference to the "rationale" of "justice and equity" borrowed from Lord Mansfield hides the fact that, reflecting its various stages of extension in availability, the claim is available in quite different situations.

The same misconception, which is present in the implied contract theory, also can occur with the "unjust enrichment" rationale. As the learned authors of Goff and Jones, The Law of Restitution remind us, "unjust

38 Baylis v Bishop of London [1913] 1 Ch 127 (CA) at 140 per Hamilton L.J.
40 Sinclair v Brougham [1914] AC 398 at 415 per Viscount Haldane LC; at 432-3 per Lord Dunedin; and at 452 per Lord Summer. A view recently confirmed by Lord Templemann in Guinness Plc v Saunders [1990] 2 AC 663.
41 Sinclair v Brougham, ibid at 414 per Viscount Haldane LC and at 433 per Lord Dunedin.
43 Bullen and Leake's Precedents of Pleading (3rd ed 1865) at 44.
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enrichment" is simply the name which is commonly given to the principle of justice which the law recognises and gives effect to in situations in which a defendant finds himself or herself in possession of a benefit which, in justice, he or she should restore to the plaintiff. A recipient of money can become unjustly enriched by the receipt of money in a variety of situations; some arise in the context of a contractual relationship — as where there has been a total failure of consideration; others arise outside such a relationship — for instance some mistaken payments and payments made pursuant to an ultra vires statutory regulation. Another way in which a recipient of money can become unjustly enriched is when he or she receives money which "belongs" to another.

A danger with the application of generalised rationales to explain the availability of the claim for money had and received is the assumption which they encourage that the claim displays the same characteristics whenever it is available. While the claim does display some common characteristics throughout its use — principally a focus upon the receipt of the money and not the retention of that money, the specific motivation for its availability in any given situation differs depending on the circumstances in which the money is received. In some situations, for instance the recovery of payments made under coercion, the courts in granting relief through this action can be seen as responding to the fact of a non-voluntary transfer; in the context of a total failure of consideration the response may be regarded as being to a fundamental breakdown in the contract. In respect to other situations, however, for instance the recovery of stolen money, the law can be seen as responding to the loss of one's money, the law protecting the plaintiff's "ownership" of his or her money.

It is in the context of protecting one's ownership of money that the claim for money had and received has the potential to confer preferential recovery in the context of an insolvency. Take an example where the plaintiff's ownership is recognised — the recovery of stolen money. The thief of your $100.00 bank note (serial number AC094856) does not become the owner of it; it is still your bank note and you can assert your ownership rights to that bank note against him or her. Your ownership of that bank note may also survive its physical transfer to another and in situations in which it does survive, you can assert your ownership against that recipient. In protecting one's ownership of money, the claim for money had and received becomes available, therefore, against all the recipients of that money until

44 Supra n2 at 12.
45 ROWLAND v DIVALL [1923] 2 KB 500.
46 BARCLAYS BANK LTD v W J SIMMS, SON & COOKE (SOUTHERN) LTD, supra n33.
47 WOOLWICH EQUITABLE BUILDING SOCIETY v INLAND REVENUE COMMISSIONERS (NO 2), supra n33.
48 LIPKIN GORMAN v KARPNALE LTD, supra n42.
49 See generally AGIP (AFRICA) LTD v JACKSON [1992] 4 All ER 451 (CA) at 463-4 per Fox LJ. See also MARTIN v PONT, supra n42.
50 While a bank note is a specific piece of property capable of ownership, it is also currency. As such it constitutes an exception to the nemo dat rule; ownership will pass to a recipient who receives it "fairly and honestly upon a valuable and bona fide consideration". MILLER v RACE (1758) 1 Burr 452, 97 ER 398 at 457-8; 401 per Lord Mansfield.
such time as ownership transfers to another. In essence, the plaintiff owner of the money has a choice of defendant(s).

A classic example of this ability to sue subsequent recipients of one’s money is provided by *Clarke v Shee and Johnston*. In that case the plaintiff’s clerk had received money for which he was liable to account to the plaintiff. Instead of so accounting, however, the clerk used some of the money to purchase lottery tickets from the defendants. As Lord Mansfield observed, “the money and notes which [the clerk] paid to the defendants [were] the identical notes and money of the plaintiff”. Having identified his money as having been received by the defendant, the plaintiff was able to successfully bring an action for money had and received against them.

It is a combination of the ability to bring this claim against all recipients of one’s money and the fact that liability arises from the receipt and not the retention of that money, which provides the means by which the common law can confer preferential recovery in the context of an insolvency. Indeed, in some respects, this claim, with its focus on the receipt of money, may be able to confer a more effective remedy than some equitable proprietary remedies. While a change of position defence may be available to the innocent recipient of another’s money, his or her potential liability must be contrasted with that of the innocent recipient of trust money who may only be liable to repay the value of the money remaining, the onus being on the plaintiff to show continued retention of that money (or its product).

2 Examples of preferential recovery

*Lipkin Gorman v Karpnale Ltd* provides modern judicial support, at the highest level, for the use of the claim for money had and received against subsequent recipients of one’s money, so as to avoid the consequences of the immediate recipient’s insolvency. This case involved a claim by the plaintiff firm of solicitors to recover money which had been misappropriated from its client account by one of its partners (one Cass) and unsuccessfully gambled by him at the defendant club. By being able to

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51 As Professor Goode in “The Right to Trace and its Impact in Commercial Transactions”, supra n6 at 369-370, has explained: “Each movement of the asset from one recipient to another . . . brings into existence a distinct personal right of [the owner]; and since the recipient, having once incurred a personal duty by his receipt of the asset, cannot thereafter shuffle it off by a dealing inconsistent with [the owner’s] rights but on the contrary will infringe such rights by that dealing, it follows that [the owner’s] . . . rights against the successive recipients are not alternative but cumulative.”

