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Sorting Out Mixtures of Property at Common Law

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This article asks a simple question: when indistinguishable items of personal property owned by A and by B are mixed together, what rights do A and B have in relation to the resultant mass? It is argued that there is insufficient evidence in the positive law to provide any convincing answer to this question, and so it is asked which interpretation that can be drawn out from the law ought to be adopted. It will be shown that – both in relation to mixtures of goods and mixtures of cash – a rule of co-ownership is to be preferred. The article's framework of analysis will be of interest to all those concerned by the relatively sparse case law that deals with foundational principles of personal property, and can help to guide a way forward in other contexts where the cases are silent, muddled, or fail to speak with one voice.

INTRODUCTION

It is not difficult to find statements to the effect that English personal property law is in a mess. Peter Birks, who did more to try to clean it up than most, once lamented that this area of private law is 'in a bad state', at least in part because 'there is no secure foundation' within legal academia from which practising lawyers and judges could build.[1] Since then, however, a relatively steady flow of literature has begun to emerge, and that foundation is beginning to take shape.[2]

This article aims to contribute to that process, by asking a deceptively simple question: when indistinguishable items of personal property owned by A and by B are mixed together, what rights do A and B have in relation to the resultant mass? This question is simple in the sense that only a cursory glance at most of the leading textbooks on personal property will provide an answer: A and B become co-owners, tenants in common of each and every constituent part of the mass.[3] This answer, however, masks a number of deeply rooted problems in our thinking about personal property. For a start, as will become clear, a number

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1 P. Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1, 1-2. See too A. Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Oxford: Hart, 2005) 3.

2 In addition to numerous new textbooks, a number of excellent monographs have been produced on specific areas of personal property law. Examples include, but are by no means limited to: S. Green and J. Randall, *The Tort of Conversion* (Oxford: Hart, 2009); R. Hickey, *Property and the Law of Finders* (Oxford: Hart, 2010); S. Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford: Hart, 2011).

3 See for example A.P. Bell, *Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989) 72; W.J. Swadling, 'Property: General Principles' in A.S. Burrows (ed), *English*

of lengthier discussions of the law relating to mixtures take issue with that claim, either qualifying it, doubting it, or rejecting it altogether. Leading textbooks on private law offer accounts of the law that appear contradictory with each other as a result.[4] A review of the law governing mixtures is, therefore, necessary, if not to iron out these inconsistencies once and for all, then at least to highlight more clearly that they exist within the academic literature.

The root of the problem is one that tends to afflict private law scholarship more generally. There are not enough cases that explicitly and decisively deal with the question of what rights A and B actually hold in a mixture. And so, much legal scholarship is backwards. We ask what rights in A and B are consistent with the cases that we do have, with the result that any number of answers to our question might be correct, as a descriptive account of the law as it stands.[5] How are we to choose between competing accounts when we are faced with this kind of problem? In this article, it will be asked which of those descriptive accounts English law would do better to adopt.[6] The reasons the law has to respond to the event of mixture will be considered, and it will then be asked which account provides the best method that the law might adopt to give effect to those reasons. It will be seen that those reasons might be given effect in a variety of ways, but that a co-ownership rule can do so in a way that is more coherent and more intelligible than others.

The article is split into several sections. The first, unfortunately necessary, section deals with terminology. As noted by other writers,[7] the loose terminology of personal property is one significant reason for the lack of clarity in our reasoning about it, and so pinning down the precise meaning of 'mixture' is an essential exercise. The second section aims to set out the current state of English law, or, more accurately, the plausible interpretations of English law that can be drawn out from our existing legal materials. It will be seen that there are two competing views, neither of which can be decisively proven to be correct from the materials alone. The third section asks what good reasons the law has to adopt the sort of response that it does; the fourth asks which of our two views gives effect to those reasons in the most satisfactory way. Finally, the fifth section applies the preceding analysis to one particularly troubling, but very important, class of mixture: that of money.

Private Law (Oxford: OUP, 3rd ed, 2013) 4.443; M. Bridge et al, *The Law of Personal Property* (London: Sweet & Maxwell, 2nd ed, 2013) 16.017; M. Bridge, *Personal Property Law* (Oxford: OUP, 4th ed, 2015) 134; D. Sheehan, *The Principles of Personal Property Law* (Oxford: Hart, 2nd ed, 2017) 28.

4 Contrast the works cited *ibid*, with C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 9th ed, 2016) 7.20.

5 This problem is starkest in discussion of mixtures of money, on which see below, pp. 81-88.

6 One might consider this to be an attempt to interpret the law in its 'best light', along the lines of the model of adjudication advocated by Ronald Dworkin. However, there is no need to endorse that model to make out the claim that, when faced with indeterminacy in the law's rules, courts should resolve that indeterminacy by adopting rules that they have good reason to adopt, so long as they are able to do so coherently with existing precedent. Hart endorsed a similar proposition: H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 3rd ed, 2012) 274-275.

7 For example Hickey, n 2 above, 162-168; L. Rostill, 'Terminology and Title to Chattels: A Case against "Possessory Title"' (2018) 134 LQR 407.

One final introductory point to make is that the question of whether the wrongdoing of one of the contributors to the mixture affects – or ought to affect – the law's response to that mixture is not explicitly considered. It appears to be settled on the strength of existing authority that the response is not changed,[8] but some earlier statements of the law clearly endorse the view that a wrongful contributor will lose any proprietary interest they had in the property prior to the mixture.[9] A consequence of the analysis adopted in this article is that it highlights the important question that needs to be considered if English law is to resolve the problem of wrongdoing once and for all: do those reasons governing the case of accidental mixture apply with the same force where one contributor is a wrongdoer? It is one major task of the present article to determine what those reasons are, and, in so doing, to contribute to the answer to that question in the future.

DEFINITION

It is necessary to clarify what is meant by the term 'mixture'. The term has been used in a number of ways, both as a label that covers a variety of doctrines and as a distinct causative event. For this reason, the section begins by drawing out two distinct meanings of the term 'mixture': legal mixtures and factual mixtures. It is only the former that is a causative event, leading to the possible creation of new property rights. Legal mixture will then be briefly differentiated from a number of other doctrines that are sometimes considered to be similar to (or a class of) 'mixture': (1) manufacture, (2) accession, and (3) substitution.[10]

The definition of a legal mixture

A 'legal mixture' will occur where A's property is intermingled with B's property in such a way that it is impossible to prove to whom a given part of the resultant mass belongs. A clear example is provided by *Gill & Duffus* v *Scruttons*[11] (*Scruttons*). A ship was transporting a number of bags of chestnuts, each owned by one of three consignees. Many of the bags burst in transit, causing a large quantity of chestnuts to lie loose in the hold. It was impossible to tell of any individual loose chestnut in which bag it had originally been kept. Another example comes from *Spence* v *Union Marine Insurance*[12] (*Spence*). A ship carrying several thousand bales of cotton – each marked as belonging to different consignees – foundered off the coast of Florida. Many of the bales fell into the sea. Some of these were lost completely, while others survived but had their

8 *Indian Oil Corp* v *Greenstone Shipping Co SA* [1988] QB 345 (*Indian Oil*).
9 This was the analysis of the law offered by Blackstone: 2 Bl Comm 405.
10 See P. Birks, 'Mixtures' in N. Palmer and E. McKendrick (eds), *Interests in Goods* (London: LLP, 2nd ed, 1998) 227–232.
11 [1953] 1 WLR 1407.
12 (1868) LR 3 CP 427.

markings washed off. It was, therefore, impossible to determine who had, prior to the ship's foundering, ownership of any particular unmarked bale.

It is important to note that there will only be a *legal* mixture – on the definition used in this article – where there is this evidential difficulty. In cases where no such difficulty arises, although it would be acceptable, in layperson's terms, to talk of a 'mixture' of property, there will be no change in the parties' rights in the property. Nor is there any plausible argument that there ought to be such a change. This is because there is no problem for which the law needs to provide a solution. In the interests of clarity, such a case will be termed a 'factual mixture' of property. On this definition, legal mixtures are a type of factual mixture. All legal mixtures are factual mixtures, but not all factual mixtures are legal mixtures.[13]

To see this distinction, consider the following example. A owns ten small, spherical sweets, and B owns his own ten sweets. The sweets have been mass produced by machines in a factory, and so each sweet is of identical shape, size and weight. Suppose that a third party, T, then puts all twenty of these sweets into a bowl and stirs the resultant mass. This is a factual mixture, but it need not be a legal mixture. If, say, A's sweets are green and B's are red, there will be no legal mixture. After T's actions, it remains possible to identify which sweets are A's and which are B's. There is no problem as to how to divide up the twenty sweets in the bowl. Similarly, were T to eat one sweet, there would be no evidential difficulty to be resolved. If there are nine red sweets left, T will have committed a legal wrong (in eating the sweet) against B, but not against A. A will remain owner of the ten green sweets.

