THE GOALS OF PROPERTY LAW: THE ACQUISITION OF PROPRIETARY INTERESTS IN CHATTELS THROUGH POSSESSION, MIXTURES, REPRODUCTION AND MANUFACTURE

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Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration.

This thesis does not exceed the word limits set by the Degree Committee of the Faculty of Law. It contains 82,340 words, exclusive of footnotes, bibliography, table of contents and other preliminary matter. The thesis contains 98,310 words inclusive of footnotes.

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Abstract

The Goals of Property Law: The Acquisition of Proprietary Interests in Chattels through Possession, Mixtures, Reproduction and Manufacture

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This thesis examines a number of events which are usually understood to act as methods by which people might acquire a new title to a chattel. It analyses the rules of English law that govern the acquisition of title following: (1) the taking possession of a chattel; (2) the mixture of identical chattels; (3) the natural production of a chattel from another; and (4) the manufacture of a new chattel. Each of these problems received extensive attention in the key Roman texts, and are discussed in modern textbooks on personal property law. Nonetheless, there remains a great deal of uncertainty in relation to these events, both as a matter of the substantive rules of English law which govern them, and as a matter of the underlying justifications of those rules.

It is the primary aim of the thesis to remedy that uncertainty, by offering accounts of the law governing each of our four events. Those accounts begin by setting out the most accurate description of English law that can be offered. Where the law can be stated with precision, the thesis aims to offer the best justification of its rules that can be found. If it is demonstrated instead that the law is unclear, the thesis prescribes how the law should develop in future.

In Chapters 2 and 3, the event of taking possession is considered. It is argued that the rule that the first possessor of an unowned chattel becomes that chattel's owner is best justified on the grounds that interference with the chattel by others may interfere with the goals that the possessor has adopted and intends to use the possessed chattel to pursue. Similar concerns suggest that the law has good reason to recognise the existence of a legal interest of the same content as that of an owner in the possessor of a chattel that is already owned by another. Alternative justifications of the law governing the event of taking possession that are prominent in the modern literature are shown to be unconvincing. In Chapters 4, 5 and 6, uncertainty is shown to exist in the rules of law that govern mixture, natural production and manufacture. In the case of the first of these events, it is unclear what kind of legal interest is created; in the case of the latter two events, it is unclear in whom the legal interest that the event creates vests. The thesis argues that a mixture ought to lead to co-ownership of the mixed chattels; that a natural production should lead to the newly created chattel falling into the same proprietary condition as the chattel from which it was produced; and that a newly manufactured chattel ought to be owned by its manufacturer. These prescriptions are made primarily by building upon the goals-based justification of the rules governing the taking of possession.

Table of Contents

Table of Cases

United Kingdom

Australia

Canada

New Zealand

USA

Table of Legislation

United Kingdom

Germany

1. INTRODUCTION

Writing at the turn of the century, Peter Birks declared that the English law of personal property is 'in a bad state', because it is an area of law that has suffered from a period of 'neglect' in academia.[1] As a result, he argued, the law has become difficult to understand and to apply, and even 'simple matters begin to seem obscure'.[2] Similar sentiments can easily be found in the work of other scholars.[3]

The primary purpose of this thesis is to contribute to the ongoing intellectual effort being made to cure the law of this defect, by offering an account of certain rules of English law that determine when a party may acquire a newly created legal title to a tangible chattel. These are rules which govern: (1) the taking possession of a chattel, which may be either unowned or owned by some other party; (2) the mixture of identical chattels; (3) the production of a new chattel from some other chattel, such as the birth of a lamb from its mother; and (4) the manufacture of a new chattel, created from pre-existing property that is destroyed in the process of creation. These events might be said to be 'simple' in the way Birks intended the term. They received extensive attention in the Roman texts, and in English summaries of the law, such as Blackstone's *Commentaries*. They are also dealt with in all modern textbooks on the law of personal property, and, where modern scholars are forced to engage with them, it is common to see claims that certain rules of law govern (1)-(4) with little – or nothing – in the way of argument to substantiate those claims.[4] One might be forgiven for supposing that the law's positive rules, and their underlying rationales, are settled.

As will become clear, however, this picture is mistaken. There is, in fact, a significant level of uncertainty about what the rules of English law that govern (1)-(4) actually are. Considerably more care is needed when enunciating those rules than is presently recognised. It is one major aim of this thesis to highlight where that uncertainty exists and to prescribe how that uncertainty ought to be remedied. In doing so, this thesis provides a useful service to personal property law because it subjects the rules of English law that govern (1)-(4) to a degree of critical scrutiny to which they have not yet been subjected. Leading textbooks on personal property law have

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[1] P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 1 KCLJ 1, 1-2.

[2] ibid.

[3] See, eg, A Pretto-Sakmann, *Boundaries of Personal Property Law: Shares and Sub-Shares* (Hart 2005) 3.

[4] See, eg, AS Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 418.

rightly claimed that our understanding of these rules is 'highly underdeveloped'.[5] More is said below, in section 1.2, about how that understanding is to be developed in this thesis.

A second aim of this thesis is to ask whether the law has good reason to take the general shape that it currently does. It is only with an understanding of what can be said in the law's favour that we can safely question whether the law ought to be subject to wholesale reform, and it is only with knowledge of the underlying reasons that ought to be taken to shape the law that the uncertainty referred to in the last paragraph can satisfactorily be remedied. Again, however, this is a task that has not been much pursued in the existing literature.

Briefly considering the work of those who have attempted to understand the law through classification can help to demonstrate this point.[6] Birks famously claimed that all legal rights – including property rights[7] – could be classified according to the 'causative event' that took place in the world and the occurrence of which caused that right to arise. These events could be classified into one of four categories: consent, wrongs, unjust enrichment, or 'miscellaneous others'. This classificatory scheme remains relatively popular among academic commentators,[8] and has a plausible claim to be the most coherent, intellectual classificatory scheme so far offered in the literature on private law.[9] It seems clear that the Birksian scheme aims at organising rights according to the reasons that might justify the occurrence of that right.[10] It is, otherwise, difficult to understand how the scheme could be used to argue for legal change, a move Birks, and others, have frequently attempted to make.[11]

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[5] D Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 26. For similar statements, see, eg, M Bridge et al, *The Law of Personal Property* (2nd ed, Sweet & Maxwell 2018) 16.001; M Bridge, *Personal Property Law* (4th ed, OUP 2015) 130.

[6] Taxonomy in the law has been said to 'promote understanding' and to act as 'an essential precondition of rationality': P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia LR 1, 3-4.

[7] ibid 9.

[8] It is adopted in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013).

[9] I leave to one side taxonomies that group legal rules together according to their context in categories such as 'media law' or 'medical law'.

[10] The same point is often made by other writers, although they are sometimes less generous and appear to believe that Birks had no genuine *intention* to identify the reasons for the right in this way: see, eg, EJ Weinrib, 'The Normative Structure of Unjust Enrichment' in CEF Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart 2008) 22-23; P Jaffey, 'Classification and Unjust Enrichment' (2004) 67 MLR 1012, 1018-21; R Stevens, *Torts and Rights* (OUP 2007) 287; KFK Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355, 362-65; C Webb, 'Treating Like Cases Alike' in A Robertson and TH Wu (eds), *The Goals of Private Law* (Hart 2009) 223-24. For a clear statement of Birks' intention to identify reasons, see P Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231, 247.

[11] Perhaps the most notorious example is the argument Birks made in favour of reformation of the equitable wrong of knowing receipt: see, eg, P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart 2002).

A debate about what classificatory schemes of law ought to be adopted is outside the scope of this thesis. So too is the question of whether Birks' own scheme was successful in the implicit aim that I have ascribed to it. For present purposes, all that need be noted is that Birks made no attempt to ascribe an underlying reason to the legal rules that govern (1)-(4). Each of the 'causative events' with which this thesis is concerned were considered by Birks to fall into his fourth, residual category: that of 'miscellaneous other events'.[12] And it is there that they have remained in later attempts to revitalise the Birksian scheme.[13] This category is said to act as 'a sort of cheat', taking in a 'huge and various assortment of rights' that cannot be fit into any other box and that appear to bear no meaningful similarity to each other.[14]

Although the work of this thesis may aid those who engage in classificatory projects, a direct contribution to such a project is not the aim of this thesis. Instead, the purpose of the discussion of taxonomy has been to serve as an example that demonstrates an important point. Namely, that there appears to be no serious, sustained attempt in the modern literature on English law to provide a positive account of the reasons that we might use to justify the law's rules that govern (1)-(4), or that we might use in arguments about how those rules should develop. Instead, leading writers on private law appear to be largely content to leave this problem unresolved.[15] This is a peculiar omission, and it is one that this thesis seeks to fill.

1.1 'Other' Events Defined

It is helpful at the outset to define the 'other' events with which this thesis is concerned, so that the subject of the thesis is made clear. Although the precise definition of these events is subject

[12] See, eg, P Millet, '*Jones v Jones*: Property or Unjust Enrichment?' in AS Burrows and A Roger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP 2006) 272 (quoting correspondence from Birks). At times Birks flirted with the idea that (2) may be an example of the law responding to a potential unjust enrichment: P Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 Texas LR 1767, 1782.

[13] See WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.422-4.445.

[14] Birks, 'Exercise in Taxonomy' (n 6) 9-10. The existence of this category ensures that the Birksian scheme cannot be incorrect, since, by definition, every right must fall into the 'miscellaneous other' category, if it cannot be fit into any of the other three categories. For this reason, some have rejected Birks' attempt at taxonomy because it is banal, or unambitious: eg Stevens (n 10) 284-87.

[15] Perhaps the most developed account of this sort can be adapted from the work of Ross Grantham and Charles Rickett. It might be argued that (2)-(4) are best understood as falling under the 'event' of 'property': see, eg, R Grantham and CEF Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 CLJ 717. At root, their claim is that, in answer to the question 'why does A gain a new title where his chattels are mixed with B's?', the law's answer is 'because A had title to the chattels that were mixed'. This is obviously true, but it is uninteresting. Whatever rights happen to flow from (2)-(4) are 'explained' by this account.

to some debate, this section simply states the definitions that will be adopted in this thesis. A fuller explanation of those definitions is offered in the subsequent chapters that deal with each specific event in detail.

It is also helpful to offer brief definitions of events that are *not* the concern of this thesis, but which are liable to be confused with the events with which the thesis is concerned. This is for two reasons. First, some of these events may, prima facie, be thought to be similar to, or a class of, an event with which this thesis is concerned.[16] It is, therefore, important to clarify that this is not so. Second, the definitions of the events (1)-(4) are necessarily somewhat abstract. In order to get a clearer grasp of the meanings of those events, it is helpful to understand why some other events are considered not to fall under (1)-(4) when those events are properly understood.

1.1.1 Events That Are the Concern of this Thesis

The following are events that are the concern of this thesis.

1.1.1.1 Taking Possession

The causative event of 'taking possession' will occur when a person has sufficient custody and control over a chattel and an intention to exercise that custody and control on her behalf.

Two distinct situations need to be considered. The first is where a party, A, takes possession of a chattel that is unowned, such as where A chases a wild fox across public land and captures it. This is an example of the event of first possession, and is examined in Chapter 2. The second sort of case is where a party, B, takes possession of a chattel that is already owned by someone else. This will be termed the event of 'later possession', and will be the subject of Chapter 3. In this thesis, reference will be made to the following examples, each of which is a particular instance where possession is taken of a chattel that is owned by a person other than the possessor:

Finder: A accidentally drops his umbrella in the street. B finds the umbrella and takes it home, knowing that it is owned by someone else.

[16] This appears to be the view of Sarah Worthington, who groups a number of events under the heading 'mixtures': S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon 1996) 135.

Mistaken Possessor: A leaves his umbrella in an umbrella stand at a museum. B, mistaking the umbrella for his own, takes the umbrella with him as he leaves the museum.

In each case, B has assumed custody and control over the umbrella and has an intention to exercise that custody and control on his behalf. It follows that B has taken possession of the umbrella and therefore, at least arguably, acquires a title of some sort to the umbrella.

1.1.1.2 Legal Mixture

A 'legal mixture' will occur where A's chattels are intermingled with B's chattels in such a way that it is impossible to prove to whom a given part of the resultant mass belongs.

It is important to note that there will only be a legal mixture – on the definition adopted in this thesis – where there is this evidential difficulty. To see this point, consider the following example. A has title to ten small, spherical sweets, and B has title to 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. 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 the holder of the legal title to 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 to which they had title before the mixture. Nor is it possible to know whether T eats one of A's sweets, or one of B's sweets. In this case, the event of legal mixture has occurred.

1.1.1.3 Natural Reproduction

A 'natural reproduction' will occur where one chattel produces another, discrete chattel, and that process of production occurs (or could have occurred) without the necessary influence of human labour, and without destroying the original, principal chattel. Examples include the

production of wool or lambs from a sheep, or an apple from an apple tree. In such a case, the new chattel comes physically from the initial chattel.

1.1.1.4 Manufacture

The event of manufacture will take place where a person, A, uses the chattel (or chattels) of another, B, to create a new chattel, and in so doing destroys the initial materials.

This process may happen in one of two scenarios. First, A may create a new chattel from materials that were owned entirely by another:

Single Property Manufacture: A uses ingredients owned by B to make a cake.

The law must determine what rights – if any – exist in relation to the newly created cake. It is important to note for present purposes that, if the law were to hold that title to the cake were to vest in B, that title would be newly created. Once it has been accepted that a new thing has been created, it follows that B's original title does not persist as it would do if A had simply improved a chattel to which B had title.

The second class of manufacture is where A combines his own property with that of B to create a new thing. Consider the following scenario:

Two Property Manufacture: A uses eggs and flour owned by B, along with other ingredients of her own, to make a cake.

Again, that cake is a new thing, and so new rights must arise in respect of it.

1.1.2 Events That Are Not the Concern of this Thesis

The following are events that are not the subject of the accounts offered in this thesis. They are, however, described here in the interests of clarity. This is both because reference to these events will be made throughout the subsequent chapters, and because it is helpful to appreciate what the events listed in 1.1.1 are not in order to gain a firmer grasp on what those events are.

1.1.2.1 Substitution

The event of substitution occurs where one asset is exchanged for another. Suppose that A has legal title to a bottle of wine. B then steals that bottle and hands over possession of it in exchange for the possession of a book. There is here the event of substitution – the exchange of the possession of the bottle for the possession of (and title to) the book. That substitution may lead to new rights being generated in A in respect of the book.

This is 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 simply a chattel to which A had title that has been used in the exchange. There have, on these facts, been two separate events that might lead to new rights being created. There is, first, the legal mixture of the two bottles of wine, and, second, the substitution of those bottles for the books.[17] This mixed substitution is best conceptualised as a legal mixture, followed by a later substitution of the mixed mass.

It is also helpful to distinguish substitution from the event of manufacture. It might be thought that similar principles govern – or ought to govern – both of these events. It has been argued that both events are of importance to the law in the exercise of 'tracing', a process that allows the law to identify one asset as 'representing' another for some purpose (usually, to allow a claimant to assert a right in relation to the traced asset of the same kind as a right that the claimant holds in relation to the initial asset).[18] The two events, however, are conceptually distinct. Where a substitution occurs, A's chattel is 'replaced' with B's in only a very loose sense. The initial chattel continues to exist, and A's initial title to that chattel may also persist unchanged. Nor would the replacement chattel be freshly created; it existed before the substitution took place. In contrast, the event of manufacture will take place where that initial chattel is replaced in a more concrete sense: A's initial chattel is destroyed, and used to create a new one which did not exist before.

There is authority that suggests that there exists a rule of English law that, in our simple example of the exchange of A's bottle of wine for a book, A acquires a new title (or, perhaps,

[17] The same analysis would govern the case where B exchanged only one of those bottles of wine for a book. There is here, again, a legal mixture followed by a substitution, and so two distinct events that ought to be considered separately.

[18] See generally L Smith, *The Law of Tracing* (OUP 1997).

a power to acquire title) to the book.[19] There is significant ongoing academic debate about how such a rule ought to be categorised, and, more fundamentally, about whether such a rule has any plausible justification.[20] These issues are not pursued in this thesis, primarily for reasons of space. It is not possible to consider each and every event that might plausibly generate a new legal title to a chattel, and so some narrowing down in scope is necessary. It is hoped that by focussing on the events outlined in 1.1.1, which have received considerably less theoretical attention in recent academic legal writing,[21] fresh insights can be developed, which are able, in due course, to shed light on the debate about claims to substitutes at common law.

1.1.2.2 Accession

As will be explained in the chapter on natural reproduction,[22] the term 'accession' is used in three distinct ways in the literature. For present purposes, however, it is sufficient to focus on the term as it is used to describe a distinct event that may alter proprietary rights. This is sometimes called the 'doctrine' of accession – or *accessio* – and will take place where A's chattel is combined with B's property in such a way that A's chattel becomes a part of B's, so that the original chattel to which A had title has ceased to exist.[23]

The classic example of accession is where chattels are attached to land; that chattel will accede to the land and the legal title held in respect of it will be lost.[24] There can, too, be accession of one chattel into another. So, thread stitched into a coat may cease to exist independently from the coat; planks and nails used to repair a ship may become a part of the ship.[25] Legal title to the thread or planks is lost, while the legal title to the coat or ship simply persists unchanged. It is for this reason that the doctrine of accession falls outside the scope of

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

[20] For recent critiques of this purported rule of law, both of which conclude that it ought not to exist, see T Cutts, *The Role of Tracing in Claiming*, DPhil Thesis (University of Oxford 2015) ch 6; A Nair, *Claims to Traceable Proceeds* (OUP 2018) ch 8.

[21] An exception is the event of 'taking possession', which has been the subject of two recent monographs: MJR Crawford, *An Expressive Theory of Possession* (Hart 2020); L Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021). As will become clear, my theoretical aims are different to those of Crawford, who aims to explain how it is that taking possession came to be an event that generates title, and of Rostill, who aims to discover the legal grounds for the rules that have been adopted to govern the event of later possession.

[22] 5.1.1.

[23] For textbook discussion, see, eg, Worthington (n 16) 136-38; Swadling (n 13) 4.471-4.476; Bridge et al (n 5) 16.033.

[24] *Holland v Hodgson* (1872) LR 7 CP 328.

[25] *Appleby v Myers* (1867) LR 2 CP 651, 659-60, per Blackburn J.

this thesis; it is not an event which causes a new title to arise. Instead, one party's title is extinguished, while the other's persists unchanged.