52 (1774) 1 Cowp 197; 98 ER 1041.

53 While the defendant gave “value” for this money by issuing the lottery tickets, this value did not constitute good consideration; the transaction being contrary to the Lottery Act 1772.

54 *Clarke v Shee and Johnston*, supra n52 at 200; 1043.

55 A common law change of position defence was recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd*, supra n42. See also s 94B Judicature Act 1908 for a statutory change of position defence.


57 Supra n42. See also *Banque Belge Pour L’Etranger v Hambrouck* [1921] 1 KB 321 (CA).
trace “their” money from the bank’s chose in action, through the hands of Cass, to the defendant club, the plaintiffs were able to transform what was a worthless personal remedy against the now insolvent Cass into a valuable personal remedy against the solvent defendant club.

What if the immediate recipient has retained the money and becomes insolvent? In this situation it may be possible to regard the Official Assignee (or equivalent) as the subsequent recipient. As Messrs Khurshid and Matthews have observed:

“If A’s property is in B’s hands and B goes bankrupt, title does not pass to B’s trustee in bankruptcy. If the trustee nevertheless gets hold of it he can be sued personally . . . so that he must either return the chattel or pay full damages. Thus a result akin to priority in bankruptcy is achieved by using common law actions.”

Judicial support for use of money had and received against the Official Assignee is provided by Scott v Surman. As Mr Michael Scott has observed, the plaintiffs in that case “were able to recover the money . . . in full as against the general credits of [the insolvent], which is the object of a claim in rem in equity. They obtained this object . . . by a direct claim against the assignees in their personal capacity, because in their representative capacity they had no right to keep the money”. In that case, Jonathan Scott and Francis Richardson consigned a quantity of tar to their agent — Richard Scott (Jonathan’s brother). Richard sold the tar, receiving in return two promissory notes and the discharge of his own debt to the purchaser. Richard then became bankrupt and the defendant assignees received both the money due on the promissory notes and a bounty paid by the government for the tar’s importation. The plaintiffs successfully brought a claim for money had and received against the defendant assignees in respect of the money derived from the promissory notes and the bounty which they had received. As Willes CJ observed in delivering the judgment of the Court:

58 Khurshid and Matthews, “Tracing Confusion”, supra n2 at 78. To a similar effect Mr Pearce, “A Tracing Paper” (1976) 40 Conv 277 at 284, observed: “It is true that the common law remedy is only personal, an obligation to pay damages, but this limitation has not resulted in any reluctance to follow property. The right remains proprietary. The limitation has resulted merely in an inability to compel the return of the property in specie. . . . In any case, an order to pay damages is a remedy little less efficacious than equity’s declaration of charge. This is so even on bankruptcy, for the remedy of damages is available against the trustee in bankruptcy personally, and so is not subject to abatement, if by tracing it can be shown that he wrongly took property which belonged, at law, to the claimant.”

59 (1742) Willes 400; 125 ER 1235. See also Whitecomb v Jacob (1711) 1 Salk 160 91 ER 149.

60 Michael Scott, “The Right to Trace at Common Law” [1965-66] WALR 463 at 482. For a contrary view see Mr Cuthbertson, “Tracing at Common Law — Myth or Reality?” (1968) 8 UWALR 204, who suggests that a plaintiff should only be able to sue the Official Assignee (or equivalent) in his representative capacity as otherwise this would prejudice the other creditors.

61 Because this money could be identified as directly attributable to the promissory notes and the bounty, which in turn were directly attributable to the importation and sale of the tar, the plaintiffs could substitute their proprietary interest in the tar for the money received by the defendants.
"The general rule is that if a man receives money which ought to be paid to another or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received. . . . To apply this general rule to the present case. The assignees having received this money which belongs to the plaintiffs and ought not to be applied to pay the bankrupt's debts, and they ought to have paid it to the plaintiffs, and not having done so, this action will lie against them for so much money had and received to the use of the plaintiffs."

If personal recovery against the Official Assignee (or equivalent) could only be achieved by showing that he or she had received the plaintiff's money, such recovery would be rare. Because we usually value a bank note or coin for the "purchasing power in terms of commodities" which it represents, one's possession of money is usually short lived; within a short time of its receipt, a bank note or coin will be either exchanged for goods or services or deposited in a bank and thereby exchanged into a *chose in action*. In responding to this factor the common law, as displayed in *Scott v Surman*, has employed tracing rules to show that a proprietary interest originally in one asset (i.e. a bank note) now resides in another asset. Assume for example that I steal your money and use it to buy a car. While you may no longer have legal title to the money — it may now legally belong to the car vendor — nevertheless, you may be able to claim "ownership" of the car. If you can, the claims of conversion and detinue are potentially available to you to protect and recover that interest against me or any other person (for instance the Official Assignee) who asserts an interest in the car contrary to your interest.