The situation, however, changes if all the sweets are red. Here, there is no way to divide up the mass of twenty sweets while ensuring that A and B each receive the same ten sweets that they owned before the mixture. Nor is it possible to know whether T eats one of A's sweets, or one of B's sweets. It is only in this type of case where there is an event to which the law might respond by altering the legal rights of the parties. This point is shown by *Colwill* v *Reeves*.[14] The claimant put his sofa among the furniture of a bankrupt, presumably with the intention of confusing the defendants, who were responsible for repossessing the bankrupt's goods. The sofa was then taken away, along with the bankrupt's own furniture. The claimant brought a claim arguing that the defendants had wrongfully taken away his sofa; the defendants argued in response that the claimant no longer had title to the sofa, because there had been a legal mixture of the furniture. This argument was dismissed because it was 'impossible that articles of furniture can be blended together' such that the goods would no longer be distinguishable from one another.[15] It was therefore possible that the defendants could have

13 Arnold draws the same distinction but prefers to use the terms 'confusion' and 'intermixture' to refer, respectively, to legal and factual mixtures: E.C. Arnold, 'Confusion' (1923) 23 Columbia LR 235. It is, however, submitted that these terms may lead to difficulty. The Roman doctrine of *confusio*, from which the English term 'confusion' derives, would not apply to all legal mixtures. It is, therefore, useful to differentiate clearly between the two doctrines.

14 (1811) 2 Campbell 575.

15 *ibid*, 576-577. Pieces of furniture would have been made individually at that time, and so each would possess 'individual characteristics'. This is now unlikely given 'modern methods of mass production': Birks, n 10 above, 244.

worked out to whom each item of furniture belonged. It was the same with those bales of cotton that had retained their marks in *Spence*; there was a factual mixture, but no legal one, because the evidential difficulty to which the law might respond did not arise. The proprietary rights of the parties therefore remained unchanged.

Two kinds of legal mixture?

A purportedly useful distinction is often drawn between 'granular' and 'fluid' legal mixtures.[16] In a granular legal mixture – as in the above cases *Scruttons* and *Spence* – individual, separable items of property are mixed. The mixture itself creates purely evidential difficulties and has no further effect on the individual items of property themselves: where twenty sweets are mixed in a bowl, there remain intact twenty individual sweets as before the mixture. An arguably distinct situation arises with fluid legal mixtures, such as mixtures of oil. Where A's ten gallons of oil are mixed with B's ten gallons, the result is a combined, *single* mass of oil, the volume of which is twenty gallons. In such a case, there has been a complete 'interpenetration' of A's property with B's, and there is a sense in which two subjects of property rights (the two masses of oil) have become one.

This point was reflected in Roman law, which drew a distinction between rules of *commixtio*, which governed granular legal mixtures, and *confusio*, which governed fluid legal mixtures.[17] Different rules applied depending on the classification of the mixture in issue. The best interpretation of this distinction is that *confusio* would arise wherever 'the contributions to the mix become irreversibly *joined or united*'.[18] In Birks' terminology, the key question for the Roman jurists was whether the mixed units 'lost their physical integrity' and became a single unit as a result.[19] This would be so with mixtures of fluids, but not with mixtures of granular substances. In a case of *confusio*, such as a legal mixture of wine, the contributors would become co-owners of the single mass of wine in proportion to their contributions:

> When the goods of two owners are, with their consent, mixed together, the whole resultant mass is the common property of both, as when people pour their wine into the same vessel or melt down their lumps of gold or silver … Indeed, if it be by chance and without the consent of the owners that their materials are mixed, whether they be of different kinds or of the same kind, the same rule applies.[20]

16 See for example Birks, *ibid*.
17 See for example J.A.C. Thomas, *Textbook of Roman Law* (Oxford: North Holland, 1976) 169; W.W. Buckland, *A Textbook of Roman Law* (Cambridge: CUP, 3rd ed, 1963) 208-209.
18 R. Hickey, 'Dazed and Confused: Accidental Mixtures of Goods and the Theory of Acquisition of Title' (2003) 66 MLR 368, 370 (emphasis added).
19 Birks, n 10 above, 232.
20 J.A.C. Thomas (tr), *The Institutes of Justinian* (Oxford: North Holland, 1975) 2.1.27.

In contrast, in a case of *commixtio*, such as a mixture of grain or sheep, the contributors continued to own the same individual chattels that they owned before the mixture. No change in the rights of the parties occurred:

> Where Titius's corn is mixed with yours … if it were mixed by accident or if Titius did the mixing without your consent, it does not become common property for the individual grains continue to exist in their own separate entities; and, in cases like this, the corn is no more made common property than there would be a common herd if Titius's cattle were mixed with yours.[21]

It appears then, that, for the Romans, a change in the proprietary rights of the parties was necessary in a case of *confusio* because a new thing had been created. Where A's oil was mixed with B's, the resulting mass was regarded as a single item of property: one mass of oil, where before there had been two. It would be 'utterly meaningless' to think of 'existing rights' continuing through the mixture, in much the same way as it would be meaningless to talk of rights in the ingredients *continuing* to exist after the baking of a cake.[22] In contrast, there was no such interpenetration in the case of a granular mixture. Clearly, the constituent elements of the mixture remained distinct. If ten of A's sheep are mixed with ten of B's sheep, there remain twenty sheep – it would be foolish to regard the mass of sheep as necessarily becoming a single entity. Because there was no such change, the Roman jurists saw no need to alter the rights of the parties.

Given the scientific knowledge of the Roman jurists, this division appeared sensible and rational. We might, however, question whether we ought now to draw a similar distinction. As Birks has convincingly argued, the logic of Roman law is conceptually flawed, at the 'atomic level'.[23] This is because a factual mixture of fluids does, in fact, behave in precisely the same way as a factual mixture of granular substances. We might think of each molecule of oil as the equivalent of a single sheep. It is only a difference of scale that separates fluids from grains, and it is plausibly only because the Romans lacked a sophisticated understanding of this fact that a fundamental distinction was drawn between fluids and granular substances.[24] Certainly, that it was practically impossible to restore contributors to a factual mixture to their original positions was not seen as an issue, or else even legal mixtures of corn would have been treated as an example of *confusio*, giving rise to co-ownership. At a theoretical level, it is precisely the same issue that prevents a division of oil that perfectly restores the status quo. It is practically impossible to restore to each contributor precisely those molecules of oil that she owned before the mixture, but it is nonetheless theoretically possible. It follows that there can be no logical reason which demands the law to draw a distinction between *confusio* and *commixtio*; if this

21 *ibid* 2.1.28.

22 Hickey, n 18 above, 381. cf D. Hume, *A Treatise of Human Nature* 1739, D.F. Norton and M.J. Norton (eds) (Oxford: OUP, 2014) 512 (suggesting that the distinction between *confusio* and *commixtio* is explicable on the basis that, in the former case, 'the imagination' could not 'trace and preserve a distinct idea of the property of each').

23 Birks, n 10 above, 234.

24 *ibid*.

is done, it can only be for some other reason. There is, too, only one type of co-ownership, which leads to co-ownership of *every* constituent part of the mixed mass; in the same way that co-ownership of sheep or corn will lead to a tenancy in common in respect of every single sheep or grain of corn, so too will co-ownership of oil lead to a tenancy in common of each molecule of oil.

Legal mixture distinguished from other doctrines

There are a number of other doctrines that might be described as types of 'mixture'.[25] It is, however, submitted that, in the interests of clarity, these doctrines are best treated separately. A brief description of the key differences between legal mixture and those other doctrines will be outlined here.

(1) *Manufacture*.[26] Where A's property is combined with B's property in such a way that a *new thing* is produced, there is no legal mixture. This is so even though there may be a sense in which there has been a mixture, in lay terms. So, where A's ingredients are 'mixed' with B's in order to make a cake, that cake is a new thing. The ingredients cannot be recovered, and the law must determine what rights – if any – exist in regards to the cake. It is not possible that A and B's titles persist, because the objects over which they had title have ceased to exist.[27] In contrast, it is always theoretically possible, in a legal mixture, for titles to remain unchanged. It is only because we lack complete information that there is any need to treat a legal mixture as a causative event.

(2) *Accession*.[28] An accession will take place where A's property is combined with B's in such a way that A's property becomes a part of B's. The classic example is where chattels are attached to land; that chattel will accede to the land and the ownership of it will be lost.[29] There can, too, be accession of one chattel into another. So, thread stitched into a coat will cease to exist independently from the coat; planks and nails used to repair a ship become a part of the ship.[30] Legal title to the thread or planks is lost, while the legal title to the coat or ship simply persists unchanged.

