RE DIPLOCK—A REAPPRAISAL.

In the years that have elapsed since the decision of the Court of Appeal in *Re Diplock*[1] and, with regard to the action in personam, its affirmation by the House of Lords in *Ministry of Health v. Simpson*,[2] the rules laid down therein appear to have been accepted with more resignation than criticism. The purpose of this article is to examine two questions. In the first place, when considering the rights of the unpaid beneficiaries to trace the trust property in rem, did the Court of Appeal apply the equitable tracing rules correctly? Secondly, in view of the fact that the House of Lords may be considered to have confined its decision, as to the action in personam, to trusts arising out of the administration of the estates of deceased persons,[3] is there any principle either of law or of equity that precludes the extension of that equitable relief to an unpaid *cestui que trust,* who derives his equitable interest from a settlement made inter vivos?

It is, perhaps, one of the major defects of a legal system, which is largely dependent upon its judiciary for the enunciation of its legal principles, that on occasions historical origins tend to become confused with and at times substituted for legal principles.[4] The likelihood of such confusion increases where there is not a periodical restatement and reappraisal of legal principles. The judiciary, as such, has every reason for refusing to lay down principles in any wider terms than are necessary for the determination of the precise issue it is called upon to decide, because the whole validity of the doctrine of precedent depends upon a thorough presentation and argument of the case by counsel. In this field of restatement and reappraisal the American RESTATEMENT[5] and CORPUS JURIS SECUNDUM have made enormous contributions and provide an aid that cannot be ignored by the Australian lawyer, be he practitioner or academic. The former work, in particular, had anticipated many of the problems that had to be considered in *Re Diplock*. Its advantage over the reported case lies in the fact that it not only states the principles involved but goes on to explain the application of those principles to a variety of situations of which it gives simple examples.

1 [1948] Ch. 465.

2 [1951] A.C. 251.

3 *Ibid.*, at 266, 273-274.

4 See MARC BLOCH; METIER D'HISTORIEN, at 7, "A quelque activité humaine que l'étude s'attache, la même erreur guette les chercheurs d'origine: de confondre une filiation avec une explication."

Where the transmission of knowledge either of facts or principles depends upon verbal communication, there is always a risk that some fact or some principle may become distorted in the process. This risk will be increased in proportion to the number of persons employed as links in the chain of transmission. It is proposed, therefore, before proceeding to an examination of the actual decision in *Re Diplock* to consider the nature of the right that was sought to be enforced and the objects of the remedies invoked for its enforcement in that case.

The Nature of the Right.

It would be a mistake to assume that, because it is said that equity in its origin acted in personam, equitable rights are mere personal rights, in the sense of not being rights in property or proprietary rights. To make such an assumption is to confuse the right with the remedies available for its enforcement. In the case of equitable interests in land at least, although the old Court of Chancery may have proceeded by way of personal pressure upon a trustee, the equitable remedy resulted in the restoration of the trust land to the purposes of his trust. Hence, it can be said of an equitable interest in land that it is a proprietary interest, which can be asserted against the whole world, with the one exception of a bona fide purchaser of a legal estate for value who has had no notice of an equitable interest. Because land is indestructible, its identification for the purpose of restoration presents little difficulty.

On the other hand chattels, by their very nature, are destructible, if at times only in the sense that they can be made physically unidentifiable by mingling them with similar chattels. However, it would not be correct to assume that the destruction, in this or any other sense, of a chattel necessarily destroys an equitable interest in it. The fact is that the equitable interest continues to exist and all that has been lost is the right to enforce it by a recaption of the chattel and its restoration to the purposes of the trust.

When dealing with equitable interests arising out of trusts of personal property, the old Court of Chancery took the view that it mattered little whether a chattel was restored to the trust in specie or whether restitution was effected in some other manner, such as the payment of money. It follows that, although the continued existence

[5] References are to the sections of the Second Edition of the RESTATEMENT OF TRUSTS (hereinafter referred to as the RESTATEMENT) promulgated in May 1959, but these do not differ from the relevant provisions of the First Edition promulgated in 1935.

of the chattel might have had some influence on the kind of relief ordered, its destruction did not preclude the granting of equitable relief. On this view the mere fact that a chattel, the subject matter of an equitable interest is destroyed, does not entail a consequential destruction of the equitable interest. Thus, it is incorrect to state, as was stated in *Re Diplock*,[6] that unless the continued existence of the property is established equity is as helpless as the common law.

For example, in equity, where a trustee has inequitably destroyed trust property, although the court cannot compel him to restore the property as such, it can compel him to make restitution by a money payment. In this respect the old courts of common law were powerless for two reasons. In the first place, they precluded themselves from recognising any interest other than the legal title of the trustee and, secondly, they laboured under the self-imposed restriction against interrogation of the actual parties to the action. In equity the problem is not, and never was, one of lack of power but one concerned with the selection of persons against whom its powers can be invoked.

It was said in *Sinclair v. Brougham,* in discussing the nature of an equitable interest, that such an interest starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, ended as so often was the case, in creating what were in effect rights of property, though not recognised as such by the common law.[7] It is submitted that this defines the true nature of an equitable interest arising under a trust of personal property.[8]

The Objects of the Remedies.