*Taylor v Plumer* provides the classic exposition of the common law's approach to tracing into a substitute asset. In that case, the defendant authorised his stockbroker (one Walsh) to uplift funds from his bank and invest those funds in the purchase of Exchequer Bills. Contrary to these instructions and with the aim of facilitating his flight from the country, Welsh used some of these funds to acquire some American shares and stock. He also exchanged part of these funds for notes of smaller denomination and using some of these replacement notes, purchased a quantity of bullion. Before Walsh could leave the country, however, he was located by the defendant's attorney and surrendered to him the shares, stock and bullion. The plaintiffs, as Walsh's assignees in bankruptcy, then unsuccessfully commenced proceedings in trover against the defendant in respect of these shares, stock and bullion. The court held that as the defendant could trace his money into these chattels, he had a better right to them than the plaintiffs. As Lord Ellenborough CJ observed:

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62 *Scott v Surman*, supra n59 at 403-405; 1237-8 per Willes CJ.
63 *Banco de Portugal v Waterloo & Sons* [1932] AC 452 at 508 per Lord Macmillan.
64 Although money "appears in the function of a mere instrument for measuring the value of individual parts of wealth . . . [it] also appears in a second and higher function, viz. it embraces the value itself which is measured by it". Savigny, *Obligationenrecht* i at 405 cited by Dr F A Mann, *The Legal Aspects of Money* (5th ed 1992) 28.
65 (1815) 3 M & S 562; 105 ER 721.
“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, ... or into other merchandize, ... for the product of or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail ...”

As shown by these examples, the claim for money had and received does have the potential to confer preferential recovery in an insolvency situation. This potential is dependent, however, upon the ability to both initially assert “ownership” in the money and trace that money into a substitute product and/or to a subsequent recipient, who has not obtained ownership of that money (or in the case of a substitute product, ownership of that product). So, to adopt the words of Lord Ellenborough, when does the means of ascertainment fail? The traditional answer, unfortunately, has been quite often. In comparison to the “modern” equitable tracing rules and presumptions, the common law has continued a conservative approach.

III TRACING AT COMMON LAW

The conservative approach of the common law is displayed by three important limitations which it has imposed on itself, or which it has been suggested the common law should impose upon itself. Although one of these limitations no longer applies, their combined effect has been to encourage a belief that the ability of the claim for money had and received to confer preferential recovery is very limited.

1 The limitations

a) Admixture of money

As Lord Greene MR observed in *Re Diplock*, the common law approaches tracing “in a strictly materialistic way”. Applying what has been referred to as an “exchange-product” theory of tracing, the common law has adopted the requirement that there has to be evidence of a direct substitution of one asset for another; only in such cases would it regard the new asset as belonging to the plaintiff. In the context of tracing money, this prerequisite means that the right to trace is lost once the plaintiff’s money is mixed with any other money or mixed in the purchase of another asset. As was noted by Lord Ellenborough in *Taylor v Plumer*:

66 Ibid at 575; 726.
67 [1948] 1 Ch 465 at 518.
68 As Messrs Khurshid and Matthews, “Tracing Confusion”, supra n2 at 79 observe, pursuant to this theory, “where A owns property which B without authority exchanges for cash or other property from C, A can claim that cash or property (the ‘exchange product’) ...”.
“[T]he right [to trace] only ceases when the means of ascertainment fail, which is the case when . . . money [is] mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguished mass of current money.” 69

Although Professor Birks has suggested that in the situation of physical mixture of money, “each coin continues in its original ownership”, it is, as he recognises, “impossible to know which coins belong to which contributor”. 70 Being unable to trace out of this mixed fund, the plaintiff is restricted by the common law to a claim for money had and received, for the value of the money so mixed. 71 The significance of this limitation becomes apparent when one recalls that, while it is tempting to equate money with bank notes and/or coins, in today's society the greatest store of money (or purchasing power) is represented by intangible property — the chose in action — representing bank accounts in which we “deposit” our money. 72

A characteristic of a bank account is that “money” is continually being deposited — or mixed. While this limitation does not prevent money had and received being brought against the owner of that bank account, it effectively prevents proceedings against subsequent recipients (including the Official Assignee). 73 This restriction should be contrasted with the approach of equity and its development of the charge.

b) Deposit into a bank account

Given the common law's reluctance to trace money once mixed, it is not surprising that it would not trace into a bank account in which other money had been deposited. What is surprising is that until the middle of this century, it was uncertain whether the common law could trace into a bank account in which only the rightful owner's money had been deposited. The problem encountered by the common law appears to have been the effective transfer of ownership to the bank inherent in the process of depositing the money — the money effectively being sold by the depositor to the bank in return for the bank's promise to pay him or her an equivalent amount of money. The bank's promise to repay, however, can

69 Supra n65 at 575; 726.
70 Peter Birks, “Mixing and Tracing” (1992) 45 CLP 69 at 79.
71 A similar result follows if the plaintiff's money is mixed with that of another's in the purchase of an asset.
72 Re Diplock, supra n67 at 521-2.
73 Jackson v Anderson (1811) 4 Taunt 23; 128 ER 235, however, suggests that if a plaintiff's money is mixed in a bank account and another person receives all the “money” in that account, the plaintiff can trace his or her “money” to that recipient. The plaintiff's agent had consigned to his principal 1969 Spanish Dollars (which belonged to the plaintiff). It appears that these coins had been mixed with a quantity of other Spanish Dollars belonging to the defendant who innocently exchanged all the coins for English pounds. Mansfield CJ held that the intermixture had no effect on the defendant's liability in trover — having disposed of all the dollars, the defendant had disposed of those belonging to the plaintiff.
be regarded as a substitute asset purchased by the money and in *Re Diplock*\(^74\) the English Court of Appeal confirmed the views of Atkin LJ in *Banque Belge v Hambrouck*\(^75\) that it was possible to trace into and through an unmixed bank account.

c) Electronic transfer

Another important limitation in common law tracing has recently been suggested. In *Agip (Africa) Ltd v Jackson* Millet J suggested that the common law “can only follow a physical asset, such as a cheque or its proceeds, from one person to another”,\(^76\) and is unable to trace transfers of money where that transfer has been implemented by “a stream of electrons”, for instance by telegraphic transfer.\(^77\) A moment's reflection will reveal the significance of this limitation in modern banking conditions. Just as the *chose in action* against a bank reflects the greatest store of one's money (as opposed to total wealth), the transfer of money between parties is represented, not through the transfer of bank notes and coins, but through the transfer of the *chose in action* (or part thereof); increasingly an electronic process. If this suggestion of Millet J is adopted, it may effectively destroy the ability to trace money (in its wide sense) at common law.