(3) *Substitution*. It is important to note the distinction between a substitution and a legal mixture. These doctrines are separate, but often arise together on a given set of facts where there has been a so-called 'mixed substitution'.[31] Suppose that A has legal title of a bottle of wine. B then steals that bottle and exchanges it for a book. There is here the event of substitution – the exchange of the bottle for the book. That substitution may lead to new rights being

25 Worthington, for example, groups several doctrines under the heading 'mixtures': S. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford: Clarendon, 1996) 135.
26 *ibid*, 141-143; Swadling, n 3 above, 4.435-4.436; Bridge et al, n 3 above, 16.034.
27 This is not to say that it is theoretically impossible for A or B to acquire rights in relation to the new thing. If such rights are acquired, however, they are newly created, and cannot be the very same rights that A and B held before the creation of the new thing.
28 See: Worthington, n 25 above, 136-138; Swadling, n 3 above, 4.472-4.476; Bridge et al, n 3 above, 16.033.
29 *Holland* v *Hodgson* (1872) LR 7 CP 328.
30 *Appleby* v *Myers* (1867) LR 2 CP 651, 659-660 *per* Blackburn J.
31 Birks, n 10 above, 231; L.D. Smith, *The Law of Tracing* (Oxford: OUP, 1997) ch 5.

generated in A in respect of the book. This is, however, an example of a 'clean substitution'. More likely to occur in practice is a mixed substitution: B adds A's bottle of wine to an identical bottle of his own, and exchanges both of these bottles for a collection of books. This exchange is said to be a 'mixed substitution', because it is not only an object to which A has title that has been used in the exchange. There have, on these facts, been two separate events that might lead to new proprietary rights being created. There is, first, the mixing of the two bottles of wine, and, second, the exchange of those bottles for the books. This mixed substitution is best conceptualised as a legal mixture, followed by a later substitution of the mixed mass.

EVIDENCE

We can now move on to ask what the effect of a legal mixture is in English law. There appear to be two plausible interpretations. The first is that of 'continuing ownership'. In other words, the law could *deny* that any change in the rights of the parties takes place. As we have seen, a legal mixture poses a purely evidential difficulty to the law, and so as a theoretical matter it is possible that the rights continue to exist as before. This was the solution adopted by Roman law in cases of *commixtio*. Second, the law might adopt a rule of co-ownership, whereby the contributors to the mixture become tenants in common of each individual part of the mixed property.[32] It will be seen that either is a plausible descriptive account of the law as it stands.

Rejection of *res nullius*

First, however, it is useful to note the explicit rejection of English courts of the claim that a legal mixture will render the property unowned by anyone, a *res nullius*. In *Buckley* v *Gross*[33] (*Buckley*), a fire had broken out in a warehouse on the bank of the Thames, and, as a result, a quantity of tallow – owned by a number of parties – melted, flowed into the river and later solidified into solid lumps. One such lump was taken out of the river by a passer-by, and sold to C. The police then confiscated the tallow from C, and sold it on to D. C brought a claim against D, arguing that his prior possession of the tallow gave him a right to exclude D which they had breached by purchasing the tallow from

32 I leave to one side the possibility that the contributors become joint tenants of the mixed property. As will become clear from the discussion below, there is no suggestion in the case law or commentary that a joint tenancy, rather than a tenancy in common, might arise after a legal mixture. It is also hard to see how the 'right of survivorship', which is the most significant feature of co-ownership by joint tenancy, could plausibly be understood to do anything other than confer an undeserved windfall on the surviving contributor, who would, after the death of the other, take ownership of the whole mixed mass.

33 (1863) 3 B&S 566.

the police.[34] Importantly, it was also argued that the finder of the tallow (and, therefore, the claimant who bought the tallow from the finder) had become the *owner* of the tallow upon taking possession of it because of the legal mixture that had occurred. This point was of importance to the court because, under section 29 of the Metropolitan Police Courts Act 1839, the magistrate hearing the dispute would be entitled to order the tallow to be detained by the police if the true owner of the tallow could not be ascertained. The argument that the tallow became *res nullius* after its legal mixture was swiftly dismissed by the court. Blackburn J stated: 'I dissent from the doctrine that, because the property of different persons is confused together, that entitles a third person to steal it with impunity'.[35] Similarly, Crompton J argued that it could not be sustained that a 'third person does not commit a crime in taking' mixed goods.[36] This reasoning was later endorsed, obiter, by Lord Sumner in the House of Lords in the case of *Sinclair* v *Brougham*,[37] where it was explicitly asserted that mixed goods 'could not fall into the hands of the first person who reduced them into possession'. Similarly, in cases of granular legal mixture, the *res nullius* solution has been decisively dismissed as being 'absurd'.[38]

Orthodoxy in consensual and accidental mixture: co-ownership

In cases of accidental and consensual mixtures, the co-ownership rule is often said to apply.[39] This has been baldly stated in a number of leading recent decisions where parties have consensually mixed their property. In *Mercer* v *Craven Grain*,[40] D agreed to store C's grain for a period of up to ten years, along with the grain of a number of other companies. D mixed that grain together and would draw on the combined mass from time to time. D would later replenish the mass. One year into the agreement, C asked for the return of their grain; because the combined store was less than C had left with D for storage, D was only able to return a proportion of the volume of grain initially left for storage. C then sought damages in conversion for D's failure to return the full amount. In response, D sought to argue that C had lost title to the grain upon the legal mixture, and so no wrong had been committed against them. This argument was swiftly dismissed by the House of Lords. Lord Templeman argued that D could, 'by no stretch of the imagination', have any plausible claim to have the best title to any individual grain present in the mixture. Instead, he argued, 'title must have remained in the growers from time to time interested in the mix in

34 For discussion of this particular aspect of the case, see for example D. Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 346-348; Hickey, n 2 above, 118-122; Rostill, n 7 above, 416-418.
35 *Buckley* n 33 above, 575.
36 *ibid*, 574.
37 [1914] AC 398, 459.
38 *Spence* n 12 above, 437. See too *Sandeman & Sons* v *Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680 HL, 695 *per* Lord Moulton (*Sandeman*).
39 Blackstone is often cited in favour of this proposition. He argued that, in these cases, 'the proprietors have an interest in common, in proportion to their respective shares': 2 Bl Comm 405.
40 [1994] CLC 328.

proportion to their respective tonnages'.[41] This argument was made without the citation of any authority. The same solution was adopted on the similar facts of *Glencore* v *MTI*.[42] C had deposited a quantity of oil for storage with D. D stored that oil in a legal mixture with oil deposited by others and would draw on the mixed mass to trade. D then went insolvent and did not have enough oil in its reserve to return to C the full amount originally stored with D. Moore-Bick J held that – subject to alternative arrangements made in the parties' contract – the oil was 'held in common'. He claimed to have 'no hesitation in accepting it as a correct statement of the law'.[43]

The same rule appears to be accepted to be the result of a legal mixture brought about by accident, or by a third party. A number of statements to this effect have been made, obiter, in the House of Lords. In *Sandeman* v *Tyzack*,[44] bales of jute were being transported from Dundee to India. A number were lost in transit, while others lost their markings. Lord Moulton claimed that he did 'not think it a matter of difficulty to define the legal consequences' of the legal mixture: the contributors had 'become owners in common of the mixed property'.[45] Similarly, in *Sinclair*,[46] Lord Sumner approvingly quoted the view expressed by Blackburn J in *Buckley* that the effect of an accidental legal mixture would 'probably' be to 'make the owners tenants in common in equal portions of the mass'.[47]

The leading case where the co-ownership rule was accepted is *Spence* v *Union Marine*, the facts of which are discussed above.[48] It was reasoned that each unmarked bale was owned in common, in proportion to the contributions that could be shown to have been made to the mass of lost bales:

> In our own law there are not many authorities to be found upon this subject; but, as far they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become *tenants in common of the whole*, in proportions which they have severally contributed to it … The goods being before they are mixed the separate property of several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and as there would be no means of distinguishing goods of each, the several owners seem necessarily to become jointly interested, as *tenants in common*, in the bulk.[49]

The same result has been applied in the *Indian Oil* case, albeit a case of a legal mixture brought about by wrongdoing.[50] There, D wrongfully mixed his oil

41 *ibid*, 329.
42 [2001] 1 Lloyds Rep 284.
43 *ibid* at [159].
44 *Sandeman* n 38 above.
45 *ibid*, 695-696.
46 *Sinclair* n 37 above, 459.
47 *Buckley* n 33 above, 574.
48 n 12 above.
49 *ibid*, 437-438 (emphasis added).
50 *Indian Oil* n 8 above. Although a case of wrongful mixing, it is worth noting that it was emphasised that the law 'must be one rule for all cases' (at 370), and that the court clearly considered itself to be applying the same rule as that adopted in accidental mixtures.

with that of C, and it was held that the contributors were tenants in common of the resultant mass: 'where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same value and quality, and they cannot in practice be separated, the mixture is held in common'.[51] The combined effect of *Spence* and *Indian Oil* appears to be to render the contributors to a legal mixture co-owners of each constituent part of the mixture, regardless of whether that property is fluid or granular. As argued above, there is no logical reason to distinguish between these two classes of case, and the modern cases have made no effort to do so.

Lionel Smith's defence of continuing ownership

As we have seen, it appears that English law holds that a legal mixture will lead to co-ownership of each individual part of the mixture, in proportion to the contributions of each. Lionel Smith, however, has defended an alternative approach, that of continuing ownership. In a case of physical mixture, argues Smith, the law 'is not concerned directly with any alteration of proprietary rights', but is instead concerned with rules of 'following': the law's rules in response to a legal mixture are simply rules 'identifying a thing with the same thing at an earlier time'.[52] The process of following is not concerned with the assertion of *new* proprietary rights, but instead allows the law to identify an asset as continuing to exist through a mixture.