It has already been observed that, in the eyes of equity, it is not material whether a deprived beneficiary under a trust of personal property has the trust property restored for his use in specie provided that restitution is made to him in some other manner. It is, therefore, a source of error to suppose that, because the equitable tracing rules were designed to identify trust property and because the equitable action in rem sometimes leads to a restoration of the original trust chattels and their vesting in the beneficiary, the purpose of the rules and of the action is to effect such a restoration.

6 [1948] Ch. 465, at 521.

7 [1914] A.C. 398, at 441-442, *per* Lord Parker.

8 *Cf.* S.197, comment *b*, ". . . The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than a contract."

Again, it is submitted that a consideration of the equitable tracing rules, if it is divorced from a consideration of the right of action in personam, will almost inevitably lead to a misunderstanding of each and to the fallacious conclusion that the action in personam must be categorised as an anomaly, because traditionally courts of equity refused to entertain actions for damages. The equitable action in personam is not an action for damages but for *restitutio in integrum* and as such is an exemplification of the long established equity jurisdiction over trusts of personal property, under which a court of equity could order a defaulting trustee either to restore the trust property or to make restitution by the payment of its worth in money. In this context the equitable tracing rules not only enable the trust property to be identified but also help to identify those who have, without title, received and dealt with the trust property in one form or another. Once these twin functions are appreciated the problem is to decide which of the persons who have so dealt with the trust property can be compelled to make restitution in equity.

In cases where a defaulting trustee is solvent and within the jurisdiction he can be compelled to make restitution in equity. In such cases an invocation of equitable tracing rules of a complicated nature will benefit no one and may well lead to a further dissipation of trust funds to meet the legal costs of that exercise. The tracing rules become important when the defaulting trustee is not solvent and it was in this context and in the context of the administration of the estates of deceased trustees that the tracing rules originated. In the former class of cases the object was to give the deprived beneficiaries an equitable charge over the property, identified in accordance with the rules, thereby placing them in the position of secured creditors in the administration of the trustee's estate in bankruptcy. In the case of trusts arising under wills and intestacies the object of the rule was to identify the trust property and exclude it from the assets of the deceased in the hands of his personal representatives available for the payment of his non-fiduciary creditors.

Having identified the property belonging to the beneficiaries and equity, by the device of a charge, having placed the beneficiaries in the position of secured creditors, they could like any other secured creditor elect, under certain conditions, to take the property so identified.[9] The fact that they may be able to take the property in this way results from the equity jurisdiction over bankruptcy ad-

[9] Bankruptcy Act, (U.K.), 1914, Schedule 2, sec. 10; Commonwealth Bankruptcy Rules 237, 242. *Cf.* comment on S. 202 (2), *infra,* note 52.

ministrations and not directly from the equity jurisdiction over trusts of personal property.

Once it is realised that the true function of the equitable rules lies in their application to situations where there is a mixed fund which is insufficient to meet all the claims on it in full and to determine whether trust funds were improperly introduced into that fund, it will be appreciated that the nature and the situation of the mixed fund have no relevance. The interpolation of such considerations only serves to confuse the issue and to distort the rules. In fact it was the irrelevant consideration of the fact that the funds had been mingled in the trustee's bank account that led to the first distortion of the equitable rule which gives the deprived beneficiary an equitable charge over the whole and over each and every part of a fund in which trust property has been mixed with non-trust property.[10]

In *Re Hallett's Estate,*[11] an agent had paid moneys due to his principal, to whom he owed a fiduciary duty, into the agent's banking account where they became mixed with the agent's own moneys. Before his death the agent made various withdrawals from the account and applied them for his own purposes. However, although the balance remaining in the account was insufficient to pay all of the deceased agent's creditors in full, it was more than sufficient to cover a restitution of the trust funds that had been paid into it. Clearly all that was necessary was to give the deprived beneficiary a charge upon the account enabling her to rank as a secured creditor in the administration of the deceased's estate.

However, because a banking account was involved and because counsel argued that the rules relating to such accounts were applicable, Sir George Jessell M.R. was trapped into a consideration of those rules. In this context the rule in *Clayton's Case*[12] had been evolved to determine a dispute between a banker and his customer, whose only relationship, either in law or in equity, was the common law relationship of debtor and creditor.[13] Starting with the common law rule that, where several debts existed between the same debtor and creditor, the creditor, and in certain circumstances the debtor, could

10 See this statement of the rule in Sinclair v. Brougham, *infra,* note 19.

11 (1879) 13 Ch. D. 696.

12 Devaynes v. Noble, Clayton's Case, (1816) 1 Mer. 572, 35 E.R. 781.

13 This is merely the primary nature of the relationship. There may be cases where the banker, by his conduct, has placed himself under a fiduciary duty to his customer, as, for example, in Woods v. Martin's Bank, [1959] 1 Q.B. 55.

appropriate any individual payment made to the reduction or extinction of any one of the debts, Sir William Grant treated the bank account as constituting a series of debts owing from the banker to the customer. On this principle he held that where there had been no express appropriation by either party, the banker's books of account provided evidence of the banker's election to appropriate. The entries had, as is usual, been made in chronological order, therefore, the banker was held to have elected to appropriate each withdrawal by the customer to the reduction and extinction of each deposit, in turn, in the order in which they were entered in his books.