2 *An evaluation of the limitations to common law tracing*

a) Why did the common law recognise the ability to trace?

An examination of the reasons why the common law recognised the right to trace is an unusual starting point for an evaluation of the limitations. It is important to do so, however, so as to challenge the argument that tracing at common law is contrary to common law ideas; an argument which may influence how we view the limitations. Is tracing contrary to common law ideas? In discussing one of the classic common law tracing cases — *Taylor v Plumer*,\(^78\) Professor Lawson, for instance, suggests that it is, observing:

> "[Taylor v Plumer] is clearly a pretty odd piece of law . . . . [I]t is obviously a fiction to say that what my agent has in breach of faith bought with my money is mine. According to all ordinary common law ideas it should be his and I should only have a personal action against him, that is to say, I should only be able to prove in his bankruptcy for its value. Nowhere else does the common law treat a fund as a single entity, which can be recovered as such."\(^79\)

What was happening in the common law tracing cases such as *Taylor v Plumer*? I suggest that either the 19th century common law judges must have perceived a pressing need to depart from orthodox common law prin-

\(^74\) Supra n67 at 519.

\(^75\) Supra n57 at 335.

\(^76\) [1992] 4 All ER 385 at 398 per Millet J (Ch).

\(^77\) Ibid at 400-401; a view which His Honour repeated in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 733-734.

\(^78\) Supra n65.

ciples or alternatively they may have had a different view of the common law than we do. Professor Lawson adopts the earlier view by suggesting that the common law was responding to the development of bankruptcy laws, "so as to prevent the agent's misconduct from swelling the funds at the disposal of the trustee in bankruptcy". 80

The development of bankruptcy laws having universal application, and with them the recognition of the concepts of rateable distribution amongst unsecured creditors and absolution from remaining indebtedness, constituted a "revolution" at English law; indeed, until the development of the concept of absolution, an undischarged debt effectively "placed the debtor in bond to his creditor". 81 This revolution has been so successful that it is easy to forget that acceptance of these concepts, albeit grudgingly by some, only occurred in England last century; that was only in 1838, some 150 years ago, that arrest on mesne process was abolished. 82 One of the first impacts of the developing bankruptcy laws was the exclusion of certain property, for instance property which the bankrupt held on trust, from distribution amongst his or her creditors. 83 Responding to the bankruptcy regimes, the courts of Equity developed the concept of tracing so as to protect equitable proprietary interests and it can be argued that the common law, concerned to safeguard the principal against an agent's insolvency, did likewise.

But was this response at the expense of common law principles? Support for the argument that it wasn't is provided by the extended ideas of ownership associated with the writ of Account. It will be recalled that the principal-agent situation was one of the core situations in which that writ had been available. Indeed, the 19th century judges, more familiar with the ideas underlying the writ of Account and the fictions associated with the claim for money had and received than we are, may not have regarded the use of tracing rules as being contrary to common law ideas but saw themselves as simply developing existing ideas so as to respond to the impact of the developing bankruptcy laws.

b) The adoption of equitable tracing rules

What is particularly interesting about the common law's response to the development of the bankruptcy rules is that it adopted the then equitable tracing rules. This process is apparent in Scott v Surman. 84 It will

80 Idem.
82 1 & 2 Vict, cl00.
83 Vandekenker v Desbrough (1689) 2 Vern 96; 23 ER 671 provides an early example of the judicial recognition that trust property was not available for distribution among an insolvent trustee's creditors.
84 Supra n59. See also Taylor v Plumer, supra 65 for further evidence of the common law's absorption of the equitable tracing rules.
be recalled that that case concerned the sale of imported tar by an agent. The agent subsequently became bankrupt and his assignees received the proceeds of two promissory notes (being part of the purchase price) and a bounty paid by the government. In holding that the principals could recover this money, Lord Willes CJ specifically noted that relief would have been available in a court of equity, observing: "whenever the equity of the case is clearly with the plaintiff, I will always endeavour if I can, and if it be any ways consistent with the rules of law, to give him relief at law."85

Whitecomb v Jacob86 is the Chancery case which supported the relief granted in Scott v Surman. What is interesting about Whitecomb v Jacob is the fact that it expressed the then prevailing view that money could only be traced into another chattel; money was regarded as having no "ear-mark" and, as such, could not be identified. In Salkeld's report of this case it is stated:

"If one employs a factor, and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c.; for, in regard that money has no ear-mark, Equity cannot follow that in behalf of him that employ'd the factor."87

This inability to identify money was also adopted by Willes CJ in Scott v Surman, who in delivering the judgment of the Court observed:

"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 any thing in this action, but must have come in as creditors . . . ".88

In the case of Taylor v Plumer,89 which was decided some 70 years later, it is apparent that the common law is continuing to obtain guidance from the Court of Chancery as to the operation of tracing rules. As Jessel MR noted in Re Hallett's Estate, Knatchbull v Hallett,90 by the time of Taylor v Plumer, Equity was willing to recognise that money could be ear-marked. In Taylor v Plumer, Lord Ellenborough, following the lead of the Court of Chancery, also recognised that money could be followed at common law; the ability to identify money only ceasing when it has been mixed with other money. As Lord Ellenborough observed:

85 Scott v Surman, supra n59 at 402; 1236.
86 Supra n59.
87 Idem.
88 Supra n59 at 403-405; 1237-8.
89 Supra n65.
90 (1880) 23 ChD 696 (CA) at 717.
"[T]he right [to trace] only ceases when the means of ascertainment fail, which is the case when . . . money [is] mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguished mass of current money."91

Since then, the common law’s approach to tracing, unlike that of equity which developed a “modern doctrine” of tracing92 pursuant to which mixed money can be identified through the use of a charge, has remained unchanged. So why has the common law continued with a conservative approach in its application of tracing rules? The apparent rationale for the inability to trace into mixed funds, that money is a fungible (it has no “ear-mark”) and therefore, once mixed with other money it cannot be identified, is puzzling. The common law has experienced no inability to develop more sophisticated rules to deal with the situation of the mixture of other fungibles, for instance corn or oil. Similarly, the common law has experienced no difficulty in creating presumptions as to the order in which money deposited into a bank account is withdrawn, so as to determine the liability of partners in a banking firm.93 Why should the common law experience a difficulty in tracing money out of a mixed bank account, so as to impose liability upon subsequent recipients?

c) A fear of too much liability?

It is submitted that the principal reason for this conservatism was in fact a fear of imposing strict liability upon subsequent recipients of the money, for the value of the money so received. As was noted earlier, the claim for money had and received, with its focus upon the receipt and not the continued retention of the money, potentially is a formidable remedy. To fulfil its function as a means of exchange, money must be able to circulate freely; if recipients fear not only that they may not acquire ownership, but that they may also face liability for their receipt of money, money would cease to function as a means of exchange. Indeed, the need to remove this fear was a significant factor in making currency an exception to the nemo dat rule.94

Similar fears apply to voluntary95 innocent recipients of money. The response of Equity in the context of innocent voluntary recipients of trust money suggests that the imposition of liability so as to recover the value of the money remaining may be appropriate in this situation. The imposition of liability for the value of the money so received, however, can be seen as being both too drastic and, if say the rule in Clayton’s Case96 is used to determine when the plaintiff’s money is withdrawn, the imposi-

91 Supra n65 at 575; 726.
92 Re Hallett’s Estate, Knatchbull v Hallett, supra n90 at 708 per Jessel MR.
93 Devaynes v Noble; Clayton’s Case (1816) 1 Mer 529; 35 ER 767.
94 See Miller v Race, supra n50 at 457; 401 per Lord Mansfield.
95 In the sense that they had not given any consideration for the money.
96 Devaynes v Noble; Clayton’s Case, supra n93.
tion of liability may be regarded as being arbitrary. In essence, the con-
servatism of the common law to tracing money can be seen as a means
to protect the voluntary recipient in a period in which there was no change
of position defence.\footnote{The concern for innocent recipients is also apparent in Lord Goff's observations in \textit{Lipkin Gorman v Karpnale Ltd}, supra n42 at 28 on tracing to the effect that "it cannot be relied upon so as to render an innocent recipient a wrongdoer". A limitation which explains why Lord Goff at 25 did not regard the claim for conversion against the gambling club as being available.}

Support for the submission, that underlying the common law's conser-
vatism, is a fear of imposing absolute liability on innocent recipients, is
contained within the judgment of Millet J in \textit{Agip (Africa) Ltd v Jackson}.\footnote{Supra n76.} In attempting to limit the significance of the decision of the Court of Appeal in \textit{Banque Belge Pour L'Etanger v Hambrouck}\footnote{Supra n57.} his Honour suggested:

\begin{quote}
"[That case] is no authority for the proposition that [money had and received] lies
against a subsequent transferee who has parted with the money, and I doubt that
it does. At this remove the action begins to take on the aspect of a proprietary claim
rather than the enforcement of a personal right to account. Should it be sought to
impose personal liability on a person who has parted with the money, recourse can
be made to equity, which has developed appropriate principles by which such lia-

ability can be determined. The alternative is to expose an innocent transferee who has
dissipated the money to a claim at law where none would exist in equity and to make
that liability depend on the fortuitous circumstances that the money had not been
mixed with other money prior to its receipt by him."\footnote{Agip (Africa) Ltd v Jackson, supra n76 at 400 per Millet J. Concern for imposing strict common law liability upon third parties may also, as Professor Birks has suggested, underlie the suggestion by Millet J that the common law could not trace a telegraphic transfer. Professor Birks suggests that this limitation "is barely intelligible except as part of a concerted attack on the strict common law liability". "Misdirected Funds: restitution from the recipient" \cite{Birks1989} 3 LMCLQ 296 at 340.}
\end{quote}

It was suggested earlier that the common law judges had sourced its
tracing rules from the Court of Chancery. If so, the subsequent expan-
sion of equity may provide a further explanation for why the judges didn't
develop further the common law's approach to tracing; in essence, the
judges may have perceived no need to do so. It is easy to forget that the
fiduciary relationship, long regarded as a prerequisite to the availability
of equitable "proprietary" remedies,\footnote{In \textit{re Diplock}, supra n67 at 540, the English Court of Appeal held that the House of Lords in \textit{Sinclair v Brougham}, supra n40, had held that an initial fiduciary relationship is necessary before property can be followed in equity. But see \textit{Elders Pastoral Ltd v Bank of New Zealand} [1989] 2 NZLR 180 (CA) and \textit{Re Goldcorp Exchange} [1994] 3 WLR 199 (PC).} originally constituted an expansion
of the situations in which equity would provide such relief.\(^3\) With this expansion, however, equity could provide relief in the principal and agent relationship, the core relationship with which the common law had been concerned.\(^4\)

d) \textit{Lipkin Gorman v Karpnale Ltd}

Against this background the recent decision of the House of Lords in \textit{Lipkin Gorman v Karpnale Ltd}\(^5\) is significant. One reason for its significance is their Lordship's recognition of the availability of a change of position defence at common law. The recognition of this defence is important because, as Lord Goff observed, it enables a court to give relief to those innocent recipients of the money, "whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full".\(^6\)

The recognition of this defence is also important for allowing the development of the action. As Lord Goff also observed, "the recognition of . . . [this] defence . . . will enable a more generous approach to be taken to the recognition of the right to restitution . . . ."\(^7\) Indeed, this "more generous approach" is apparent in their Lordships' willingness to recognise a more expansive approach to tracing at common law than the orthodox legal approach would suggest is possible.

