sion was reasonable, and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will therefore advise His Majesty to direct that with regard to the Ile Bédard the judgment complained of be reversed with costs in the Court below to the appellants the Cedars Rapids Company, and (2) that with regard to the Ile aux Vaches and the reserved power and mill site the judgment complained of be set aside, and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth, no costs being allowed to either party in the arbitration already held or in the Court below; and further, that neither party ought to have costs before this board.

Counsel for the Appellants—Sir R. Finlay, K.C.—Mignault, K.C. (of the Colonial Bar)—Geoffrey Lawrence. Agents — Lawrence Jones & Company, Solicitors.

Counsel for the Respondents — Sir E. Clarke, K.C. — Macmaster, K.C. — Sir A. Lacoste, K.C. — A. Lacoste (the three last of the Colonial Bar). Agents — Blake & Redden, Solicitors.

HOUSE OF LORDS.

Thursday, February 12, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Dunedin, Atkinson, Parker, and Sumner.)

SINCLAIR *v.* BROUGHAM.

(On Appeal from the Court of Appeal in England.)

Building Society—Liquidation—Competing Claims of Depositors and Shareholders—Ultra vires Business—Building Societies Act 1836 (6 *and* 7 *Will. IV. c.* 32).

Where a building society had outwith its powers done banking business and taken deposits from the public, *held* that depositors and shareholders ranked *pari passu* in the liquidation.

Judgment of the Court of Appeal *sub nom. re Birkbeck Permanent Benefit Building Society*, 1912, 2 Ch. 183, *varied.*

Re Guardian Permanent Benefit Building Society, 23 Ch. Div. 440, *distinguished.*

Blackburn and District Benefit Building Society v. *Cunliffe Brooks & Company*, 29 Ch. Div. 902, *overruled.*

Re Hallett's Estate, 13 Ch. Div. 696, *considered.*

Appeal from an order of the Court of Appeal, dated the 18th May 1912, affirming an order of Neville, J., dated the 6th November 1911, whereby a declaration was made as to the proper mode of the application of the assets of the Birkbeck Permanent Benefit Building Society.

The facts are stated in Lord Dunedin's judgment.

Their Lordships took time to consider their judgment, which was delivered as follows:—

Lord Chancellor—In the opinion which I am about to deliver Lord Atkinson desires me to state he concurs.

In June 1911 an order was made for the winding-up of the Birkbeck Permanent Benefit Building Society. The Society was formed in 1851 under the Building Societies Act of 1836, with rules which, with certain amendments subsequently made, were duly certified and enrolled. The object of the Society, according to these rules, was to enable the members to raise a fund out of which they might be individually enabled to buy or build houses. Rule 35 conferred on the directors a power to borrow without limit, but it is clear that the power so given could not extend beyond borrowing for the legitimate purposes of the Society. There were two classes of shareholders, those to whom loans were granted and those who were mere investors. Under an amendment rule the investing shares were divided into two classes, A shares and B shares, differing mainly in this respect, that the A shares matured and were to be paid off after a certain period, while the B shares were permanent. The shareholder could, however, in either case give notice and withdraw the amount of his share.

During the earlier period of the Society's existence the funds, which were derived both from shares and from loans by depositors, were laid out in mortgages to members. Later on while the Society continued its business as a building society it began gradually to increase its deposits and to do the business of a banker. In the balance-sheet of the 31st March 1910 the liabilities to shareholders are stated to amount to £1,053,728, while the liabilities to depositors are £10,784,323. The assets are stated to include mortgages from advanced members, loans, and property in hand, amounting to £726,610; money at call, short loans and advances to customers, £995,466; investments in various kinds of stocks, shares, and debentures, £8,740,788; ground rents, £433,826; and cash at the bankers and in hand, £1,069,753.

The Society had begun about 1871 to call itself the Birkbeck Bank. Many of its business documents came to be so headed, and it is obvious that at the time when it was wound-up it had, while still retaining its business as a building society, turned much the larger part of its enterprise into that of a bank.

Notwithstanding that the Act of 1836 does not incorporate the building societies registered under it, its provisions make it clear that such a course as the Birkbeck Society took was contrary to these statutory provisions, and the apparent action of the Society in carrying on the business of banking and in borrowing for that purpose was therefore *ultra vires*, and was *not in con-*

templation of law the action of the Society. The contracts entered into for the purposes of this business were accordingly, so far as the Society was concerned, void.

The questions which now arise are in substance how the liquidator is to dispose of the mass of assets in his hands. He raised these questions before Neville, J., on a summons. The learned Judge ordered the assets to be applied—first, in payment of costs; secondly, as I gather, by general consent in paying debts properly incurred to outside creditors; thirdly, in paying the unadvanced members or shareholders the amounts due to them in respect of the subscriptions paid on their shares, including any bonus and interest to which they were entitled by the rules; and fourthly, in distribution of the balance among the customers of the Society on deposit or current account (for brevity I shall speak of these as depositors) in proportion to the amounts standing to their credit in the books. The majority in the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J., Fletcher Moulton, L.J., dissenting) took the same view. The decision of that majority was based on the following grounds—They held, first of all, that the rule enabling borrowing did not authorise the Society to engage in banking business, and that its action in so doing was altogether *ultra vires*.

I think that on this point there is no doubt that the Courts below were right, and that they carried their view to its proper conclusion when they held that every receipt on deposit for the purposes of such business was *ultra vires*. The majority went on to hold that in so far as the legitimate indebtedness of the Society was not increased—for the reason that the money borrowed was applied in the payment of legitimate debts—the depositors could be treated as subrogated to the rights of these debtors, at all events to the extent of their debts as distinguished from any securities for these debts. They also thought that if the depositors could identify their money as earmarked they could follow it under what is called a tracing judgment. But they held that unless the depositors could bring themselves within one or other of these propositions they could not claim to be creditors either at law or in equity, and that their only right was to an order such as was made in the case of *re Guardian Permanent Benefit Building Society*, 23 Ch. Div. 440, which would give them the surplus assets after payment of all legitimate debts and of 20s. in the £1, to the members or shareholders. It was the order made in that case which Neville, J., had followed. Buckley, L.J., referred to difficulties which he felt in understanding the decision of Sir George Jessel in that case. He was unable to see why, if the assets belonged to the Society, the members were not held entitled, not only to 20s. in the £1, but to the share in the surplus which the rules gave them. But he considered that the Court of Appeal were bound by the decision of the Court of Appeal in that case. For reasons to which I will refer later on it will appear that I share the difficulty in understanding it which Buckley, L.J., experienced.

Fletcher Moulton, L.J., was of opinion that the principle which the authorities had laid down carried with it the consequence that the Court would not, even in the case of an *ultra vires* transaction which could give rise to no debt as between the parties to the transaction, permit the one who had wrongfully received the money to keep it merely because he was in possession of it. He thought that as the money must be taken to have been received by the misrepresentation or carelessness of its agents the Society could not keep it as against the depositors. This seemed to him to be implied in what was laid down in *re Guardian Permanent Benefit Building Society*, not merely in the Court of Appeal, but in the subsequent decision on appeal to the House of Lords—*Murray* v. *Scott*, 9 A.C. 519. He held that not until the Society had made restitution of this money (which was never really part of the assets) to the depositors could there be assets belonging to the Society which ought to be distributed on the principle laid down by Sir George Jessel in the *Guardian Society's* case. To proceed otherwise would be to look at possession only and to disregard rights of property. He therefore dissented, holding that the depositors should be paid in priority to the B shareholders. With the A shareholders a settlement had been come to, and as to their title no question was then or is now raised.

The question before the House is whether Neville, J., and the majority in the Court of Appeal arrived at a conclusion which was right in point of principle apart from the authorities, and whether if your Lordships should be disposed to differ from them we are so bound by the authorities, and particularly by the cases decided in this House, that we are precluded from arriving at a different conclusion. It is contended for the appellants that they are entitled to succeed in recovering their deposits either on the footing of being money had and received by the Society to their use, or as being money which never truly formed part of the assets, and which can now be followed in the hands of the Society's agents and the liquidator.

I propose to consider, in the first place, the question whether an action for money had and received would have lain against the Society on the footing that although its conduct in receiving the depositors' money was *ultra vires* it had become improperly as between itself and the depositors enriched thereby, so that the amount so received was money held to the depositors' use and recoverable as a debt independently of any right to trace and follow. Two authorities were cited in support of the argument that such an action could have been brought successfully. One of these was a judgment of Sir William Page Wood, V.C., in the case of *re Phœnix Life Assurance Company*, 2 J. & H. 441. The other was a decision of the Court of Appeal in Ireland which followed his judgment in *Flood* v. *Irish Provident Assurance Company*, 1912, 2 Ch. 597. In

these cases the principle of tracing was not relied on, but it was apparently held that the amount of certain premiums which had been paid in respect of policies the issue of which was *ultra vires* could be recoverable as money had and received.

If these decisions had related to the recovery of borrowed money I should find it difficult to reconcile them with principle. If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would on principle appear to be one *in rem* and not *in personam*—a claim to follow and recover specifically money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie *in personam* of a statutory society which by hypothesis cannot in the case in question have become a debtor, or entered into any contract for repayment, is to strike at the root of the doctrine of *ultra vires* as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure.

It is therefore binding both at law and in equity. In the jurisprudence of England the doctrine of *ultra vires* must now be treated as established in a stringent form by Acts of the Legislature and decisions of great authority which have interpreted these Acts. This is a principle which it appears to me must to-day be taken as a governing one, not only at law but in equity. I think it excludes from the law of England any claim *in personam* based even on the circumstances that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is *ultra vires*. All analogies drawn from other systems, such as that of the Roman law, appear to me to be qualified in their application by two considerations. The first is that, broadly speaking, so far as proceedings *in personam* are concerned, the law of England really recognises (unlike the Roman law) only actions of two classes—those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu*, it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed. This is a point to which I shall have to return later on in what I have to say. The second consideration is that where an Act of Parliament imposes a restriction on capacity, that restriction is binding in equity as much as at law, the principles of which equity follows.