Quite properly the learned Master of the Rolls refused to apply this rule to the case before him where the dispute was not between banker and customer but between the customer and a claimant to whom he owed a fiduciary relationship. However, instead of restating the established equitable rule, although that was what he purported to do,[14] he stated a rule which, because it was based on a theory of implied appropriation, bears more resemblance to the rule in *Clayton's Case* than it does to the true equitable rule. It is to the effect that where a person occupying a fiduciary position mixes the money of the person to whom he owes the fiduciary duty in a banking account with his own money, he must be deemed to have appropriated his subsequent withdrawals primarily to that part of the account which represents the deposits of his own money.[15] This rule works well enough in cases where the balance remaining in the account is sufficient to discharge the fiduciary obligations but it raises quite unnecessary problems where that balance is inadequate.

A strict application of this erroneous rule would mean that where the balance of the account is reduced to below what is required to discharge the fiduciary obligation, the beneficiary would only be able to trace in equity those withdrawals that had been made subsequently to the exhaustion of the fiduciary's interest in the mixed account. This in fact was the situation that had to be dealt with in *Re Oatway.*

In *Re Oatway*[16] a trustee had deposited trust funds in his own

14 (1879) 13 Ch. D. 696, at 709, ". . . where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust,* or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simple and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee. . . . That is the modern doctrine of equity."

15 *Ibid.,* at 727.

16 [1903] 2 Ch. 356.

banking account in which his own moneys had already been deposited. The trustee made several withdrawals from the account before his own contributions to it were exhausted and with one of those withdrawals, amounting to £2,137, he purchased shares in his own name alone and not in the joint names of himself and his co-trustee. His subsequent withdrawals depleted the account below what was necessary for the restitution of the trust moneys. Now, under the rule enunciated in *Hallett's Case,* the moneys withdrawn and invested in the purchase of the shares must be deemed to have been the trustee's own money. Furthermore, even if the shares purchased had been of a class expressly authorized by the terms of the trust, any theory of implied appropriation to the purposes of the trust is faced by the indisputable fact that the shares were not purchased in the names of both trustees.

Although Joyce J. purported to follow *Re Hallett's Estate,*[17] he in fact gave the deprived beneficiary a charge on the shares purchased by the defaulting trustee and supported this decision by an enunciation of the true rule and not of the erroneous rule laid down in that case. He said, "To this I answer that he was never entitled to withdraw the £2,137 from the account, or, at all events that he could not be entitled to take that sum from the account and hold it or the investment made therewith, freed from the charge in favour of the trust, unless or until the trust money paid into the account had been first restored, and the trust reinstated by due investment of the money in the joint names of the proper trustees, which was never done."[18]

The correct rule then is that, if a trustee improperly creates a mixed fund, consisting in part of trust property and in part of his own property and whether or not that mixed fund is located in a banking account, his *cestui que trust,* will be given an equitable charge over the whole and over each and every part of the amalgam. The true effect of the decision in *Hallett's Case* was to extend the application of this rule to every case where property which is subject to a fiduciary duty is mixed with the property of the person who is under that duty. If authority is required for this statement of the rule it is to be found in no less than three of the four speeches delivered in the House of Lords in *Sinclair v. Brougham.*

In *Sinclair v Brougham*[19] Viscount Haldane, referring to

17 *Ibid.,* at 360.

18 *Ibid.,* at 361. His Lordship also said at 360-361: "The order of priority in which the various withdrawals and investments may have been respectively made is wholly material."

19 [1914] A.C. 398, at 422, 438, and 442. Lord Sumner agreed that Hallett's

Hallett's Case, said, "The agent could not set up that any part of the money in the bank was his until he had made good his breach of duty, and in that sense there was a charge." Lord Dunedin said, "Now, there are certain situations of which *Hallett's Case* is an example, where the one sharing party has a right to say to the other, It is not in your mouth to say that the assets are not all mine, to the the full extent of my claim." Lord Parker said, "In such a case the beneficiary can only claim a charge on the property for the amount of trust money expended in the purchase. The trustee is precluded by his conduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case [*Hallett's*], this principle was held applicable when the trust money had been paid into the trustee's banking account." Can there be a more authoritative statement of the correct rule or of its primary object of placing the deprived beneficiary in the position of a secured creditor? Furthermore, there is no suggestion in any of the speeches that the rule is subject to be varied by the defaulting trustee's appropriations. Indeed, *Sinclair v. Brougham* clearly stated that he cannot be heard to say that he has appropriated any part of the fund.

Re Diplock—The Judgment in Rem.

The first notable distinction between *Re Hallett's Estate* and *Re Diplock* is that whereas in the earlier case the funds were mixed by the person who was under the fiduciary duty, in the later case the mixing was carried out by persons who had received trust funds from executors under the mistaken belief that they were entitled to them as beneficiaries under the will. In the event it was proved that the executors and their legal advisers had misconstrued the terms of the will and that the recipients had no title either in law or in equity to the trust funds that had been paid over to them.