It will be helpful to discuss Smith's analysis in relation to a concrete example. Consider *Sheep*: A owns ten sheep, which are mixed with B's ten sheep in such a way that it cannot be said with certainty to whom each individual sheep belonged before the mixture. Adopting the orthodox analysis (that of co-ownership) as outlined above, A and B become tenants in common of each and every sheep present in the mixture. Their rights have changed, and the legal mixture acts as a causative event bringing about new rights in A and B.

According to Smith, in contrast, in *Sheep*, were A to take a sheep out of the mixture, the law can deem that sheep to belong to A, and *always* to have belonged to A. In the eyes of the law, there is no change in rights brought about by the facts of *Sheep*, and talk of 'co-ownership' or 'tenancy in common' is fictional:

> The common law is often said to react to a [legal] mixture by making the owners of the contributed items into tenants in common of the mixture. If this is the case, then … it is a very unusual sort of tenancy in common. The better view appears to be that these phenomena which resemble a mutated tenancy in common actually flow from the rules of following; that is, the rules which determine the extent to which a contributor to a mixture is allowed to assert that some of the mixture *is* his contribution, or part of his contribution. Since following identifies part of the

51 *ibid*, 370.
52 Smith, n 31 above, 71.

> mixture with the contribution, it allows the assertion over that part of the mixture of the *original* proprietary rights which were held in the contribution.[53]

The rule of following is said to be that, in *Sheep*, A is able to identify his sheep in any part of the mixed mass, subject to B's right to do precisely the same. The end result is that the law deems A's ten sheep to be, and to always have been, those ten sheep that A in fact withdraws from the mixture. There is thus, as a matter of law, no change to the rights of A and B brought about by the mixture.

Although these rules are artificial – we know that it is highly improbable that those ten sheep are, as a matter of fact, the same ten sheep that A owned earlier – Smith argues that the law adopts this fiction as a method of resolving the evidential difficulty caused by a legal mixture. An important move in Smith's argument is to claim that it would be 'insupportable' for the law to 'give up' in the face of this evidential difficulty:

> Assume that eighty per cent of a mixture comes from A and twenty per cent from B; make it sixteen of A's sheep and four of B's. If half of the twenty sheep are lost, it is clear that some of A's contribution subsists in the remaining ten sheep. In fact, the remaining sheep must include at least six and at most ten which came from A. So simply to give up on following would be indefensible; it would amount to denying that *any* of the ten could be said to have come from A's contribution, even though some of them must have.[54]

It does not follow, however, that the law *must* adopt Smith's approach in order to avoid the clearly indefensible position Smith describes. If A and B were to become tenants in common of each individual sheep, the law has not 'given up' on A in any plausible sense: A's prior interest is given protection through a new co-ownership interest. Smith, however, frames the debate as a choice between two options: continuing ownership on the one hand, and abandonment of any rights on the other. Smith feels justified in making this move because, he argues, the rights of A and B in *Sheep* are not treated as those of co-owners, and so it cannot be correct that A and B are tenants in common of each sheep. Talk of 'co-ownership' or 'tenancy in common' by the judiciary in this context is only metaphorical and is not an accurate description of the rights of the parties.

It is, therefore, of crucial importance in Smith's argument that the substantive rules that are applied by the courts are necessarily incompatible with co-ownership of each individual sheep. It is only if this descriptive claim is sound that Smith's argument that the true position of English law is continuing ownership can be convincing as that argument is formulated.

Smith makes a number of arguments that purport to show that A and B are not truly co-owners of *each* individual sheep.[55] Each will be discussed in turn.

53 *ibid* (emphasis in original).
54 *ibid*, 72 (emphasis in original).
55 *ibid*, 75-76.

Unilateral Partition

First, Smith argues that A is at liberty to take his portion of sheep out of the mixture unilaterally, whereas a tenancy in common can only be brought to an end by court order, or by agreement. This argument relies, first of all, on the existence of this power, that of unilateral partition of a mixed mass of property. However, it is not clear that Smith has successfully made out that this power exists. He invokes a collection of vague dicta, none of which explicitly state that unilateral partition is permissible after a legal mixture.[56] It is odd to suppose that the weight of these comments should outweigh those numerous, explicit acceptances of a tenancy in common.[57] Smith, for example, relies on the following comment of Staughton J in *Indian Oil*: 'the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture'.[58] However, it is not clear that this is an endorsement of a unilateral power to withdraw from the mixture. Much turns on an interpretation of the terms 'entitled' and 'receive'. Plausibly, all that is meant by Staughton J is that, were the court to order such a division, a quantity equal to that contributed by A would be the award.[59] Alternatively, one might think that this may be an intended invocation of 'deemed consent' – if consent (absent a court order) is required, it is plausible to suppose that both A and B will consent to a return to the status quo; no reasonable party could reject this arrangement. This appears to be the best interpretation of the statement of Bovill CJ in *Spence*, on which Smith also relies in favour of a unilateral power of partition:

> Practically, [in a case where A's one bale is mixed with B's 99 bales], the owner of the one bale would receive one of the bales, either by delivery of the ship-owner or by agreement, and probably be content, and this ought to operate as a partition, so as to vest the residue in the owner of the larger share.[60]

It follows that there is insufficient evidence to establish that this power exists such that the rights of A and B in *Sheep* cannot be conceptualised as those of co-ownership.[61]

56 See M. Raczynska, *The Law of Tracing in Commercial Transactions* (Oxford: OUP 2018) 66-67.

57 See for example n 49 above; *In re London Wine Co (Shippers) Ltd* [1986] PCC 121, 152 *per* Oliver J; *Re Stapylton Fletcher* [1994] 1 WLR 1181, 1199 *per* Judge Paul Baker QC.

58 *Indian Oil* n 8 above, 370-371.

59 This appears to be Birks' reading: P. Birks, 'Mixing and Tracing' (1992) 45 CLP 69, 74-75 ('Under section 188 of the Law of Property Act 1925, a co-owner with a 50 per cent share or more may apply to the court for a division, and the parties may of course agree to divide. The entitlement to which Staughton J refers would presumably have to be realized through one or other of those means').

60 *Spence* n 12 above, 437.

61 Even if a power to unilaterally partition a mixed mass does exist in the law, it can only follow from this fact that the mixed mass is not subject to a tenancy in common if there also exists a legal rule that prevents co-owners from unilaterally partitioning co-owned property as a general matter. If no such rule exists, that contributors to a legal mixture may partition the mass tells us nothing at all about the nature of the rights that they hold in the constituent parts of that mass; such a power would exist in relation both to property the subject of co-ownership and to property the subject of continuing ownership. It has been argued that the existence of this rule in English law 'is not entirely clear' but that it may 'cause problems in ordinary commerce' where it appears sensible to allow co-owners to divide co-owned property without seeking the

Disposal of the Entire Mass

Smith also argues that, were B to dispose of the *entire* mass of sheep, he will be liable to A in conversion, despite the common law rule preventing co-owners from suing each other for disposing of the common property.[62] This rule has now been removed by statute.[63]

Smith's argument relies primarily on the authority of *Jackson* v *Anderson*[64] (*Jackson*). D received a barrel containing 4,718 Spanish dollars, and sold the barrel to a third party. 1,969 of those dollars had been owned by C, and the legal mixture in the barrel had taken place without their authority. C argued that D was liable in conversion for selling their dollars; given that the whole barrel had been sold, it was argued that D must have sold those 1,969 dollars that had belonged to C. As such, looked at retrospectively, the evidential difficulty caused by a legal mixture was of no importance. Given the facts of the case, C would be able to show the exact amount of their original property that had been converted by D; each and every one of the dollars that had been owned by C must have been sold. C was therefore able to claim damages for the sale of his dollars. It follows that the case cannot have been correctly decided, if the legal mixture of the dollars led to a tenancy in common, given the existence of the common law bar preventing liability between co-owners. Sir James Mansfield CJ expressly ruled the co-ownership solution out, arguing instead that 'one has a right to a certain number, and the other to the rest', which was 'not like the case of tenants in common who have a right to a part of every grain'.[65]

We have, however, several reasons to doubt the strength of the authority of *Jackson*. First, it has been argued that the rule applicable in the case was unique, because the case concerned a legal mixture of *money* rather than ordinary chattels.[66] As will be discussed at length below, it has been argued by a number of commentators that a different set of rules applies, or ought to apply, where the property in issue is money. It is, therefore, plausible to argue that *Jackson* has no application outside this context. Second, there is good reason to suppose that the court reasoned as it did in *Jackson* because it was influenced by the bar that a co-owner could not sue another co-owner in conversion for disposing of the co-owned property except where there had been a destruction of that property. If this is right, the court could and would have held a rule of co-ownership to apply to the facts of *Jackson*, were the bar not to exist. This reasoning would not affect the outcome of the case; C would then be able to sue D for the disposal of the mixed mass of notes. Due to statutory intervention in England,[67] the bar has been removed and therefore the authority of *Jackson* is considerably

consent of the other co-owners (Bridge et al, n 3 above, 19.028). cf *Butler* v *Butler* [2016] 4 WLR 133 at [73] *per* Simon Barker J.