Nor does the difficulty of extending the scope of the judgments of Sir William Page Wood and the Irish Court of Appeal to cases of borrowing appear less when the foundation of the action for money had and received is investigated. Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay either actual or imputed by law. *Moses* v. *Macferlan*, 2 Burr. 1005, is the leading case on the point. It was an action on the case for money had and received under circumstances where any notion of an actual contract was excluded. But Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt—"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract."

The claim in *Moses* v. *Macferlan* was one of *assumpsit*—in the form of the common *indebitatus assumpsit* count. This was a form of claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed *in consimili casu* under the provisions of c. 24 of the Statute of Westminster (13 Edw. I). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of *assumpsit* arose. In *Slade's* case (1602, 4 Rep. 92*b*) the Judges resolved that "every contract executory imports in itself an *assumpsit*," with the result that it became no longer necessary or desirable to use as the remedy where money was due to the action of debt which was embarrassing because it let in the right to a "wager of law." Then came the extension of *indebitatus assumpsit* to cases in which it was clear that no express promise could be proved. For, as Lord Mansfield points out, the law is ready to imply a debt in such cases arising *quasi ex contractu*. The promise to pay which created the right of action might have been a pure fiction of law. In many cases no such promise could possibly have been established. Yet it took some time before the Judges brought themselves to go so far. *Starke* v. *Cheesman* (1699, 1 Lord Raymond, 538) was a claim on a bill of exchange by the holder against the drawer on the allegation that the drawee had refused to accept. It was held that an actual promise must be implied. But what is remarkable is the language of the judgment in which the declaration, which contained an *indebitatus assumpsit* count, was held good. Holt, C.J., is reported to have said "that the notion of promises in law was a metaphysical notion, for the law makes no promise but where there is a promise of the party." Yet the observation of Holt, C.J., notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally gave the action its comprehensive range and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of *assumpsit* has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law.

Speaking of the action of *assumpsit* generally he says—"In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment"—(Lectures on Legal History, p. 166).

Notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise. And it appears to me that as matter of principle the law of England cannot now, consistently with the interpretation which the courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been *ultra vires* to give it. The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual.

I am accordingly of opinion that while the decisions of Sir William Page Wood and of the Irish Court of Appeal, to which I have referred, may possibly, notwithstanding that the issue of the policies was *ultra vires*, be supported on the ground that they related merely to the failure of consideration for the premiums paid (a question on which it is unnecessary for me to express any opinion) they cannot be invoked as authorities for the proposition that an action for money had and received would have lain in a case of borrowing *ultra vires*.

It follows that the depositors in the present case will not succeed unless they are able to trace their money into the hands of the Society or its agents as actually existing assets. The question is whether they are able to establish enough to succeed upon this footing. Their claim cannot be *in personam* and must be *in rem*—a claim to follow and recover property with which, in equity at all events, they had never really parted.

I proceed therefore to consider the case on this restricted footing. The evidence is very scanty, but it must be taken that the depositors' money was used on a large scale in acquiring the assets now in the liquidator's hands, for the value of these assets is far in excess of the contributions of the shareholders, and much of it can be due to the money of the depositors alone. The difficulty of establishing a title *in rem* in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognises as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.

But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset if capable of being earmarked as purchased with the money can be claimed by the true owner of the money. This is a principle not merely of equity but of the common law. It is explained in the judgment of Lord Ellenborough in *Taylor* v. *Plumer*, 3 M. & S. 562, who pointed out that there was no reason why the doctrine that money could not be followed should apply to circumstances in which a broker had wrongfully invested money of his principal in purchasing securities into which it could be traced. The reason of this is plain. The broker could not in these circumstances set up as against his principal the rule which applies to what has been paid over as currency, that ordinarily transfer of possession is transfer of property. So long as the money which the principal has handed to his agent to be applied specifically and not on a debtor and creditor account can be traced into what has been procured with it, the principal can waive his right of action for damages for tort, and affirming the proceeding of the broker claim that his money is invested in a specific thing which is his. But Lord Ellenborough laid down as a limit to this proposition that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his bankers, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was of course that a relation of debtor and creditor had arisen between the banker and his client the broker which precluded the notion of following the money.

That seems to be so far as the doctrine of the common law is concerned the limit to which the exception to the rule about currency was carried. Whether the case be that of a thief or of a fraudulent broker or of money paid under mistake of fact, you can even at law follow, but only so long as the relation of debtor and creditor has not superseded the right *in rem*. This is well put by Bramwell, L.J., in *ex parte Cooke*,

4 Ch. Div. 123, who explains why the principal in *Taylor* v. *Plumer* could claim the money—"Because the money was paid to the broker, not as trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character so as not to create the mere relation of debtor and creditor between him and his principal." Thesiger, L.J., in *re Hallett's Estate*, 13 Ch. Div. 723, states the principle in other words, but to the same effect—"All cases where it has been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts—in other words, that they were cases where the relationship of debtor and creditor had been constituted instead of the relation either of trustee and *cestui que* trust or of principal and agent."

It is in my opinion impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation may be in this position, but it is not because of his trust or fiduciary duty. The common law which we are now considering did not take cognisance of such duties. It looked simply to the question whether the property had passed, and if it had not—for instance where no relationship of debtor and creditor had intervened—the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me to be on ground of principle as true of money paid under mistake of fact or on an *ultra vires* contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee.

But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrongdoer into his account with his banker, who simply owed him a debt, so that no money was or could be in the contemplation of a court of law earmarked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrongdoer, that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was. And as Jessel, M.R., pointed out in *re Hallett's Estate*, this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was as I think merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the plaintiff. If so, subject to certain qualifications which I shall presently make, I see no reason why the remedy explained by Jessel, M.R., in *re Hallett's Estate*, of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is *ultra vires*. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient in my opinion to bring the transaction within the general principle.

There was another point which was decided in *re Hallett's Estate*. Jessel, M.R., and Baggallay, L.J., held that the rule in *Clayton's* case, 1 Mer. 572, did not apply so as to determine by reference to dates the appropriations of cheques drawn on the bank account, inasmuch as they considered that a person standing in a fiduciary relationship must be taken to have intended to draw cheques for his own purposes only on so much of the balance as was his. On this second point Thesiger, L.J., dissented from the majority. He thought that he was bound by the decision in *Pennell* v. *Deffell*, 4 D. M. & G. 372, and the subsequent authorities which had followed it. "Equity," he said, "has gone very far in aid of trust creditors when it holds that they may follow and obtain, in priority to general creditors, moneys paid to a banker, and therefore no longer existing in specie as moneys numbered and earmarked but converted into a debt, and it may be that the distinguished Judges I have referred to may have thought that equity had gone far enough, and that in the absence of express appropriation the general rule of appropriation of payments in and out of a banker's account should apply to that debt when forming part of a larger debt, made up as to the rest of the moneys, not trust moneys, paid into the bank."

As all the outside creditors have been paid off by consent we have not in the appeal before the House to consider the decision in *re Hallett's Estate* on this second point; and I do not desire to be taken as indicating any opinion on a question which is not before us, and to which I have only referred for the purpose of making this clear.

I now proceed to apply these conclusions to the case we have to deal with.

I must begin by pointing out that the circumstances here are in material points different from those in *re Hallett's Estate*. There the agent had in breach of his duty paid the money of his principal into his bank, so that it formed part of a general debt due to him on current account with the bankers. It was held that the money of the principal must be paid to him out of the debt so due. To call the right of the principal a charge on the debt, as Jessel,

M.R., did, was only to express compendiously, but somewhat loosely, that indebtedness was for a single sum of which the amount of the principal's money formed an integral part, and that the agent could not draw on account of the single sum, in which he had improperly mixed his own funds with the money of his principal, until he had made good the amount of that money.

For the purpose of the question before us the really relevant part of the judgment in *re Hallett's Estate* is that which shows how the difficulty of following money into a debtor and creditor account like a banker's is got over in equity. The loan to the bankers was regarded as an investment *pro tanto* of the principal's money, and the latter was treated as entitled to waive the breach of duty by his agent, and to claim the investment to the extent of the amount due to him as made on his behalf. 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.

In the present case the investment was not made in breach of a fiduciary duty on the part of the Society, and it was actually made with the authority of the depositors although on the supposition that a banking business was *ultra vires.* What was a material point in *re Hallett's Estate,* therefore, does not occur here. No doubt it was *ultra vires* of the Society to undertake to repay the money. But it was none the less intended that in consideration of giving such an undertaking the Society should be entitled to deal with it freely as its own. The consideration failed, and the depositors had the right to follow the money so far as invalidly borrowed into the assets in which it had been invested, whether these assets were mere debts due to the Society or ordinary securities, but that was their only right.

As to the part of the assets which was acquired with money paid by the shareholders the case appears to me to be free from difficulty. The money paid to the Society by the shareholders was paid as the consideration for the shares which were issued to them. That money therefore, beyond question, became the money of the Society. A large part of it has probably been applied *ultra vires* in the acquisition of the assets of the banking business. These assets can accordingly be claimed only by the Society itself as belonging to it, and the shareholders have no direct title to them.