On the well established principle of equity that the owner of an equitable interest in property has a right which he can assert against the whole world with the one exception of a bona fide purchaser of a legal estate for value without notice of a breach of trust, the true beneficiaries under the will had an equitable title to the trust funds in the hands of the actual recipients, who because they had given no value were mere volunteers. Therefore, under the equitable tracing rules the unpaid beneficiaries were entitled to follow the trust moneys into the volunteers' banking accounts in which those moneys had been

Case was applicable but did not attempt to expound any rule laid down in that case. Lord Atkinson concurred in the judgment of Viscount Haldane.

mixed with the volunteers' own moneys. However, because the volunteers had no notice of the breach of trust at the time when the funds were mixed, it would have been inequitable to treat them in the same way as a defaulting trustee who has mixed trust funds with his own money. In deciding that the equities of the unpaid beneficiaries and of the volunteers were equal the Court of Appeal applied the same principle as had been applied in *Sinclair v. Brougham.*[20] That decision had in fact extended the principle, already extended in *Hallett's Case,* to cases where an equitable interest is not derived from a fiduciary duty.[21]

In *Re Hallett's Estate* Sir George Jessel examined the question as to whether the equitable process of tracing in rem was confined to deprived beneficiaries under an orthodox trust or whether it extended to all cases in which a fiduciary duty has been established. In an earlier case, *Ex parte Dale & Co.,*[22] an eminent equity lawyer Sir Edward Fry, considering himself to be bound by a series of common law decisions, had reluctantly held that the equitable tracing rules could not be applied unless the fiduciary duty had been derived from an orthodox trustee—*cestui que trust* relationship. After a careful consideration of that decision, the common law cases cited therein and of the authorities in equity, Sir George Jessel concluded that there is no distinction, and never has been a distinction, between persons occupying one fiduciary position or another fiduciary position as to the right of the beneficial owner to follow the trust fund in equity.[23]

In *Sinclair v. Brougham* the decision appears to have proceeded on the basis that the person who had mixed the funds of two rival claimants in the mixed fund had owed a fiduciary duty to neither of them. But it was held that where a person parts with his money as a result of a misrepresentation he cannot be considered to have parted with his equitable interest even though his legal interest may be said to have passed by delivery. Thus, persons who had placed their money on deposit with a society to be applied for purposes ultra vires the society, and shareholders whose contributions had been applied by the society's agents for ultra vires purposes, were held to have equal

20 [1948] Ch. 465, at 539.

21 In the sense that if Hallett's Estate can be said to have extended the right to trace in equity to all cases where the equitable interest is derived from a fiduciary duty, Sinclair v. Brougham appears to have extended it to all equitable interests regardless of their origins.

22 (1879) 11 Ch. D. 772.

23 (1879) 13 Ch. D. 696, at 720.

equities in a mixed fund representing the society's assets. Then, having decided that the equities of the only two classes of claimants on the mixed fund were equal, the House of Lords decided that they were entitled to a charge upon that fund *pari passu*.[24] Because the mixed fund was insufficient to meet the claims of both classes in full, it is beyond dispute that the expression *pari passu* was used to indicate that the rival claimants were to share in the mixed fund in the proportions that the contributions of each class of claimants bore to the total contributions of both classes.[25] This charge was expressed to be in addition to the right of any individual claimant to trace his own particular contribution in equity.

In *Re Diplock,* at a very early stage in the judgment of the Court of Appeal, it was said that the decision in *Sinclair v. Brougham* was of fundamental importance,[26] and it was upon the principles stated therein that the Court of Appeal decided that the unpaid beneficiaries and the volunteers had equal equities in the banking accounts into which the volunteers had paid their own and the trust moneys. Then, having held that there was no fiduciary duty owed to the unpaid beneficiaries by the volunteers, it was decided that the erroneous rule as stated in *Re Hallett's Estate* had no application and, therefore, that, in spite of the fact that the volunteers had used the money withdrawn for their own purposes, they could not be deemed to have elected to appropriate their withdrawals from the fund to their own interest in the fund. Worse was to come. It was decided that the rule in *Clayton's Case* must be applied to determine to whom the balance in the accounts belonged.[27]

Now, even if the question had been one of presumed appropriation, there are two objections to the application of *Clayton's Case* and it is submitted that they are fatal to it. In the first place, that case decided that in the absence of an express appropriation by either the customer or the banker, the manner in which the banker kept his books is the best evidence of his intention to appropriate in that manner. It is difficult to see how the actions of the banker, carried out without reference to the customer, can be evidence of the customer's intention to appropriate. Secondly, even if the banker's

[24] See Lord Greene's analysis in Re Diplock of Lord Parker's judgment in Sinclair v. Brougham, especially at 526-527.

[25] [1948] Ch. 465, at 528 this interpretation was adopted.

[26] *Ibid.*, at 518.

[27] *Ibid.* The supplementary judgment at 559-563, dealing with the claim in rem against the National Institute for the Deaf, deals in detail with this aspect.

books are admissible in evidence, where he is not a claimant, it is difficult to see how they can rebut the evidence of the admitted fact that the withdrawals were actually applied to the purposes of the volunteers and not to those of the beneficiaries.[28]