62 'It is well established that one tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it': *Morgan* v *Marquis* (1854) 9 Ex 145, 148 *per* Parke B.

63 Torts (Interference with Goods) Act 1977, s 10.

64 (1811) 4 Taunt 24.

65 *ibid*, 30.

66 Most notably, Birks, n 10 above. See further the works cited at n 107 below.

67 n 63 above.

weakened.[68] In fact, in the New Zealand case of *Coleman* v *Harvey*,[69] the court dealt with the same problem – an unauthorised sale of the whole mixed mass by one contributor – by abolishing the bar, applying common law principles. The bar was said to rest 'upon a historical basis not now consonant with the requirements of society or justice', since its effect would be to leave a contributor to a legal mixture 'as often as not' with no remedy to enforce their proprietary rights.[70]

Remedies

Suppose, in *Sheep*, that C takes all twenty sheep, and is subsequently sued by A in conversion. Smith argues that it is 'a more accurate reflection of reality' to say that A is wronged in respect of *only* ten sheep, as would follow under the continuing ownership model: it follows that A will receive compensation for ten sheep, and C will remain entitled to possess the remaining ten sheep (as against A).[71] There are, however, two difficulties with this argument. First, it seems circular; it is only a reflection of the underlying 'reality' if we assume A and B not to have become co-owners of each individual sheep. Second, Smith's argument is plausibly understood as a critique of the *remedies* that might be awarded to A, rather than as a comment on A's underlying right. Here, A ought to be awarded compensation 'relating to the *value* of his interest' in the mixed mass of sheep;[72] clearly, this will be equivalent to ten sheep, because that is the likely division of sheep that A and B would adopt. This result is ensured by statute, which demands either that A identify B so that B can be joined to the action and the resultant damages apportioned between them,[73] or that A account to B for his share of the damages award.[74]

Summary

It follows that there is no convincing reason to suppose that the co-ownership account must be an inaccurate description of the law. Once that claim is dismissed, the force of the continuing ownership account is much diminished. If, however, we accept that talk of 'tenancy in common' might be fictional, we must adopt different metrics against which to assess our competing accounts of the law. Otherwise, we will end up weighing a series of judicial statements against each other, and no progress will be made.

68 Birks argues that the statutory removal of the bar has 'removed' this reason in favour of continuing ownership: Birks, n 10 above, 246.
69 [1989] 1 NZLR 723.
70 *ibid per* Somers J. It has been argued that this is now the best interpretation of 'the common law' generally, including English law: G. McCormack, 'Mixture of Goods' (1990) 10 LS 293, 303.
71 Smith, n 31 above, 76.
72 J. Hill and E. Bowes-Smith, 'Joint Ownership of Chattels' in N. Palmer and E. McKendrick (eds), *Interests in Goods* (London: LLP, 2nd ed, 1998) 261 (emphasis added).
73 Torts (Interference with Goods Act) 1977, s 8.
74 *ibid*, s 7.

RATIONALE

A good starting point is to ask for what reason English law responds to a legal mixture in the first place. What values might be served by a rule of co-ownership, or of continuing ownership? David Hume once wrote that, where a legal mixture takes place, the solution appears 'natural and easy'.[75] Most modern writers, like Hume, apparently subscribe to the co-ownership view, which has been said to produce 'the just result'[76] and to be 'sensible and rational'.[77] It is odd, then, that the substantive law is so hard to pin down. Perhaps progress can be made by asking whether the law has good *reason* to adopt one rule rather than another. In this section, we can begin by considering what reasons are in play when a legal mixture takes place, and whether those reasons can map onto our debate.

Avoidance of a 'proprietary vacuum'

It has been argued that the common law 'abhors the absence of proprietary or possessory rights as a kind of vacuum' and that it ought to seek to ensure that valuable property is the subject of ownership.[78] Numerous commentators have suggested that this abhorrence can explain certain rules governing the acquisition of proprietary interests, most commonly in the context of the taking possession of goods,[79] but also in relation to manufacture, accession and mixtures.[80] The fundamental thought behind this argument is that it is 'better that things are owned by someone, because ownership helps to ensure use, and in a world of scarce resources, productive use is a paramount ideal'.[81]

This argument, however, is incomplete. It tells us only that the law ought to ascribe ownership to *someone*. It cannot give us any compelling reason to award ownership to any particular person. And so, even if we grant the claim that it is preferable for objects to be owned rather than unowned, it follows that the 'proprietary vacuum' argument cannot, without more, do sufficient work for our purposes.

75 Hume, n 22 above, 511.
76 I. Brown, 'Admixture of Goods in English Law' [1988] LMCLQ 286, 287.
77 P. Stein, 'Roman Law in the Commercial Court' (1987) 46 CLJ 369, 371.
78 O.W. Holmes, *The Common Law* 1881 (London: Belknap Press, 2009) 214.
79 See for example D.R. Harris, 'The Concept of Possession in English Law' in A.G. Guest (ed), *Oxford Essays in Jurisprudence* (Oxford: OUP 1961) 92; G. Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603, 610.
80 P. Millett, '*Jones* v *Jones*: Property or Unjust Enrichment?' in A.S. Burrows and A. Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006) 272 (quoting personal correspondence from Peter Birks).
81 R. Hickey, 'The Problem of Divesting Abandonment' (2016) 80 Conv 28, 38. A similar point is often made by law and economics scholars: see for example R.A. Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 Virginia LR 535, 551.

Efficiency

Plausibly, the law has good reason to adopt rules that are efficient, which either save costs for the legal system by reducing disputes, or allocate resources to a party that will make the best use of that resource. A rule that appears intuitively to be fair is likely to be administratively efficient; it will be self-applied, readily understood by citizens, and costs of litigation will therefore be minimised.[82] Such a rule will also maintain the law's 'legitimacy', in the sense that citizens will believe the law to work in their favour, and so they will be more likely to be willing to follow the law as a general matter.[83] It appears that *either* co-ownership or continuing ownership stands up to this element of the efficiency test; as we have seen, the law has been praised for its fairness, even though its precise rules have not been adequately fleshed out.

The dictates of allocative efficiency, however, cut against both of our plausible rules. This is because, as Epstein explains, it is likely to be inefficient to impose a relationship onto two parties which requires them to work together to manage or divide property.[84] This leads to a risk of conflict between those parties, and to administrative costs in negotiating partition of the mass. Concerns of allocative efficiency suggest that the law ought to pass ownership to a single party, who would then be able to manage the property as she saw fit. That the law clearly does not do so – and even explicitly rejects the view that ownership of mixed property ought to vest in the first taker of it, who is likely to be well placed to make use of that property – suggests that this kind of concern can be, and has been, outweighed.

Unjust enrichment

It has been argued that English law responds to legal mixtures in order to avoid the 'unjust enrichment' of the contributors to the mixture. Each party's interest, it might be argued, works to prevent the possible unjust enrichment of the other, which would arise were they to acquire sole title to all of the sheep.[85]

There are, however, real difficulties with this argument. First, the argument provides no explanation of what kind of right A and B should acquire.[86] A

82 The importance of this concern to property law has been outlined by T.W. Merrill in a number of works: see for example 'Accession and Original Ownership' (2009) 1 *Journal of Legal Analysis* 459, 476-479; 'Ownership and Possession' in Y. Chang (ed), *Law and Economics of Possession* (Cambridge: CUP, 2015).

83 See E. Zamir and D. Teichman, *Behavioral Law and Economics* (New York, NY: OUP, 2018) 161-162. cf N.J. McBride, *The Humanity of Private Law* (Oxford: Hart, 2019) ch 6.

84 R.A. Epstein, *Simple Rules for a Complex World* (London: Harvard UP, 1995) 117. See too Y. Chang, 'An Economic and Comparative Analysis of *specificatio*' (2015) 39 *European Journal of Law and Economics* 225, 230, n 29.

85 This argument is put forward, tentatively, in P. Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 Texas LR 1767, 1782.

86 The principal commentator who explicitly argues that the principle of unjust enrichment governs – or ought to govern – a case of legal mixture is Ben McFarlane, who argues that the law ought to be reformed so that one party acquires ownership of the entire mass, while the other party acquires a 'persistent right' against the other's ownership: B. McFarlane, *The Structure of*

personal right to a monetary award is sufficient to strip the other party of any enrichment they might have gained at the other's expense, and this is the law's ordinary response to an unjust enrichment. Second, the argument must assume, to get off the ground, that a change in rights is necessary. As the above discussion shows, both in relation to Roman law's doctrine of *commixtio* and to Smith's continuing ownership solution, this is not a necessary truth. It is conceptually possible that a legal mixture effects no change in the rights of the parties. As such, an argument from unjust enrichment collapses into incoherence; new rights are created in A and B to prevent the unjust enrichment of the other party, while, were no new rights created, there would be no unjust enrichment in need of remedying. Third, and most importantly, it is far from clear in what sense we might say that either party's enrichment (by acquisition of ownership of the whole) can be said to be 'unjust' in such a way that this principle does normative work. Without more, an argument from unjust enrichment cannot be read as identifying the *reasons* why the law exists as it does.