1.1.2.3 Improvement

The doctrine of accession might be treated as a particular instance of a broader event that might be termed 'improvement'. This latter event is wider than the doctrine of accession because it need not involve the destruction of a chattel. A might, for example, merely labour on B's property, increasing its value. In such a case, A may be able to recover a monetary award from B, representing either A's wasted expenditure or B's enrichment.[26] The precise nature and scope of A's claim is the subject of considerable academic debate.[27] However, the important point to note for present purposes is that, in such a case, there is no plausible case to be made that A's activity operates to extinguish the legal title of B. This is because the property itself remains of the same fundamental nature.

A useful contrast can be drawn with the events of manufacture and accession. Where a manufacture takes place, the initial chattel is not merely improved, but destroyed and replaced with a new thing; in the context of accession, it is a chattel belonging to A, that attaches to B's chattel or land, that is responsible for its increase in value.

1.1.2.4 Profits

Finally, it is important to understand the conceptualisation of the 'event' of earning profits through renting, or leasing, a chattel. This event is often thought to bear a similarity to the events with which this thesis is concerned, in particular that of natural reproduction. The two are sometimes treated as part of a single principle of 'income',[28] which purportedly dictates that the owner of property naturally acquires title to any 'profits' generated through that property. These are, however, conceptually distinct, for two reasons. First, only the event of natural reproduction deals with the issue of a new chattel being created. The accrual of rent instead involves a consensual exchange of something that exists before the event occurs; if A leases his cow to B, A's 'new thing' is whatever B agrees to transfer to A in exchange. Second,

[26] See *Greenwood v Bennett* [1973] QB 195.

[27] See, eg, AS Burrows, *The Law of Restitution* (3rd ed, OUP 2011) 237-40, and the works cited therein.

[28] See, eg, AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1964) 117-18.

the methods by which A accrues that profit are different. The profit derived from a natural reproduction is title to a chattel that is physically created, whereas rent is accrued in exchange for the title-holder's consent to temporarily relinquish their right to exclude the payor from their property.[29]

1.2 The Aims of the Thesis

The purpose of this thesis, as stated above, is to offer an 'account' of each of the four events outlined in 1.1.1. The main aim of each account is to contribute to the intelligent development of an understudied area of law. The lack of academic engagement with the events that are the concern of this thesis has led to two potential problems that this thesis seeks to remedy. The first is a problem of *clarity*: the precise legal rules that govern a particular event may be unclear, either because multiple interpretations of the law are open to us, or because there exists no relevant case law. The second is a problem of *justification*: those legal rules that govern a particular event, and that can be shown to exist as a matter of the positive law, may be unjustified. If so, it follows that those rules should be replaced.

These problems exist to differing extents depending on the event in issue. For instance, it is generally accepted that the first person to take possession of an unowned chattel will become its owner. There is no doubt that a legal rule with that content exists. However, there is considerable debate about whether that rule can be justified, and, if so, how that justification might be found. In contrast, the law governing legal mixtures and manufacture is far less clear. In both cases, plausible interpretations of the law's rules can be drawn out from existing materials which suggest that different consequences follow the event. For example, in the case of legal mixture, it has been argued both that the contributors acquire new legal interests, becoming tenants in common of each part of the mixture, and that the contributors' prior interests are unchanged. It is demonstrated in Chapter 4 that it is not possible to prove conclusively that either view is a correct descriptive statement of the law's rules as those rules presently exist. It will be argued in Chapter 6 that, in the context of manufacture, it is not clear, as a matter of the positive law, who will acquire title to the newly created chattel. This is a

[29] cf JE Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in R Chambers, CCJ Mitchell and JE Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) (exploring the conceptual distinction between the accrual of rent and the event of substitution).

different sort of uncertainty to that which afflicts a legal mixture: it is not the nature of the newly created interest that is unknown, but rather in which party that interest vests.

The table below summarizes the uncertainty that, it will be shown, exists in English law in relation to each of the events that are the concern of this thesis. Uncertainty exists, to some degree, in each of the events. It is only in the context of the taking possession of an unowned chattel that a complete descriptive account of the law's rules can convincingly be offered. As the contrast between legal mixture and manufacture demonstrated, uncertainty might afflict the law's rules at different levels. For present purposes, we can consider four different ways in which the law might be uncertain. First, there may be uncertainty in the content of the rule that determines whether the event in question has occurred in the world. Second, it may not be clear who it is that acquires a new proprietary interest. Third, the nature of that interest may be unclear. Fourth, it may be unclear whether certain other factors – most notably, one party's wrongdoing – might prevent a party from acquiring an interest that they otherwise would acquire. Where the legal rule is sufficiently certain, this is marked in the table with a tick. A cross indicates that the law is uncertain and so calls for clarification.

It is important to note two further features of the law that are not captured in this distinction. First, the law's rule may be certain in its content, but that content allows for a degree of vagueness. Examples are the event of taking possession, which requires a 'sufficient' degree of custody and control, and the event of manufacture, which requires that a 'new thing' be produced. In both cases, the formulation of the law in abstract terms is settled, and there are core cases where it is clear that the event has occurred, but there will be borderline sets of facts where the application of the rule is not straightforward. In Chapter 6, it is demonstrated that there is very little guidance to be found in the case law as to when a 'new thing' will be produced such that a manufacture will occur. The theoretical framework argued for in that chapter is used to help to remedy that vagueness to some degree. Second, some elements of the law are clear as a matter of the positive law, but we have reason to suppose that the rule may not withstand scrutiny in an appellate court. For instance, there is clear authority that states that a thief acquires a title of some sort to a stolen chattel. This authority, however, has come under sustained attack in academic and judicial discussions of the law, and so an evaluation of this rule will serve a useful purpose even though the law is settled on the existing authorities.

		Definition of the event	Acquirer of the interest	Nature of the interest	Effect of wrongdoing
Ch 2	**First Possession**	✓	✓	✓	✓
Ch 3	**Later Possession**	✓	✓	✗	✓
Ch 4	**Legal Mixture**	✓	✓	✗	✓
Ch 5	**Natural Reproduction**	✓	✗	✓	✗
Ch 6	**Manufacture**	✓	✗	✓	✗

This thesis, therefore, has two primary aims: first, it offers a justification of existing legal practice, by determining the best reasons that can be offered in defence of existing legal rules; second, it highlights indeterminacies within our legal practice by identifying uncertainty within the operation of legal rules, and suggests how that indeterminacy ought to be remedied. The balance struck between these twin aims will necessarily vary depending on the state of the English legal materials in relation to each event, which will have varying degrees of uncertainty within them. It follows that each account must begin with a descriptive component, which sets out as clearly as possible what rules of English law actually exist. This is the first limb of each account offered in this thesis. An overview of the process of description is given below (1.2.1).

Once we have a firm grasp on those positive legal materials, it will then be possible to move on to consider justification and clarification. In the context of first possession, the account is justificatory: Chapter 2 sets out the best justification of the law that can be found. Chapters 3 and 5 have both justificatory and clarificatory components, because there are certain elements of the law that are settled. In the context of later possession, it is clear that the possessor acquires a right that others not physically interfere with the possessed chattel, but it is unclear whether that right persists after the loss of their possession in the same way as does the legal interest of an owner. In the context of natural reproduction, it is clear that, at least in certain cases, the owner of the principal chattel will become the owner of the new chattel that

is produced from it. In other cases, however, there appears to be no clear rule. Chapters 4 and 6 are primarily clarificatory. It is clear that the contributors to a legal mixture either remain holders of their original titles, or acquire new rights of co-ownership in respect of each and every chattel present in the mixture. In the case of manufacture, there is no clear rule that governs in whom title to a newly manufactured chattel vests. In order to resolve those indeterminacies, it is asked which of the competing rules that can be drawn out from the existing legal materials the law would do best to adopt. Thus, the clarificatory project is pursued by comparing the candidate legal rules against one another and assessing the reasons that the law has to adopt those rules. In other words, we must compare the strength of the justifications that can be offered in defence of those candidate rules. What is meant by the term 'justification' is explained in more detail below, in 1.2.2.

1.2.1 Description

Each account begins with a descriptive element, which simply describes, as accurately as possible, those legal rules that can be distilled from case law, and from statutes, that govern the event in question. Where uncertainty in the law's rules exists, that uncertainty will be noted and academic arguments about that rule will be considered, as a matter of their doctrinal potency. That is, those arguments are about what the rules are, not about what those rules should be. Those arguments must be assessed in those terms.

This is a relatively uncontroversial task; it is the task with which most textbooks on personal property law claim to be concerned. However, it does not follow that the accounts advanced in this thesis are uncontroversial. Part of the value of the work of the thesis is to be found in the simple fact that a close reading of existing textbooks reveal disagreements about what rules of English law exist. This is perhaps clearest in respect of the event of 'taking possession', which has recently been subjected to considerably more doctrinal scrutiny than the other events with which this thesis is concerned.[30] As will be demonstrated in the following chapters, this is no less true in relation to legal mixtures, natural reproduction or manufacture. In fact, it is not uncommon to see contradictory claims about what legal rules govern these events within the same work.[31] That many writers on personal property law appear to be

[30] For recent doctrinal analyses of the event, see Crawford (n 21) ch 3 and Rostill (n 21) ch 5.

[31] Contrast, eg, Bridge et al (n 5) at 16.035 and at 20.027.

unaware of these debates – or, perhaps, have chosen not to engage with them – demonstrates a level of complacency in the existing literature that ought to be addressed.

A clarificatory note is needed on how this thesis resolves these doctrinal debates about what the most accurate statement of the legal rules are. As with any descriptive account of the law, the thesis looks to the outcomes and reasoning of decided cases. In the context of personal property law, however, a number of issues must be borne in mind in this process. All of these problems stem from the fact that, in contrast to many other areas of private law, there are only a relatively small number of cases where our questions are directly in issue.

First, it is common to see particular emphasis placed on the rules of Roman law. There appears to be a general belief that, in the absence of clear guidance from English authority, an onus is placed on courts to justify their decisions where they depart from Roman law.[32] Blackstone once claimed that the rules governing legal mixture and manufacture in particular have been 'implicitly copied and adopted' by English law through the work of the earlier writer, Bracton.[33] It is, however, submitted that such reasoning should be approached with caution. It is quite clear that English law does not – and need not – follow Roman law in all respects. For this reason, the Roman sources are cited only with the intention that they offer guidance as to how a court might reason were they faced with a novel point, and where they are necessary to understand the reasoning of an English court in formulating a rule of English law.

Second, and relatedly, it is common to rely on foreign jurisdictions, in particular Australia, Canada, New Zealand, and the United States. Some commentators have claimed to offer descriptive accounts of the law governing all 'common law' jurisdictions in relation to our events.[34] This exercise, however, is problematic for the simple reason that these jurisdictions often do not speak with one voice. Nor do English courts treat the decisions of any one other jurisdiction as being binding authority. Like Roman law, the existence of a decision in one jurisdiction is of only evidential importance in questioning how a rule of English law might develop, and so the rules of other common law jurisdictions are explained where they are relied upon by English courts, or where English law is unclear.

[32] Thus, it is common to see courts claim that their resolution to a dispute is justified on the grounds that it coheres with their understanding of Roman law: see, eg, *Spence v Union Marine Insurance* (1868) LR 3 CP 427, 438-39 (legal mixture); *Tucker v Farm and General Investment Trust Ltd* [1966] 2 QB 421, 427 (natural reproduction).

[33] 2 Bl Comm 404.

[34] The most explicit example is Lionel Smith's *The Law of Tracing* (n 18), which offers an account of tracing rules deduced from the case law of all of these jurisdictions.

Third, many writers place undue weight on statements about the law that were, strictly speaking, made in *obiter dicta*. This is, again, a tendency that is understandable due to a shortage of decisive case law, but it is one that should also be treated with the caution that it deserves. *Obiter* statements are not binding, but they are important as attempts to elucidate existing rules, and are, of course, sometimes treated by lower courts as if they were authoritative statements of a legal rule. The danger of relying excessively on *obiter dicta* can be easily seen by considering the discussion of the House of Lords in *Foskett v McKeown*,[35] a case in which a number of the events that are the concern of this thesis were misunderstood, and a number of leading cases were omitted from discussion. It is those cases that are the source of English law's rules, not the confused *dicta* of *Foskett*.

Finally, it is important to note that some commentators have attempted to deduce rules of English law that govern these events from case law that deals with the interpretation of specific contractual agreements. This is a particular issue in the context of manufacture, where there have been a good number of cases involving contractual disputes, and only a small number dealing with the basic, default rules of law that govern in the absence of agreement. Such cases, however, concern the rules of contractual interpretation, and so do not establish any general rule of English law that governs the event of manufacture. This is because it is accepted that parties are free to determine for themselves what legal interests arise after a particular event.[36] It follows that the default rules of law with which this thesis is concerned can be disapplied by a contrary provision found in a contract between the parties. Where a decision is made on the basis that a contractual provision determines their interests, that decision has nothing directly to say about the rules of English law as a general matter. At best, they may act as useful guidelines that demonstrate a plausible way in which a court might reason.

1.2.2 Justification

The justificatory limb of each account is concerned with identifying the best reasons that might be offered in defence of a legal rule.

It is helpful to spend some time explaining what is meant by the term 'justification' in this thesis. It is common for theorists of private law to draw a distinction between a justification for

[35] [2001] 1 AC 102. See further 6.1.3.

[36] See, eg, *Clough Mill Ltd v Martin* [1985] 1 WLR 111 (manufacture); *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyds Rep 284 (legal mixture).

a legal rule and an explanation of that rule. Plausibly, this project could be understood either as justificatory or explanatory in nature. It is, however, submitted that, in the interests of clarity, this project should be understood as being justificatory in nature.

According to John Gardner, a justificatory inquiry is a narrower project than an explanatory one.[37] The latter can be understood as an attempt to enhance understanding of the practice that is to be explained, but which goes beyond describing the content of the practice. So, we might talk of explanations of a legal rule that are 'historical' (that explain the causal forces that brought the rule about), or that are 'psychological' (that explain what truly motivated judges or legislators in the creation of the rule). The vagueness of the term 'explanation' is such that it is unhelpful, in much the same way that it is unhelpful to ask simply 'why' the law is as it is. For this reason, this thesis does not use the language of explanation.

Instead, the language of justification is to be preferred, because it has more concrete meaning. To justify a legal rule is to set out some or all of the reasons that show the rule to be a good thing.[38] It is important to note that this need not be the same as to claim that the rule is justified *all things considered* (or, to put it another way, that the rule as it is aligns with the ideal rule that ought to be adopted); that latter issue can only be determined by weighing the strength of the reasons that can be canvassed in the rule's favour. We first need to know what those reasons are. Only then can we debate whether the rule ought to be retained, or instead replaced with some other rule.

There are here two different projects that might confused, which we can label 'all-things-considered' and *pro tanto* justificatory projects. The first aims to show that the practice in question *ought to be retained*, because it aligns with the ideal practice. The second instead aims to show the *best reasons* that can be offered in favour of the practice. Such a project need not conclude that those reasons are sufficient to justify the retention of the practice in the face of competing considerations that suggest that the practice ought to be replaced. A *pro tanto* justificatory project could instead leave the question of retention unanswered, or conclude that the reasons that have been offered are too weak to justify retention of the practice.

[37] Gardner claims that 'all justifications are explanations', but that not all explanations are justifications: J Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 2. Although a resolution to this debate is not important in attempting to clarify the aims of this thesis, I doubt that Gardner's claim here is sound. It seems true to say that, for an account of a legal rule to be an explanation of that rule, that account must have a causal component, that describes how the rule came about. This is clearly not so in the case of a justification.

[38] We might alternatively say that it is to set out some or all of the considerations that count in favour of that rule: T Scanlon, *What We Owe to Each Other* (Belknap Press 1998) 17.

It is this second type of justificatory project that is pursued in this thesis. The aim is not to show that any given legal rule forms part of an ideal law. It is, instead, to ask what are the best reasons that might demonstrate that a given legal rule should be retained or adopted. The question of whether these reasons are strong enough to demand that the rules not be replaced with an entirely different set of rules is left for another time.

This type of project is pursued for several interlocking reasons. A proper inquiry into what the rules of an ideal law of personal property would be would require a full defence of the institution of private (as opposed to, for example, communal) property as a whole. Such a project would hugely expand the scope of the thesis, and there is no particularly convincing reason to suppose that the conclusion to this initial inquiry would be that the institution of private property is justified all things considered. It is, too, an important preliminary step that should be taken before embarking on inquiries of that sort to discover what it is that can be said in favour of our existing practices.

With these clarifications in mind, it is helpful at this stage to set out the two principal kinds of justification that can be found in the literature on personal property law and that could be considered in each account.

1.2.2.1 Natural Right Justification

This first sort of justification can usefully be termed a 'natural right' justification, because it claims that a legal rule has good reason to exist where that rule gives effect to, or concretises, an exclusionary non-legal right. To say that a right is exclusionary is to say that it ought to be followed regardless of whether the state of affairs that the right's existence brings about are desirable.[39] On some views, that a person owns a chattel gives would-be interferers with that chattel an exclusionary reason that demands that they not interfere with it.[40] This view has some intuitive plausibility. Suppose that a person steals food from a wealthy and gluttonous billionaire, in order to feed a starving child. The billionaire has no knowledge of that theft, nor would he have been able to eat all the food in his possession before it spoiled. One might well conclude that this theft is justified on the balance of reasons, because it serves a very important interest of the child and imposes little or no detriment on the billionaire. Nonetheless, we might

[39] cf J Raz, *Practical Reason and Norms* (2nd ed, OUP 1999) 35-48.

[40] eg A Ripstein, 'Possession and Use' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 164-66. See further AJ MacLeod, *Property and Practical Reason* (CUP 2015) 185-88.

still think that the theft is wrong, simply because the food that was stolen belonged to the billionaire, and to no one else.

In this thesis, focus will be given to Kantian justifications of the acquisition of property rights, such as those developed by Arthur Ripstein and Ernest Weinrib. Justifications of this sort have become particularly prominent in the literature of general private law in recent times, and modern writers continue to endorse variants of these Kantian accounts in the context of personal property law. For this reason, these accounts deserve particular attention.

It is helpful to set out the most important premise of such theories here, before explaining in later chapters how that premise has been applied to debates about some of the events which are the concern of this thesis. The Kantian theory begins with consideration of human interactions in a pre-legal state of nature; here, all human beings are subject to duties that dictate that they must act consistently with each other's independence. That independence is understood as 'self-mastery', or as being the person who is entitled to make choices in relation to your means. To be independent is to be in a relationship with other people whereby those others do not make any choices about your means. Thus, independence is 'not a good to be promoted; it is a constraint on the conduct of others imposed by the fact that each person is entitled to be his or her own master'.[41] In the state of nature, that independence first manifests itself as a right that others not interfere with your body. On this view, when we ask why it is wrong for me to punch you, the answer is given in terms of exclusionary reasons: it is because what uses your body is put to is up to you, and not because the existence of a duty that I not punch you promotes a beneficial state of affairs.[42]

It is from that premise that Kant and his followers build out to a justification of the system of private property and, with it, a justification of particular methods of acquiring private property rights. As Ripstein puts it:

> The idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers. Kant argues that these norms and institutions do more than enhance the prospects for independence: they provide the only possible way in which a plurality of persons can interact on terms of equal freedom. Kant's concern is not with how people

[41] A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard UP 2009) 15.