It was because the purposes underlying the equitable tracing rules were ignored that the Court of Appeal led itself to this extraordinary conclusion. However, right or wrong, its decision is binding until it is overruled by the House of Lords, unless it can be shown that it is already contrary to an existing decision of that tribunal. In *Re Diplock* a large part of the judgment in rem was devoted to a careful analysis of what was said in *Sinclair v. Brougham* but in its conclusions the Court of Appeal completely ignored what the House of Lords had eventually decided. In that case the House of Lords having laid down the equitable principles upon which the equal equities of the rival claimants to the mixed funds were based, proceeded to make an order that they should have a charge *pari passu* on the mixed fund. Now, as we have already observed the balance of the fund was not sufficient to meet the claims in full and, therefore, there must have been some withdrawals from the fund after the depositors and shareholders had made their respective contributions. However, it was at no time suggested that the rule in *Clayton's Case* should be applied to determine the respective rights of the rival claimants to the balance of the mixed fund. On the contrary, it was decided that they should share the balance rateably.[29]

It is true that it was said in *Re Diplock* that where the equities of the contributors to a mixed fund are equal, they will have a charge upon it *pari passu* but, if this charge is confined, as it was in that case, to cases where there have been no withdrawals from the mixed fund after the trust funds were deposited in it, it involves giving a different interpretation to the expression *pari passu* from the one placed upon it in *Sinclair v. Brougham*. If there have been no withdrawals there can be no question of a rateable disposition of the mixed fund because each of the claimants will be fully reimbursed.

28 It is arguable, in view of the provisions of sec. 17 (3) of the Partnership Act, 1890 that the problem raised by the facts of Clayton's Case should now be treated as a question of novation, that is to say whether or not the customer had agreed to accept the liability of the surviving partners in discharge of the liability of the deceased partner's estate. As was said by Lord Eldon, in Ex parte Williams, (1816-1820) Buck's Cases in Bankruptcy, a very little will do to make out an assent by the creditor to the agreement.

29 Clayton's Case is only mentioned on one occasion by the House of Lords in Sinclair v. Brougham and then only to observe that it had been held not to apply in Hallett's Case. (See Viscount Haldane at 421).

Exceptionally, if there were an overdraft at a time when the account owners' money and the trust money were deposited *simultaneously* in the account there would be a proportionate disposition of the balance even though the principles in *Re Diplock* were to be applied. It would only be in such an unlikely combination of events that the principles laid down in *Re Diplock* can possibly produce the same result as the decision in *Sinclair v. Brougham.*

It is submitted that in so far as *Re Diplock* decided that the rule in *Clayton's Case* is to be applied to the determination of the respective rights of claimants to the balance of a mixed fund, when the equitable rights of the claimants are equal, it was contrary to the express decision of the House of Lords in *Sinclair v. Brougham* that in such circumstances the balance is to be shared rateably. Even if by some process of juggling with the *ratio decidendi* of the House of Lords' unanimous decision it can be distinguished from *Re Diplock* or that case from it, the difficulty of justifying an application of *Clayton's Case* is that it was based upon a presumed intention to appropriate. How can it be presumed that the volunteers in *Re Diplock* intended to appropriate their withdrawals as a debit against the interests of the unpaid beneficiaries when they in fact were not aware of their existence and did in fact spend the money for their own and not the beneficiaries' purposes?

Having cut down the unpaid beneficiaries' rights in the mixed banking accounts the Courts of Appeal proceeded to enunciate a new restriction upon their equitable rights to trace the withdrawals, which, on its interpretation, were to be regarded as the beneficiaries' moneys. It was held that where such withdrawals had been applied to the making of improvements to the existing properties of the volunteers they had become unidentifiable in equity and therefore the beneficiaries' equitable interest in the moneys so withdrawn had been extinguished.[30] Now, in the absence of direct authority contrary to this aspect of the judgment it cannot be said with certainty that it was wrong. However, if the reasons given in support of it are invalid, there is a strong probability that it was wrong.

In the first place, it was said that, where the recipients had mixed the trust moneys not with their own moneys but with their own land, the trust moneys had lost their identity.[31] This means that where money is applied to making improvements to land, equity is powerless. But is this really so? If trust land were to be conveyed in

[30] [1948] Ch. 465, at 546 *et seq.*
[31] *Ibid.*, at 547.

breach of trust to a volunteer without notice of the breach and thereafter he expended his own moneys on improving it, there is no doubt that the deprived *cestui que trust* could recover the land. However, to do so he would have to make application to a court of equity and there can be little doubt that the court would require him to do equity. It is submitted that to do equity in such a case would entail a reimbursement to the volunteer at least to the extent that his expenditure had enhanced the market value of the trust land. In such a case the volunteer when he effected the improvements had the legal estate and cannot, therefore, be treated as a mere trespasser. Conversely, there appears to be no reason in principle why a volunteer who, because of his receipt of trust moneys is amenable to the jurisdiction of a court of equity, cannot be ordered to reimburse the trust at least to the extent that the land has been enhanced in value for his purposes. That is to say to the extent that he is personally enriched as a result of the breach of trust.

Then it was said that it would be inequitable to subject the volunteers' land to an equitable charge in favour of the deprived beneficiaries, because an order for sale is the only method of enforcing such a charge.[32] This ignores the fact that the beneficiaries would have to apply to a court of equity for that order and like all equitable orders it could be made upon equitable terms. For example, there would be nothing to prevent the order being made conditional on the default of the volunteers reimbursing the trust to the extent that the value of the land had been enhanced for their purposes and the inclusion of a provision that the volunteers should have a reasonable time in which to raise the necessary money.