The total mass of assets which the liquidator has to distribute thus represents in part money which the depositors are entitled to follow and in part money which the Society is entitled to follow. If the present value of these assets was equivalent to the total amount of such money there would be no difficulty—the assets would be apportioned according to the sources from which they came. Does it make a difference that the value has shrunk so that the two sets of claimants cannot be paid in full? I do not think so. The position of the Society is different from that of the agent in *re Hallett's Estate.* The depositors have no alternative right in this case to disaffirm the transaction to the extent of claiming on the footing that their money has been applied in breach of trust. All they can do is to adopt the dealings with the money that they handed over under circumstances in which it never ceased to be theirs, and claim the part of the mass of assets which represents it as belonging to them in equity.

There has been no breach of fiduciary duty on the part of the Society, and it appears to me that this circumstance is material in distinguishing the consequences here from those which followed in *re Hallett's Estate,* on the footing that there the agent could not gain at the expense of the principal an advantage for himself or his general creditors by, in effect, setting up a breach of duty. The depositors can, in my opinion, only claim the depreciated assets which represent their money and nothing more. It follows that the principle to be adopted in the distribution must be apportionment on the footing that depreciation and loss are to be borne *pro rata.* I am of course assuming in saying this that specific tracing is not now possible.

What is there must be apportioned accordingly among those whose money it represents, and the question of how the apportionment should be made is one of fact. In the present case the working out of a proper apportionment based on the principle of tracing not only would involve immense labour, but would be unlikely to end in any reliable result. The records necessary for tracing the dealings with the funds do not exist. We have therefore, treating the question as one of presumption of fact, to give such a direction to the liquidator as is calculated to bring about a result consistent with the principles already laid down.

I think that this direction should be that, without disturbing anything that has up to now been settled or agreed, he should apportion the entirety of the remaining assets (including mortgages and loans) between the depositors and the shareholders in proportion to the amounts paid by the depositors and by the shareholders respectively. In this way I am of opinion that the nearest approach practicable to substantial justice will be done. I think that this is the utmost extent to which, consistently with well-established principles, a court of justice can go in compelling the Society to restore that of which it has become possessed through its *ultra vires* transactions. In his dissenting judgment in the Court of Appeal, Fletcher Moulton, L.J., proposed to go further, and to apply the assets in paying the depositors before the shareholders received anything. For reasons which result from what I have already stated, I think that to do this would really be inconsistent with settled law as to the effect of *ultra vires* transactions. What I propose is, I think, not at variance with what this House actually decided in *Murray* v. *Scott,* 9 A.C. 519, and in such cases as *Cunliffe Brooks & Company* v. *Blackburn and District Benefit Building Society,* 9 A.C. 857, and *Baroness Wenlock* v. *River Dee Company,* 10 A.C. 354.

It is not the method of distribution directed in the case of *re Guardian Permanent Benefit Building Society*, 23 Ch. Div. 440, where the Court of Appeal said that not only the creditors of the Society but the unadvanced members must be paid in the first instance, and the balance only divided among the lenders from whom advances had been obtained without legal authority. But I do not think that the decision there upon this point can be upheld unless on the facts in that case no reliable attempt to trace was held to be possible. If such presumptions as to the sources of the assets could have been made, as I think must be made, in the present case, the method of distribution adopted would not have been justifiable on the assumption that the principle I have stated is the right one. There is much force in the criticism of the judgments in that case made by Fletcher Moulton, L.J., and by Buckley, L.J., in the present case. The reasoning implied in those judgments appears to me to have been pushed to an extent which, unless carefully qualified, establishes not its conclusion but either too much or too little.

The agents of the Society in the present case, unlike the Guardian Society, have acted *ultra vires* in the application not only of the depositors' but of the Society's own money, by lending it to customers with whom it dealt as a banker, and in investing it in securities for banking purposes. And we are not dealing with any question in which the shareholders are seeking to claim against the Society on a footing inconsistent with their true contract as quasi-partners. It is in their case, as in that of the depositors, a question only of a right to follow, and in a distribution by a liquidator based on this principle I see no reason why either set of claimants should have priority over the other. The contest does not arise between shareholders as such and creditors of the Society. It arises between persons, each of whom claims that, so far as the point at present in dispute is concerned, certain moneys were his, and never ceased to be his, and are now represented by specific assets.

The only authorities to which I wish to make further reference specifically are *Cunliffe Brooks & Company* v. *Blackburn and District Benefit Building Society*, which I have already mentioned, and the subsequent decision in *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Company*, 29 Ch. Div. 902. In the first of these cases this House laid down the principle, affirming the Court of Appeal, that where securities had been deposited with bankers for overdrafts which were *ultra vires* the bankers could not hold the securities. That seems to have been obviously right on the facts before the House. In the subsequent case the Court of Appeal took a further step and held that the liquidator could recover from the bankers moneys paid to them by the society and applied in discharge of the money which they had lent to it by way of overdraft and so lent *ultra vires*. I think that decision, which was not brought before this House for review, was wrong under the circumstances of the case in the absence of proof by the society, who by the fact of repayment had made an admission to the contrary effect that the money advanced by the bankers had been lost and could not be treated as charged. The society ought, in my opinion, to have been regarded in the absence of evidence to this effect as having simply returned to the bankers the latter's own money. For the same reason I entertain considerable doubt whether *ex parte Wilson*, 21 Q.B.D. 301, was rightly decided.

I have examined the other authorities cited by the learned counsel on both sides in the course of the argument, but except in so far as I have already referred to these authorities I do not think it necessary to comment on them, for it is only on the points which I have mentioned that I find anything in what I am about to propose that is not really in harmony with them.

I move that the judgments of the Court below be varied so as to give effect to a declaration, subject to matters which have already been settled by the consent of the parties, and subject to any application which may be made by any individual depositors or shareholders with a view of tracing his own money into any particular asset, and subject to the payment of all proper costs, charges, and expenses, the liquidator ought to proceed in distributing the remaining assets of the Society between the depositors and the unadvanced shareholders on the principle of distributing them *pari passu* in proportion to the amounts properly credited to them respectively in the books of the Society in respect of their advances at the date of the commencement of the winding-up, and that the case be remitted to the Court of first instance to apply this principle. As the appeal is one of an unusual character, and the litigation was essential for ascertaining the rights of all parties, I think we should not disturb the orders of the Courts below in regard to costs, and that the costs of all parties to this appeal should be paid out of the assets on the same footing as in the Court below.

LORD DUNEDIN — The facts of this case admit of being stated with extreme brevity. The Birkbeck Permanent Benefit Building Society, established in 1851 under the Building Societies Act of 1836, and having for its proper object the usual purposes of a building society, started and developed a banking business. On the 20th June 1911 a winding-up order was pronounced. The outside creditors, to use a convenient term, were inconsiderable in number and value, and have been paid. There remain the claims of the bank customers or depositors and the shareholders. The exact figures are not available, but an approximate idea may be gathered from the balance-sheet of the 31st March 1910, from which it appears that in rough figures the claims of the shareholders represented a little over one million pounds, those of the depositors ten and three-quarter millions.

The shareholders are divided into two classes, A and B. The A shareholders made

an arrangement with the depositors, and accordingly no question arises in respect of them. The B shareholders elected to stand on their legal rights. For the purposes of this case it is enough to describe the B shareholders in the terms which have become familiar through cases decided in your Lordships' House as unadvanced shareholders who had not at the date of the winding-up given notice of withdrawal.

On the 30th June 1911 the liquidator by summons directed against persons representative of each class of claimants, asked for directions from the Court as to how the assets were to be applied. The assets were not sufficient to pay all claimants in full, but they were more than sufficient to pay the outside creditors and the shareholders. This summons, after certain amendments, was finally disposed of by an order of Neville, J., of the 6th November 1911. By this time the arrangement already mentioned between the A shareholders and the depositors had been come to. The order ranked the claimants and directed the assets of the Society to be distributed as follows:—1. Costs of winding-up, including costs of scheme of arrangement between A shareholders and depositors. 2. Payment of outside creditors. 3. Payment to unadvanced members of all sums due, including interest and bonus. 4. Balance to depositors in proportion to sums at their credit.

This order has the effect, so far as the B shareholders are concerned, of paying them in full. Against this order an appeal was taken, and the order was affirmed by the Court of Appeal, Fletcher Moulton, L.J., dissenting. Appeal has now been taken to your Lordships' House.

I do not propose to occupy your Lordships' time by discussing the question of whether the accepting of the depositors' money on a contract to repay was *ultra vires*. I think it clearly was *ultra vires*, and I agree with the learned Judges of the Court of Appeal in the reasons they give for so holding.

The order as made is admittedly made on the authority of the order made by the Court of Appeal in *re Guardian Permanent Benefit Building Society*. In itself the order obtains but scant praise from the learned Judges who felt bound to pronounce it. The Master of the Rolls says that the *Guardian* order is binding upon him, but adds—"I feel a difficulty in discovering the principle on which it was based. It seems to me a rough and ready tracing judgment, illogical, but possessing the merit of attempting to do partial justice to the lenders." Buckley, L.J., explains this illogicality in a very pertinent passage which I need not quote.

Apart from the fact that the *Guardian* order was framed by eminent Judges—Sir George Jessel, Cotton, and Bowen, L.JJ—it seems to me that its authority is somewhat scant, and in particular, that there is no possibility of saying it has in any way received the approval of your Lordships' House. I should like to make this clear by a brief examination of that case. There were two sets of questions—one as to the position of the lenders of money, the other as to the position of certain paid-up preference shareholders who had taken shares under a certain rule 32 of the Society. The Society in that case had by its rules a power to borrow without any limit as to extent.