Preservation of the status quo ante

It is submitted that the best explanation that can be offered in favour of English law is that its rule acts to preserve the legal position of the parties prior to the mixture so far as is possible. There are two elements to this claim. The first, negative, aspect is concerned with the remedial structure available to the contributors. Unless both parties retain or acquire the strongest legal title to the property, their positions are necessarily weakened by a legal mixture. Their rights in relation to the property will be exigible against a smaller class of persons, and they may lose priority in insolvency.[87] At least where neither party is at fault, there appears to be no reason to suppose that such a weakening of rights can be justified. The second, positive, aspect of this claim focuses on the *management* of the property. The nature of ownership entails a right to exclude third parties who would interfere with the property. This right to exclude carves out a space for the right-holder, preserving the interest they have in using the property in pursuit of their goals. As Katz has argued, the owner of property

Property Law (Oxford: Hart, 2008) 161-162, 298-299, 331-332. The main argument made by McFarlane in favour of this approach is that it would strike a more acceptable balance between the interests of the party whose property has been mixed and third parties who deal with the party in possession on the reasonable assumption that he is the true owner of the property. This is because such a third party may be able to invoke a defence of bona fide purchase to refute a claim against them made by the prior owner. McFarlane's argument, however, is out of line with general property law, where defendants are regularly held liable to owners of property on a strict basis. It is odd to suppose that protection ought *only* to apply in aid of those third parties dealing with property that has been mixed, rather than in all cases where that third party could not have been expected to know of his wrongdoing. For this reason, McFarlane's argument is best seen as being one in favour of reforming the tort of conversion as a general matter. Presumably, if the tort were reformed so that it required an element of fault, there would be no objection to the co-ownership solution on this basis.

87 cf R. Goode, 'The Right to Trace and its Impact in Commercial Transactions – I' (1976) 92 LQR 360, 394.

is permitted to 'set the agenda' for the property which is owned.[88] This has the valuable consequence of allowing the owner to express her identity to the world, by choosing to pursue certain goals rather than others and to thereby maximise her pursuit of value in particular, concrete ways.[89] It follows that the law has good reason to preserve the status quo so far as is possible in response to a legal mixture.

Two important consequences follow from this argument, both of which are embodied in English law. First, there is good reason for A and B to have the mixed property restored to them, so that plans formulated in respect of the property might be fulfilled. Second, *both* A and B ought to retain any prior right to exclude third parties from damaging, destroying or interfering with the mixed property, since this would have the effect of interfering with those plans, where they require the specific property in issue for their fulfilment. These concerns can only be given effect in one of two ways: continuing ownership, or co-ownership. In any other plausible response to a legal mixture, the rights of the contributors are diluted, affording them lesser protection against third parties, or forcing them to abandon the course of action that had been undertaken in respect of the property. As will be argued in the next section, it is the co-ownership rule that can serve this purpose in the most satisfactory way.

RESOLUTION

It appears that either of our competing visions of English law can serve the reasons outlined in the last section. It follows that we must adopt some other metric against which we can determine the desirability or plausibility of each. One such metric is that of coherence; we might ask which rule leads to the most clear and satisfying way of understanding the law. Here, co-ownership is undeniably superior. The continuing ownership solution imports a large degree of artificiality. This is so for two reasons.

First, and most obviously, it is simply false to suppose that, after a legal mixture, A and B can be returned to their exact positions, with rights over the precise items of property that they previously owned. The co-ownership solution does not lead the law to subscribe to a blatant fiction in this regard.

Second, and more importantly, the continuing ownership model poses significant conceptual difficulties where C takes only a *part* of the combined mass, rather than the whole. It is not clear how the continuing ownership analysis could escape the conclusion that, were a part of the mixture taken, A and B could not bring a claim against C without invoking elaborate, and unnecessary, fiction.

Recall our earlier example, *Sheep*: A owns ten sheep, which are mixed with B's ten sheep in such a way that it cannot be said with certainty to whom

88 L. Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 U Toronto LJ 275.

89 An extended defence of this value is offered in J. Gardner, *From Personal Life to Private Law* (Oxford: OUP, 2018) ch 5. For another argument that seeks to demonstrate the importance of a person's goals to private law, and to property law in particular, see A.J. MacLeod, *Property and Practical Reason* (Cambridge: CUP, 2015).

each individual sheep belonged before the mixture. Suppose that C now takes one sheep from the mass of twenty. Under a model of continuing ownership, neither A nor B can definitely establish that C has breached a duty owed to them in particular, and so it appears to follow that neither can bring a claim against C. However, as we have seen above, the suggestion that mixed property becomes *res nullius* is given short shrift by the courts precisely because it would allow a third party to take mixed property without incurring liability. Under the continuing ownership model, it appears that rules of evidence dictate that C is liable to compensate neither A nor B.

It might objected in response that there is no injustice in allowing C to escape liability in such a case – plausibly, A and B only 'deserve' a remedy where they can show a wrong has in fact been committed against them. Indeed, under the continuing ownership model, to award damages in such a case to both parties (either in full or proportionate shares) must inevitably confer a windfall on one party, who has suffered no wrong.

This argument is jarring and appears intuitively unconvincing. In another field of private law, the inverse problem has been dealt with: where we know a duty to have been breached, but we cannot be sure *by* whom. In *Fairchild* v *Glenhaven*[90] (*Fairchild*), the claimants contracted mesothelioma after working for a number of defendants while exposed to asbestos dust. Each defendant had failed to take reasonable care in providing the claimants with a safe place to work. It was accepted that the claimants' mesothelioma had been caused by one of the defendants, but it could not be shown on the balance of probabilities which defendant had been the cause. It appeared to follow that no defendant could be held liable to the claimants, since it could not be established of any particular defendant that the requirement of causation could be made out. It was, however, thought obviously unfair were the claimants to go uncompensated, given that at least one defendant must have caused the mesothelioma;[91] it was held, therefore, that each defendant was liable to compensate the claimant.

In both *Sheep* and *Fairchild*, evidential limitations prevent the law from establishing the required link between claimant and defendant needed in the ordinary case to determine liability; in each case, it appears objectionable for the law to allow this to happen. The reasons for this have been fleshed out in considerably more detail in relation to *Fairchild*, although it is submitted that many of the arguments invoked in justification of *Fairchild* can also be applied to *Sheep*. Three such justifications can be considered:

(A) *Deterrence*.[92] One might argue that allowing C to escape without sanction will encourage C to commit a wrong; the law must deter C from wrongdoing by ensuring that he makes no gain from his wrongdoing, and so the law must manufacture a remedy against him.

(B) *Relative injustice*. It has been argued, of *Fairchild*, that it would be 'less unfair' to impose liability on a careless defendant than it would be to leave

90 [2002] UKHL 22, [2003] 1 AC 32.

91 Such an outcome 'would be deeply offensive to instinctive notions of what justice requires and fairness demands': *ibid* at [36] *per* Lord Nicholls.

92 See S. Steel, *Proof of Causation in Tort Law* (Cambridge: CUP, 2015) 269-275.

an injured – and wronged – claimant uncompensated.[93] Perfect justice may demand that, in *Sheep*, C pay full compensation to one of A or B. It would, one might argue, be less unjust to enrich a not-wronged claimant than it would be to deny a wronged claimant *any* compensation at all. The claim from *relative injustice* appears stronger in the case of *Sheep* than in *Fairchild* – we know C to have committed a wrong, and so C is left no worse off a result of being held liable to both A and B than he would against the baseline of 'perfect' justice. The only difference of substance against that baseline is the enrichment of one of A or B.

(C) *Vindication*. It might, finally, be argued that a remedy ought to be awarded to A or to B in *Sheep* in order to vindicate their rights, one of which has necessarily been infringed. In *Fairchild*, the House of Lords repeated a concern that the rights of the claimants could be rendered 'empty' of any meaningful content.[94] This argument, if convincing, would hold sway regardless of whether making the defendants liable would in fact have any deterrent effect on potential wrongdoers. Arguably, one 'function' of the law of torts is to demarcate and protect certain interests of citizens which are deemed to be of particular importance.[95] Where the general rules of evidence work in a self-defeating way – as is possible on the facts of *Sheep* – those rules plausibly ought to give way so that the primary function of tort can be maintained.

If we can accept these arguments, it follows that, in *Sheep*, the law has good reason not to permit C to escape without some kind of liability for his wrongdoing. That the continuing ownership model appears to allow C to do so, therefore, amounts to a convincing reason for the law to prefer the co-ownership model. Under the latter model, the law is able to maintain the coherent claim that C is liable both to A and to B *because* he has breached a duty owed jointly to both parties. There is, under a model of co-ownership, no need to invoke the reasons (A)-(C) to justify an *exception* to the general rules of evidence. Instead, the tension between rights and evidence is melted away.

For this reason, it is submitted that the best interpretation of the response of English law to a legal mixture is that the contributors to the mixture become co-owners of each and every individual constituent part of the mixture. It is odd to suppose that we ought to accept that the law should rely on an array of artificial rules to govern a legal mixture, when all desired results are easily attainable through a simple rule of co-ownership. This rule permits the law to protect both contributors to the mixture, and does so in the most intellectually satisfying way.