Before leaving the question of the *Diplock* judgment in rem it is as well to consider how some of the problems raised therein have been dealt with in the RESTATEMENT, if for no better reason than that the writer feels the need of some support in his disagreement with equity lawyers of such eminence as the late Sir George Jessel and the late Lord Greene.

(1). *Where there is a mixed fund in the control of the trustee.*

"Where the trustee wrongfully mingles trust funds with his individual funds in one indistinguishable mass, and subsequently makes withdrawals from the mingled fund, the beneficiary is entitled to a proportionate share both in the part which remains and in the part

[32] *Ibid.*, at 548.

which is withdrawn, or at his option he is entitled to an equitable lien upon both parts to secure his claim for reimbursement."[33]

It is submitted that this statement completely accords with the rule as stated in *Sinclair v. Brougham* and not with the rule as stated in *Re Hallett's Estate.* Furthermore, it is interesting to note that the RESTATEMENT limits the operation of the rule in *Roscoe v. Winder*[34] to deposits made by the trustee after his withdrawals have exhausted the whole of the mixed fund.

(2). *Where the trustee controls a mixed fund containing funds of more than one trust.*

"Where a trustee wrongfully mingles property held by him as trustee under different trusts and exchanges the mingled mass for other property the beneficiaries of the trusts are entitled to enforce a constructive trust on the property so acquired and are entitled to share the property proportionately . . . . Where the trustee deposits in a single account funds held by him as trustee under different trusts and subsequently wrongfully withdraws and dissipates a part of the deposit, the beneficiaries of the trusts are entitled to share the balance of the deposit proportionately, regardless of the order in which the deposits were made."[35]

Again this statement, in excluding the application of the rule in *Clayton's Case,* accords with the decision in *Sinclair v. Brougham* and not with the decision in *Re Diplock.*

(3). *Where the trustee transfers trust property to a volunteer without notice.*

". . . the transferee can be compelled to restore the property to the trust if he has not disposed of it and has not so changed his position that it would be inequitable to compel him to restore it."[36]

The RESTATEMENT goes on to explain that where the property transferred is money the mere fact that the donee has spent the money does not relieve him from liability to reimburse the trusts. To be relieved of liability he must show that as a result of receiving the money he was induced to embark upon some extraordinary expenditure, which he would not have incurred but for his receipt of the trust funds, and that this is so even where the expenditure occurred before

33 S 202 (1), comment *i*.
34 [1915] 1 Ch. 62.
35 S 202 (1), comment *n*, and illustrations.
36 S 292 (1).

he had notice of the breach of trust.[37] Furthermore, it explains that, where the trust property transferred to him is not money and if he has disposed of it before receiving notice of the breach of trust, he will be liable, at his option, either to surrender the proceeds of sale or to pay the value of the property at the time. In either event the donee can set-off sums expended by him out of his own money on the improvement of the trust property prior to his having received notice of the breach.[38]

It is submitted that these provisions of the RESTATEMENT provide valid answers to the objections of the Court of Appeal in *Re Diplock* to the granting of an equitable charge in favour of the unpaid beneficiaries over those properties of the volunteers which had been improved by the expenditure of the trust moneys.

(4). *Where a volunteer recipient of trust funds mixes them with his own.*

The RESTATEMENT makes no specific provisions for this situation but in view of the personal liability imposed by the mere receipt of the trust funds, under (3) above, such provisions are unnecessary where, as in *Re Diplock,* the volunteer recipients are solvent. Where the recipients are insolvent, it is submitted that the solution of the proportionate charge will in many cases produce an equitable disposition as between the volunteers' creditors and the unpaid beneficiaries. On the other hand the application of the rule in *Clayton's Case* will give one class a purely accidental advantage based upon the mere fact that his money was paid into the mixed fund at a date later than that of the other class.

There is one other possible solution to the problem and this solution will only be valid if the situation can be viewed as *causa primae impressionis,* on the basis that *Re Diplock* was wrongly decided and that *Sinclair v. Brougham* is not an authority to the contrary, because it was not concerned with an account within the control of either claimant. However, starting with *Sinclair v. Brougham,* it is authority for the proposition that where the claimants have equal equities they have rateable charges on the fund but where one of the claimants has control of the fund it is submitted that different con-

[37] *Ibid.,* comment *i.*

[38] *Ibid.,* comments *h* & *d.* It is also interesting to note that by relieving the volunteer from liability where he has disposed of the trust property by way of gift and imposing liability on his donee alone, the RESTATEMENT (comment *i.*) underlines the distinction between equitable liability in personam and common law liability in conversion.

siderations apply. The clear fact is that withdrawals made by the controlling claimant are actually applied for his own purposes and not those of the other claimant, of whose claim, *ex hypothesi,* the controller has no knowledge. Accordingly there appears to be no reason in principle why those withdrawals should not diminish the controller's interest in the mixed fund and his proportionate charge over it.

The Judgment in Personam.

Before proceeding to an exhaustive historical and jurisprudential analysis of the right of an unpaid beneficiary to recover from an improperly paid donee by means of a direct action in personam, the Court of Appeal said that, if such a right of action were to be justified, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction.[39] In holding that the unpaid beneficiaries were entitled to maintain such an action, it cannot be questioned that the Court of Appeal had more than justified its decision on a purely historical basis. Indeed, even if it had felt that there was some doubt as to the equitable basis of such an action, it may well have justified its decision on the basis that it was subject to binding precedents. However, when this aspect of the case came to be considered by the House of Lords, in *Ministry of Health v. Simpson,*[40] that tribunal was subject to no binding precedent and could have rejected a purely historical basis for its decision.