The Court of Appeal held that a power to borrow without limitation as to amount was *ultra vires*; that consequently the lender of money had no legal or equitable claim of debt against the Society; and they then made the order in question. As in question with the other shareholders they admitted the claim of the preference shareholders, but this—although valuable from another point of view in the discussion of these matters—is for the moment beside the question. The ranking under the order therefore was, first, outside creditors; second, shareholders; third, balance to lenders of money. The case was taken to your Lordships' House on two points—by the lenders of money as against the order postponing them, and by the ordinary shareholders as against the preference shareholders. Their Lordships in this House held that the Court of Appeal was wrong in holding that a power to borrow was *ultra vires* because unlimited; and no question being raised as to the borrowing having been for anything but legitimate objects of the Society, the result was that the lenders became ordinary creditors, and as such ranked before all shareholders. As regards the preference shareholders they affirmed the Court of Appeal.

Now it appears plainly from this that the result of this was entirely to sweep away the order, not upon an expressed opinion that the order was itself wrong, but because it affirmed the true facts to be such as to make the order inapplicable to the facts of the case. Consequently this House had really no opportunity of considering whether the order itself was right.

It was strenuously contended, however, at your Lordships' Bar, that the *Guardian* order was at least inferentially approved by the House in the subsequent but nearly contemporaneous case of *Cunliffe Brooks & Company* v. *Blackburn and District Benefit Building Society*. This is, I think, a misconception of the case. In that case a bank had made advances to the society upon deposit of securities as in ordinary bankers' practice, the securities being held by the bank to meet the overdraft. The suit was one at the instance of the liquidator of the society to recover the securities. The Court of Appeal held that the overdraft was a borrowing and was *ultra vires*, but said that if the bank could show that the moneys paid upon the overdraft, or any part of them, had been expended in paying the just debts of the society, the bank would *pro tanto* be entitled to the benefit of the securities. The bank appealed. The liquidator presented no cross-appeal. This House held that the decision of the Court of Appeal was right in so far as it held that an overdraft was a borrowing and was *ultra vires*, with the resulting consequence that the bank could not hold the securities in respect of contract.

As regards the equity which was conceded to them by the order, they pointed out that

no appeal was made against that order. Now it will be observed that this case dealt with the retention of the securities alone, and the moment that contract was gone the right to the securities was gone, for to hold them it was necessary to hold them against all the world, *i.e.*, against the ordinary creditors of the society. But the question was not raised, and could not be raised in that litigation, of what would be the fate of a claim at the instance of the bank against the general funds in the liquidation, and if that claim was made what would be its ranking or position as in a question with shareholders. This is clear from the mere statement of the case. But it was clearly seen by Lord Watson, who in the course of his judgment expressed himself as follows—"If it were possible in the present suit to determine the whole questions which have arisen or may yet arise between the parties in regard to these advances by way of overdraft, your Lordships would have many important questions to consider. But the sole object of these proceedings at the instance of the liquidators is to recover certain assets of the Society which are held by the appellants in security of the advances made by them."

I therefore come to the conclusion that not only is the *Guardian* order not binding on this House, but that it does not bear with it any evidence that the question in its broad aspect was very carefully argued.

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 A in mistake for the house of B. An action would lie against A for restitution. Such an action could easily be founded on the right of property. To use the Roman phraseology, there would be a *jus in re;* and where there was a *jus in re* there would not be, I take it, any difficulty in finding a form of common law action to fit the situation. But the moment you come to deal with what in Roman phraseology is called 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 for 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. My noble and learned friend Lord Sumner, in his opinion, which I have had the advantage of seeing, has conclusively shown that it was not. But being a legal form it does not admit, in spite of Lord Mansfield's dictum that such an action was very beneficial and to be encouraged, of being stretched beyond its capacity. What concerns my view, however, is only this, that it is a contrivance which is introduced to meet an equitable idea, which idea is a wider idea than that expressed by the proposition that when there is a *jus in re* an action will lie, and when there is not such 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 never will be a *jus in re*—there can at most be only a *jus ad rem.*

Viewing as I do the equity as based on inherent ideas of justice, it is, I think, very instructive to see how it is dealt with in other systems. I therefore make no apology for going to the Roman law, not as an authority, for such it is not, but as instructive as to how these matters may be dealt with, and as suggestive, as I shall afterwards show, as to the true answer to the difficulties of the present case. The English common law has various actions which, under a classification which I understand to be really one of modern growth, are divided into actions in respect of contract and of tort. But in the Roman law the actions covering the same field are actions *ex contractu* and *quasi ex contractu,* actions *ex delicto* and *quasi ex delicto.* The class we are dealing with are obviously actions *quasi ex contractu.* Accordingly we find in the case of a chattel that while the *actio commodati* covered the case where there was a contract, *i.e.*, a bailment, there was also an *actio utilis* where there was no contract. And coming to the case of money, while *mutuum* was proper loan, *pro-mutuum* covered the cases where money was had and received without contract, and a special form of action for the common case of the payment of a supposed but non-existing debt was known as *condictio indebiti.* Now the English law having no quasi-contracts got over the difficulty in such cases as the action for money had and received by the fiction of a contract.

It is, I think, obvious that the distinction between the fiction of a real contract on the one hand and the existence of a quasi-contract on the other is a distinction of a most metaphysical description. Both systems, at anyrate in the case of money paid under a mistake in fact, recognise the obligation to repay where there is no *jus in re.* Both systems, I think, recognise the equitable rule, and proceed to carry it out according to the forms of their own development.

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. The result is that it is a real debt, and as such entitled to take its place along with the debts of all proper creditors. To put an example. Suppose a sum of money was paid by A to the credit of B at his bankers under the mistaken idea that a debt was due. Suppose that the next

day, before A had discovered the mistake, B drew out the whole balance at his credit and spent the cash, and went bankrupt the same day. Can it be doubted that A would have a claim in B's bankruptcy which would rank equally with all B's ordinary creditors.

Up to this time I have been putting cases where the recipient of the money does not receive it under an *ultra vires* contract. Let me now examine the position where the money is received under a contract to repay and where that contract is found to be *ultra vires.* That there can be no resulting proper contractual obligation is clear from the decisions of this House in *Ashbury Railway Carriage and Iron Company* v. *Riche*, L.R., 7 H.L. 653, and *Baroness Wenlock* v. *River Dee Company*, 10 A.C. 354. It is here that the difficulty comes in in extending the action for money had and received to such a case. For, in the first place, if that action lay it would have the effect of bringing in A, who has *ex hypothesi* no binding contract to urge against B, *pari passu* with the ordinary creditors of B who have got binding contracts; and in the second, how is it possible to say that there is a fictional contract which is binding in circumstances in which a real contract is not binding? I confess that for a person not bred to the common law to express an opinion as to the true meaning and extent of common law actions is to handle *periculosæ plenum opus aleæ.* But to the best of my comprehension, and notwithstanding the case of *re Phœnix Life Assurance Company*, 2 J. & H. 491, I have come to the conclusion that the action for money had and received cannot be stretched to meet the situation.

It is not, however, necessary that the claim should be one capable of being made good by action at law. It will suffice if there is an equitable remedy.

Precisely the same difficulty was felt and met in the Roman law. True, there was then no doctrine of *ultra vires* in the modern sense of the word. But after all the only effect of the doctrine of *ultra vires* is to render contracts which are *ultra vires* a nullity. You cannot have more than a nullity, and such a nullity was equally found in the Roman law in the case of the contracts of pupils who were totally incapable of contracting. Now the Roman law met the situation by recognising that there was the supereminent equity with which I started, and proceeded to apply it, while giving full effect to the doctrine of there being no contract. The supereminent equity was expressed by the Roman jurists in the brocard *nemo debet locupletari jacturâ alienâ.* When, therefore, the advance was made to the pupil, there was no longer, as in the case of the ordinary person, an obligation to restore—a debt taking its place along with other debts—but the pupil was bound to give up *in quantum locupletior*—that is to say, to give up the superfluity which he was possessing. But only a superfluity—that is to say, something which if he kept would be pure gain to him. I cite authority for what I have said:—Dig. 13, 6. "Commodati vel contra"—"1. (Ulpian). Impuberes commodati actione non tenentur quoniam nec constitit commodatum in pupilli persona sine tutoris auctoritate, usque adeo, ut, etiamsi pubes factus dolum aut culpam admiserit, hac actione non tenetur, quia ab initio non constitit. (*Cf.* the doctrine that an *ultra vires* contract of the company cannot be ratified even by all the members.) . . . 3. (Ulpian). Sed mihi videtur, si locupletior pupillus factus sit, dandam utilem commodati actionem secundum divi Pii rescriptum." . . . Dig. 26, 8. "De auctoritate et consensu Tutorum et curatorum"—"5. (Ulpian). Pupillus obligari tutori eo auctore non potest. . . . Sed et quum tutor mutuam pecuniam pupillo dederit vel ab eo stipuletur, non erit obligatus tutori. Naturaliter tamen obligabitur in quantum locupletior factus est: nam in pupillum non tantum tutori verum cuivis actionem in quantum locupletior factus est, dandam divus Pius rescripsit.

Pothier, the great French jurist, took the same kind of view. In his "Traité des obligations," after dealing with contracts, he goes on to consider "Des autres causes des obligations," and he puts first in this category quasi-contracts. On these he comments as follows:—Sec. 114—"Dans les contrats c'est le consentement des parties contractantes qui produit l'obligation: dans les quasi contrats il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation en rendant obligatoire le fait d'où elle résulte." 115—"Toutes personnes, même les enfants et les insensés, qui ne sont pas capables de consentement, peuvent par le quasi contrat qui résulte d'un fait d'un autre être obligées envers lui et l'obliger envers elles; car ce n'est pas le consentement qui forme ces obligations et elles se contractent par le fait d'un autre, sans aucun fait de notre part."