MONEY

Legal mixtures of money require particular attention. There is a considerable amount of debate about the rules of English law that govern such legal mixtures,

93 *ibid*, 185-189, 285-287.
94 *Fairchild* n 90 above at [62] *per* Lord Hoffmann, and at [155] *per* Lord Rodger.
95 See for example J.N. Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253.

and it is the aim of this section to clarify the terms of that debate and to offer a resolution to it.

First, however, a clarificatory note is needed. The only kind of mixture of money that is directly in issue is a legal mixture of *cash*. It is common to talk of 'mixtures' of money in a bank account, but this language is conceptually inaccurate. Suppose that A steals a £10 note from B and deposits it into her bank account. There is a sense here in which A's money has been 'mixed' with B's. This, however, is not a legal mixture. The result of A's deposit is to increase, by £10, the debt that A's bank owes to A. There is no physical mixing of cash, and the evidential difficulty that leads to the event of legal mixture does not arise. The better view is that this is an example of the event of substitution; B's note is transferred to the bank in exchange for an alteration to the bank's debt. For this reason, the effect of 'mixtures' of money in a bank account is not the concern of this article.

It would, however, be wrong to think that this limitation in scope means that the question of what rules govern a legal mixture of cash is unimportant. The legal treatment of so-called 'mixtures' of money in a bank account appears to have been developed by analogy to legal mixtures of cash and chattels,[96] and so it is important that we have a clear grasp of those cases before moving on to ask whether similar principles might govern 'mixtures' in a bank account. Moreover, legal mixtures of cash may call for special treatment. Some commentators subscribe to the view that legal mixtures of ordinary chattels lead to co-ownership, but that legal mixtures of cash do not.[97] It is the resolution of this debate that is the focus of this section. It will be argued that this view should be rejected, and that the best interpretation of English law is instead that legal mixtures of cash lead to co-ownership of the mixed notes or coins.

There are at least four competing accounts of the rights of parties to a legal mixture of cash made by scholars. Each account has a certain degree of fit with the cases. There are two particular classes of authority that need to be borne in mind. Commentators have sought to reason backwards from this authority to come to a conclusion as to the effects of a legal mixture of cash. The result is that the law is in a thoroughly confused state.

The first authority is *Jackson*,[98] the facts of which have been outlined above. Importantly for our purposes, recall that C's Spanish dollars were mixed with D's, and C was able to bring a claim in conversion against D for the subsequent sale of those dollars. This was so despite the received wisdom that a common law rule existed which prevents one co-owner from suing the other where there has not been a destruction of the property. The court explicitly reasoned that this rule was inapplicable in this case because C and D continued to own the exact dollars they had contributed to the mixture.

The second rule with which a theory of legal mixtures of cash must deal is the established common law rule that a mixture of money defeats the 'common

96 See for example *Foskett* v *McKeown* [2001] 1 AC 102, 141 *per* Lord Millett ('the same principle operates whenever the mixture consists of fungibles, whether these be physical assets like oil, grain or wine or intangibles like money in an account') (*Foskett*); Birks, n 59 above, 85-86.

97 For example Swadling, n 3 above, 4.443, n 649.

98 n 64 above.

law tracing' exercise.[99] This is best illustrated with an example. Suppose that B steals a £10 note from A, and exchanges that note for a book. The common law can identify the book as the exchange product of the note, and, arguably, B can now claim some sort of proprietary right in the book itself. This cannot be done, however, in a slightly different case, where there has been a mixed substitution of money.[100] So, if B steals that £10 note from A, then puts that note, along with three other £10 notes, in B's wallet and uses one of those notes to purchase the book, A will be unable to acquire any kind of property right in the book.

The important question for our purposes is what rights exist in relation to those four notes in B's wallet. Call this legal mixture *Wallet*. Most accounts of those rights take the form of 'logical inferences' drawn from our two classes of case.[101] There are four such accounts in the literature.

Title Extinguished

The most straightforward account of the effect of a legal mixture of cash is that the party whose money has been mixed loses any legal title they had to it. This appears to be the view of Lord Goff, who suggested in *Lipkin Gorman* v *Karpnale* (*Lipkin Gorman*) that 'at common law, property in money, like other fungibles, is lost as such when it is mixed with other money'.[102] The same view is endorsed by Virgo, who writes that, where a legal mixture takes place, 'it is simply not possible to say in what property the claimant has a proprietary interest', and so 'where such mixing has occurred, the claimant's legal title to the property will be extinguished'.[103] If this view is correct, the rule that no rights follow from a mixed substitution is easily explained: A has no interest in the four notes in B's wallet, and so can have no interest in the book.

There are, however, a number of difficulties with this account of the law. First, it must be inconsistent with the outcome of *Jackson*; if C had no title to the dollars when D received the barrel, due to the earlier legal mixture of those dollars, it is not plausible to suppose that D can have committed any kind of legal wrong against C. Second, the argument creates some conceptual problems. It is not clear how the law is to determine whose title – of the contributors to the mixed mass – is to be extinguished. Plausibly, in *Wallet*, the answer will be A, because it is B who is in possession of the notes. But does B's title stem from his earlier title to three of the notes, or from his possession of the mass? If the latter, it follows that legal mixtures of cash may become unowned. Where A's and B's cash is mixed by accident – say two bags of coins burst in transit – does the resultant mass belong to A or to B? It is implausible that the money becomes unowned, since that would allow a third party to take it without committing

99 This rule is said to be derived from *Taylor* v *Plumer* (1815) 3 M&S 562. It has since been reaffirmed in a number of recent cases, for example *Agip (Africa) Ltd* v *Jackson* [1991] Ch 546, 566.
100 See n 31 above.
101 Birks, n 10 above, 242.
102 *Lipkin Gorman* v *Karpnale* [1991] 2 AC 548, 572D.
103 G. Virgo, *The Principles of the Law of Restitution* (Oxford: OUP, 3rd ed, 2015) 615.

any legal wrong. Such an outcome has been dismissed as unacceptable, in the context of ordinary chattels, in a number of cases.[104] This problem is particularly acute where the mixture is brought about by a wrongdoing third party. Suppose that C steals A's cash, and mixes it with cash that C earlier stole from B. It seems implausible that the law would hold that this kind of activity by a wrongdoer could extinguish their property rights. This would relegate A and B to the status of unsecured creditors against C, and give them no protection at all against a recipient of the money from C.[105] One way around this issue may be to treat a legal mixture of cash as an example of *accession*;[106] the party whose contribution to the mixture is the lesser loses title, and so A's one note accedes 'into' the other three. The obvious difficulty caused by such an analysis is that it offers no guidance where two parties contribute the same amount into the mixture.

Continuing Ownership

A more plausible account is offered by Birks.[107] He argues that legal mixtures of cash result in 'continuing ownership', rather than co-ownership. That is, the ownership of each individual note will remain unchanged. So, A and B remain owners of their original notes in *Wallet*. The limitation on common law tracing is then best understood as an issue of evidence. Where B takes one note from the mixture and exchanges it for a book, A must prove that it was *his* note that was used in order to be able to claim rights to the book. Where the notes are indistinguishable from one another, A will be unable to do so.[108] Similarly, were C to take one note out of B's possession, A will be unable to bring a claim against C for converting the note, because A will not be able to show that it was his note, rather than B's, that has been taken.

The great strength of Birks' explanation is that it can easily account for *Jackson*. Where C takes *all* of the mixture, it follows that C must have taken a note to which A had title; there is no evidential problem here, and so C will be liable to A for converting his note. However, it should be noted that an important practical consequence follows in the context of common law tracing.[109] Were C to take all of the mixture and exchange those notes for a bottle of wine, it follows that the common law ought to be able to trace A's note into the wine. There can be no doubt of the contribution A has made to its purchase. It is, however, questionable whether the law allows A to do this. There appears to

104 See pp. 68-69 above.
105 See Goode, n 87 above, 394.
106 See n 28 above.
107 Birks, n 10 above, 239-242. See too J. Ulph, 'Retaining Proprietary Rights at Common Law Through Mixtures and Changes' [2001] LMCLQ 449, 455; S. Gleeson, *Personal Property Law* (London: Pearson, 1997) 60-63.
108 More accurately, A will be unable to do so without invoking some kind of artificial legal rule, such as a rule that says that the first notes put into the mixture are deemed to be the first notes taken out of it. This is the default position where a 'mixture' of trust money takes place in a current account: *Devaynes* v *Noble* (1816) 1 Mer 529; 35 ER 767. Goode has argued that the common law could adopt such a fiction to allow tracing through mixtures, while still holding that legal mixtures of cash lead to continuing ownership: Goode, n 87 above, 395-396.
109 Birks, n 10 above, 241.

be no case on this point, and judicial and academic statements of the rule that mixtures of money defeat the ability to trace at common law are often made in an unqualified fashion.[110] It is, therefore, plausible to suppose that in such a case tracing will not be possible. If so, we have good reason to doubt the accuracy of *continuing ownership*.