Nevertheless, it has been suggested that the decision is to be explained on the basis of the rivalry between the old Court of Chancery and the ecclesiastical courts seised of testamentary matters, and the desire of the former to provide a remedy which would excel in efficacy that afforded by the latter in requiring a first paid legatee to give security.[41] To leave such a statement unamplified is to suggest that the decision cannot be supported upon any principle of equity and that as a result historical accident must be substituted for principle. It is submitted, with respect, that the Court of Appeal did nothing of the sort, but in fact clearly set out the equitable basis of the action.

39 [1948] Ch. 465, at 481-482. It is to be regretted that the possible application of sec. 28 of the Administration of Estates Act 1925 was not considered.

40 [1951] A.C. 251.

41 Dennis Lloyd in (1948) 26 CAN. BAR. REV. 1356, at 1367 appears to take this view: *Cf.* Marc Bloch, *op. cit. supra* note 4, at 6: "Dans le vocabulaire courant, les origines sont un commencement qui explique. Pis encore: qui suffit à expliquer. Là est l'ambiguité, là est le danger."

Although the Court of Appeal had previously stated that it did not think it necessary or desirable that it should attempt an exhaustive formulation of the equity invoked which would be applicable to every class of case,[42] it did in fact base its decision upon an equitable principle that is not incapable of justifying the proposition that unpaid beneficiaries, deriving their equitable interests from settlements made *inter vivos,* may very well have a similar right of action. It stated this principle when it said, "And as regards the conscience of the defendant upon which in this as in other jurisdictions equity is said to act, it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled."[43]

It is submitted that the qualification, prima facie, means nothing more than that if the unpaid beneficiary establishes that the defendant received trust property to which the defendant had no title the onus passes to the defendant to prove that there are special circumstances which would make it inequitable for him to be compelled to make restitution, as for example, where he can show that the beneficiary in some way contributed to the breach of trust or, perhaps, as envisaged in the RESTATEMENT,[44] where the defendant has made some extraordinary expenditure which he would not have made had he not received the trust property.

With regard to this aspect of the decision what the Court of Appeal was saying, in effect, was, although the old Court of Chancery may well have invented a *form* of action in its desire to oust the ecclesiastical courts from jurisdiction over the administration of deceased persons, it, nevertheless, insisted that the *cause* of action must be the infraction of an equitable interest based on an equitable principle. Furthermore, although a court of equity in the year 1948 may have felt that it was precluded from enunciating a new equitable principle, it could not hold that Lord Nottingham was similarly restricted in the year 1682 when he decided *Noel v. Robinson.*[45] So to hold would be to ignore the basic historical fact that, although the courts of common law at one time considered that they merely declared what had always been the law, the old Court of Chancery, at any rate prior to the time of Lord Eldon, never advanced that fiction in support of its principles.[46]

42 [1948] Ch. 465, at 502.
43 *Ibid.,* at 503.
44 *Supra,* note 37.
45 1 Vern. 90, 23 E.R. 334.
46 Re Hallett's Estate, (1879) 13 Ch. D. 696, at 710, *per* Jessel M.R.

Having established the right of action on a broad equitable principle for which it had found numerous precedents, the Court of Appeal was faced with greater difficulty when it decided to limit the right of action against the volunteer recipients to cases where the unpaid beneficiaries could establish that for all practical purposes they had already exhausted their rights against the executors. Indeed, in dealing with this aspect, the Court appears to have relied upon the absence of any authority contrary to such a limitation rather than upon any direct authority in support of it.[47] In this respect the Court may be said to have evolved a new principle. Nevertheless, it is submitted that it stated that principle with clarity when it said, "In our judgment the absence of exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling upon equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which is justly his."[48]

When the matter came to be considered by the House of Lords, although it may be said to have reserved the right to consider whether the action in personam would be available to an unpaid beneficiary under a settlement made *inter vivos,* it clearly affirmed the equitable principle upon which the Court of Appeal had based its decision. Lord Simonds, who delivered the only speech, in which the other members unanimously concurred, said, ". . . *David v. Frowd* is an authority strongly in favour of the respondents. It is fatal to the appellants' argument, which I have already mentioned, that the equitable remedy was confined to cases of unpaid creditor or legatee, and is consistent only with the view that the remedy was one (to use Lord Davey's words) devised by the Court of Chancery in the administration of the estate of a deceased person to avoid the evil of allowing one man to retain money legally payable to another and was applicable wherever it could appropriately be applied."[49]

In view of the House of Lords' reservations it may still be an open question as to whether a *cestui que trust* under a trust created *inter vivos* can maintain an action in personam against a volunteer recipient of trust property, who had no notice of any breach of trust when the trust property was transferred to him and before he had disposed of it.

[47] [1948] Ch. 456, at 503.
[48] *Ibid.*, at 503-504. The RESTATEMENT imposes no such restriction.
[49] [1951] A.C. 251, at 268.