[42] cf A Ripstein, 'Beyond the Harm Principle' (2006) 34 Philosophy & Public Affairs 215.

> should interact, as a matter of ethics, but with how they can be forced to interact, as a matter of right.[43]

That account will be considered with particular detail in reference to the taking possession of an unowned chattel (2.2.1). It will be seen that the Kantian justification of the law takes the form of a claim that the law concretises a provisional right that one has to exclude others from one's means, and that the act of taking possession is a legitimate way by which one might make an unowned chattel one's means.

1.2.2.2 Instrumental Justification

The discussion in the previous section reveals an alternative method by which we might attempt to justify a legal rule: by showing that the legal rule brings about a beneficial state of affairs that would otherwise not exist. On this form of justification, we can compare the state of affairs that the rule brings about with the state of affairs that would exist if the rule did not exist or was replaced with some other rule. If the rule brings about a good state of affairs – say, it promotes some interest that a person has – we can say that this gives the law a good reason to adopt the rule. Given that this thesis seeks to offer *pro tanto* justifications, it is no criticism of the justification to say that the reasons that the instrumental justification provides are weak reasons. If they are the best reasons that can be cited in favour of the law, then it follows that they are the reasons that must form part of our justification.

As we shall see, the most promising line of argument that can be made in this vein focuses on the (non-legal) interests of holders of property rights, and argues that those rights serve important interests that rights-holders have. It is, however, worth considering explicitly at this stage the role that arguments based on economic efficiency will have in this thesis. These are a particular kind of instrumental justification, which argue that legal rules may be justified if they work to maximise social wealth. In the realm of personal property law, these arguments seek to show that a legal rule either minimises wasted costs, ensures that a chattel is transferred to the person who can extract the most (financial) value from that chattel, or creates incentives to invest in the chattel to increase its financial value.[44]

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[43] Ripstein, *Force* (n 41) 14.

[44] See, eg, TW Merrill, 'Accession and Original Ownership' (2009) 1 Journal of Legal Analysis 459, 474-79.

In this thesis, it will be accepted that an increase in social wealth brought about by a given legal rule provides the law with a reason to adopt that rule. This requires some explanation, because it might be doubted that the efficiency of a given legal rule counts in favour of that rule when it comes to justifying it.[45] If this is correct, it follows that considerations about the economic effects of a rule ought not to form part of a justification of that rule, because they fail to show any sort of reason that might show that rule to be a good thing. However, this thought should be resisted. Properly understood, the objection does not demonstrate that the efficiency of a rule gives us no reason to think that the existence of the rule is a good thing, but instead shows that these reasons are plausibly weak reasons. It follows that these reasons are worth knowing because they can form part of our justification of the rule.

This point is most obvious when it comes to an argument that claims to show that a legal rule will reduce administrative cost when compared with a different rule. Clearly, this is a good thing, if that saved expenditure is spent in a productive way. If other things are equal, it seems straightforwardly true that we should prefer a rule that imposes smaller costs than a competitor rule. Suppose a legal rule exists that says that all breaches of contract lead to a damages award of £100. No one would seriously argue that such a rule is better, all things considered, than a rule that says that breaches are to be compensated according to the actual loss suffered by the innocent party. But so too could no one doubt that the rule would have certain benefits – saved expenditure – because of its certainty. Thus, *in this respect*, the rule is better than the compensatory one, and this gives the law a reason to accept it as a rule, albeit a reason that is likely to be outweighed by competing reasons. We can therefore offer a justification of the rule.

The claim that it is desirable for a chattel to be owned by the person who can extract the most value from that chattel can be defended in similar terms. It seems true to say that, if other things are equal, we ought to prefer a rule that brings about this state of affairs. This is because the financial value that that person extracts from the chattel can be used by that person as an instrument to obtain other forms of value, which are worth having for their own sake.[46] Suppose that there exists some unowned chattel that is up for distribution. We might allocate that chattel to one of any number of people, but one of those people is a particularly skilled craftsman, who would be able to work on the chattel and increase its value to a greater extent than any other person. It seems true that this fact gives us a reason to allocate that chattel to that person. Once

[45] eg NJ McBride, *The Humanity of Private Law: Part I* (Hart 2018) 10-11.

[46] Ronald Dworkin has convincingly argued that a mere increase in social wealth is not something worth having for its own sake: RM Dworkin, 'Is Wealth A Value?' (1980) 9 Journal of Legal Studies 191.

it has been worked on, the craftsman can use this increase in value as an instrument to obtain valuable goods, and – because it is this particular craftsman who is the person able to extract the most value from the chattel – there will be more instrumental value created through this allocation than any other possible allocation.[47] Of course, it will almost never be the case that other considerations will not provide competing reasons to allocate that chattel to some other person, and, as will be demonstrated in later chapters, the prescriptions that arguments of this sort might make are often indeterminate. It does not, however, follow that that those reasons cannot form part of a *pro tanto* justification of the law.

One might object that offering a *pro tanto* justification that is unlikely to succeed as an all-things-considered justification is not a project that it worth pursuing. This would, however, overlook the other arguments put forward in the rest of this thesis, which seek to add to any good reasons that can be found on the basis of a rule's economic efficiency. One also ought to remember that, if it is true that arguments from economic efficiency are the best arguments that can be made in favour of a given legal rule, then this is a truth that is worth knowing. It is only once we know this that we can safely move on to assess arguments for wholesale reform or incremental legal development.

1.2.3 Clarification

The final sort of question that is pursued in this thesis is a clarificatory one, and is relatively straightforward. Each account aims to remedy whatever uncertainty may be identified in the descriptive part of the account. That clarification consists of two steps: first, candidate legal rules are identified which plausibly fit with our existing legal materials; second, those candidate legal rules are assessed by reference to the strength of the reasons that can be canvassed in their favour. Thus, the primary aim of the clarificatory parts of the thesis is to prescribe the rule that English law ought to adopt, by considering the strength of the *pro tanto* justifications that can be offered in defence of those candidate rules. Those justifications are to be determined in the same way as the justifications of existing legal rules, as described in 1.2.2. The thesis therefore sets out the direction in which personal property law ought to develop if the law is to move towards a more justifiable set of rules, and, in doing so, provides a *pro tanto* justification both of that developed body of law and of our existing practice.

[47] Again, it seems true that this instrumental value will, at least in part, depend upon what that wealth is in fact used as an instrument to obtain.

1.3 A Note on Terminology

The terminology of personal property law is notoriously difficult terrain to navigate.[48] There is simply not the space required in this thesis to offer an extended defence of the terms adopted. There is a danger – reflected in much of the literature on the subject – that debates become bogged down in semantic, fruitless disagreements about the 'correct' meaning of particular terms. Instead, this section will outline the key terms that may cause difficulty, and will explain how they are to be used in the following chapters. Not all of these terms are used in the most conventional way; indeed, there is simply no correct way to use many terms, despite protestations that are often made to the contrary by legal scholars. It is hard to find two scholars or judges that use the same terms in precisely the same way in all instances. The best that can be hoped for is clarity and consistency. By assigning a clear and single definition to particular terms (and by avoiding certain terms altogether), the substantive arguments made in the thesis will become easier to follow.

1.3.1 Possession

'Possession' will be used to mean a state of fact. More specifically, the state of fact that exists where a person has both physical custody and control of a chattel and an intention to exercise that custody and control on their own behalf.

The terms 'de facto possession' and 'legal possession' will not be used. This is a contrast that is commonly drawn,[49] but is liable to confuse, because the word 'possession' is used in two different senses. The former refers simply to a legally significant state of fact. It is, therefore, redundant, given that the term 'possession' will be used in this sense in this thesis. The latter refers to a set of legal *rights*, including the right that others not unreasonably damage or destroy the 'possessed' chattel, the right that others not deprive you of possession of the 'possessed' chattel, and the right that others not make use of the 'possessed' chattel without your consent. A person may have 'possession' of a chattel in this latter sense, but not have custody and control of that chattel at the same time. Such a person, however, will not be described as being in possession of that chattel for the purposes of this thesis.

[48] For an overview of many of the main terms, see Crawford (n 21) 45-48.

[49] See, eg, F Pollock and RS Wright, *Possession in the Common Law* (Clarendon 1888) 11-20; S Green and J Randall, *The Tort of Conversion* (Hart 2009) 86; Sheehan (n 5) 10-14.

1.3.2 Right to Possession

The term 'right to possession' is one candidate to replace the term 'legal possession'.[50] It more accurately conveys the important point that the subject of the term is a set of rights, and not a state of fact. However, it will not be used in this thesis, because it fails to capture the full extent of the legal rights that a person acquires when they have possession of a chattel.[51] This is so because such a person has more than a right to maintain their possession, understood as a right that others not dispossess them of the chattel. A person with a 'right to possession' is able to bring a claim against others in the torts of negligence, trespass and conversion, and so another will wrong such a person if they damage or destroy that chattel. This need not involve dispossession. The term 'right to possession' is therefore under-inclusive.

1.3.3 Title

Another candidate to replace the term 'legal possession' is 'title'. However, this term is also unhelpful, and so will not be used in the subsequent chapters of this thesis, except where it is necessary to do so either to set out or to engage with the particular arguments of courts or commentators. The term should be avoided for at least two reasons.

First, the term is used in the existing literature in a myriad of different ways,[52] and so its continued use is liable to cause confusion. Two common meanings of the term demonstrate this problem clearly. It is common to talk of 'possessory title', intended to refer to the set of rights that arise in a party because they have taken possession of a chattel. Thus, we might say that B, who finds A's umbrella on the street, has a 'title' to the umbrella, and that A is the 'owner' of the umbrella. However, it is also common to see talk of '*the* legal title' to a chattel. This is usually intended to refer to the legal interest held by an absolute owner of a chattel, and only that interest. Thus, if we were to ask 'who has title to the umbrella?', we might plausibly respond 'only A', 'only B', or 'both A and B', depending on how the term 'title' is understood.

[50] Another similar candidate term is 'right to exclusive possession', or 'right to exclusive possession forever', favoured by Swadling: Swadling, 'Property: General Principles' (n 13) 4.131.

[51] S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 20; L Rostill, 'Terminology and Title to Chattels: a Case against "Possessory Title"' (2018) 134 LQR 407, 420-23; Crawford (n 21) 37-39.

[52] See, eg, Honoré (n 28) 134-41; R Hickey, *Property and the Law of Finders* (Hart 2010) 165-66.

Second, the term 'title' is inherently vague.[53] The word conveys nothing as to the content of the legal interest of the holder of the title. Its continued use, therefore, is liable to mean that confusion as to the contents of A's and B's interests will also continue.

We can avoid these problems by avoiding use of the term, and by instead adopting a vocabulary that has more concrete meaning. As William Swadling explains, the term 'title' derives from 'entitlement', and so the obvious lacuna that the term leaves is that it does not make clear to what a title-holder is entitled.[54] It is submitted that the best answer that can be given to this question is: entitlement that others do not (intentionally or carelessly) physically interfere with the chattel in question.[55] Those others may commit one of the chattel torts if they do so interfere, for example if they damage the chattel, dispossess the title-holder, or refuse to return possession to the title-holder upon request. Two (or more) people could have this kind of entitlement in relation to a single chattel. To return to our umbrella example, both A and B could have this sort of entitlement. The principal difference between them would be the class of person against whom their entitlement exists. In the case of A, this class encompasses the whole world; in the case of B, this class is the whole world except A.

1.3.4 Ownership

One term that will be used in this thesis in place of 'title' or 'right to possession' is 'ownership'. This is a term that will only be used to describe the legal interest held, in our example, by A. That is, to say that a person 'owns' a chattel is to say that they have a right that others not physically interfere with that chattel, and so the whole world, prima facie, owes a correlative general duty to A not to interfere with the chattel.[56] Thus, an owner of a chattel, in this sense, is the person with the greatest possible interest recognised by law in relation to that chattel. They owe no general duties to another not to interfere with the chattel, and any duty of non-

[53] Indeed, it is for this reason that the term has been used to describe proprietary interests so far in this chapter.

[54] WJ Swadling, 'Unjust Delivery' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP 2006) 280.

[55] See B McFarlane and S Douglas, 'Defining Property Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013). A term of this sort is often used interchangeably with 'an entitlement to (immediate) exclusive possession'. However, that term is unhelpful, as we have seen, because it obscures the fact that a person with this kind of entitlement has rights that others not interfere with a chattel without withholding possession from them.

[56] It is helpful to conceptualise owners as also having a power to license such interference, and a power to transfer their right to non-interference: JE Penner, *Property Rights: A Re-Examination* (OUP 2020) 6-16.

interference that they do come under arises by virtue of their actions in respect of the chattel.[57] In contrast, the duty of non-interference that others are subjected to, that are owed to A, are imposed upon them by virtue of their status as non-owners. Thus, B, the finder of A's chattel, is not the chattel's owner, because B owes to A a general duty not to interfere with that chattel.

There are four main objections to this particular use of the term 'ownership'. The first is that the notion of 'ownership' plays no role when it comes to resolving disputes between two parties in a dispute over a chattel.[58] Instead, a court must simply ask whether one party breached a duty, owed to the other, not to physically interfere with the chattel. So, a claimant need only demonstrate that they had a better claim to the chattel than the defendant, and not that they had the best such claim. There is, therefore, no need to determine a chattel's owner in order to determine the liabilities of parties, and, it might be argued, it follows that 'ownership' is not a concept that English law recognises.

Although it is undoubtedly true that courts need not determine who owns a chattel in order to resolve disputes about that chattel, it does not follow that there are no owners in English law, as this thesis understands the concept of ownership. This is because we can, as scholars, usefully consider all disputes that might come before a court in relation to a given chattel. If we do so, it becomes clear that it is useful to think in terms of a chattel's ultimate owner. The norms that govern the behaviour of B are quite different to the norms that govern the behaviour of A, when we consider those norms as a whole. B is not free to use the umbrella as he pleases; he commits a legal wrong in so doing. Therefore, the law demands that B not interfere with the umbrella. The same is not true of A, who may, prima facie,[59] put the umbrella to whatever use he pleases.[60] This would be the case even if it were also true that all other parties in the world owe identical duties both to A and to B not to interfere with the umbrella.

Second, it is sometimes thought that the concept of 'ownership' plays no role in English law because an 'owner' cannot rely merely on her ownership to bring a successful claim against a defendant, but must instead demonstrate that the defendant committed a legal wrong, or

[57] They may, for instance, create a valid contract with another in respect of the chattel that places them under a duty not to interfere with it.

[58] Swadling, 'Unjust Delivery' (n 54) 281.

[59] The rider is intended to capture two qualifications. First, A will be unable to put the umbrella to certain uses, such as using it as a weapon to attack another person. Second, A may come under a personal obligation owed to another, created through his conduct, that places A under a duty not to use the umbrella for certain purposes.

[60] The same point has been made by Crawford (n 21) 56-57 and by Rostill, *Possession* (n 21) 170-73.

breached a legal duty, owed to her.[61] The mere fact that the defendant possesses a chattel owned by the claimant is insufficient for the claimant to establish liability in the chattel torts. However, this is no true objection to the concept of ownership adopted here. Although it is undoubtedly true that a claimant must prove that the defendant breached a duty owed to her in order to bring a claim in tort, it simply does not follow that there can be no concept of 'ownership' in English law. On the view adopted in this thesis, to say that A is a chattel's owner is simply to say that anyone might breach a general duty owed to A not to interfere with that chattel.

A third objection to the use of the term 'ownership' adopted in this thesis is that it might be argued that it cannot be equated with a general right that others not physically interfere with the chattel that is owned, because there are situations in which a person whom we would not call a chattel's 'owner' has a right of this sort, and the person whom we would naturally call the owner does not seem to have a right that others not interfere with the chattel in question. The typical example that purports to demonstrate this is where a person creates a bailment of a chattel for a term. In such a case, it is usually said that it is the bailee who has the 'right to possession' of the chattel, while the bailor has only a 'reversionary interest'.[62] So, if a third party were to interfere with the chattel, it is the bailee, and not the bailor, who can bring a claim in conversion.[63] If this is right, it may follow that we ought not to say that the bailor is the chattel's 'owner', at least as this thesis has defined that concept.

It is, however, submitted that the better view is that the bailor (or lessor) of a chattel does retain a right that others not interfere with a bailed chattel, and so remains its owner.[64] A number of analytical points are worth emphasising here. First, as will be demonstrated in Chapter 3, the bailee's possession of the chattel is sufficient to demonstrate an entitlement to sue a third party who interferes with the chattel.[65] It follows that the fact that the bailee has a right that others not interfere with the bailed chattel cannot establish that the bailor has no such right. Second, it is clear that the bailor does have a general right to exclude all the world from

[61] The lack of a *vindicatio* in English law forms part of the criticism of the notion of 'ownership' in ELG Tyler and N Palmer, *Crossley Vaines on Personal Property* (5th ed, Butterworths 1973) 39.

[62] See, eg, S Green, 'Understanding The Wrongful Interference Actions' [2010] Conv 15.

[63] *Gordon v Harper* (1796) 7 TR 9, 101 ER 828.

[64] The same is true where a person sells a chattel to another on 'retention of title' terms. They retain the right that they had before the sale, which is a right that others not physically interfere with the chattel. Thus, the purchaser may commit one of the chattel torts if they act inconsistently with their agreement, third parties owe general duties in relation to the chattel to the seller, and (of most practical importance) the insolvency officers of the purchaser will breach a legal duty owed to the seller if they purport to sell the chattel in order to meet the purchaser's debts.

[65] So, it is not necessary for the bailee or lessee of a chattel to demonstrate that they have possession in virtue of there being a bailment or lease: *Burton v Hughes* (1824) 2 Bing 173, 130 ER 272.

the chattel of some sort, and that this right can be given protection in tort.[66] So, the bailee is under a duty to return the chattel to the bailor at the end of the term of the bailment, and is also under a duty to act consistently with the terms of the bailment.[67] If the bailor is able, under the agreement, to call for possession from the bailee at will, then they are able to bring claims against all third parties who tortiously interfere with the chattel.[68] If, however, the bailor is not so able, then in order to bring a claim against third parties who interfere with the chattel they must further demonstrate that this interference has damaged their 'reversionary interest' in the chattel.[69] Thus, it must be shown that the interference has led to permanent damage to the chattel such that the bailor will not recover it in the state it ought to have been in at the end of the term of bailment. It follows that a third party (or a bailee) who disposes of a bailed chattel will breach a duty owed to the bailor and may be liable in tort. These are general duties that arise in virtue of the bailor's status as the chattel's owner.