It will be recalled that in that case, a dishonest partner had withdrawn cash from Lipkin Gorman's client account for the purpose of continuing his gambling. Applying two earlier decisions of the Privy Council,\(^8\) Lord Goff held that the dishonest partner became the legal owner of the cash on its withdrawal from the bank. Irrespective of this finding, however, Lipkin Gorman was successful in its claim against the recipient gambling club. The puzzling aspect of this decision is that if the cash legally belonged to the dishonest partner, how could it also legally "belong" to Lipkin Gorman so as to provide the foundation for this action? While recognising that Lipkin Gorman had to establish a basis on which it was entitled to this money, Lord Goff was of the opinion that to do so, it did not have to show that the money was its legal property; it was only "a general rule" that the necessary basis could be so established.\(^9\) The neces-

\(^3\) See Birks, supra n5 at 381.

\(^4\) A moment's reflection reveals the success of Equity's expansion; the principal and agent relationship has now become the paragon example of a fiduciary relationship. As Messrs Khurshid and Matthews have observed, "[t]he problem [with dishonest agents] [i]s fairly and squarely within equity's general jurisdiction over fiduciaries". Khurshid and Matthews, "Tracing Confusion", supra n2 at 81.

\(^5\) Supra n42.

\(^6\) Ibid at 34 per Lord Goff. As Lord Goff also observed at that page, this defence is "not open to one who has changed his position in bad faith" and "should not be open to a wrongdoer".

\(^7\) Ibid at 35.


\(^9\) Supra n42 at 27.
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sary proprietary base in this case was held to be the original *chose in action* between the solicitors and their bank.\(^{10}\) In essence, Lipkin Gorman could trace their interest in the *chose in action* into some sort of interest in the money which legally belonged to the dishonest partner and which he "gave" to the defendant club.\(^{11}\)

e) The future for common law tracing

So what is the future for common law tracing? One option is for the common law to simply adopt the "modern" equitable tracing rules. As we have seen, the courts of common law have previously adopted equitable tracing rules and there is also some judicial support for the continuation of such an approach.\(^{12}\) Adoption of these rules would, of course, extinguish the limitations considered earlier. In particular, the concept of a charge over a fund and the presumptions as to the distribution of money from a mixed fund would facilitate the tracing of money in and out of a mixed bank account. While such an approach does have attractions, it is submitted that *Lipkin Gorman v Karpnale Ltd*\(^{13}\) is inconsistent with it. In that case, their Lordships clearly saw themselves as dealing with a legal remedy with its own approach to tracing, albeit an approach which is wider than had been considered.

There are also policy arguments against the adoption of the "modern" equitable rules and presumptions. When considering these rules and presumptions, it must be remembered that they were developed principally in the context of disputes between the beneficiaries and the general creditors of an insolvent dishonest trustee; a context in which Equity's sympathy clearly lies with the beneficiary. Confronted with the problem of receipt of (trust) money by an innocent voluntary recipient, Equity has responded, not only by adopting the general approach that a plaintiff can only recover to the extent that he or she can identify their money as remaining in the possession of that recipient,\(^{14}\) but by applying the rules and presumptions

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10 Ibid at 29.

11 A recent case displaying a similar judicial approach in focusing upon the "reality" of the situation is *Agip (Africa) Ltd v Jackson*, supra n49. In that case money misappropriated through the medium of forged payment orders drawn on the plaintiff's bank were held to be the plaintiff's money, Fox LJ observing at 462: "In practical terms [the bank] paid with Agip's money . . . . [T]he substance of the matter is that money standing to the credit of Agip's account was paid to a third party . . . . The reality is a payment by the customer . . . ." See also *Reid v Rigby & Co* [1894] 2 QB40, in which, notwithstanding a finding that the defendant's manager had borrowed money from the plaintiff for his own purpose in replacing money belonging to the defendants which he had abstracted, this borrowed money being deposited into the defendant's bank account, it was held that the plaintiff could bring a claim for money had and received against the defendants.

12 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (CA) at 1282 per Denning MR.

13 Supra n42.

14 But see *In re Diplock*, supra n67 in which it was held that an innocent voluntary recipient of money may become personally liable in Equity to refund money which that person had received as a result of a mistaken distribution by an executor.
in such a way so as to inhibit the plaintiff from identifying property in that recipient's possession as "belonging" to him or her; property which factually can be seen as being derived from that money (or into which that money has gone).\textsuperscript{15} Although \textit{Lipkin Gorman v Karpnale Ltd} does provide evidence that the common law is also willing to develop presumptions in favour of innocent recipients,\textsuperscript{16} the general approach of Equity is unavailable to it. As will be recalled, the claim for money had and received imposes liability for the receipt, not the retention, of the money. While a change of position defence is now available, it must be remembered that this defence places the onus on the defendant to show that he or she did in fact change their position in reliance on the receipt of the money.

If the common law is not to adopt the "modern" tracing rules where does this leave the limitations considered earlier? The common law has already recognised that there should be no limitation on its ability to trace into an unmixed bank account; that particular limitation should therefore be forgotten.