One ground for objection to such an extension of the right of action in personam is that its existence in the sphere of the administration of the estates of deceased persons is an anomaly to be explained upon historical grounds and not upon any equitable principle.[50] It is submitted that the foregoing analysis of the decision disposes of that objection. Another objection is that to allow the plaintiff to proceed in personam is undesirable because it can result in his recovering more than he can recover by an application of the equitable tracing rules as enunciated in *Re Diplock*.[51] Even if the tracing rules had been correctly stated in *Re Diplock*, this objection implies a misunderstanding of the primary purposes of the tracing rules. It is submitted that those purposes are accurately set out in the RESTATEMENT:[52]

> "*Necessity of tracing trust property.*
>
> The claim of the beneficiary against the trustee for breach of trust does not of itself entitled him to priority over the general creditors of the trustee. Thus, if the trustee sells trust property and dissipates the proceeds, the beneficiary is not entitled to priority over other creditors of the trustee. The beneficiary is entitled to priority only if and to the extent that he can trace the trust property into the product. . . ."

Once this purpose of placing the unpaid beneficiary in the position of a secured creditor is appreciated, to object that he may recover something more in his role of unsecured creditor is to object to the basic principles of the administration of bankrupt estates, under which any secured creditor is entitled to prove for dividend with regard to the amount of his claim that it is not satisfied out of the realization of his security. In any event he cannot recover more than what he was improperly deprived of.

The only valid objection to an extension of the right would be that there is some equitable principle that demands that equitable interests derived from wills and intestacies must be treated on a more favourable basis than such interests created *inter vivos*. *Re Hallett's Estate* is some authority for the proposition that once a breach of a fiduciary duty has been established, regardless of how that duty originated, a court of equity will apply equitable remedies to effect restitution.[53] Clearly there is nothing in the broad principle upon

50 *Supra*, note 41.

51 NATHAN'S EQUITY THROUGH THE CASES, (4th ed.) 1961 at 477.

52 S 202, comment on Subsection (2), *o*.

53 (1879) 13 Ch. D. 696, at 720.

which the Court of Appeal based its decision that would, of itself, exclude the extension of the right of action. However, it may be that in the case of an *inter vivos* trust there are equitable defences open to the volunteer recipient that would not be available in the case of a testamentary trust.

In point of fact, without any pretension to omniscience, it is difficult to visualize more than two defences to such an action and they appear to be equally applicable to either kind of trust. In the first place, there is the defence of change of the recipient's position, as set out in the RESTATEMENT and that is merely a variation upon the well established equitable defence of hardship.[54] Both the RESTATEMENT[55] and the English cases make it abundantly clear that the mere fact of having to repay after the trust money has been spent does not amount to hardship in this context. Something more than mere expenditure of the trust property must be shown even though the expenditure was occasioned by the receipt of the trust funds. It is submitted that what must be shown is that, but for the receipt of the money, some expenditure of a kind, which would not otherwise have been incurred, was in fact made.

Secondly, it would be an equitable defence to show that the unpaid beneficiary had by his conduct induced the volunteer recipient to treat the trust property as his own. For example, where the beneficiary with full knowledge of his own rights has either concurred in the improper transfer of the trust property or had unduly delayed his assertion of his rights.

Although there may be no English authority for the extension of this right of action, the implications of such an extension have caused no apprehension in the United States of America, where the RESTATEMENT, with certain limitations on the amount to be recovered, envisages the right of action as being available to any beneficiary, regardless of how he acquired his beneficial interest.

[54] In (1949) 65 L.Q. REV. at 49, Lord Denning ventured the opinion that 'equitable estoppel' may be a defence open to the volunteer. Whilst this may be valid as against the trustee, it is difficult to appreciate why it should succeed against the unpaid beneficiary who had no knowledge of a breach of trust. *Cf.* Gareth H. Jones, *Change of Circumstances in Quasi-Contract,* (1957) 73 L.Q. REV. at 49-53.

[55] S 292, comments *d, e, f, g, h, i,* and *k.* It is respectfully submitted that neither Lord Denning nor Mr. Gareth Jones presents the whole American viewpoint, because each has chosen to consider the general provisions in the RESTATEMENT as to Restitution in Equity and to ignore the specific provisions dealing with the beneficiary's rights against third parties.

In his detailed analysis of the decisions on the right of action in personam, Lord Greene found it to have originated in the case of *Noel v. Robinson*,[56] which had been decided by Lord Nottingham. No one was more concerned than Lord Nottingham to refute Selden's observations with regard to the variations in the length of the feet of different Chancellors[57] and he would be disagreeably surprised to learn that the length of the modern Chancellor's foot increases when it is in the grave and decreases when it is amongst the living.[58]

P. F. P. HIGGINS.*

56 (1682) 1 Vern 90, 23 E.R. 334.

57 "One Chancellor has a long foot another a short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience." TABLE TALK OF JOHN SELDEN, (Pollock ed. 1927) at 43. *Cf.* the observations of Lord Nottingham in Cook v. Fountain, (1676) 3 Swanst. 585, at 600, 36 E.R. 984, at 990, and those of Lord Eldon in Gee v. Pritchard, (1818) 2 Swanst. 402, at 414, 36 E.R. 670, at 674.

58 The author is indebted to Mr. D. A. McConville for the assistance he has derived from the article *Tracing and the Rule in Clayton's Case*, (1963) 79 L.Q. REV. 388.

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