Hybrid Account

Fox has attempted to incorporate the outcome of *Jackson* into the *title extinguished* account of legal mixtures of cash. He endorses the view expressed by Lord Goff in *Lipkin Gorman*, but suggests that the result of *Jackson* is explicable because the former owner's title to his money survives within a legal mixture 'for a time'.[111] The liability of the defendant in *Jackson* means that the claimant's title must still have existed at the time when the defendant took the entire mass of dollars. Nonetheless, Fox argues, A's title may be extinguished, depending on how the mixture is treated:

> The precise time when the former owner's title to his or her money was extinguished would differ depending on how the person currently in possession dealt with the mixture. At the latest, however, specific identification would become impossible once there had been some drawing of money from the mixture. In that case it could no longer be said with the standard of absolute certainty required by the common law rules of identification that the money assets of the original owner remained within it.[112]

There are two difficulties with this analysis of the law. The first is normative. We might make the same objections made above in response to the *title extinguished* argument. By what logic can we justify relegating the interests of A and B to purely personal rights because of the wrongdoing of a third party? The second difficulty with the *hybrid* account of the law is that it is conceptually flawed. Fox claims that A's title is *lost* at the moment when money is taken out of the mixture. However, it simply does not follow from the fact that it cannot be shown that a certain duty has been breached that that duty no longer exists. It is far more plausible to suppose that the right in question continues to exist; for this reason, we have compelling reason to prefer *continuing ownership* as the explanation of the common law's inability to trace after mixtures of cash.

Co-ownership

There is one further plausible interpretation of the rights in *Wallet*. This is that A and B are co-owners of each note, in proportion to their respective contributions to the combined mass. The obvious benefit of this approach would

110 For example *Shalson* v *Russo* [2003] EWHC 1637, [2005] Ch 281 at [103] *per* Rimer J.
111 D. Fox, *Property Rights in Money* (Oxford: OUP, 2008) 244.
112 *ibid*.

be consistency across all cases of legal mixture,[113] a position for which most academic commentators have called.[114]

As a matter of the positive law, this position is arguably at odds with our two classes of authority. It is, however, submitted that this objection is not necessarily compelling reason to reject the co-ownership rule in relation to legal mixtures of cash. First, the force of the court's logic in *Jackson* can be doubted. As discussed above,[115] the court's reasoning was necessary to avoid the common law bar preventing co-owners from bringing claims in conversion against the other co-owner. Such a rule no longer exists in the law, and so a finding of continuing ownership is no longer needed to manufacture a remedy in such a case. Moreover, as discussed at length above, a model of continuing ownership poses considerable difficulty where only a part of the legal mixture is interfered with by some third party. It is deeply implausible, and inconsistent with the rejection of the *res nullius* solution as a general matter, to suppose that the law allows a third party to escape liability by taking only one note in *Wallet*.

The second class of authority which poses apparent difficulty for a co-ownership rule is those cases which suggest that tracing is not possible after a mixture at common law. Birks argues that the inability of the common law to trace through a mixed fund is 'incompatible' with a rule of co-ownership of cash.[116] Were the notes co-owned in *Wallet*, A would have a share in *each* note. It follows that, were B to use a single note to purchase a book, the law could allow A to claim a similar co-ownership interest in the book. That the law does not allow A to do this, Birks argues, means that mixed cash necessarily cannot be co-owned. This point is surely overstated.[117] There are three reasons we have to doubt Birks' argument. First, although there is no clear authority on this point, it has been argued that *any* legal mixture will defeat the process of common law tracing, not simply mixtures of money.[118] If this is correct, then Birks' argument is considerably weakened. If no rights in the exchange product of a legal mixture of corn can be claimed, it may follow that the inability to claim legal rights in the product of a mixed substitution of cash need not be a result of the rights of the parties in the mixture; rather, that inability may be a result of some other rule of law that prevents the making of such claims after any legal mixture.

Second, if there is a special rule applying to legal mixtures of cash, this rule may not be one governing the proprietary interests of the contributors to the

113 Note that Lord Goff's formulation of the *title extinguished* analysis in *Lipkin Gorman* n 102 above, relies on the false claim that the same analysis governs cases of legal mixture of chattels.

114 Smith, n 31 above, 163-164; Birks, n 10 above, 242; Goode, n 87 above, 395; Fox, n 111 above, 246.

115 Text at n 68 above.

116 Birks, n 10 above, 240.

117 As Birks seems to recognise; he suggests that inferences drawn from tracing may not be 'watertight': *ibid*, 242.

118 For example A.S. Burrows, *The Law of Restitution* (Oxford: OUP, 3rd ed, 2011) 123 ('where there has been no clean substitution, *in particular* where money being traced has been mixed with other money, tracing at common law has traditionally been thought to fail') (emphasis added). There are, however, some commentators who appear to limit the common law rule to mixtures of money (for example Bridge et al, n 3 above, 31.029), while many cases talk only of 'mixed funds' (for example *Shalson* v *Russo* n 110 above at [103] *per* Rimer J).

mixture, but rather may prevent the claiming of property rights in substitutes after a legal mixture of *cash*. This rule may exist regardless of whether the rights in *Wallet* are ones of continuing or co-ownership. Such a rule may reflect a more general trend in private law that money is to be treated as a special class of private property.[119] If this is correct, A and B may co-own each note, but some other rule then prevents A from claiming a proprietary interest in the exchange product of the mixed money. This may done in the hope that such a rule will encourage commercial activity.[120] If such a rule is found to draw arbitrary distinctions, then it should be abolished, but it does not follow that the rule itself does not exist.[121]

Third, and finally, it has been questioned whether there exists a power to acquire rights in substituted property at common law at all, even in the case of *clean* substitutions. While there is clear authority that states that this is possible,[122] it has been convincingly shown that this authority has seriously misunderstood previous case law,[123] and it has also been argued that any power to claim proprietary interests at common law in substitute property has no normative basis.[124] Given these arguments, it is plausible to suppose that any inability to claim rights at common law in property acquired through a mixed substitution of money may rest on a deeper proposition; namely, that one is unable to claim such rights at common law after any substitution. If so, it follows that the common law's limitation on tracing out of a legal mixture of cash does not flow from the nature of the proprietary interests held by the contributors to the mixture at the time of the substitution, and so that limitation can give us no reason to reject the *co-ownership* analysis of a legal mixture of cash.

Conclusion on legal mixtures of cash

As has been shown in this section, the effects of a legal mixture of cash are unknown in the law. Commentators are left to reason backwards from a number of related doctrines and sparse case law, and the result has been a number of plausible, but flawed, accounts. Given the limitations of the case law, there is no decisive way to determine which of our four accounts is an accurate statement of the law. However, due to the normative and structural flaws of the competing accounts, it is submitted that the *co-ownership* analysis is the most plausible. This brings the law into line with the orthodox understanding of legal mixtures of

119 The owner of cash, for example, will not be able to bring a claim in conversion against the bona fide purchaser of that cash: *Miller* v *Race* (1758) 1 Burr 452. Generally, such a defence does not apply where goods are converted, although there are a limited number of exceptions to that general position: see for example Sale of Goods Act 1979, ss 24 and 25.

120 See, for one explanation of private law's treatment of money, Fox, n 111 above, ch 8.

121 Many commentators have argued that the rule preventing tracing at common law through a mixed substitution either does not exist or ought to be abolished, for example S. Khurshid and P. Matthews, 'Tracing Confusion' (1976) 95 LQR 78; Smith, n 31 above, 162-174.

122 *Trustee of the Property of FC Jones and Sons* v *Jones* [1997] Ch 159.

123 L.D. Smith, 'Tracing in *Taylor* v *Plumer*: Equity in the Court of King's Bench' [1995] LMCLQ 240.

124 See for example T. Cutts, *The Role of Tracing in Claiming* DPhil Thesis (University of Oxford, 2015) ch 6.

ordinary chattels, is the most normatively convincing and coherent account, and we have no compelling reason to think that our two classes of cases from which our rules are deduced demand such an account to be false.

CONCLUSION

If we are to make progress in a project that aims to render the law of personal property more coherent, we must be willing to look again at some basic doctrines. Those rules governing the acquisition of new proprietary rights, for example, have been labelled 'conceptually underdeveloped' by leading commentators,[125] despite the fact that they undeniably form fundamental building blocks from which the rest of the law develops.[126] Without a firm grasp of this law, we risk being led into error; the law relating to legal mixtures is often relied upon to develop other areas – such as that of equitable tracing – but this is done against a background of uncertainty and confusion. Arguably, recent developments demonstrate this risk materialising.[127] The primary aim of this article has been to eliminate that particular risk for the future, by offering the best account of the law governing legal mixtures. A secondary aim, however, might be equally important. Where the legal material runs out, scholars must be willing to step outside the comfortable boundaries of precedent, to take stock of broader arguments of theory or policy, and to take a step forward. It is only in doing so that we can build those secure foundations that English personal property law has lacked for so long.

125 Bridge et al, n 3 above, 16.001.

126 It was for this reason that these rules were the subject of much attention in the Roman texts, as well as in the works of more recent writers such as David Hume, Hugo Grotius and Samuel von Pufendorf.

127 The obvious example is the supposed inadequacy of the judgment in *Foskett*, n 96 above, as shown by the slew of critical commentary that the case has generated.