I have made these citations to show that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract. Is English equity to retire defeated from the task which other systems of equity have conquered? Let us for a moment examine what the argument on the other side is. There being no contract, it is impossible, it is said, to have any obligation on the part of the Society to restore what it has taken from the depositors. The only right of the depositors is a right to vindicate property, or, in other words, when you have a *jus in re* you can enforce it, but if the thing has so disappeared that a *jus in re* is no longer to be found (and this must practically always be so in the case of money), then your remedy is gone. The sole relief which equity can give is that if you can show that your money has paid a just debt, in that case you shall have action. It comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations

by saying Corban. In the words of technical equity it is unconscionable.

The appalling result in this very case would be that the Society shareholders having got the proceeds of the depositors' money in the form of investments, so that each individual depositor is utterly unable to trace his money, are enriched to the extent of some 500 per cent. I am aware that the order under review shrinking from that result provides that when the shareholders get 20s. in the £ the rest may go to the depositors. But as to that there is, to my mind, no possible answer to the terse and inexorable logic of Buckley, L.J. Even as it is the result is that illegitimate banking guarantees the shareholders 20s. in the pound.

But further, the whole strength of this argument lies in the idea that the *jus in re* represents the depositors' only right—that there can be no obligation on the other side at all. It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a *jus in re*, for you cannot have a *jus in re* in currency. It shows that 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.

It is the case that the common law, as I have already said, works by means of a fiction which becomes inapplicable when the money has been received under an *ultra vires* contract. All, therefore, that is left to it is to vindicate *in forma specifica*, and its forms of action fail when the thing can no longer be identified. Equity—I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that situation? I think not. I think it can always, in the exercise of the same jurisdiction, help the common law by tracing, and can say that if the proceeds of property can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form. To do this is to give full effect to the doctrine of *ultra vires*—for the party receiving is not ordered to pay as a debt the equivalent of what he originally got, but ordered merely to surrender what he still has as a superfluity, an enrichment which but for the original reception of the money he would have been without.

It therefore in each case becomes a question of evidence. Now, that the Society in the present case has got a superfluity is obvious. The assets, shrunk as they are owing to the fall in the value of investments, are still far beyond all moneys contributed by the shareholders. But what is the measure of the superfluity? The outside creditors here were actually paid because their claims were inconsiderable. In my judgment they were rightly paid under the circumstances of the actual case, and had they not been, they would stand, after expenses of the liquidation, as first in the ranking. For in a question with shareholders we are told that they were debts of a character which the directors had a power to make. And in a question with the depositors, they were incurred in a business, illegally carried on no doubt, as for the Society, but yet one which the depositors had been willing that the directors should carry on. Now what is the position of the shareholders? I take it to be clear that the shareholders are not creditors of the Society, but are merely the persons who are entitled on a winding-up to share the assets of the Society among them. This is, I think, quite settled by the decision of your Lordships' House in the case of *Walton* v. *Edge*, 10 A.C. 33, where an unadvanced member who had given notice of withdrawal was held entitled in the liquidation to be paid in full before his fellow unadvanced members who had given no such notice.

The position therefore comes to this—The shareholders are entitled to share among the proper assets of the Society. But they are not entitled to be made rich at the expense of the depositors by swelling the assets of the Society by means of the proceeds of moneys which they themselves never contributed. There is a mixed mass of assets, as to the precise composition of which as to source it is impossible to pronounce. Had the assets never shrunk there would be enough to pay both in full. But they have shrunk and someone must bear the loss.

Now there are certain situations, of which *re Hallett's Estate*, 13 Ch. Div. 696, 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 extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other. It is a mere question of evidence. What has happened is truly this—The directors of the Society have taken the moneys of the shareholders which they had a right to receive and the moneys of the depositors which they had not, and mixed them so that they cannot be discriminated from each other, and have put them, so to speak, in the Society's strong box, where the mixed mass is found by the liquidator. It is here, and here only, that I differ from my noble and learned friend Lord Moulton in his dissenting judgment in the Court below—a judgment which really follows the extremely able judgment of Bristowe, V.C., of the County Palatine Court of Lancaster, in *re Guardian Permanent Benefit Building Society* (*sub nom. Crace-Calvert's* case, 23 Ch. Div. 440). There being no direct evidence the only equitable means is to let each party bear the shrinkage proportionately to the amount originally contributed, and this is the judgment of my noble and learned friend on the Woolsack, in which I concur.

I wish to remark, in conclusion, that it seems to me that this line of reasoning gives full effect to the doctrine of *ultra vires* even in the somewhat rigid form in which it has

been adopted by your Lordships' House in *Ashbury Railway and Iron Company* v. *Riche.* To go further, as the respondents' argument seeks to do, is, I think, to run the doctrine mad. It was a doctrine which was introduced in order to let societies keep their own money, not to appropriate other people's.

I have dealt with the whole matter rather on principle than on authority. But I ought to say that I concur with the Lord Chancellor in thinking that the case of *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Company* was wrongly decided, and for the reason he gives; and that I agree with Moulton, L.J., in thinking that the decision of this House in *Murray* v. *Scott*, 9 A.C. 519, being the second question in *re Guardian Permanent Benefit Building Society* is really an affirmation of the principle that there may be an equity when there is no contract, for the contract under which the £30 shares were issued before the amendment of rule 32 was made was null and void, the rule not having been certified by the certifying barrister.

LORD PARKER—The Birkbeck Permanent Benefit Building Society is an association formed under and regulated by the Statute 6 and 7 Will. IV, cap. 32. It is not incorporated, but acts through its directors, and acquires and holds property in the names of the trustees. Its objects are defined by its rules, and do not, and indeed having regard to the statute could not, properly include the carrying on of the business of bankers. It was therefore *ultra vires* for the Society to carry on a banking business. Nevertheless for many years prior to its liquidation its directors and agents, affecting to act on its behalf, had carried on an extensive banking business popularly known as the Birkbeck Bank, and in the course of such business had received many millions of pounds on deposit or current accounts. Moneys so received are in contemplation of law borrowed moneys, and although the Society had under its rules power to borrow for the purposes of its legitimate business, it of course had no power to borrow for the purposes which were *ultra vires*. It is reasonably clear, having regard to the documents in evidence, that all those persons from whom the directors and agents of the Society received money on deposit or current account must have been aware that the borrowing thus constituted was borrowing in the normal course and for the purposes of a banking business and not for the legitimate purposes of the Society. None of such persons, therefore, can rely on the borrowing powers conferred by the Society's rules.

It has been settled in the cases of *re National Permanent Benefit Building Society*, L.R., 5 Ch. 309; *Cunliffe Brooks & Company* v. *Blackburn and District Benefit Building Society*, 9 A.C. 857; and *Baroness Wenlock* v. *River Dee Company*, 10 A.C. 354, that an *ultra vires* borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not therefore open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make. At the same time there seems to be nothing in those decisions which would bind the House, if they were considering whether an action would lie in law or in equity, to recover money paid under any *ultra vires* contract which was not a contract of borrowing—for example, money paid to a company or association for the purchase of land which the company had no power to sell, and the sale of which was therefore void, or money paid to the company or association by way of subscription for shares which it had no power to issue. In such cases the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the *ultra vires* contract. It will therefore be well to postpone consideration of such cases as *re Phœnix Life Assurance Company*, 2 J. & H. 441, and *Flood* v. *Irish Provident Assurance Company*, 1912, 2 Ch. 597, till the question actually arises.

Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows:—First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed) the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied. There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case if the contract of loan involves a security for the money borrowed the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off—see the case of *Cunliffe Brooks & Company* v. *Blackburn and District Benefit Building Society*, the case of *Baroness Wenlock* v. *River Dee Company*, and the case of *Wrexham, Mold, & Connah's Quay Railway Company*, [1899] 1 Ch. 440. It is still open to your Lordships' House to adopt either view should the question actually come up for determination.

Secondly, it appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through

an agent be party to an *ultra vires* act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender.

At law, therefore, the lender can recover the money so long as he can identify it, and even if it has been employed in purchasing property there may be cases in which by ratifying the action of those who have so employed it he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. 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, it ended, as was so often the case, in creating what were in effect rights of property though not recognised as such by the common law.

The principle on which and the extent to which trust money can be followed in equity is discussed at length in *re Hallett's Estate*, 13 Ch. Div. 696, by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case this principle was held applicable when the trust money had been paid into the trustee's banking account. I will add two further illustrations which have some bearing on the present case. Suppose the property is acquired by means of money part of which belongs to one owner and part to another, the purchaser being in a fiduciary relationship to both, clearly each owner has an equal equity. Each is entitled to a charge on the property for his own money, and neither can claim priority over the other. It follows that their charges must rank *pari passu* according to their respective amounts. Further, I think that as against the fiduciary agent they could by agreement claim to take the property itself, in which case they would become tenants in common in shares proportioned to amounts for which either could claim a charge.

Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity he would be in exactly the same position as the fiduciary agent, and could not therefore assert any interest in the property until the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand I cannot at present see why he should have any priority as against the property over the owner of the money which had in fact been misapplied.

It remains to mention the case of *re Guardian Permanent Benefit Building Society* (*Crace-Calvert's* case, 23 Ch. Div. 440), which has in the present case been followed by Neville, J., and the Court of Appeal. It is worth while to call attention to the facts of this case, which differ in some important particulars from the facts of the case your Lordships have to decide. There the society was, like the Society in the present case, formed under and regulated by the Act of 6 and 7 Will. IV, cap. 32, and according to the rules had an unlimited power of borrowing money when required for its legitimate purposes. The Court of Appeal first decided that such an unlimited power to borrow was void, so that the society had in effect no power to borrow at all—a decision subsequently reversed in this House—*Murray* v. *Scott*, 9 A.C. 519.