What about the position in respect to mixed bank accounts? For the reasons given above, there is an argument that, for the protection of subsequent innocent voluntary recipients, this limitation should remain. While this argument may be persuasive against the adoption of the equitable tracing rules and presumptions, it is submitted that it is less persuasive when used to support the continuation of an absolute limitation on the ability to trace into and out of a mixed bank account. An immediate difficulty with such an absolute limitation, for instance, is the protection which it may provide to wrongdoers. Take for example, the situation in which a mixed bank account is used by parties to a fraud as a device to inhibit the recovery of the money. I steal $1,000.00 of your money and deposit it into my bank account in which there is an existing credit balance of $1.00. I then transfer $1,000.00 from that account to an accomplice. Should my mixing of the money destroy any prospect of recovery from the accomplice? In such a situation, I suggest that the common law should be able to resort to the "reality" of the admixture, so as to defeat such cynical abuse. In this respect \textit{Lipkin Gorman v Karpnale Ltd} once again becomes interesting. In that case, the parties had come to an agreement as to the account of the plaintiff's "money" which the defendant had received. Assuming that the dishonest partner had probably mixed at least some of this money with his own (if even just in his pocket or wallet) one wonders whether in the absence of his agreement the House of Lords would have still found for the plaintiff? I would suggest yes. Factually, Cass must have gambled and lost the plaintiff's money to the defendant club. \textit{Lipkin Gorman v Karpnale Ltd} is also important for confirming that the avail-

\textsuperscript{15} A classic example of this is \textit{In re Diplock}, supra n67.

\textsuperscript{16} In that case Lord Goff suggested that tracing "cannot be relied upon so as to render an innocent recipient a wrongdoer". This rule would protect the innocent recipient of money from actions for conversion while ensuring that the change of position defence is available. Supra n42 at 27-28.
Recovery of Money

ability of the claim against subsequent recipients is founded on the fact that “for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money”.17

For these reasons, an absolute limitation on the ability to trace out of a mixed bank account appears inappropriate. Given the claim's general rationale for restoring what would otherwise constitute an unjust enrichment and the fear against the imposition of arbitrary liability upon innocent third parties, in what situations should the law be able to trace out of a mixed bank account? I would suggest there are two principal situations in which this should be available.

The first situation is when the third party is the Official Assignee (or equivalent). With the aim of placating my creditors, I steal $100,000.00 from you. I deposit this money into my bank account in which I have a credit balance of $100.00. Before I can pay my creditors, however, I become bankrupt. Should you be defeated from receiving preferential recovery simply because of this admixture? Even if I had dissipated $25,000.00 of the money, should not preferential recovery for the remaining $75,000.00 be available? In contrast to the trust situation, which may justify the use of presumptions aimed at identifying money which remains in a mixed bank account as representing trust property, in this situation, the focus may be on the reality of the situation — factually could any of the plaintiff's “money” have survived in that account?18 Support for such an extension comes from the fact that the early common law tracing cases demonstrate a policy decision in favour of preferential treatment for the “owners” of property wrongly transformed into other property, as against the general unsecured creditor.

The second situation would be in respect to the cynical use of the mixed bank account so as to facilitate fraud. Again, in this situation, an emphasis on the “reality” of the situation, tempered by proof of wrongdoing, may be appropriate.

What about the limitation as suggested by Millett J on the ability to trace money transferred by electronic transfers of money? As was noted above, in suggesting this limitation, Millett J was concerned as to the imposition of absolute liability upon subsequent recipients. Given the protection accorded by the change of position defence and the restrictions on the ability to trace out of a mixed bank account suggested above, it is respectfully suggested that this limitation should not be accepted. It is just a means of transfer and, as such, it is submitted that it should have no detrimental effect on the ability to trace.

17 Ibid at 27 per Lord Goff.
18 While it is tempting to use the rule in Clayton's Case, supra n91, the concern must be for its arbitrariness — see Barlow Clowes International Ltd (In Liquidation) v Vaughan [1992] 4 All ER 22 (CA) and Re Registered Securities Ltd [1991] 1 NZLR 545 (CA). The use of the “rolling charge” may be possible but the practicalities of the situation must also be recognised — see Barlow Clowes International Ltd (In Liquidation) v Vaughan.
IV The Future

The claim for money had and received is a fascinating remedy. Its form suggests that it is designed to facilitate the recovery of money as if it were debt. This association with the recovery of debts is not only reinforced by the implied contract theory but the debt takes on a contractual flavour. Given both this association and contractual flavour, it is not surprising that claims for preferential recovery can meet some scepticism. As has been seen, however, money had and received is not really about the recovery of consensually created debts. Described using modern concepts, the claim is about the restoration of what would otherwise constitute an unjust enrichment. As such, and in hindsight, the claim can be seen as developing over the centuries in response to changing societal and judicial views as to what circumstances the retention of money constitutes an unjust enrichment.

Over this period, the focus of expansion has been on imposing liability upon the initial recipient of the money. In the 1990s, however, while the expansion of immediate liability continues, attention is increasingly being directed at the issues raised in insolvencies. The basic concept underlying our insolvency laws, the pro rata distribution of unsecured assets amongst the insolvent's general creditors, is increasingly being challenged. Where does this leave the claim for money had and received?

In some situations, the defendant's unjust enrichment does arise because of his or her receipt of the plaintiff's money. The thief or finder of one's money provide classic examples in which the action is specifically responding to protect ownership rights. In such situations, the claim has the ability to confer preferential treatment. Admittedly, this preferential treatment is subject to the vagaries of the traditional common law approach to tracing, but in the post Lipkin Gorman period there are strong arguments for acknowledging that the common law can take, and indeed does take, a more robust view to tracing than it has previously been attributed with.