It follows that a bailor of a chattel can be said to have a right that others not physically interfere with the chattel even during the term of bailment. If the chattel is not damaged in such a way that we can say that her reversionary interest has been affected, then this may prevent a wrongdoer from being held liable to the bailor,[70] but this fact alone does not demonstrate that the bailor has no general (primary) right that others not interfere with the chattel.[71]

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[66] This fact is very difficult to understand on an alternative view of the law, because that view is premised on the claim that, in creating a bailment, the owner of a chattel 'splits' her ownership by giving the bailee the 'right to possession' that she previously held while retaining those rights that make up a 'reversionary interest'. This leads to two serious conceptual difficulties. First, it seems to follow that activity that remains wrongful as against the bailor (such as destroying the chattel) ought not to be wrongful as against the bailee, because the bailee cannot have been given that particular right by the bailor. Second, it also seems to follow that a bailor ought to be able to destroy a bailed chattel without committing a legal wrong against the bailee, but ought not to be able to interfere with the chattel in a more trivial way. Again, this follows from the premise that the bailor has parted with only some of the particular rights that previously made up her ownership interest, and has retained those particular rights that make up her 'reversionary interest'.

[67] N Palmer, 'Bailment' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 16.02.

[68] It is uncontroversial that a bailor at will can bring claims in conversion or negligence. More difficult is a claim in the tort of trespass, which is often said to be available only to persons in possession at the time of the alleged wrong. However, the better view is that a claim in trespass is available to a person with a right to 'immediate possession' of a chattel: Douglas (n 51) 31-33; Rostill, *Possession* (n 21) 101, n 14.

[69] eg *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437. It has been said that the result is the creation of three chattel torts, labelled 'quasi-conversion', 'quasi-trespass' and 'quasi-negligence': A Tettenborn, 'Reversionary Damage to Chattels' (1994) 53 CLJ 326, 330-31.

[70] This is so for the simple reason that, where a bailor's 'reversionary interest' is not affected, it will be the bailee who bears the cost of repairing the chattel: *HSBC* (n 69) at [29]-[30], per Longmore LJ. Similarly, a bailee will be barred from bringing an action against a wrongdoer if the bailor has already recovered damages from them (*O'Sullivan v Williams* [1992] 3 All ER 385) and a bailor will be barred if the bailee has already recovered damages from the wrongdoer (*The Winkfield* [1902] P 42, 61, per Lord Collins MR).

[71] cf Douglas (n 51) 36, arguing that *Gordon* (n 63) is wrongly decided.

What of the ability of the bailee to sue the bailor who interferes with the bailee's possession? It might be argued that this fact demonstrates that the bailor does not have a right of 'ownership', as this thesis uses the term. The better view, however, is that the bailee's entitlement to sue stems from the bailor's breach of a personal right that the bailee acquires against the bailor in virtue of the bailment.[72] If the bailment is made under a contract, the bailor will breach that contract by retaking possession of the chattel, and, if damages are an inadequate remedy,[73] specific performance of the contract may be ordered, which would mean that the bailor could not reclaim possession from the bailee. None of these elements of the law demonstrate that the bailor has parted with a general right that all others not interfere with the bailed chattel.[74] Instead, a bailment has the effect of creating personal obligations between bailor and bailee,[75] and of ensuring that some dealings with the chattel by the bailee that would otherwise be tortious do not amount to legal wrongdoing.

There is one final objection to the use of the term 'ownership' in this thesis that ought to be dismissed. Recall our earlier example, where B finds A's umbrella in the street and takes possession of it. It has been argued that, because A and B acquire the same legal interest – that is, a right that others not physically interfere with the umbrella – their interests should be given the same name. Thus, Ben McFarlane and Simon Douglas argue that both A and B should be said to have an 'ownership' of the umbrella,[76] and Swadling argues that both have a 'right to exclusive possession forever'.[77] On either view, the use of the term 'ownership' adopted in this

[72] Thus, the duty of non-interference that a bailor owes to a (gratuitous) bailee arises because of the bailment, in the same way that the bailment itself is the source of the bailee's positive duties to take care of the bailed chattel: N Palmer, *Palmer on Bailment* (3rd ed, Sweet & Maxwell 2009) 1.051.

[73] *Beswick v Beswick* [1968] AC 58.

[74] This analysis also helps to explain why it is that third parties who acquire a bailor's interest will not owe duties not to interfere with the possession of the bailee; it follows from the doctrine of privity. There *may* be an exception to this general position if the successor in title to the bailor knows of the bailment at the time he acquires the bailor's interest: *De Mattos v Gibson* (1859) 45 ER 108, 110, per Knight Bruce LJ. The view adopted in this thesis is better able to make sense of this limitation than other views about the nature of a bailment. The *De Mattos* rule would simply operate to impose a new personal obligation on the successor in title to the bailor: B McFarlane, 'Identifying Property Rights: A Reply to Mr Watt' [2003] Conv 473, 480. In contrast, if we accept the view that the bailor has no general right to exclude the world from a bailed chattel, because they have parted with it, then it follows that the successor in title to the bailor ought *always* to be bound by the bailee's interest, whether they have knowledge of the bailment or not, as an application of the *nemo dat* rule: eg Bridge et al (n 5) 13.010.

[75] It may be objected that a particular kind of bailment – a pledge – does create a 'property right', because a successor in title to the pledgor will owe a duty not to interfere with the pledged chattel to the pledgee: *Halliday v Holgate* (1868) LR 3 Ex 299. This fact, however, does not contradict the view adopted in this thesis. A pledgor of a chattel remains its owner. Successors in title to the pledgor come under personal obligations to the pledgee without voluntarily assuming them: cf Penner, *Re-Examination* (n 56) 15-16.

[76] B McFarlane, *The Structure of Property Law* (Hart 2008) 144-46; Douglas (n 51) 26.

[77] Swadling, 'Property: General Principles' (n 13) 4.131.

thesis – as a term that describes *only* A's interest, but not B's – should be avoided because it encourages readers to believe that A and B acquire interests of different kinds.

The reason this argument is rejected here is that the arguments offered by McFarlane, Douglas and Swadling (and others) – that claim to show that A and B have the exact same interest – can be doubted. As will be discussed at length in Chapter 3, a plausible case can be made that the better interpretation of the law is that B acquires a legal interest that mimics A's, but that is different in that it is exists only while B remains in possession of the chattel. To borrow Swadling's terminology, we can question whether B has a right to exclude others from physical interference with the chattel *forever*, in the same way that A does. It is only once we know for certain that both A and B do in fact have the same interest that we might then conclude that both should be given the same name. Until then, both should be given different names to make this doubt clear. It follows that this thesis does not call B's interest one of 'ownership'. This term is only useful as a description of A's interest, and will be used accordingly.

1.3.5 General Property Interest

Once it has been established that we will use the term 'ownership' to describe A's right that others not physically interfere with a particular chattel, we are still left with no useful term to describe B's legal interest. The nature of that interest is discussed at length in Chapter 3. However, as will become clear, that interest consists of a transferable right to exclude others from the chattel. It is, therefore, possible to consider B's interest to be 'proprietary' in nature, because it imposes general duties of non-interference on an indefinitely large class of persons. That interest will, therefore, be called a 'general property interest'.[78] This term is intended to convey the fact that B's interest mimics A's interest, but may not be precisely the same. The term captures the essence of B's interest, but makes clear that all of the details of B's interest have yet to be settled.

[78] The term is the recommended language of a number of scholars: see Hickey (n 52) 166; Rostill, 'Terminology' (n 51) 423-24.

2. FIRST POSSESSION

The purpose of this chapter is to offer an account of the causative event of 'taking possession', where possession is taken of a chattel that is *unowned*. That possessor, A, will become the owner of that chattel; he will acquire an alienable legal interest that includes the right to exclude all others from the chattel. Call this the *first possession rule*. The law governing this event will be described, and justifications of the rule will be considered. It will be seen that the *first possession rule* has a number of strengths (and weaknesses) in terms of its efficiency that have been outlined in extensive commentary from the law and economics literature. These points ought to be borne in mind, but are ultimately inconclusive. It will be further argued that the *first possession rule* is best justified on the basis that A's ownership serves to protect his (non-legal) interest in the fulfilment of the plans or goals that he has formulated and intends to use the possessed chattel to pursue.

2.1 Description

The *first possession rule* appears to be well established in English law. It is often baldly stated in leading modern textbooks on personal property law,[1] and the rule was endorsed in clear terms by Blackstone:

> [W]hen once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it.[2]

According to Blackstone, the system of private property began as one of usufructuary rights – 'a kind of transient property, that lasted so long as he was using it, but no longer' – on the grounds that it would be 'unjust' to interfere by force with another's present use of property.[3]

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[1] See, eg, M Bridge et al, *The Law of Personal Property* (2nd ed, Sweet & Maxwell 2018) 16.003; D Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 25; MA Jones et al (eds), *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell 2020) 16.49.

[2] 2 Bl Comm 258 (footnotes omitted). For a statement of the same rule in Roman law, see WW Buckland, *A Textbook of Roman Law* (3rd ed, CUP 1963) 205-08.

[3] 2 Bl Comm 4.

Later, when mankind 'increased in number, craft, and ambition', it became necessary to establish a system whereby chattels and land were subjected to ownership as we now understand it, in order to avoid 'innumerable tumults' and to maintain public order.[4] First possession was the primary method chosen by the law in order to determine who was to be the owner of any given chattel or piece of land, and so Blackstone lists first possession as one method (among others) of acquiring ownership of a chattel.[5]

If we accept this account of the law, the *first possession rule* can be very easily stated: where A takes possession of a chattel that is unowned, A becomes the owner of that chattel. This rule, however, requires some more elaboration. In particular, we might ask, first, what it means to 'take possession' of a chattel and, second, what kind of legal interest A acquires.

2.1.1 The Event

The causative event of 'taking possession' will occur when a person has sufficient custody and control over a chattel and an intention to exercise that custody and control on her behalf.

The leading case that defines possession for the purposes of the causative event of 'taking possession' is *Pye v Graham*.[6] Although a case concerning possession of land, Lord Browne-Wilkinson (with whom Lords Bingham, Hope, Hutton and Mackay agreed) made clear that the same principle applies to chattels.[7] He states: 'there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")'.[8] These two requirements – factual possession and the intention to possess – are said to have 'always' existed in the common law and are 'obviously necessary'.[9] Each will be discussed in turn.

(1) *Factual possession*. In order to have 'factual possession' of a chattel, one must have a sufficient degree of custody and control over it. For the purposes of this rule of law, the

[4] 2 Bl Comm 5.

[5] 2 Bl Comm 401.

[6] *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL).

[7] ibid at [42]. A clear statement of the same rule in the context of the possession of a chattel can be found in *Parker v British Airways Board* [1982] QB 1004 (CA), 1019, per Eveleigh LJ.

[8] *Pye* (n 6) at [40].

[9] ibid.

'sufficiency' of that custody and control is to be determined by comparing the claimant's dealings in respect of the chattel in question with the dealings that can be expected of a reasonable hypothetical owner of that chattel.

The classic English case that demonstrates the need for 'factual possession' is *Young v Hichens*.[10] The defendant disturbed a group of fish, by rowing his boat through them, as the claimant began to encompass them in his net. Although it was 'almost certain' that the claimant would have caught the fish but for the defendant's actions, it was held that the claimant had not yet obtained any right that the defendant not interfere with the fish, because he lacked 'actual power' over them. It follows that the claimant had not yet taken possession of the fish, and the causative event of taking possession had not yet occurred.

There are two particular problems that give rise to difficulty in the application of this rule.[11] The first is that the degree of custody and control required by the law will depend on the circumstances, and will vary according to what can reasonably be expected of the claimant in regards to the particular chattel in question.[12] In *The Tubantia*,[13] for example, the claimants undertook a salvage expedition to recover cargo from the wreck of a ship in the North Sea. They sought an injunction to restrain the defendants – a rival company – from interfering with their salvage operations. It was held that the claimants were entitled to exclude the defendants; they had managed to cut holes in the side of the ship, and to work on the ship during certain periods of the summer when the weather was favourable. This was all that the claimants could possibly have done with the wreck, given 'the difficulty of possessing things which lie in very deep water'.[14] It would be unreasonable to expect the same degree of custody and control as might be required in relation to an apple or a knife.

The second difficulty is that possession is a vague concept. There are some clear cases in which there is no dispute as to whether there is sufficient custody and control, but others which are unclear. Harris argues that the courts ask themselves 'whether the facts before them are sufficiently analogous to the perfect pattern of possession' such that we can say that possession has been made out.[15] That perfect pattern might be said to be where a claimant has complete

[10] (1844) 6 QB 606. See too *Churchward v Studdy* (1811) 14 East 249; 104 ER 596.

[11] See L Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021) 10-11.

[12] DR Harris, 'The Concept of Possession in English Law', in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 74.

[13] [1924] P 78.

[14] ibid 90, per Sir Henry Duke.

[15] Harris (n 12) 80.

physical power over how the chattel is used, knowledge of its existence, the intention and capability to exclude the rest of the world from it, and receipt of it from a prior person with the same characteristics.[16] Where one of these features is lacking or incomplete, the court must decide whether the 'given approximation is such that possession may be held sufficiently established'.[17] It follows that there must be marginal cases, where there are plausible arguments that might be made both in favour of, and against, the claim that a particular person has the degree of custody and control over a chattel that English law requires for ownership to arise in that chattel on the basis of that person's 'taking possession' of it.

With these two difficulties in mind, the general rule is that, for possession to be made out such that ownership arises because of that possession, the necessary degree of custody and control is that which can be expected of an owner. A clear statement to this effect is found in *Powell v McFarlane*,[18] per Slade J: 'what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land [or chattel] in question as an occupying owner might have been expected to deal with it and that no one else has done so'.[19]

This analysis of the law was explicitly endorsed as correct by Lord Browne-Wilkinson in *Pye*.[20] To establish whether custody and control is sufficient, therefore, one must compare the claimant's actions in respect of the chattel with those of a hypothetical owner; those actions must show a course of dealing with the chattel that one would expect from that hypothetical owner in relation to that chattel. This inquiry can be made clearer by returning to the facts of *The Tubantia*. There, it was reasoned that the claimant's actions in respect of the wreck were all that 'a prudent owner would probably have done' with a wreck of that sort – namely, investigate the contents and state of the wreck, when possible due to favourable weather, in preparation for a larger expedition.[21] It followed that the claimants had taken possession of the wreck, and so had acquired a right to exclude the defendants from it.

(2) *Intention to possess*. 'Factual possession' of a chattel must be paired with the requisite intention to possess. This is defined as an intention to exercise custody and control of the chattel

[16] *R v Warner* [1969] 2 AC 256, 309.

[17] ibid.

[18] (1977) 38 P&CR 452.

[19] ibid 471.

[20] *Pye* (n 6) at [41].

[21] *The Tubantia* (n 13) 90.

for one's own benefit, and, as such, requires an intention to 'exclude the world at large'.[22] It is important to note that it follows that a possessor's intention need not be to become the absolute owner of the chattel, nor is it important that the claimant believes herself to be the owner. A wrongdoer or thief is able to have the requisite intention, even if she knows that another person has a superior claim to the chattel, so long as they intend to exercise their custody and control for their benefit. The intention to possess 'can be, and sometimes only can be, demonstrated by acts of the body'.[23] It is, then, often the conduct itself which proves the existence of the requisite intention, unless evidence to the contrary can be established.[24]

2.1.2 The Interest

There is surprisingly little explicit discussion in the case law as to the nature of the first possessor's legal interest; it is generally assumed, rather than argued, that the possessor will acquire the interest that has been termed 'ownership', rather than a more limited interest.[25] In part, this is to be expected because, as explained in 1.3.4 above, courts do not need to make any determination about a chattel's ownership in order to resolve a given dispute, but instead need only determine whether one of the parties had a right that the other not interfere with the chattel, and whether that right has been breached. The clearest statement of the rule comes from Blackstone, who, as mentioned above, argued that first possession originally created only a usufructuary right, but that, as society developed, usufruct was transformed by law into 'absolute property'. As explained in the Introduction, this means that the first possessor acquires an alienable right to exclude others from (deliberately or carelessly) physically interfering with the chattel, which binds all the world and is of indefinite duration.

2.2 Justification

The purpose of this section is to offer our *pro tanto* justification of the *first possession rule*. It will be argued that the Kantian justification of the rule fails, because it is internally flawed. Instead, a far more convincing justification for the rule can be found by adapting a strand of

[22] *Pye* (n 6) at [43]; *Powell* (n 18) 472.

[23] *Pye* (n 6) at [70], per Lord Hope.

[24] ibid at [76], per Lord Hutton.

[25] Rostill has recently claimed that this is a proposition of law which 'everyone accepts': Rostill (n 11) 2, n 13.

philosophical literature to the specific problem of first possession, and by combining those claims with a number of arguments developed in the law and economics literature.

2.2.1 Natural Right

As mentioned above, in 1.2.2.1, Kantian justifications of the *first possession rule* begin with the proposition that all people are independent, in the sense that they are master of their body and their legitimately acquired means: you are entitled to determine what is to be done with your body and property, so long as that determination is consistent with the independence of everyone else, and no other person may make such a determination in respect of your body or your property.

Naturally, the question then becomes *how* one may legitimately make some unowned chattel one's means, and so subject others to duties not to interfere with that chattel. According to Arthur Ripstein, there is a 'simple answer: an object becomes subject to somebody's choice when that person takes control of it'.[26] In this section, I set out the steps that Ripstein adopts in answering that question, and then explain why they are unconvincing. There are three steps. First, Ripstein begins by offering a justification of a *system* which recognises ownership that is consistent with and, in some sense, demanded by independence, and, second, Ripstein argues that it is by taking control of a chattel that is unowned that one can acquire ownership of that chattel. However, this argument does not justify a full system of enforceable legal rights; in order to complete such a justification, Ripstein argues that the provisional rights established by the first and second steps must be legitimised.