The directors of the society had affected to borrow money from various lenders, but no lender was able to prove that his money had gone in discharge of any legitimate indebtedness of the society, or to trace his money into any particular asset of the society. Part of it had been applied in paying off loans previously contracted, and the remainder, together with the loans so paid off, had in some way or other been used for the legitimate purposes of the society and found its way into the society's assets. The society was in liquidation, and it was treated by Sir George Jessel as fully established that its assets had been increased by and to a large though undefined extent represented the borrowed moneys. He therefore held that after paying thereout the costs of the liquidation and all debts and everything to which the members were entitled by way of return of capital, interest, and bonus, the surplus ought, "on the plainest possible principles of equity," to be returned to the people who advanced the money.

No doubt at first sight it is difficult to be certain as to the principles of equity to which Sir George Jessel referred. But I think the difficulty may be solved by disentangling the equity itself from the directions by means of which the Court endeavoured to give effect to it. The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by and in fact still represented the borrowed money. It would be inequitable for the society to take advantage of the misapplication by its agents of money belonging to others and held by them in a fiduciary capacity. In other words it was the same equity as that on which a tracing order is based. I cannot, however, disguise from myself that the directions given by the

Court with the object of working out this equity are open to considerable criticism, at any rate if they be treated as proper to be given in every case, and not depending on the particular facts then before the Court.

Suppose that when the moneys were advanced, the assets of the society were insufficient to pay the creditors of the Society in full, or to pay anything to the contributories, but that by means of the *ultra vires* loans such assets had at the date of the winding-up been so increased that both creditors and contributories could be paid in full, the creditors and contributories remaining the same. Would it be in accordance with equity and good conscience that these creditors or contributories should claim to be paid in full? I cannot think that it would. It seems to me that in equity and good conscience the amount of increase in the assets due to the *ultra vires* borrowings ought to be restored to the lenders. Neither creditors nor contributories ought in equity to be allowed to retain an advantage derived by reason of the misapplication by the society's agents of moneys which were in the position of trust moneys. Counsel sought to explain the *Crace-Calvert* case in the following way. It was clear, they put it, that the money of the *ultra vires* lenders, or at any rate some part of it (the exact amount being unascertained), was in the mass of assets in the hands of the liquidator. If the legal claims of all persons having any possible claim on the assets were first satisfied, what then remained would clearly represent the borrowed money. This money would in fact be identified as the lenders' money, not by any positive evidence but by a process of exclusion. This explanation fails in at least one important respect. The legal claims of the society's members were not confined to payments of the principal of their shares with interest and bonus. The members were legally entitled to all the assets, except such part thereof as the lenders could identify as belonging in equity to them, subject, of course, to the claims of the society's creditors. Logically, therefore, it would be impossible to arrive at what in equity belonged to the lenders by first satisfying the legal claims of the creditors and members. It was said that in *Grace-Calvert's* case there were admittedly no profits; but why, if this be assumed, should the members be entitled to interest or bonus? It seems to me that the actual directions given in that case must be considered merely as a rough and ready way of ascertaining in the particular case before the Court the extent to which the assets had been increased by and represented this borrowed money, and not as capable of logical justification.

If the Court had, as it might have done, directed an inquiry on the point, material facts not before the Court might have been disclosed. It might have been shown that the debts due to the ordinary creditors had really been incurred in preserving the bulk of assets in which the shareholders and *ultra vires* lenders were alike interested, in which case it might be equitable that these debts should be first paid out of the fund. On the other hand it might have been shown that these debts were incurred before the *ultra vires* borrowing, in which case I cannot at present see how the creditors could claim to be in a better position because of the *ultra vires* borrowing. And again the true facts with regard to profits might have come out. The answer to the inquiry would have thus depended largely on the facts put in evidence. One question of principle only would, I think, have been involved. Could the society be considered as having itself been a party to any breach of fiduciary duty so as to preclude it from asserting any interest in the assets until the *ultra vires* lenders had been fully repaid thereout? Or was the society in the position of a person who had innocently received from a fiduciary agent money belonging to another and invested it with money of its own? My present opinion is that the first of these questions should be answered in the negative and the latter in the affirmative, in which case the society and *ultra vires* lenders would as against the assets rank *pari passu* and without any priority the one over the other. It is, however, unnecessary to decide this point, because the facts of the *Crace-Calvert* case are distinguishable from the facts of the case now before your Lordships.

It is important to observe that in the *Crace-Calvert* case the money was borrowed for and applied to the legitimate purposes of the society, the loan being *ultra vires* because the society according to the Court of Appeal had no power to borrow at all even for its legitimate purposes. In the present case the Society had power to borrow for its legitimate purposes, and the borrowing in question is *ultra vires* only because to the knowledge of the lenders it was for a purpose not authorised by the Society's constitution. This distinction is, I think, of considerable importance. In the first place, if the agents of a society, having power to borrow, borrow money intending, to the knowledge of the lenders, to apply it for an illegitimate purpose, but in fact apply it for the legitimate purposes of the society, there seems no reason either in law or in equity why the loan to the extent to which it is so utilised should not be treated as valid. In the next place, if the money be in fact utilised for the illegitimate purpose for which it is borrowed, say, the carrying on of an *ultra vires* banking business, to whom does this business belong? Whose are the assets and whose are the liabilities? The Society cannot be a party to any transaction or series of transactions not within its powers. The Society therefore is neither entitled to the assets nor subject to the liabilities acquired or incurred in the business. No doubt if the business is a financial success the directors or agents who carried it on would have to account to the Society for the profits or surplus assets, for equity will not allow a director or other agent to make a profit out of his directorship or agency. It is quite clear, however, that the Society could not be entitled to anything except the profits or

surplus. It could not claim to be entitled to the assets of the business and exempt from its liabilities on any plea of *ultra vires*, and for this purpose the borrowed moneys would be a liability of the business.

But suppose that the illegitimate business is carried on in part only with the borrowed money and in part with money belonging to the Society. Even in this case the business will not belong to the Society, nor will the Society be entitled to its assets or subject to its liabilities any more than it would have been the case if the only money employed in the business had been the borrowed money. Further, the Society's right in equity to take the assets subject to the liabilities if the business were successful would be similarly unaffected. But the fact that the Society's own money had been employed by its directors or agents in an *ultra vires* business would entitle the company to an additional equity. It would be entitled on the principles of *re Hallett's Estate* to follow the money as long as it or any property acquired by its means could be identified. In other words, it would have exactly the same equities in this respect as the *ultra vires* lender, including the equity which in my opinion underlies *Crace-Calvert's* case. It follows from this that it would be entitled to take or claim a lien on any assets of the business acquired exclusively with its money, and to a lien or charge on any asset or mass of assets acquired partly only with its money, subject nevertheless to this, that if the *ultra vires* lender could establish a similar lien or charge the two liens or charges would rank *pari passu*. Moreover, this right on the part of the Society would not be affected by the question whether the business had been carried on at a profit or at a loss.

The present case is not quite so simple as the one I have supposed, for this reason—The legitimate business of the Society included the making of loans to members to enable them to acquire houses or land. Many such loans were in fact made, but it is impossible to say how far the money lent was the money of the Society or the money of the *ultra vires* lenders. The question is whether these facts in any way affect the situation. Of course if the Society could trace its own money into any of these loans the security for the loan would undoubtedly belong to the Society, but no such tracing appears to be possible. And again, if any *ultra vires* lender could trace his money into any of these loans he would not only be entitled to the security, but might claim to be a secured creditor of the Society on the ground that the *ultra vires* borrowing was validated by the use of the money for purposes for which there was a valid borrowing power in the Society—but no *ultra vires* lender can so trace his money. There does not appear to be any presumption of law as to whose money was utilised for the purposes of those loans. Moreover, the directors treated the loans in question as part of the banking business and included them in the balance-sheet which was posted up in the bank premises and supplied to customers who asked for it. Under these circumstances I think the fact that those loans were within the legitimate purposes of the Society cannot affect the situation in any way.

The case therefore presents itself in this way—Here is a mass of assets arising in the course of an *ultra vires* business carried on by the directors and agents of the Society. There are on the other hand liabilities how or for what purpose incurred is not in evidence. No one claims any interest in the assets except the *ultra vires* lenders, the members of the Society, and the creditors, in respect of the liabilities to which I have referred. The *ultra vires* lenders and the members are willing that these liabilities and the costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is left may be taken to represent in part the moneys of the *ultra vires* lenders and in part the moneys of the Society wrongfully employed in the business. The equities of the *ultra vires* lenders and of the Society are equal, and it follows that the remainder of the assets ought to be divided between the *ultra vires* lenders and the Society rateably, according to the capital amount contributed by such lenders and the Society respectively. This mode of distribution gives effect to all the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in *Crace-Calvert's* case, for there the business actually carried on was *intra vires*, and thus belonged to the Society, except in so far as the *ultra vires* lenders could establish any equitable claim. It depends solely on the fact that the assets for distribution being assets not for a legitimate but an *ultra vires* business, are not the assets of the Society, except in so far as they can substantiate some equity to them, and that such equity as they have can arise only from an application of the same principles to which the *ultra vires* lenders are themselves entitled to have recourse.

There are two further points which arose in the course of the argument before your Lordships' House and which I desire to mention. In the first place, there is the decision of the Court of Appeal in the case of *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Company* (*No.* 2), 29 Ch. Div. 902. Speaking for myself, I am by no means satisfied that a statutory company or association whose agents have borrowed money on its behalf, though it has no power to borrow, can in no circumstances repay the loan. It may well be that if the money does not come into the coffers of such company or association, or if so coming it is subsequently lost, there may be no power of repayment. But if the money can be traced, or if the circumstances are such that if the Society were in liquidation there would be an equity such as that to which effect was given in *Crace-Calvert's* case, why should not the company or association repay the money so far as it is represented by assets in their hands? As at present advised I see no reason why it should not; nor indeed am I satisfied that the equity to which effect is being given in this case is

necessarily confined to a liquidation. It is, however, unnecessary for your Lordships to decide these points.