The expansion of the ability to trace money at common law, as has been suggested, would extend the potential of the claim for money had and received so as to confer preferential recovery in the context of an insolvency. There may remain, however, one significant limitation. As has been noted earlier, the ability of the common law to confer preferential recovery is premised upon the plaintiff asserting ownership to money received by the defendant. Once the plaintiff is deprived of his or her legal ownership, for instance by the operation of the currency exception to the nemo dat rule, the ability to bring this action against subsequent recipients ceases. If the immediate recipient can acquire title pursuant to the process by which he or she acquires the money from the plaintiff, then the action is automatically unavailable against subsequent recipients (including the Official Assignee) with the result that the ability to confer preferential recovery is nullified.

The example given at the commencement of the article — the theft of money — provides a strong example in which the common law recognises that ownership does not pass to the thief. What about other situations, for instance, the much more common situation in which the plaintiff has
paid the money to the defendant? Is preferential recovery available in such situations? The orthodox answer must be that the common law appears reluctant to find that ownership remains with the plaintiff. As Mr Burrows has observed, the common law has developed “technical” rules to determine the transfer of title to money; rules which he observes “are difficult to relate to intuitive morality”. The result is that it appears that only in “a limited number of [such] cases does the property in the money not pass to the payee”. An example given by Mr Burrows of a situation in which title does not pass is that of a fundamental mistake. He compares this with a causative mistake in which he suggests title does pass.

Should the nature of the mistake be so significant? Acting under the influence of a non-fundamental mistake, but nevertheless one sufficiently causative so as to justify restitutionary relief against the immediate recipient, you pay me $100.00. The money is still in the envelope in which you gave it to me when I became insolvent. Why shouldn’t you be able to trace this money into the possession of the Official Assignee and bring a claim for money had and received against him or her?

In this respect, the claim’s inheritance from the writ of Account becomes important and challenges the orthodox view of legal rights to money. Perhaps it is appropriate for the legal profession to reconsider Lord Dunedin’s observations in *Sinclair v Brougham*, as to the claim for money had and received, His Lordship observing:

“Now I think it is clear that all ideas of natural justice are against allowing A to keep the property of B, which has somehow got into A’s possession without any intention on the part of B to make a gift to A. Where there is contract the solution is according to the contract, or you might say the position truly does not arise. Such are the cases of a bailment of a chattel or of a loan of money. But there are many cases where the position does arise and where there is no contract.

The case of a chattel is easy: A shopkeeper delivers an article at the house of B in mistake for the house of A. An action would lie against B for restitution. Such an action could easily be founded on the right of property . . . . But the moment you come to deal with . . . a fungible, and especially when you deal with money, then the *jus in re* may disappear, and with it the appropriateness of such common law action. The familiar case is the paying of money by A to B under the mistaken impression in fact that a debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action of money had and received.

I think one cannot help feeling that this action was truly the putting of an equitable doctrine under a legal form. I am using the word equitable in a non-technical sense, for I am not suggesting for a moment that the action was borrowed from technical equity . . . . What concerns my view, however, is only this, that it is a con-

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21 Although some of Lord Dunedin’s views were regarded with suspicion by the English Court of Appeal in *Re Diplock*, supra n67 at 520, as Goulding J observed in *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd* [1981] Ch 105 at 119, that Court’s concerns appear to have been directed at any suggestion that a “tracing remedy could be applied wherever the defendant could be shown to have got an unjust enrichment, a superfluity as Lord Dunedin called it”.
22 A right of property valid as against the whole world.
trivance which is introduced to meet an equitable idea, which idea is a wider idea than that expressed by the proposition that where there is a *jus in re* an action will lie, and where there is not a *jus* it will not. This follows from the undoubted fact that where money is in question under modern conditions (by which I mean not put into bags or a stocking) there will never be a *jus in re*, there can at most be only a *jus ad rem* . . . .

Now, that there is an obligation to restore, binding the defendant to pay in an action for money had and received, does not, I think, admit of doubt . . . .

Both an action founded on a *jus in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.”

Immediate support for the recognition of wider legal interests in money is provided by cases such as *Scott v Surman* and *Clarke v Shee and Johnston* (in which the defendant or the agent received the money from a third party and the plaintiff’s “ownership” of this money was derived from his relationship with the agent — the plaintiff never “owned” the money prior to its receipt by the defendant or agent), and *Taylor v Plumer* and *Lipkin Gorman v Karpnale Ltd* (in which the plaintiff’s “ownership” was derived from their ownership of the bank account from which the money ultimately received by the defendant was sourced).

Re-embracing extended ideas of ownership does not mean that preferential recovery is automatically available. Just as the claim for money had and received is not about the recovery of consensually created debts, it is also not just about the recovery of one’s property; the action has extended its coverage too far to be so described. Lord Dunedin, for example, in the above extract, excluded the contractual situation from his discussion of the proprietary aspect of the action. It also does not mean that preferential recovery should be available outside the insolvency situation or be for any more than the value of the money so received.

Irrespective of whether such extended ideas of legal ownership are re-embraced, the claim for money had and received does have significant potential for the recovery of money in the context of an insolvency. We forget it at our peril.

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23 As Professor Sutton describes it — “a right, as between the principal and the agent (and, if the agent is bankrupt, his assignee) to treat the property as his own, even though he may have no general right of property valid as against the whole world.” “Tracing,” supra n78 at 71-2.
24 Supra n40 at 431-433.
25 Supra n59.
26 Supra n52.
27 Supra n65.
28 Supra n42.