2.2.1.1 The Kantian Argument

The first step in the Kantian defence of the *first possession rule* is to claim that, as a general matter, a system of ownership is justifiable. This is so for two reasons. First, chattels are not purposive beings with independence, and so a person's ownership of a chattel – and their ability

[26] A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard UP 2009) 90. Although my focus here is primarily on Ripstein's account, there are several variants of Kant's arguments that exist in the literature: see, eg, BS Byrd and J Hrushcka, 'The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property and His Doctrine of Rights' (2006) 56 University of Toronto LJ 217; BS Byrd and J Hrushcka, *Kant's Doctrine of Right: A Commentary* (CUP 2010) ch 5; EJ Weinrib, *Corrective Justice* (OUP 2012) ch 8; EJ Weinrib, 'Ownership, Use, and Exclusivity: The Kantian Approach' (2018) 31 Ratio Juris 123. My concern is not with determining which of these accounts accurately capture Kant's own, but simply with the strength of the arguments presented.

to determine to what uses that chattel is to be put – cannot 'wrong' that chattel. Second, to deny persons ownership of chattels would 'sterilise a perfectly sensible way in which persons could set and pursue plans'.[27] The key idea is that, without a right to determine how chattels are to be used while not in physical possession of those chattels, persons will not be able to pursue plans in the same way as they would with such a right. To take Ripstein's classic example:

> As a matter of fact, you may be able to set yourself the end of making a mushroom omelet without having rights to objects that are not in your physical possession, but you could not have an entitlement against others to set yourself the end of making one. If there were no such rights, someone else would be entitled to take the eggs you had gathered while you were sautéing the mushrooms, and you would not be entitled to do anything to stop her. Your entitlement to set and pursue purposes would thus depend on the particular choices made by another.[28]

With no rights to determine how a chattel is to be used while it is not in our possession,[29] we would be unable to pursue a great number of plans that we otherwise would. We would be purposive beings with limited capacity to pursue purposes, and this would, in Byrd and Hrushcka's terminology, mean that 'freedom would be in contradiction with itself'.[30] In order to avoid such a state of affairs, the possibility to own chattels and land is needed.[31]

With this framework in place, Ripstein then considers the problem of acquisition, an account of which is needed to complete his account of property law more generally. Ripstein endorses the *first possession rule*, for two reasons. First, to make a chattel that is unowned subject to a particular person's ownership wrongs no one, because that chattel must be no one's exclusive means. The rule does not deprive people of things they already have, but merely removes the possibility that they might acquire that which is acquired by another.[32] Second, taking control of a chattel is a necessary step in subjecting that chattel to your choice:

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[27] JE Penner, *Property Rights: A Re-Examination* (OUP 2020) 164.

[28] Ripstein, *Force* (n 26) 91-92.

[29] There is no need for any kind of right to exclude others from a chattel to ensure that people are able to put chattels to some kinds of use. If I am eating an apple, it is wrong for you to rip it out of my grasp, because to do so interferes with my body. Our bodily rights therefore ensure a very limited ability to pursue plans with certain chattels that we can physically hold.

[30] Byrd and Hrushcka, 'Natural Law' (n 26) 220.

[31] Ripstein, *Force* (n 26) 60-64, 88.

[32] ibid 100.

> The account is boring because the only factual precondition of rightful acquisition of an unowned object is empirical possession of that object. The act in question is simply bringing a thing under your control, so that you can now decide how to use it… Wishing for a thing engages your will in a sense that is irrelevant; subjecting it to your choice – making it a means for setting and pursuing your purposes – is established only by taking control of it. Nothing more is required. All you need to do is take physical possession, and give a sign to others that you are doing so in order to have it as your means rather than just for a specific use. These steps are required because they are just the steps in subjecting a thing to your choice.[33]

One acquires a right to determine the purposes to which a chattel is to be put, therefore, simply by taking control of that chattel. It is worth emphasising that Ripstein's defence of the *first possession rule* is a qualified one. If we are to have a system that recognises ownership, we must also have some rule that governs the acquisition of unowned chattels. It is the *system* that is demanded on the Kantian account, and, for this reason, Ripstein argues that the *first possession rule* is only of 'secondary' importance.[34]

Ripstein, however, claims that rights to exclude others from chattels are only *provisional* outside a 'civil condition'. This is because these rights suffer from three defects, each of which can be resolved by entering a civil condition of public legal institutions.[35] As Nicholas Sage helpfully notes, two of these defects are 'procedural' in nature, while one is 'substantive'.[36] The procedural defects are termed the defects of *enforcement* and of *indeterminacy*. The defect of enforcement arises because, in a state of nature, there is no central system to enforce whatever rights we have, or to provide remedies for their breach. People therefore lack assurance that others will, as a matter of fact, refrain from interfering with their independence, and so people are unable to fulfil their purposes to the extent that they would were a system of enforcement provided. The defect of indeterminacy flows from the nature of our right to independence. Its exact content and scope are unclear, and so there is a need for some sort of conclusive, neutral adjudicator to resolve specific disputes over its application.

These two problems mean that people are obliged to enter the civil condition in order to ensure that everyone's independence is realised. This also means that the substantive defect

[33] ibid 104-05.

[34] ibid 96.

[35] ibid ch 6.

[36] NW Sage, 'Original Acquisition and Unilateralism: Kant, Hegel and Corrective Justice' (2012) 25 Canadian Journal of Law & Jurisprudence 119, 123.

noted above can be addressed. The defect is that rights that arise as a result of the *first possession rule* are *unilaterally imposed* by the first possessor on others, and so appear to be inconsistent with their independence, because it places them under an obligation that they would not otherwise be under. Acts that were previously permissible are now wrongful, and – given that the entire world did not actually consent to that duty's imposition – it appears to follow that no person can be forced to respect a first possessor's provisional ownership.

According to Ripstein, this problem can be remedied through the entrance into a civil condition, because the recognition of a first possessor's ownership by a public legal institution transforms that act of taking possession from being purely 'unilateral' to being one that has authorisation that is 'omnilateral'.[37] Because the *first possession rule* is given the endorsement of a public institution, all who are bound by the duties that the rule create can be said to have 'authorized' those duties. It follows, argues Ripstein, that the imposition of those duties is made legitimate in a way that it was not before entry into the civil condition. We can call this third and final step the *authorisation argument*.

2.2.1.2 Criticisms of the Kantian Account

In this section, I argue that the Kantian account set out above should be rejected. It follows that the argument fails to make out a Natural Right justification of the *first possession rule*, and so we must look elsewhere if we are to find a coherent defence of the law. It is helpful to take each of the arguments made in reverse order.

(1) *The authorisation argument*. Ripstein's solution to the unilateralism problem should be rejected as unconvincing. However, it should be noted that it has recently been argued that the *authorisation argument* is unnecessary, and that the Kantian account provides a coherent justification of the *first possession rule* simply by relying on the first and second steps of Ripstein's argument. It will be argued in this part that the better view is instead that the

[37] Ripstein, *Force* (n 26) 157. Ernest Weinrib offers a slightly different account of the mechanism through which otherwise illegitimate unilateral acts of acquisition can be made legitimate. According to Weinrib, the civil condition operates to create a 'reciprocal' system of acquisition that creates a 'unity within which different acquirers both bind and are bound': Weinrib, *Justice* (n 26) 279. The idea appears to be that all unilateral acquisitions can be tied together, because any given person may take the benefit of, or be burdened by, the *first possession rule*. This account is convincingly rejected by Sage (n 36) 126-27, who points out that Weinrib offers us no reason to think that a collection of illegitimate appropriations can be made legitimate by virtue of their being a collection. Instead, it seems equally plausible to suppose that what we have is a simply a collection of illegitimate appropriations.

unilateralism objection does defeat the Kantian argument. Nonetheless, it is argued below that the first and second steps of Ripstein's account also fail.

There are at least three reasons why the *authorisation argument* is unconvincing. First of all, it is hard to understand exactly what is meant by an 'omnilateral will', and how it can justifiably turn otherwise illegitimate appropriations into legitimate ones. Ripstein makes clear that the *authorisation argument* does not claim that all persons actually consent to the operation of the *first possession rule*. He stresses that the Kantian account differs from one that 'seeks to authorize appropriation in terms of a historical or hypothetical agreement by the people who own the Earth in common to permit people to divide it up'.[38] This is because such an agreement could not, as a practical matter, be made, and, even if it were, it could not legitimately bind future generations who were not yet born when the agreement was struck.[39] And yet, it is clear that, according to Ripstein, the *first possession rule* is made legitimate because 'everyone, including you, has conferred a power on me to appropriate'.[40] This move seems to be every bit as fictional as one based on hypothetical consent, and so it seems that we should reject it for the same reasons.

We might think, then, that the *authorisation argument* takes the form of something close to an argument from hypothetical consent, that claims that it is rationally necessary for all to sign up to public institutions that endorse the *first possession rule*. On this view, to say that all people 'authorise' an appropriation is to say that all people would authorise that appropriation if they had the opportunity to give their consent to that appropriation.[41]

This leads us into the second problem with the Kantian argument, which is that to invoke 'rational necessity' in this way appears to be at odds with the fundamental building blocks of independence and freedom. Part of what it means to be one's own master is to be able to act in ways that are *not* rationally demanded, that may be foolish, impudent or unhelpful.[42] Why should any particular person accept a limitation to their freedom to which they did not actually consent? It seems that there is no answer to this question available to the Kantian theorist on

[38] Ripstein, *Force* (n 26) 155. Both Grotius and Pufendorf offered accounts of the *first possession rule* that attempted to sidestep the problem of unilateralism by invoking consent or agreement: H Grotius, *On the Law of War and Peace* (SC Neff ed) (CUP 2012) Book II, ch 2, §2; S von Pufendorf, *De Jure Naturae et Gentium Libri Octo* (CH Oldfather and WA Oldfather trns) (Clarendon 1934) Book IV, ch 6.

[39] ibid 155-56.

[40] ibid 157.

[41] This is an interpretation of Kant that has been offered: see, eg, P Guyer, *Kant* (Routledge 2006) 268-79.

[42] For a particularly clear statement of this view, see A Ripstein, 'Possession and Use' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 158.

the terms of their own theory.[43] If we accept that people should have their freedom restricted in this way – to 'legitimate' the *first possession rule* – then it is hard to see why we should not allow it to be restricted in other areas where it would be rational to do so. On this view, the idea of authorisation appears to drop out of the picture. Whatever argument we can provide that justifies our adoption of the fiction that all consent to the rule, or that all authorise the rule, it is the strength of the argument itself that does the work to justify the rule.

A third problem with the *authorisation argument* is that it appears straightforwardly objectionable to suppose that every pre-legal right that arises as a result of a person taking possession of a chattel that is unowned needs to be secured in a 'civil condition' for that right to bind others. Consider the following example, offered by Victor Tadros:

> Suppose that some Jewish Germans are hiding from Nazi authorities. They store food and other essentials that they require to survive. A Nazi sympathizer discovers the supplies and takes them away, knowing that this will lead to the deaths of the Jewish people. He does this even though he does not need the supplies.[44]

According to Ripstein's account, the Nazi sympathizer here does not commit a wrong, because the society in which he lives is not a 'civil condition',[45] and so whatever rights the Jewish people have in relation to the stored food and other essentials are provisional and thus cannot be enforced or violated. This surely cannot be correct.[46]

In response to these objections, it has recently been argued by Sage that the unilateralism problem is no true problem on the Kantian account, and so, even if we accept that Ripstein's response to the problem fails, it does not follow that the Kantian account itself is flawed. Instead, argues Sage, we can simply fall back on the first and second steps of the argument. The reason that the unilateral imposition of duties of non-interference is unproblematic, according to Sage, is that those duties do not affect everyone's freedom or independence

[43] Sage (n 36) 128-29. See too H Steiner, 'Corrective Rights' in M McBride (ed), *New Essays on the Nature of Rights* (Hart 2017) 223.

[44] V Tadros, 'Independence without Interests?' (2011) 31 OJLS 193, 202-03.

[45] Ripstein is clear that Nazi Germany is an example where the civil condition does not exist: Ripstein, *Force* (n 26) 337.

[46] A similar point has been made in the literature that asks whether indigenous populations acquire any kind of right to exclude others from their lands. To say that the existence of (moral) rights to exclude others requires the existence of a legal system that recognises such rights suggests that indigenous populations have no such right, but this conclusion seems intuitively objectionable: A Stilz, 'Property Rights: Natural or Conventional?' in J Brennan, B Vossen and D Schmidtz (eds), *The Routledge Handbook of Libertarianism* (Routledge 2018) 246-52.

(properly understood), because the first possessor's acquisition of an unowned chattel simply affects others' *wishes* in relation to – or potential uses of – that chattel:

> [B]y definition, the object in question, which you are *originally* acquiring, is not yet subjected to any other person's control or action. Thus, the object is at most the target of others' *potential* action – in other words, of their mere wishes. That is irrelevant for Kant… Original acquisition does diminish 'freedom' in one sense: it shrinks the domain of objects that are available for others to access in the future – the domain of objects that could *potentially* be subjected to others' action. But that has nothing to do with Kantian freedom.[47]

On this view, Ripstein is mistaken to think that there is a problem that needs to be resolved through an 'omnilateral will'. Instead, we can say that the first possessor of an unowned chattel acquires ownership of that chattel simply because they have subjected it to their choice.[48] This is unproblematic because other people have no right over the chattel. The *first possession rule* changes the context in which they operate by making it that they can no longer make use of the chattel without wronging the first possessor, but it does not deprive them of their means because the chattel never was their means or subject to their choice. It follows that, if this view is correct, the *first possession rule*'s operation does not interfere with the means of non-possessors, and so there is no issue – at least from within the Kantian premises – that needs resolving through an invocation of consent or authorisation.

It is, however, submitted that this argument is unconvincing; the imposition of new duties of non-interference in respect of an unowned chattel does appear to affect independence in the Kantian sense. This is because it does not seem correct to say that to transform an unowned chattel into an owned one need only affect a person's wishes in relation to that chattel. Ripstein explains that a choice is distinguished from a wish depending on whether a person 'take[s] himself to have means available to achieve' the project in question.[49] Suppose that a person, A, sets himself the goal of catching, skinning and eating an animal which happens to be unowned; before he is able to do so, however, another person, B, takes possession of the animal, and therefore a new duty arises that changes A's normative situation. It would now be wrongful

[47] Sage (n 36) 132 (emphasis in original). The argument has recently been endorsed by James Penner: see Penner, *Re-Examination* (n 27) 174-77.

[48] Sage sets out this theory in fuller detail in N Sage, 'Is Original Acquisition Problematic?' in J Penner and M Otsuka (eds), *Property Theory: Legal and Political Perspectives* (CUP 2018).

[49] Ripstein, *Force* (n 26) 14.

for A to catch the animal. Does this affect A's wish or his choice? It seems that we can plausibly say that it is the latter, because, given that the animal was unowned before B's appropriation, A took himself to be able to use the animal – and was as a matter of fact at liberty to use the animal – in the pursuit of his project.[50] It appears to follow that, in a relevant sense, A has had his freedom diminished or constrained, and so, in the absence of some convincing further argument that has not so far been offered on the Kantian account, we should conclude that, if our aim is to construct a system of law that preserves every person's independence, we should construct a legal system that does not contain the *first possession rule*.[51]

(2) *The need for control*. Regardless of whether we accept this rejection of the *authorisation argument* or Sage's reinvented Kantian account, it is submitted that the first two steps of Ripstein's case for the *first possession rule* should be rejected in any case. We can start with his argument in defence of the rule, which claims, first, that taking possession is a necessary step in subjecting an unowned chattel to one's choice, and, second, that we need some rule to govern the acquisition of ownership. It follows, claims Ripstein, that the *first possession rule* is justifiable if we are committed to bringing about a system of private ownership.

Understood in this way, it is hard to discern why we should accept this as an argument in favour of the rule, when we consider other rules that the law might adopt. We might instead have a rule that allocates ownership to a person whenever they decide that they will make some use of a chattel; this alternative rule would have the effect of bringing unowned chattels into a system of ownership, and also appears to rely on a step that is necessary to take if one is to subject that chattel to one's choice. There appear to be two responses open to the Kantian theorist. The first is to emphasise the need for the act of appropriation to have a communicative element, that signals to others that you intend to appropriate an unowned chattel as yours: 'If others could not determine that you meant to bind them, you cannot bind them'.[52] Again, however, it is plausible to suppose that there are other moments in the process of subjecting a chattel to one's choice that also communicate to others an intention to appropriate that chattel.

[50] A will be able to use the animal in the sense that no other person has a right that A not use the animal, and so its use would not be wrongful. There is no need for A to acquire a right to exclude others from the animal in order to see his uses of it realised, as a matter of fact.

[51] A similar point has been made by Hillel Steiner, who argues that, if Sage is correct, it must follow that a person can appropriate 'the entire surface of the Earth', and every chattel in it, and that this would be permissible, even though it seems implausible to suppose that this does not relevantly constrain others' freedom: Steiner (n 43) 224. If my argument in this part is not accepted, it seems to follow that this sort of appropriation would be permissible on the Kantian account.

[52] Ripstein, *Force* (n 26) 105.

Thus, when one pursues an unowned fox,[53] or begins to enclose a group of unowned fish in one's net,[54] it seems clear both that there is a signal sent about one's intention to become owner of the fox or fish, and that a necessary step towards subjecting the fox or fish to one's choice has been taken. Thus, it does not appear to be the case that the *first possession rule* is the *only* method the law might adopt to allocate ownership of unowned resources that tick both of the boxes that Ripstein's account emphasises. What is needed is an argument that shows that the moment of taking possession is the moment upon which the law should fixate.

Second, one might argue not that taking possession is a necessary step towards subjecting a chattel to one's choice, but instead that taking possession just *is* subjecting a chattel to one's choice.[55] We might say that where a person begins to capture an unowned animal is unimportant to the law because that person has yet to subject the animal to their choice, but that they have subjected the animal to their choice as soon as they have taken possession of it. This is so because it is at that moment that they are physically capable of determining the uses to which the animal is to be put.

Again, however, this argument seems incomplete because it offers no argument that explains why it is that we ought to accept that the *fact* that a person is physically capable of determining the purposes to which a chattel might be put should generate a *right* that others respect those purposes. There seems to be a distinction of importance here. A factual ability to set purposes for a chattel need not always coincide with a right to do so; a person might have one without the other. An owner of a chattel is entitled to exclude others from that chattel even if they have forgotten about the chattel, or have never physically come into contact with it. In either case, that the owner may be unable physically to determine the purposes to which the chattel is put does not affect her right to do so. Similarly, a thief might take possession of another's chattel – and thereby become the person who physically determines the purposes to which the chattel is put – and, at least plausibly, it could be the case that they acquire no right that others respect their determinations about how the chattel is to be used.

To sum up, Kantian defences of the *first possession rule* do not offer any extended or convincing defence of why it is that we should adopt that rule in particular, rather than some other rule. Instead, they appear to assume that the rule is defensible. For Ripstein, this is

[53] cf *Pierson v Post* 3 Cai 175 (1805).