In the second place, there is *Murray* v. *Scott*, 9 A.C. 519, which constitutes the basis of the dissenting judgment of Fletcher Moulton, L.J., in the present case. With this judgment I find myself in all respects except one in substantial agreement. I agree that so far as the distributable assets represent the money of the *ultra vires* lenders they are not in equity the assets of the Society. The distributable assets must be purged to this extent before it can be ascertained what in equity belongs to the Society. The point on which I differ is this—Whereas Fletcher Moulton, L.J., was of opinion that the amount to which the assets must be purged is the amount of the moneys lent, I think the true view is that the amount to which the assets must be purged is the amount only to which they have been increased by and still represent the borrowed money. It is only in this connection that *Murray* v. *Scott* requires consideration. In that case the society had issued £30 preference shares which they had no power to issue and received from the subscribers the full amount thereof. The society had subsequently obtained power to issue £1 preference shares, and had accepted a surrender of each £30 preference share in consideration of the issue to the holder of thirty £1 preference shares. It was held that though the latter transaction could not stand at law, yet the society were in equity bound to treat the subscribers either as holders of validly issued £1 preference shares or creditors for the amounts they had subscribed. It is clear that in either case they would, according to the actual decision in *Crace-Calvert's* case, be paid before the *ultra vires* lenders got anything, so that the equity was not the *Crace-Calvert* equity.

The equity is, in the judgments of Sir George Jessel, M.R., and Cotton and Bowen, L.JJ., based upon the misrepresentation of the society's agents in that they had printed in the rules of the society a clause expressly empowering the issue of £30 preference shares, though such clause had been disallowed by the barrister and therefore did not in fact form part of such rules. The decision was affirmed by this House, Sir George Jessel's reasons being approved by Lord Blackburn. Now undoubtedly if the agents of a society affect to borrow money in the course of a banking business there is not only an express representation of authority, but an implied representation of (1) a power to borrow, and (2) a power to borrow for banking purposes, for without such powers the authority could not be given. Yet the same Judges had just decided *Crace-Calvert's* case, and clearly did not intend to go back on their decision. I can hardly think they intended to base their decision on the particular manner in which the misrepresentation had been made. It seems to follow, therefore, that in the case of an *ultra vires* borrowing, the nature of the transaction precluding as it did the creation of a debt at law or in equity, no such equity could, in their opinion, arise as that which they held to arise in *Murray* v. *Scott*, which was an *ultra vires* issue of shares. I doubt, therefore, whether *Murray* v. *Scott* can be relied on as any authority in the present case, and if so relied on it is contrary to the *Crace-Calvert* case and other cases which decide that no debt can arise out of an *ultra vires* borrowing. It is to be observed that Cotton, L.J., refers to the equity as arising, not only if the *ultra vires* transaction is brought about by the misrepresentation, but if it be brought about by "the carelessness or otherwise" of the company's agents. In other words, he seems to me to be dealing with it simply as a case of total failure of consideration from whatever cause. I am not satisfied that total failure of consideration would not have afforded ample ground for the actual decision, and, as I have already said, there is nothing to preclude this House from deciding that under the circumstances of *Murray* v. *Scott* an action lay at law for money had and received.

The appeal having in part succeeded and in part failed, I think the reasonable course would be that the costs of all parties should be treated as costs of the liquidation and paid out of the assets.

LORD SUMNER — I agree that the whole banking business of the Birkbeck Society was *ultra vires;* that the banking contracts of loan which ostensibly arose in the course of it were void; that the funds procured alike from shareholders investing in the building society business and the customers of the banking business have been inextricably confused, and have been indiscriminately employed in acquiring assets which cannot now be attributed to the one branch rather than to the other; and that everybody concerned — customers, shareholders, and officers—must all be taken to have known of the legal invalidity both of the acquisition of the depositors' funds and of the disposition of any funds in a banking business. Probably very few of them knew or suspected it in fact, but the knowledge that a banking business was being carried on was common to all, and all had notice of the rules. All must equally abide by the legal consequences of this invalidity.

The depositors' case has been put, first of all, as consisting in a right enforceable in a common law action. It is said that they paid their money under a mistake of fact or for a consideration that has wholly failed, or that it has been had and received by the Society to their use. In my opinion no such actions could succeed. To hold otherwise would be indirectly to sanction an *ultra vires* borrowing. All these causes of action are common species of the genus *assumpsit*. All now rest and long have rested upon a notional or imputed promise to repay. The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which if made *de facto* it would inexorably avoid.

To the other difficulties of such claims I will allude shortly. There was no mistake of fact. The facts were fully known so far as was material. The rules and objects of

the Society were accessible to all. The only mistake made was a mistake as to the law, or that mistake of conduct to which all of us are prone—of doing as others do and chancing the law.

There was no failure of consideration. As Bowen, L.J., says in *re Guardian Permanent Benefit Building Society*, 23 Ch. Div. 440—"Those who deal with a society which professes to have power to borrow, have equal means of knowledge with the society itself of the statutory powers of the company; they are put, so to speak, upon inquiry whether the company really can borrow validly or not, and if they choose to lend their money to a company which cannot properly borrow, it cannot be said there is a failure of consideration. The company has got their money, it is true, but they must be taken to have known what they bought and to have been willing to pay their money on the chance."

Further, the depositors' money was not had and received by the Society but by its officers, and receipt is an essential—*Prince* v. *Oriental Bank Corporation*, 3 A.C. 325. If it was *ultra vires* for the Society to take customers' accounts—that is, in the eye of the law—to borrow the money on its promise to pay, it was *ultra vires* for it to authorise its officers to do so on its behalf. The money, cheques, bills, and so forth have no doubt reached the Society's coffers, and thereafter have been dealt with as the depositors were willing and intended that it should be dealt with, and so far as has appeared in this case the officers of the Society are not now chargeable. The Society has the proceeds, or rather the liquidator has them, in that sense of possession which is necessary to found "tracing orders" and otherwise for the purpose of the winding-up, but it has not got them and there is no receipt of them in the sense which is necessary to raise the implication of a promise to repay that would bind the Society.

In these straits Lord Mansfield's celebrated account of the action of money had and received in *Moses* v. *Macferlan*, 2 Burr. 1005, was of course relied upon. It was said that for anyone to keep the depositors' money as against them would be unconscientious, while that they should get it back would be eminently *ex æquo et bono*, though it appeared also that conscience had nothing to say against payment of the depositors in full at the expense of the shareholders, though all must be deemed alike cognisant of the invalidity of the society's banking business. *Burgess & Stocks*' case in *Phœnix Life Assurance Company's Liquidation*, 2 J. & H. 441, which was relied on, is irrelevant if treated as a case of an *intra vires* borrowing of the amounts of the premiums in question, which seems to have been the *ratio decidendi* of Page Wood, V.C. If the decision is supposed to be that in every case where money is paid under a contract which proves to be *ultra vires* it may be recovered as upon a consideration that has wholly failed, I think it goes too far, for the reasons I have already given. There may have been special facts to justify such an opinion in that case, though I think not, for the effect of it must in any view have been to bind the society in fact to a contract which in law was not binding at all. The other cases cited seem to me insufficient to support the appellants' claim to any common law right. The action for money had and received cannot now be extended beyond the principles illustrated in the decided cases, and although it is hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiff's use, I think it is clear that no authority extends them far enough to help the appellant now.

Resort was then had to equity, and, as I understood it, the argument was that the action for money had and received was founded on equity and good conscience, and imported a head of equity (apart altogether from its possibly too limited application at law), namely, that whenever it is *ex æquo et bono* for A to repay money which he has received from B and would be against conscience for B to keep it, then A has an equity to have B decreed to repay it. For this again Lord Mansfield's authority in the same case was invoked.

I cannot but think that Lord Mansfield's language has been completely misunderstood. Historically the action for money had and received was not devised by the Court of Chancery, nor was it applied there either in form or in substance. It was a form of *assumpsit* already old in Lord Mansfield's time, and his own citation of earlier actions of this sort should be enough to show if that were necessary that he never thought otherwise. It was said to be a "liberal" action in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. The action has been described as "liberal" because "the party waives all torts, trespasses, and damages—Anon., (1772) Lofft., 320. In and after Lord Mansfield's time its liberality in point of practice is shown by the fact that the plaintiff declared with a minimum of particulars and the defendant pleaded the general issue, under which he could prove almost anything—see 2 Williams Saunders 120, Notes to *Chandler* v. *Vilett*; *Orton* v. *Butler*, 5 B. & A. 652; *Owen* v. *Challis*, 17 L.J., (C.P.) 266. No doubt it gave scope (at least in days when reported cases were less multitudinous than now) for decisions to meet what is called the "justice of the case." These features attracted Lord Mansfield, chafing already at the rigidity of the older forms of action, and emulous, no doubt, of the adaptability and growth which characterised the doctrines of equity in his time. He and Buller, J., spoke of the action in somewhat varying terms from time to time—see *Weston* v. *Downes*, 1 Doug. 23; *Longchamp* v. *Kenny*, 1 Doug. 137; *Sadler* v. *Evans*, 4 Burr. 1984; *Straton* v. *Rastall*, 2 T.R. 366. Lord Mansfield, who in *Clarke* v. *Shee*, Cowp. 197, merely described the action as "a liberal action in the nature of a bill in equity," in *Towers* v. *Barrett*, 1 T.R. 133, says it is "founded on principles of eternal justice." In *Straton* v. *Rastall* Buller, J., says that "of late years this Court has very properly