[54] cf *Young v Hichens* (n 10).

[55] Ripstein seems to endorse this view at times: see, eg, Ripstein, *Force* (n 26) 104. The argument is made much more clearly by Sage: Sage, 'Is Original Acquisition Problematic?' (n 48) 109-14.

relatively unimportant, because, as we have seen, he is primarily concerned with justifying a system of that recognises ownership, and whatever rule is used to allocate unowned chattels is said to be secondary to that system. Nonetheless, it is submitted that no satisfactory positive explanation has been offered that shows that the law has good reason to give effect to the *first possession rule* rather than some other rule.

(3) *The system of ownership*. Finally, Ripstein's first and most important argument, that claims to demonstrate the need for a system of ownership, is unconvincing. Recall that the argument was made up of two claims: first, that chattels are not purposive beings, and so cannot be wronged by being the subject of ownership; and, second, that, without such a system, persons would be unable to pursue projects that require determinations about how chattels are to be used while that chattel is not in our physical possession. Ripstein's defence of the latter point is brief, but the same argument is made in clearer terms by Byrd and Hrushcka:

> If practical reason contained an absolute prohibition against using an external object of choice, I could not take an unowned apple and eat it. I could not take control of an unowned field, whose plowing, sowing, and reaping presuppose my control over the field to the exclusion of others and their alternative use of the field over a longer period of time. *No one would be permitted to take and use anything*. Such a prohibition would make us spectators in a world filled with usable objects of choice we could not use… We, therefore, must assume that acts of taking possession and using things for an unspecified period of time to the exclusion of others are legally permitted.[56]

It is important to note that this argument is not that a system which recognises ownership is demanded by a working out from independence, but is instead a 'postulate of practical reason' that is 'incapable of further proof'.[57] It follows that all persons must will such a system to exist, lest they act unreasonably (because they would act contrary to the postulate).

As others have noted, one difficulty with this argument is that there appears to be no need for *ownership* to exist in order to remedy the problem that would occur were persons unable to

[56] Byrd and Hrushcka, *Commentary* (n 26) 114 (emphasis in original).

[57] Ripstein, *Force* (n 26) 61.

take and use chattels or land.[58] Thus, the Kantian account seems incapable of justifying, without more, the legal interest that arises as a result of the *first possession rule*.

Following James Penner, we can define a usufructuary right as a 'right of occupation' with the following characteristics.[59] First, it is a right that is not unlimited in time; instead, it lasts only while the right-holder is actually making use of a chattel. Second, the right-holder has no power to transfer their right to another. Third, it is not exclusive; any number of people could make use of the chattel in question so long as later users do not interfere with the uses of the right-holder. It seems clear that Ripstein's account omits the possibility of usufructuary rights. Instead, he frames the choice as being between full-blooded ownership on the one hand, and a mere right to maintain possession via a right to exclude others from our bodies on the other. Clearly, however, a system of usufructuary right may be adequate to address the concerns that the system of ownership is meant to address. In fact, it is in many ways superior, since it limits the options open to non-right-holders in respect of appropriated chattels less than would a system of ownership.[60] It follows that, at best, the Kantian account can only justify the act of taking possession giving rise to a usufructuary right. Some other argument, then, is needed if we are to justify the *first possession rule*, as it exists in English law, on the grounds that it is necessary to give effect to exclusionary reasons derived from our independence.

There is another problem with Ripstein's case for a system of ownership, which is that the postulate of practical reason is asserted rather than argued for. It is no doubt true that a world in which no person could eat apples or cultivate land would be an undesirable one, but it is at least plausible to suppose that this may be required if we are to live in a world that is *rightful*, where no person constrains another's independence.[61] It seems that the most convincing way to understand Ripstein's argument is as a claim that such a world would be a worse world than one in which ownership is possible, because in a world with ownership people have, as a practical matter, more options open to them, more projects that they might pursue. This is an instrumental argument, that compares two hypothetical worlds against each other and claims that we have reason to act to bring about whichever world contains a more desirable state of

[58] The argument also surely falls foul of the second objection raised against the *authorisation argument*, discussed above at pp 39-40.

[59] Penner, *Re-Examination* (n 27) 177-78.

[60] ibid 177-80. See too KR Westphal, 'Do Kant's Principles Justify Property or Usufruct?' (1997) 5 Annual Review of Law and Ethics 141, 158-59.

[61] Ripstein recognises this possibility: Ripstein, *Force* (n 26) 61. Byrd and Hruschka also accept that it is not inconceivable that all uses of chattels or land may be forbidden: Byrd and Hruschka, *Commentary* (n 26) 115.

affairs. If so, it is hard to see why we should accept a mere assertion that this is the case, rather than argument. Nor does the argument appear to take the form of a justification that this thesis terms one of 'Natural Right'. Instead, the argument collapses into an instrumental claim: that we have reason to instigate a system that recognises ownership of chattels because to do so would be a good thing, because it promotes a desirable state of affairs. It is claims of this sort that are examined in the following sections, 2.2.2 and 2.2.3.

2.2.1.3 Conclusion

For the reasons outlined above, the Kantian argument fails to establish that English law has good reason to contain the *first possession rule* on the basis that the rule concretises a provisional, pre-legal right that is exclusionary in nature. The account appears to be incoherent on its own terms: it fails to establish that the rule is consistent with all persons' independence, and it fails to demonstrate that the law ought to adopt the *first possession rule* rather than some other rule. Indeed, it is hard to see why, on this account alone, we should accept that ownership of chattels should be permitted at all. It may well be that a rightful condition can only exist where people are limited to holding usufructuary rights, or where people are afforded no rights to exclude others from chattels of any sort.

2.2.2 Economic Efficiency

The *first possession rule* has been subjected to a great deal of scrutiny within the law and economics literature. In this section, the purported strengths of the rule will be outlined, alongside its weaknesses. It will be shown that the literature reveals that the law has a number of good reasons to adopt the rule – in particular the reduction of costs. Ultimately, however, the literature on the efficiency of the *first possession rule* is inconclusive. The weaknesses of the rule appear to outweigh its strengths; indeed, in a number of well-known economic studies of rules of first possession, in the specific contexts of homesteading[62] and patents,[63] it has been argued that the rule generates significant inefficiencies and ought not to be adopted. Perhaps the most withering criticism of the rule is that offered by David Haddock, whose own economic

[62] TL Anderson and PJ Hill, 'The Race for Property Rights' (1990) 33 Journal of Law & Economics 177.

[63] Y Barzel, 'Optimal Timing of Innovations' (1968) 50 Review of Economics and Statistics 348.

analysis leads him to conclude that the rule has 'little to recommend it' despite its intuitive economic attractions.[64] For this reason, many who view the law through an economic lens are content to argue that best defence of the law as it stands is either that the costs of reforming the *first possession rule* as a general matter would be great, and so the rule acts as a placeholder to be replaced with some other rule if the opportunity arises,[65] or (more generously) that it simply appears to be, in some contexts, the least unattractive of a host of unattractive rules.[66]

It is, however, an overreaction to reject economic analysis out of hand; the writing on the topic provides many valuable insights into the merits of the *first possession rule* – and its competitors – that ought to be borne in mind when we consider whether the rule might be justified. Below, five points of contention will be discussed in relation to the rule; the economic literature has focussed on these points, and whether the rule is 'efficient' is to be determined by an aggregate assessment. For present purposes, these will serve as five arguments that seek to demonstrate either that the law has good reason to adopt the *first possession rule*, or that the law has good reason to adopt some other rule.

2.2.2.1 The Case for the Rule

The positive case for the *first possession rule* on the grounds of its economic efficiency consists of the following three main strands of argument.

(1) *Assignment of ownership*. A premise underlying all economic analysis of the *first possession rule* is that the law ought to seek to ensure that valuable chattels are the subject of ownership. This argument is usually traced back to Holmes, who claimed that the law 'abhors the absence of proprietary or possessory rights as a kind of vacuum'.[67] The reasoning behind this claim has been made forcefully and succinctly by Richard Posner:

[64] DD Haddock, 'First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value' (1986) 64 Washington University Law Quarterly 775, 791.

[65] See, eg, TW Merrill, 'Accession and Original Ownership' (2009) 1 Journal of Legal Analysis 459, 493. cf TL Anderson and PJ Hill, 'The Evolution of Property Rights: A Study of the American West' (1975) 18 Journal of Law & Economics 163.

[66] See, eg, RA Epstein, *Simple Rules for a Complex World* (Harvard UP 1995) 59-63 (arguing that first possession is defensible on the grounds that it is preferable to distributions of ownership based on lotteries, auctions, or 'second possession').

[67] OW Holmes, *The Common Law* (1881, Belknap Press 2009) 214.

> It is highly desirable from an economic standpoint that valuable resources should be made subject to a right of exclusive use, control, and benefit in someone. Without such a right, incentives to invest in the production of valuable goods will be suboptimal – for example, the owner of farmland will have no assurance that he will be able to reap where he has sown. Some resources, moreover, will be overused – for example, a pasture owned in common: None of the owners of the cattle pastured on it will consider the cost that their use imposes on each other by reducing the amount of forage. In short, efficiency requires property rights.[68]

Thus, the *first possession rule* has the benefit of subjecting unowned resources to ownership, and so of getting that resource into the system of private property. Once in that system, the appropriated chattel can be used by its owner with confidence that her projects in respect of the chattel can be fulfilled, and that any benefits that attach to the chattel (such as an increase in its financial value after improvement) will be realised by the owner and not by some other person. The *first possession rule* creates incentives to invest in the chattel, without which such investment will not be made and valuable resources will go to waste.[69]

An additional, and important, benefit is that the chattel can also be transferred to another person who is able to realise more of that value. At least in a system with no transaction costs, those who are able to extract more value from the chattel will bargain with the present owner, and we can expect that the chattel will work its way into the hands of the person who values it most.[70] Under the assumption that it is a good thing to maximise social wealth in this way, it follows that the *first possession rule* has the benefit of beginning this process of exchange.

The obvious criticism of this argument is that it gives us no reason to prefer the *first possession rule* over any other rule that converts an unowned chattel into one that is owned. We could ascribe ownership to anyone at all, and that person would be incentivised to invest in the chattel, or would be able to transfer it to another person who would put it to better use. Thus, it is clear that the argument is incomplete – what is needed is some further argument that demonstrates that the *first possession rule* achieves these benefits to a greater degree or in a more effective fashion than other rules.

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[68] RA Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 Virginia LR 535, 551.

[69] cf *The Tubantia* (n 13) 90, per Sir Henry Duke.

[70] cf RH Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law & Economics 1.

(2) *Selection of owner*. One way in which we might flesh out the benefits of the *first possession rule* is to argue that the rule works to identify an initial owner who has certain desirable attributes. In this regard, the rule has a number of strengths, although, inevitably, these points must be tempered by the fact that the rule works in an undiscerning way; it is unrealistic to suppose that the general attributes of a first possessor emphasised in the literature can be present in every instance of first possession. Sometimes, the owner is simply the party lucky enough to stumble upon the chattel. One who attempts to defend the *first possession rule* solely on this ground must argue that the benefits of an indiscriminate rule outweigh its drawbacks. Richard Epstein, for example, argues that the rule works as a general matter to identify suitable owners,[71] and so the costs that would be imposed on a court, were it to enquire into the role of luck in the claimant's appropriation, would not be worth enduring.[72]

The *first possession rule* is often conceptualised in this regard as distributing the unowned chattel according to a race, or competition: potential owners must compete with one another in a winner-takes-all contest, where the prize to be won is ownership of the chattel. Thus, we might think of two hunters fighting against each other to be the first to capture a wild fox.[73] The loser is left with no reward for their labour, while the victor takes ownership of the animal. What, if anything, does the fact of victory tell us about the fox's captor? It tells us, first of all, that the possessor actually desires the fox, and so is likely to put the fox to better use than, say, a person randomly selected to become its owner, who would be likely to sell the fox quickly.[74] First possession, in contrast, 'gets us off to a good start in making valuable use of the resource and will eliminate the need for at least some subsequent transfers, thus saving the costs of making these transfers'.[75] So, although the first possessor is unlikely to be the person who will

[71] Epstein claims that the *first possession rule* works 'probably in 80 to 90 percent of cases': Epstein, *Simple Rules* (n 66) 59. It is not clear how Epstein has arrived at that figure.

[72] RA Epstein, 'Luck' (1988) 6 Social Philosophy & Politics 17, 26-28.

[73] cf *Pierson v Post* (n 53).

[74] In fact, a plausible case can be made that argues that, for this very reason, distributing unowned resources via a lottery may be an efficient way to ensure that the resource finds its way to that person who values it most. If it is true that a randomly selected owner will sell the resource, it follows that the purchaser of that resource will have many (and perhaps more, if she must win the resource via a bidding competition with other would-be purchasers) of the desirable attributes that law and economics scholars emphasise in relation to the first possessor, such as an actual desire for the resource. If this is done quickly – because the initial owner has no desire to keep the resource – it may follow that the resource will be transferred to its highest valuer more quickly than a resource distributed via the *first possession rule*. Plausibly, that saved time should be considered as saved cost and, therefore, an increase in social wealth. To my knowledge, no scholar has made this argument, although its plausibility does emphasise the indeterminacy that afflicts defences of the *first possession rule* that are rooted in a desire to see resources transferred to those who most value them.

[75] Merrill, 'Accession' (n 65) 488. See too CM Rose, 'The Law is Nine-Tenths of Possession: An Adage Turned on its Head' in Y Chang (ed), *Law and Economics of Possession* (CUP 2015) 55-56.

put the fox to best use, or the person who will value the fox most highly, it is claimed that she is at least likely to be a more efficient owner than someone who placed such a small value on the fox that they either did not enter the race to become first possessor, or did not invest sufficient resources into the race itself such that they would get to the fox before all others.

A second attribute that scholars emphasise in the first possessor is their physical connection to the chattel that is possessed: by definition, they must be in control of the chattel, to the exclusion of others. As a matter of fact, it follows that, in this sense, the possessor is uniquely well-placed to make immediate use of the chattel, to realise its value.[76]

(3) *Administrative costs*. The final element of the case for the *first possession rule* on the grounds of efficiency rests on the claims that the rule is cheap to enforce, and easy for citizens to understand and to follow. The rule, therefore, when contrasted with alternatives, leads to administrative costs being saved for public institutions. This is so for three distinct reasons.

First, the rule requires minimal administration compared to other distributive mechanisms, such as lotteries or auctions, which would entail significant expenditure by some party to organise the lottery or auction. One can expect that the administrative costs of running an auction to determine ownership of an unowned chattel may be larger than the costs saved by finding a willing owner who places a higher value on the chattel than the first possessor. This is particularly so where the chattel in question is of little financial value. Thus, the *first possession rule* reduces 'administrative drag' while still providing some form 'allocative gain' in the selection of the chattel's owner.[77]

The second cost-saving strength of the *first possession rule* is that, when disputes as to the rule's application do arise, courts are able to resolve that dispute in a relatively straightforward way: where A and B are in dispute over the ownership of some chattel, courts need only rely on the 'single variable' of time to determine the outcome.[78] Nonetheless, there are undoubtedly *some* costs of this sort that are imposed upon courts, in particular where there is dispute about whether a certain party's actions are sufficient to count as 'possession' for the purposes of the *first possession rule*.[79] Those cases, however, are relatively rare, and are likely to be significantly less frequent than disputes that would arise were courts to ask to determine, as

[76] Posner (n 68) 553-54.

[77] Epstein, *Simple Rules* (n 66) 61.

[78] See RA Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 Washington University Law Quarterly 667, 670.

[79] This is a consequence of the vagueness of the concept of 'possession': see above 2.1.1.

between A and B, whose need for the chattel is greater, or whose planned use of the chattel is superior. Rules that require value judgments of this sort would cause litigation, which would in turn lead to an increased burden on the legal system, and to wasted time as the dispute is heard – time that could have been spent making use of the resource.[80]

Third, the *first possession rule* is said to minimise the information costs placed upon citizens. The significance of information costs to a system of property law has been repeatedly emphasised in the works of Thomas Merrill and Henry Smith. They argue that the informational burden placed on citizens by property law must be minimised because of the nature of ownership, which imposes onerous duties of non-interference on all non-owners. If compliance with these duties 'required the application of subtle distinctions, extensive fact finding, and frequent recourse to adjudication, property rights would never get off the ground'.[81] If this were so, legal duties would simply not be followed, and the costs endured by the legal system in attempting to ensure compliance with those duties would be so great that compliance would, as a matter of fact, be unattainable. There would be no legal ownership worthy of the name. In terms of information costs, the *first possession rule* scores well: it is both easy for legally unsophisticated actors to understand, and chimes with intuitive notions of fairness.[82] It follows that citizens will comply with the duties of non-interference that are imposed upon them as a consequence of the rule, and so the legal system need not spend its limited resources enforcing rules governing the initial acquisition of unowned chattels.

2.2.2.2 Criticisms of the Rule

The arguments canvassed above together form the positive case for the *first possession rule* on the grounds that it leads to economically efficient outcomes. The basic claim is that the rule works to bring unowned chattels into private ownership, which allows as much value as is possible to be extracted from the chattel, and that the rule does this – at least as a general matter – better than alternatives because those alternatives would be more expensive to administer. One problem with this claim lies in its analysis of costs; it has been forcefully objected by a

[80] Epstein, 'Past and Future' (n 78) 672.

[81] Merrill, 'Accession' (n 65) 476.

[82] ibid 476-77. See too HE Smith, 'The Language of Property: Form, Context, and Audience' (2003) 55 Stanford LR 1105, 1115-25; TW Merrill and HE Smith, 'The Morality of Property' (2007) 48 William & Mary LR 1849, 1858-60. For analysis that claims to show that the *first possession rule* is a 'psychological fact' that most people intuitively accept to be true, see O Friedman and KR Neary, 'First Possession Beyond the Law: Adults' and Young Children's Intuitions about Ownership' (2009) 83 Tulane LR 679.

number of law and economics scholars that, properly analysed, the *first possession rule* in fact leads to wasted costs that (1)-(3) fail to take into account. We can call this the *internal objection* to the argument from efficiency, because the objection aims to show that the basic claim is, as an empirical matter, false – that there exist other rules that can bring an unowned chattel into the system of private ownership, and that can begin the process of the free alienation of that chattel, but that do so at a lower overall cost.