extended the action for money had and received. It is founded on principles of justice, . . . but it must be remembered that it was extended on the principle of its being considered like a bill in equity. And therefore in order to recover money in this form of action the party must show that he has equity and conscience on his side, and that he could recover it in a court of equity." But the reported cases do not show how if at all this obligation was enforced. I think it is evident that Lord Mansfield did not conceive himself to be deciding that this action was one in which the courts of common law administered "an equity" in the sense in which it was understood in the Courts of Chancery—see observation of Farwell, L.J., in *Baylis* v. *Bishop of London*, 1913, 1 Ch. 127 —and the cases actually decided show that the description of the action as being founded in the *æquum et bonum* is very far from being precise. Even the decision in *Moses* v. *Macferlan*, which has since been dissented from, for some time unsettled the law—see Smith's Leading Cases, Notes to *Marriot* v. *Hampton*, 7 T.R. 269, 2 S.L.C. (11th ed.) 421—and this last-mentioned case is one which illustrates the proposition that money is not thus recoverable in all cases where it is unconscientious for the defendant to retain it, for no one could doubt that Hampton's retention of the money in that case was very like sharp practice. *Crockford* v. *Winter*, 1 Camp. 124, and *Martin* v. *Morgan*, 1 Brod. & B. 289, are instances, on the other hand, which show that Lord Ellenborough and Dallas, C.J., respectively understood that in that form of action the Court strove to do what was just and not to administer equity. With whatever complacency the Court of King's Bench might regard the views expressed in *Moses* v. *Macferlan*, protests were very early made against it in the Common Pleas (*Johnson* v. *Johnson*, 3 Bos. & P. 162, at p. 169), and in *Miller* v. *Atlee*, 3 Ex. 799, 13 Jur. 431, Pollock, C.B., bluntly declared the notion that the action for money had and received was an equitable action to be "exploded," and Parke, B., sitting by him did not say him nay. This episode is reported only in 13 Jurist, but it smacks of truth. Since then allusions have been made from time to time to the connection between this cause of action and equity or the *æquum et bonum* (though they are not precisely the same things)—for example, in *Smith* v. *Jones* 1 Dowl. P. C. N. S. 526, *Tregoning* v. *Attenborough*, 7 Bing. 97, *Rogers* v. *Ingham* 3 Ch. Div. 351, *Phillips* v. *London School Board*, 1898, 2 Q.B. 447, at p. 453, and *Lodge* v. *National Union Investment Company*, [1907], 1 Ch. 300, at p. 312—but I take them all to be merely descriptive of the undoubtedly wide scope of this essentially common law action. There is now no ground left for suggesting as a recognisable "equity" the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer.

The appellants next submitted that even though the money of the depositors might not be repayable in full, the order made by Neville, J., for convenience called the *Guardian* order, was inapplicable in the present case, and, indeed, that the judgment of the Court of Appeal in *Crace-Calvert's* case in the *Guardian Permanent Benefit Building Society's Liquidation* was wrong. I think that in any case that order is not applicable in the case now before your Lordships. There the money was borrowed by the directors, and it does not appear that the shareholders as a body were in fact cognisant of the borrowing. Here the fact that a banking business was being carried on was a matter of notoriety and even of pride. There the money, when received, was applied to the legitimate purposes of a building society, and the only business carried on was that of a building society; here the money was applied on a very large scale for the purposes of the *ultra vires* banking branch; here, further, the shareholders' money, paid in respect of shares they held, was very largely applied in the same way. For the reasons pointed out by my noble and learned friend Lord Parker of Waddington I think that this substantially and sufficiently differentiates *Crace-Calvert's* case.

The majority of the Court of Appeal, while deeming themselves bound to follow and apply *re Guardian Permanent Benefit Building Society*, did not conceal their doubts of its correctness. Should that case come before your Lordships' House directly for review, as it clearly is open to review, I confess that I should be slow in arriving at the conclusion that I could not assent to the decision of so strong a Court. In that case assets were found, to which no doubt Mrs Crace-Calvert's money had contributed, but which were employed in the business legitimately carried on by the society. *Prima facie* they were the society's assets, and out of them the unadvanced shareholders were by the rules entitled to be repaid the amount of their shares severally. This at least was their legal right. No one could show what particular assets were the fruits of the borrowed money. Against this legal right, who had an equity that should prevail? Not, at any rate, the *ultra vires* lenders, who had no legal right at all, who had certainly lent their money in order that it might be invested in the building society business, and who also, in the view of the Court, which I think was right, were to be deemed in law to have lent on the chance (doubtless, as they thought, without risk) that all would be well and that the contract would be performed. I think the order made was rightly described by Cozens-Hardy, M.R., as a rough tracing order. A ruthless logic would have given all to the shareholders—principal, interest, bonus and surplus—but this would have held the shareholders entitled to approbate the gains, while bound in law to reprobate the borrowing by which they were acquired. It is plain that Jessel, M.R., thought that by giving what was given to the shareholders the Court had eliminated all but the proceeds of the *ultra vires* borrowing, and I should hesitate to reject this view, if the only alternative were to find the share-

holders entitled to everything, though I recognise that it was not more than approximately exact.

I think the present case must be decided upon equitable principles, upon which there is no direct authority. Of equitable principles I hesitate to speak confidently, for did not Jessel, M.R., say that the principle of the *Guardian* order, which has given so much trouble, was one of the plainest of them? Yet perhaps I may say of myself what Thesiger, L.J., said of Baron Bramwell in *re Hallett's Estate*, that "even to the mind of a common law judge the principles of law which have been applied now for some time in equity have been made perfectly plain." What ought to be done I think is clear; the only difficulty is how to describe the principle and how to affiliate it to other legal or equitable rules.

The question is one of administration. The liquidator, an officer of the Court, who has to discharge himself of the assets that have come to his hands, asks for directions, and after hearing all parties concerned the Court has the right and the duty to direct him how to distribute all the assets. No part of them can remain undistributed as *res nullius*. No one has ventured to argue before your Lordships that the shareholders take everything to the exclusion of the depositors, and so make a huge windfall. In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognised rule of law or equity be disregarded. In this case neither the shareholders nor the depositors have the better equity; the money of each has, with the consent of all, been indiscriminately applied in acquiring assets beyond as well as within the Society's powers, the former in much the larger measure. The claims in each class are equal, and I think for the present purpose identical.

Analogous cases have been decided with regard to chattels. They differ, no doubt, because of the fact that the property in the chattels remained unchanged, though identification and even identity of the subject-matter of the property failed, whereas here, except as to currency, and even there only in a restricted sense, the term property, as we use that term of chattels, does not apply, and, at least as far as intention could do it, both depositors and shareholders had given up the right to call the money or its proceeds their own, and had taken instead personal claims on the Society. In *Buckley* v. *Gross*, 3 B. & S. 566, at p. 574, where tallow in burning warehouses melted and ran down a sewer, and a stranger collected it, Blackburn, J., says—"The tallow of the different owners was mixed up into a molten mass, so that it might be difficult to apportion it among them; but I dissent from the doctrine that because the property of different persons is confused together, that entitles a third party to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass. Again, *Spence* v. *Union Marine Insurance Company*, L.R., 3 C.P. 427, is a case where cotton in bales belonging to different consignees was so damaged by sea perils that it arrived with marks obliterated and otherwise injured, and after delivery to the respective consignees of all that could be specifically identified as theirs, a mass of unidentifiable damaged cotton remained. There, as here, no doubt one bale, in fact, represented A's money and another B's; there, as here, all were depreciated, but probably not each in the same degree, but no one could say which bale was any particular person's property, or who, therefore, should bear the greater and who the less depreciation. The goods could not be treated as *bona vacantia*, they could not fall into the hands of the first person who reduced them into possession, and on principles and analogies derived from Roman law the Court treated the consignees as tenants in common of the unidentifiable cotton, in the proportion borne by the numbers originally shipped by them to the number remaining. This decision has never been questioned for nearly fifty years.

I agree, without recapitulating reasons, that the principle on which *re Hallett's Estate* is founded justifies an order allowing the appellants to follow the assets, not merely to the verge of actual identification, but even somewhat further in a case like the present, where, after a process of exclusion, only two classes or groups of persons having equal claims are left in, and all superior claims have been eliminated. Tracing in a sense it is not, for we know that the money coming from A bought one security, and that coming from B another, and that the two securities did not probably depreciate exactly in the same percentage, and we know further that no one will ever know any more. Still I think this well within the "tracing" equity, and that among persons making up these two groups the principle of rateable division of the assets is sound. I agree in the decision proposed, both as to the order to be substituted for that of the Court of Appeal and as to the costs.

Their Lordships varied the judgment of the Court of Appeal so as to give effect to a declaration that, subject to any application which might be made by any individual depositor or shareholder with a view of tracing his own money into any particular asset, and subject to the cost of the liquidation, the liquidator should proceed, in distributing the assets of the Society between the depositors and the unadvanced shareholders, on the principle of distributing them *pari passu* in proportion to the amounts properly credited to them respectively in the books of the Society at the date of the commencement of the winding-up.

Counsel for the Appellant—Cave, K.C.—Tomlin, K.C. Agents—Burton, Yeates, & Hart, Solicitors.

Counsel for the Respondent Brougham—Clauson, K.C.—C. Turner. Agents—Freshfields, Solicitors.

Counsel for the Respondent Ravenscroft—Upjohn, K.C. — Younger, K.C. — Wills. Agents — Ashurst, Morris, Crisp, & Company, Solicitors.