There are two general strands of reasoning to the *internal objection*: first, the *first possession rule* generates wasteful expenditure among would-be possessors who are not first to take possession, and, second, the rule leads to longer term detriment in the form of overexploitation of resources. It is only when these two negative effects of the *first possession rule* are taken into account that a true assessment of the rule can be offered; what is required is presumably some sort of analysis that is able to determine, empirically, whether the *first possession rule* actually does lead to more efficient results than its competitors. Without such a study, it is hard to see how we can be sure of that the benefits of the rule outweigh its costs.[83] This is particularly so given the wealth of modern literature that demonstrates that individuals do not act perfectly rationally in the process of exchange. Behavioural economists have shown that people irrationally place a higher financial value on a chattel that is currently in their possession than they otherwise would.[84] It follows that one fundamental assumption that lies behind the defence of the *first possession rule* – that the first possessor is likely to sell the chattel to another who valued the chattel more highly than the first possessor did before they took possession – may be false, and so we can expect that some first possessors will refuse to sell the chattel to another who in fact values that chattel more highly.

(a) *Wasteful races*. The first objection to the basic claim of the efficiency account of the *first possession rule* is that it overlooks the wasted costs that are incurred by those participants in the race who do not reach the chattel first. Because the rule creates a winner-takes-all

[83] The problem of indeterminacy in the prescriptions of economic analysis of law is well-known, and it has been argued that this is the reason why law and economics scholarship has been largely ineffectual as a tool of reformation within contract law: see, eg, E Posner, 'Economic Analysis of Contract Law After Three Decades: Success or Failure?' (2003) 113 Yale LJ 829.

[84] This is known as the 'endowment effect', and has been the subject of many studies. For an introduction to the topic, see D Kahneman, *Thinking, Fast and Slow* (Penguin 2011) 289-300. For an overview of the experimental evidence in favour of the endowment effect, see, eg, D Kahneman, JL Knetsch and RH Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' in CR Sunstein (ed), *Behavioral Law and Economics* (CUP 2000); R Korobkin, 'Wrestling with the Endowment Effect, or How to Do Law and Economics without the Coase Theorem' in E Zamir and D Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2014) 301-11.

competition, these competitors recover no reward for their labour and so there is an inevitable amount of 'deadweight loss'.[85] This problem has been extensively analysed by Dean Lueck, who concludes that where competitors are 'homogenous', and so each competitor has a similar chance of success in being the first to possess the chattel, there is likely to be significant costs that are wasted by unsuccessful competitors.[86] In contrast, if there is a very likely winner before the race begins, would-be competitors are discouraged from entering the race, and so save themselves the costs that would be incurred. It follows that the efficiency of the *first possession rule* will vary depending on the context in which it is adopted; we can expect that in some contexts sunk costs will be significantly lower than in others. Nonetheless, it is plausible to suppose that there will exist some circumstances where the total costs wasted by unsuccessful competitors will outweigh the gains made by bringing the chattel in question into private ownership. Where this is the case, the *first possession rule* does not simply work in a less efficient manner than its competitors, but instead actually causes social wealth to be lost.[87]

(b) *Overexploitation of resources*. The second line of objection to be made is that the *first possession rule* creates incentives that lead to the overexploitation of resources, and so a reduced level of social value for the future.[88] This is so for a number of related reasons. First, citizens are incentivised to take possession of as many unowned chattels as possible, for fear that someone else will do so and the chattel will later prove valuable. This may lead to a classic 'tragedy of the commons' where valuable natural resources are extinguished because they are withdrawn from the common pool prematurely.[89] There is also a similar risk that unowned chattels become subject to the exclusive control of a party who has little use for that chattel; given the inevitable existence of transaction costs that prohibit free alienation, it follows that whatever social value that particular chattel has may not be realised.

Second, and relatedly, there is little incentive on citizens to care for resources that they have not appropriated for themselves; any investment made in those resources is likely to be beneficial to another party – the first possessor – and not to the investor. Again, the incentive structure of the *first possession rule* is that valuable resources are appropriated for the benefit

[85] Merrill, 'Accession' (n 65) 482.

[86] D Lueck, 'The Rule of First Possession and the Design of the Law' (1995) 38 Journal of Law & Economics 393.

[87] The analyses of Anderson and Hill (n 62), Barzel (n 63), and Haddock (n 64) reject the rule for this reason.

[88] See Merrill, 'Accession' (n 65) 483-86.

[89] cf G Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

of citizens in the short term, but at the expense of value that could be realised later on. Where collective action is required to prevent this sort of outcome, it is clear that an argument from efficiency suggests that the *first possession rule* ought to be replaced with some other rule. As in relation to the *wasteful races* objection, this can only be plausibly determined as a result of sustained critical analysis of specific instances where the rule might be adopted – as a general matter, it is hard to be confident that the *first possession rule* truly is a cost effective way of bringing unowned chattels into the system of ownership.

The points made above demonstrate that a plausible case can be made that a defence of the *first possession rule* based on its efficiency fails on its own terms. It is beyond the scope of this thesis to subject the various contexts in which the rule may plausibly be adopted to the sort of detailed economic analysis that could determine the status of the rule as an efficient distributor of unowned chattels. However, we might here note the flexibility of arguments based purely on efficiency by outlining the case that can be made for vesting ownership of all unowned chattels in the state; following Haddock, we can term this the rule of 'mightiest possession'.[90] Such a rule has the benefits of assigning ownership to a single owner, and it does so in a way that is simple to understand, and so we can expect that the rule can be self-applied by citizens – although perhaps some advertisement of the rule may be necessary. The state would, too, seem to be a suitable owner. We can expect the state to attempt to determine the party who values the chattel most highly, and to sell it to that person; doing this would have the effect of increasing the value of its realm and the tax base within it, and so is in the state's self-interest. How are we to know whether this system is more or less desirable than one based on the *first possession rule*? The answer, it seems, is that we cannot unless we trial such a system, and tally its costs and benefits to assess its output. Arguments from efficiency, therefore, are not only indeterminate, they are, as a practical matter, likely to be unfalsifiable.

The proper response to the *internal objection* is that we ought not to take the argument from efficiency to its extreme – as claiming that the *first possession rule* is justified because it is the *most* efficient rule – but instead take stock of the learning from the economic literature, and accept that it demonstrates some good reasons that exist that count in favour of the rule when it comes to justifying it. In particular, it seems true to say that – all else being equal – we ought to prefer a rule that is cheaper to administer than one that is more expensive. To adopt such a rule means that finite resources can be productively used elsewhere, and it would be

[90] Haddock (n 64) 775.

foolish to discard entirely the deep analysis that the *first possession rule* has been subjected to by those who make cost saving central to legal analysis.

2.2.3 Goal Pursuit

It was argued above, in 2.2.1.2, that the Kantian account, when fully expounded, appears to collapse into an instrumental argument, that claims no more than that the *first possession rule* may be justified because the rule brings about a desirable state of affairs that would otherwise not exist. In doing so, emphasis was placed upon the value of ownership in promoting people's ability to set and pursue goals. It is argued in this section that this value – combined with some economic concerns – provides the most coherent justification of the rule.

It will be argued, first, that people have an interest in setting and pursuing particular projects or goals, and that ownership of chattels can promote that interest. The *first possession rule* has good reason to exist, on this account, because it is an application of this more general proposition to a particular set of facts. The first possessor's actions in relation to an unowned chattel amount to a step towards the pursuit of a goal that they have adopted, and all other persons have reason not to interfere with their pursuit of that goal. The first possessor's legal right to exclude others can be justified as a right that seeks to protect them from interference with the goal that they have adopted and require the chattel in question to pursue.

The intuitive attractions of this argument can be seen by considering the following example, set out by Penner:

> Imagine coming out of the woods and finding some fish neatly piled on the riverbank, or a basket of apples… [Y]ou would understand that to grab the fish or the apples would be to interfere with some other human agent's purposive activity and that, understanding the interest people have in the success of their purposive activity, you would understand it to be wrong to take the fish or the apples, i.e. you would understand yourself to have a duty not to interfere with them… [R]espect for the interest that others have in the fulfilment of their purposes and the fish's and apples' contribution to that in this case could be cognitively assimilated, that is, understood by you, as a reason not to interfere which would prevail over your current, personal,

goals, such that it would be both rational and reasonable to regard yourself to be under a duty not to interfere.[91]

The argument made below expands upon Penner's brief discussion, and demonstrates that this interest exists and is grounded in the flourishing of the appropriator.[92]

2.2.3.1 The Interest in Pursuing Goals

The first claim that needs to be defended to make out the *goal pursuit* account of the *first possession rule* is that people have an interest in the pursuit of their particular goals, or, in Penner's terminology, in the 'success of their purposive activity'. Intuitively, it seems clear that such an interest does exist; we have already seen the invocation of that intuition in the Kantian account considered above. We might make two arguments that seek to rationalise that intuition, both of which are linked by the underlying thought that these projects are in some sense constitutive of a person's identity.[93]

The first such argument has been recently developed in the context of property law by Adam MacLeod,[94] and builds on the earlier work of John Finnis. According to Finnis, a flourishing life can be said to be made up of a collection of basic goods, which include, among others, the goods of friendship, knowledge, and play. Each of these goods are said to be intrinsically valuable and incommensurable with one another; there is no 'objective priority' among them and so one might live one's life with particular amounts of each good, and still be

[91] JE Penner, 'On the Very Idea of Transmissible Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 265.

[92] Although not explicitly discussed, the account set out below bears a similarity to a reinterpretation of John Locke's labour-based justification of ownership that has recently gained some prominence in the philosophical and legal literature: see, eg, AJ Simmons, *The Lockean Theory of Rights* (Princeton UP 1992) ch 5; ER Claeys, 'Productive Use in Acquisition, Accession, and Labour Theory' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013); ER Claeys, 'Labor, Exclusion, and Flourishing in Property Law' (2017) 95 North Carolina LR 413. These writers argue that ownership may be justified on the grounds that it is demanded by a 'natural right' that all persons have in the pursuit of their survival and self-improvement. The account developed in this section draws on this literature, but makes no claim as to the existence of this natural right; instead, persons' interest in survival or improvement is conceptualised as part of a broader non-legal interest in pursuing projects or goals, the existence of which affects the reasons that bear on others' actions.

[93] The link between identity and property law is famously explored in M Radin, 'Property and Personhood' (1982) 34 Stanford LR 957. Radin argues that a person can take chattels or land to be constitutive of their person where those items are of particular personal importance. The classic examples would be a person's wedding ring or home. An argument of this sort is not explored in this thesis, because it is clearly implausible to suppose that people regularly attach importance of this kind to a chattel which they acquire through the *first possession rule*. Instead, the link between property law and personhood considered below is more indirect.

[94] AJ MacLeod, *Property and Practical Reason* (CUP 2015).

said to flourish to an equal degree compared with another person who pursues those goods in differing amounts.[95] Given this point, there is a need for another basic good that 'is participated in precisely by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out'.[96] Finnis labels this good the good of 'practical reasonableness', and considers this good to sit alongside the others as a good that a life must contain if we can consider that life to be going well. On this view, then, the adoption of particular goals or projects is of basic value, in the sense that it cannot be reduced down to a different good.

A second, and structurally very similar argument, has been defended by John Gardner.[97] For Gardner, however, the setting and pursuit of goals is not valuable for its own sake, but is instead valuable in instrumental terms, because the adoption of particular goals allows persons to bring about more value in their lives than they otherwise would:

> The importance of personal goals comes from the necessary constraints of a single life as a vehicle for pursuing value. Life is a progress of finite duration, necessarily conducted in a particular spatio-temporal location. We have only one life to live, and we are bound to live it at a particular time, and in particular places. That being the case, we can only pursue and realize as much value as we have time and space to pursue and realize… The fact that our lives are finite means that we have to select among the many valuable things that we have the capacity to pursue… So the case for having a life that is shaped around goals that are realistic relative to the finitude of a life is a case that is based on the demands of value itself. The pull of value itself is infinite, but by endeavouring to pursue it infinitely one may well serve it less.[98]

On either understanding of the nature of the value that attaches to the adoption of a particular goal, it seems clear that a sound case can be made for the claim that a person has good reason to set and pursue that goal, on the simple basis that the goal's pursuit enhances that person's wellbeing by bringing about a life that contains more valuable goods.

The adoption of a goal also says something of importance about the person who chose that particular goal rather than another. One might choose either to set the goal of becoming a

[95] See, eg, J Finnis, *Natural Law and Natural Rights* (2nd ed, OUP 2011) 100.

[96] ibid.

[97] J Gardner, *From Personal Life to Private Law* (OUP 2018) ch 5.

[98] J Gardner and T Macklem, 'Value, Interest, and Well-Being' (2006) 18 Utilitas 362, 374-75. See too ibid 173-74.

painter, or of playing professional golf; there is no reason to suppose that either one of those goals is more valuable than the other. But, once one or other of those goals has been chosen and pursuit of it has begun, there is a sense in which we might say that the goal itself shapes the identity of the chooser. That choice gives her new reasons for action, and tells us what values she considers to be desirable. It shapes her future decisions and plays a conscious role in her life. As Finnis explains, when one makes practically reasonable choices, 'one more or less transforms oneself by making the choice, and by carrying it out, and by following it up with other free choices in line with it. One's choice in fact lasts in, and as part of, one's character'.[99] The summation of one's goals makes up a significant part of one's identity.

The case for an interest in a person's pursuit of goals therefore operates on two levels. The first level is made up of the basic claim that goals are valuable, and that persons have reason to bring as much value as possible into their lives. The second level is a deeper claim, that the method which one adopts in order to bring about that value is, at least in some sense, constitutive of one's identity, and one has an interest in shaping that identity.

2.2.3.2 Goals and Ownership

It seems clear that chattels can be used to serve the interest set out above, because it is through controlling or using chattels that particular goals can be pursued. On this view, the legal right to exclude others that makes up the legal interest that we have termed 'ownership' can be justified as protecting the pursuit of goals that an owner has set and requires a chattel in order to pursue. If that right is not infringed by others, it follows that the owner will remain able to use that chattel, and, therefore, to pursue the goal that she has adopted in respect of it.[100] MacLeod makes the point clearly in discussing the following example:

> If Sally can own a trumpet, and thus be secure in her use and possession of it, insulated from collective decision-making, then she can master the instrument and develop the connatural ability to make music on it. If she succeeds, she will become Sally-the-trumpet-player. This Sally is in one sense the same Sally who set out to learn to make music. But in other ways, the new Sally is a different person… [T]rumpet playing has become part of Sally's identity because

[99] J Finnis, *Reason in Action: Collected Essays Volume I* (OUP 2011) 239. It is for this reason that Gardner claims that 'there is no life without goals': Gardner, *Personal Life* (n 97) 174.

[100] For Gardner, a concern to 'keep her life on its existing track' should be understood to be the motivation behind most of private law's 'primary duties': Gardner, *Personal Life* (n 97) 183.

> Sally has transformed herself into someone who acts for the reason of making music, and not for other possible reasons… Sally's plans for the use of her things are entitled to the non-interference of others because Sally is performing her acts of self-constitution in her capacity as a human being… Criminal prohibitions against theft are justified by the significant harm that one causes by stealing the personal property of another. To steal is to upset an array of plans of action that are constitutive of the owner's identity. It is to destroy various instantiations of the basic good of practical reasonableness. And it is to fail to respect the owner as an agent of practical reason. In short, it is *wrong*.[101]

Thus, if we accept that we have reason to respect others' pursuit of their goals, it follows that we have reason not to interfere with the chattels that others are presently using in the pursuit of those goals; to destroy or damage those chattels is likely to have the effect of destroying or damaging those goals.[102] It follows that the legal interest of ownership may bring about a desirable state of affairs, in that it gives effect to, and secures, those reasons that bear on our action outside the law.

There are three prominent objections that might be made to this argument, each of which focuses on the apparent mismatch between the nature of the legal interest of ownership and some sort of non-legal interest that centres upon the value of using chattels. The first objection has been forcefully made by Ripstein in response to any and all theories that purport to justify rules of property law on the basis that a legal right to exclude secures some interest a person has in *use* of chattels or land.[103] For Ripstein, such an argument must fail because the view inevitably leads to the claim that the law is over-inclusive. It leads us to the position that the law deems actions to be wrongful that, in an ideal world, ought not to be deemed wrongful. Thus, if the argument made above is sound, one might object that the *first possession rule* ought not to generate a right of ownership, but instead should lead to the creation of a usufructuary right, that permits others to use the chattel in question so long as their use does not set back the uses or projects of the right-holder. On the view defended above, it seems that a harmless trespasser commits no wrong, but it is clear that a harmless trespass is a *legal* wrong.[104]

[101] MacLeod (n 94) 102-04 (emphasis in original).

[102] This argument mirrors Finnis' own very brief defence of a system of private property. See Finnis, *Natural Law* (n 95) 168-69.

[103] Ripstein, 'Possession and Use' (n 42).

[104] See, eg, *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, at [25]-[30], per Lord Reed.

The most coherent response to arguments of this sort is to invoke a number of instrumental benefits that come with an *absolute* right to exclude others, when that right is compared with a more limited right that others not interfere with uses of a chattel.[105] First, to permit harmless uses of an owner's chattel may increase the risk that accidental harm is done to that chattel. Second, an absolute right of exclusion is considerably cheaper for courts to enforce. They need not inquire into the mental state of the right-holder to determine what projects the chattel was planned to be used for, but instead need only ask whether the purported wrongdoer physically interfered with the chattel. Third, and relatedly, an absolute prohibition on interfering with chattels is a considerably easier norm for citizens to follow than one which prohibits interferences with the use of a chattel, because it cannot realistically be expected that citizens can tell to what purposes a chattel is being, or is planned to be, put. Fourth, it is plausible that even supposedly harmless trespasses carry with them some kind of psychological harm or discomfort that the law has reason to prevent.

For Ripstein, these responses to his objection do not amount to convincing reason to refute his basic point. Instead, he argues, it is an owner's independence (in the Kantian sense described in 2.2.1.1) that explains the law's rules. Ownership of a chattel mirrors the right to exclude others that you have over your own body; if we ask why it is that you have such a right, the answer seems to be simply that it is because the uses to which your body is put is up to you, and not because it promotes some other value.[106] The law, Ripstein argues, gives a similar response in answer to the question of why people have rights to exclude others from chattels.

The difficulty with Ripstein's argument here, at least as it applies to the argument advanced in this section, is that it does not seem to bite against the sort of inquiry pursued, which is that of a *pro tanto* justification. Ripstein is clear that he believes his account to be superior because it is a better fit with existing law and legal reasoning, and that his theory is able to offer 'the key to *understanding* the doctrinal structure of property law'.[107] However, this is not the sort of project that is undertaken here, the concern of which is to determine what can be said in favour of our existing legal rules when considering what the law ought to be. If it is true that

[105] Penner, *Re-Examination* (n 27) 197-99. It is worth emphasising here that these moves are not open to the Kantian account offered by Ripstein, who claims that the *first possession rule* is justified on the basis that it gives effect to the independence of the first possessor, and so the rule is necessary to secure 'rightful' relationships between citizens regardless of the desirability of the state of affairs that the rule creates: 1.2.2.1. In this section, I hope to have demonstrated that there is more than a grain of truth to the Kantian account's focus on purposiveness and agency, but that truth is to be found in instrumental terms. cf Penner, *Re-Examination* (n 27) 199-200 (explaining that he regards himself as a 'kind of impossible theoretical chimera, a Kantian instrumentalist').

[106] Ripstein, 'Possession and Use' (n 42) 175.

[107] ibid 162 (emphasis added).

the instrumental concerns outlined above are unconvincing as all-things-considered justifications of what the law ought to be, then the proper conclusion may be that the law should be reformed, so that the legal system recognises only usufructuary rights, rather than ownership. This is, however, not a reason to suppose that these arguments do not form the best case that can be made in defence of the law as it exists.

The second objection that might be made to the positive case for a legal system that recognises ownership is similar, but claims instead that the argument suggests that the law is *under*-inclusive, because it fails to deem as legally wrongful certain acts that appear to be wrongful when considered against a standard that places central emphasis on the interest persons have in the use of chattels. Doctrinally, the point has been most clearly made by Ben McFarlane and Simon Douglas: it appears that, as a matter of English law, an owner has no right that another not impair their ability to use a chattel.[108] Instead, what must be shown is physical, or tangible, interference with the chattel itself. Thus, I commit no property tort in relation to your car by blocking your drive and, in so doing, preventing you from using the car in the pursuit of whatever project you had planned.[109] This is so even though, when looked at purely from the point of view of your factual ability to pursue that project, the same effect could be achieved by damaging the car's engine by carelessly dropping a heavy weight onto it. This latter act is legally wrongful, while the former is not.

Again, however, this objection can be dealt with easily by considering other instrumental concerns. In particular, a legal rule that prohibits illegitimate interferences with a person's use of a chattel will lead to a dramatic increase in costs, from the point of view of both courts charged with resolving disputes and of citizens who expect to be guided by the law's norms.[110] This is so because what is required is a definition of when an interference with a person's use of a chattel is to be deemed to be *illegitimate*. Clearly, a rule that stated that any and every interference with another's planned use of a chattel would be unworkable. This would have the potential to render wrongful the act of moving – by occupying a space that was previously vacant, I render that space unoccupiable (as a physical matter) by another person or thing, and so I may interfere with potential uses that you might have set in relation to that physical space. Working out the contours of a right of non-interference with use would clearly require

[108] B McFarlane and S Douglas, 'Defining Property Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 226-30.

[109] See, eg, *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport* [2008] EWHC 2794 (Comm).

[110] See, eg, MJR Crawford, *An Expressive Theory of Possession* (Hart 2020) 30-34.

considerable time and effort, and there is no reason to suppose that the right could be stated with the precision needed to ensure that the benefits of such a rule would outweigh its costs.

Finally, a third objection to this account asks why it is that a person ought to acquire a right to exclude others from a chattel which is indefinite in time. We might instead think that, if such a right is to arise, it should persist only while the chattel in question is being used in pursuit of a given purpose. Nonetheless, it is clear that a legal right to exclude others from a chattel persists even after the owner's uses for it expire.

Familiar concerns suggest that the law has good reason to exist as it does. A rule that says that a right-holder's right to exclude persists only while they have uses in relation to the chattel requires courts, and citizens, to determine at what point those uses have been fulfilled. Without knowledge of the right-holder's mental state, it is hard to see how this could be determined. This would, first, have the effect of creating a great deal of administrative cost, and, second, lead to a risk that citizens will be unable to be guided by the law's norms, and so misjudge the duties or liberties to which they are subjected. In addition to this point, it is worth noting that the concern could be addressed through the legal rules that govern the abandonment of chattels.[111] Plausibly, we can expect a person who no longer has uses for a chattel to abandon that chattel, or to seek to transfer it to another. It follows that the law may be justified in awarding a right to exclude that is, in principle, indefinite in duration.

It follows that none of the objections to the account made above are convincing. Each of the responses to those objections are more than adequate to demonstrate that the law has good reason to take the shape that it does, and so they may form part of our justification of the *first possession rule*. Before moving on to discuss the relevance of the act of taking possession specifically, two further points are worth emphasising. First, each of the responses made above ultimately break down into the simple claim that the law as it currently exists can best be defended on instrumental grounds. The claim is that the law's rules bring about a desirable state of affairs, because those rules lead to an increase in particular kinds of value. Part of that justification is made in terms of economic efficiency – in particular, saved administrative cost. As recognised in the Introduction, the worth of that saved cost must turn, in part, on what that saved cost is used as an instrument to obtain. Second, the argument outlined above makes sense of the existence of disagreement, both about what the law's rules are, and what they should be. The latter is most obviously accounted for, because the justification calls for some balancing between values of different orders, and reasonable people may disagree about where that

[111] See generally R Hickey, 'The Problem of Divesting Abandonment' [2016] Conv 28.

balance ought to be struck. This point bleeds into the law's rules, and helps us to understand why cases like those discussed above – of the harmless trespass or of the blocked road – are considered to be hard cases. Thus, there is some evidence to suggest that some kind of duty not to impair an owner's ability to use their chattel does exist in English law,[112] and the law that governs harmless trespass is notoriously complex and difficult to rationalise.[113] Although it might be objected that the account offered here is indeterminate,[114] this is not a reason to reject the account, but instead reflects the underlying messy reality to which legal rules attempt to bring some order.

2.2.3.3 Goals and Possession

With the framework above in place, a relatively straightforward case can be made in defence of the *first possession rule*, which is similar in shape to the first two steps of the Kantian account considered above. When a person takes possession of an unowned chattel, they acquire a right to exclude others from that chattel because that right protects the pursuit of the goals that they have set and are pursuing through their use of the chattel in question.[115] The fact that those goals exist gives rise to reasons not to interfere with the possessed chattel which bear on the actions of others. As argued above, the possessor's ownership brings about a desirable state of affairs, because it permits the first possessor to increase the value in their life, and to constitute themselves through their purposive activity.

The instrumental flourishing-based account of the *first possession rule* offered here is also able to overcome some of the hurdles that afflicted the Kantian account. The first is the difficulty posed by the 'unilateral' element of the *first possession rule*. This is the problem that the unilateral act of the first possessor imposes duties onto the world to which they did not consent, and, at least intuitively, it appears objectionable for this to happen. Jeremy Waldron has claimed that a unilateral power to impose duties of this sort is 'so unlike any other ethical idea that it cannot simply be regarded as an intuitive or self-evident truth… on the face of it, it

[112] See Douglas and McFarlane (n 108) 228-29. *Club Cruise* (n 109) has been subjected to academic criticism: eg C Hawes, 'Conversion by Detention' [2009] LMCLQ 188.

[113] See, eg, AS Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, OUP 2019) ch 18.

[114] Eric Claeys has criticised flourishing-based justifications of property law for this reason. See his review of MacLeod (n 94): (2016) 79 MLR 751, 755.

[115] This argument bears a strong resemblance to the 'labour theory' of acquisition offered by Claeys: Claeys, 'Acquisition' (n 92) 34-35.

seems unfamiliar and repugnant'.[116] The *first possession rule* therefore appears to call for particularly strong justification.

There is a straightforward and, it is submitted, convincing response to this objection. We might begin by noting that unilaterally imposed duties are not particularly 'unfamiliar', despite Waldron's claim to the contrary.[117] The most obvious example of a duty being unilaterally imposed is upon the birth of a child, which leads to new duties being imposed on all others, such as that not to interfere with the child's body. It is surely implausible to suppose that people could object to the imposition of those duties on the grounds that they did not consent to them. On an interest-based account of those rights, this is easily justified on the grounds that the right promotes an interest of the child that is of particular importance.

This is not to say that unilaterally imposed duties are always unproblematic. As Hugh Breakey explains, such duties may have a number of 'worrisome features', in particular that they appear to constrain the range of choices open to the duty-bearer, and could be imposed upon them without their knowledge, making it difficult for duty-bearers to be guided by the norms to which they are subjected.[118] However, on an instrumental account of those duties, these features simply must be weighed against the importance of the interest that the duty promotes; so long as that interest is sufficiently important, the reasons that the law has not to impose the duty may justifiably be outweighed. In relation to the *first possession rule*, then, when it comes to considering the rule as an all-things-considered matter, the question is whether the interests outlined in this section are important enough to justify the possessor's ownership in the face of competing concerns. As explained in the Introduction, however, the concern of this thesis is not to provide an all-things-considered justification of the rule, and so all that is needed here is to set out what can be said in the rule's favour.

A second issue that caused difficulty on the Kantian account, but that can be overcome on the instrumental account offered here, was that there appeared to be no particularly good reason offered to explain why ownership should arise at the moment of taking possession, and not at some earlier, or even later, time. At first blush, this problem appears to bite against the *goal pursuit* account. Plausibly, one might expect that ownership should arise at the moment that a

[116] J Waldron, *The Right to Private Property* (OUP 1988) 265. For similar views, see, eg, Pufendorf (n 38) Book IV, ch 4, §5; Crawford (n 110) 123.

[117] See, eg, L Wenar, 'Original Acquisition of Private Property' (1998) 107 Mind 799, 816; H Breakey, 'Without Consent: Principles of Justified Acquisition and Duty-Imposing Powers' (2009) 59 Philosophical Quarterly 618, 621-24.

[118] Breakey (n 117) 634-36.

person sets a goal in relation to an unowned chattel; at that point, they have made a decision about how they wish to use the chattel, and so it seems that all other people now have reason not to interfere with the chattel. This is clearly not the law's position, which demands that the chattel be subjected to a degree of custody and control. On the *goal pursuit* account, it is plausible to suppose that ownership comes too late: a person's right to pursue their goal arises only after they have set that goal and gone some way in their pursuit of it.[119]

There are, however, a number of instrumental concerns that demonstrate that the law has good reason to rely on a rule that requires the chattel to be subjected to possession. First, and most obviously, it is simply not plausible to suppose that courts are able to determine the moment at which a person has formulated a plan in respect of a chattel. Some kind of physical manifestation of that decision is needed so that a dispute about a person's entitlement might be resolved. Second, it is only at the moment where a person has actually subjected a chattel to their control that we can confidently say that that person will be able to put that chattel to use. Recall the case of *Young v Hichens*,[120] where it was held that the claimant had no right to exclude the defendant from a group of fish that the claimant had almost caught. We cannot be sure that the claimant would have been able to use the fish in pursuit of the projects that he had set for them.[121] The *goal pursuit* account suggests that we should be wary of awarding ownership to a person too *early*, otherwise the chattel in question may not be used, and its use by others will become wrongful. This would mean that the owner's right to exclude others fails to bring about the particular valuable good identified by the *goal pursuit* account.

Another strength of the *first possession rule* that is often emphasised in the literature is the rule's communicative element.[122] The act of taking possession is visible to other citizens, and is generally understood by them to be a method by which one might stake a claim to chattels.[123] It follows that the law has good reason to rely on the moment of taking possession, rather than some other moment, because that rule is likely to be easily followed by citizens. This is of particular importance if we think of the event of taking possession to be a method of resolving conflict; in *Young v Hichens*, plausibly the law had good reason to award ownership *both* to

[119] This problem is explored in relation to the Kantian account in AJ Julius, 'Independent People' in S Kisilevsky and MJ Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart 2017).

[120] *Young* (n 10).

[121] This point is reflected in the old distinction between wild and domesticated captured animals. In the case of the former, the owner's right to exclude others from the animal would cease to exist if the animal escaped their control, and so could no longer be put to use by its owner.

[122] The classic article is C Rose, 'Possession as the Origin of Property' (1985) 52 University of Chicago LR 73.

[123] For a detailed analysis of the literature, see Crawford (n 110) ch 4.

the claimant *and* the defendant, because both parties had formulated projects and desired to use the fish in issue in order to pursue those projects. What is needed, then, is some method that resolves the conflict between them, and between their competing interests. So long as the method that is chosen resolves that conflict in a clear way, both parties can know where they stand and set out to pursue plans that are qualified by a desire to pursue plans in a manner consistent with others' capacity to do the same. Thus, the efficacy of the *first possession rule* is to a degree self-enforcing; once the rule is established and relied upon, people will, out of respect for the goals of others, set out to pursue conditional goals: to use chattels for particular purposes so long as those chattels have not yet been subjected to the possession of others.

2.3 Conclusion

This section has offered a justification of the *first possession rule* that relies upon the claim that the rule brings about a desirable state of affairs, primarily because the rule promotes (non-legal) interests of the first possessor. The claim is combined with other instrumental concerns which demonstrate that other rules which may, as a theoretical matter, be sufficient to promote the interests of the possessor lead to a reduction of value of a different sort – namely, economic value in the form of administrative cost.

3. LATER POSSESSION

The subject of this chapter is the second kind of case where 'taking possession' of a chattel acts as a causative event that generates a new legal interest: where B takes possession of a chattel that is already owned by some other party, A.[1] Thus, A has a right that B not interfere with that chattel. B, however, acquires his own legal interest – a general property interest – that is good against all the world except for A. Call this the *later possession rule*. Two examples will be the focus of discussion:

> *Finder*: A accidentally drops his umbrella in the street. B finds the umbrella and takes it home, knowing that it is owned by someone else.

> *Mistaken Possessor*: A leaves his umbrella in an umbrella stand at a museum. B, mistaking the umbrella for his own, takes the umbrella with him as he leaves the museum.

In this chapter, a descriptive account of English law will be offered, which shows that B's general property interest is alienable, and comprises a right to exclude all the world (except for A) from the chattel. One major indeterminacy will be noted and explained, which this chapter labels the problem of the 'persistence' of B's interest. There are two views on this problem present in the academic literature, and it will be explained that neither can be decisively proven to be correct on the authorities alone. The first view claims that B's interest behaves in precisely the same way as does that of an owner, except that the interest binds a smaller class of third parties. The second view claims that B acquires an interest that is similar to A's, in that it endows B with a right to exclude others, but that interest is more limited because it is more easily lost. When B loses possession of the chattel, on the second view, B also loses his general property interest. So, if C were to steal the chattel from B, C may commit a legal wrong against both A and B according to both views. The crucial difference between them, however, is the case where another person, D, subsequently steals that chattel from C. Both views agree that D owes duties not to interfere with that chattel both to A and to C. According to the first view, D also owes such a duty to B; according to the second view, D owes no such duty to B.

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[1] My focus in this chapter is on those cases where B takes possession of A's chattel without the consent of A, and so where it clearly cannot be said that A has transferred to B a general property interest by 'splitting' his prior ownership of the chattel. It is, however, submitted that the same analysis ought to apply to cases where A creates a bailment of a chattel, be it a gratuitous bailment at will or for a term, a lease or a pledge: cf 1.3.4.

It will be argued below that there is insufficient evidence in English law to determine, as a descriptive account of the law, whether the first or second view of B's general property interest is correct. This is so because both views can account for the outcomes of decided cases. The first view undoubtedly appears superior, because it makes sense of existing case law more easily, but it will be shown that the second view, when fully set out, is also able to cohere with existing precedent. Thus, we must fall back on our justificatory inquiry to determine which view ought to be adopted. A number of purported justifications of B's interest will be considered, and many of those that have taken on particular prominence in the modern literature will be shown to be largely unconvincing. Instead, it will be argued that B's general property interest is best justified in the same manner as A's ownership, where A takes possession of an unowned chattel: that is, B's legal interest protects his purposive activity from interference by third parties. From the perspectives of C and D, there is little normative difference between a first and a later possessor; if A's ownership can be justified, then so too can the first view of B's general property interest.

3.1 Description

There is no need to recount in any detail the definition of the event with which this section is concerned, because it is the same event as that described in relation to first possession.[2] B will 'take possession' of a chattel owned by A for the purposes of the *later possession rule* where B has sufficient physical custody and control of that chattel, paired with an intention to possess it. Of considerably more interest are the debates about the nature of B's interest, and the effect of B's wrongdoing on the *later possession rule*.

3.1.1 The Interest

The purpose of this section is to describe the uncontroversial elements of B's interest. It will be shown in 3.1.2 that there are two competing views of this interest: first, that it comprises a legal interest of the same sort as A's, and, second, that it comprises a more limited interest that exists only while B remains in possession of the chattel. Both interpretations of the law agree that B acquires a legally protected interest while B remains in possession of the umbrella, both

[2] 2.1.1.

in *Finder* and in *Mistaken Possessor*. That legal protection takes the form of a right that others not physically interfere with the possessed chattel. The interest is protected by the chattel torts of trespass, conversion, and negligence.

This means, first of all, that B has a right that C (and D, E, F…) not dispossess him, because to do so will amount to a trespass against B; this is a 'direct, immediate interference with the claimant's possession of a chattel'.[3] As Luke Rostill has convincingly shown,[4] B's interest goes beyond a right to maintain present possession, and consists instead of a more general interest that is a 'right to exclude'. B's interest is protected by the tort of trespass,[5] and the tort can be committed without dispossession. So, were C to deliberately rip the fabric of the umbrella in B's possession, C will have committed the legal wrong of trespass against B.[6] The same point flows from B's right that C not negligently cause foreseeable damage to the umbrella:[7] C can cause such damage without causing B to lose possession of the umbrella.[8]

It is also clear that B's general property interest is protected by the tort of conversion. In order to succeed in a claim in conversion, one need not prove that one is the owner, but instead need only prove actual possession or an immediate right to possession at the time of the tortious act. Thus, in *Finder*, if, say, B were to hand the umbrella to C for safe-keeping, and C were to later refuse to hand the umbrella back to B, C will have committed the tort of conversion against B.[9] A definition of conversion is hard to state, but, as Simon Douglas has argued, the gist of the tort appears to be the exclusion of the right-holder from the use or possession of the chattel in question by the intentional exercise of exclusive physical control over that chattel.[10]

B's general property interest is also alienable. The interest may be transferred to another person by delivery, or by way of sale. The latter type of transfer can take place without B

[3] MA Jones et al (eds), *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell 2020) 16.132.

[4] L Rostill, 'Terminology and Title to Chattels: A Case against "Possessory Title"' (2018) 134 LQR 407, 420-23; L Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021) 100-04.

[5] See, eg, *Carter v Johnson* (1839) 174 ER 283, 284.

[6] *Fouldes v Willoughby* (1841) 151 ER 1153, 1157, per Alderson B ('Scratching the panel of a carriage would be a trespass'). See too, eg, *Sheldrick v Abery* (1793) 1 Esp 55 (stabbing a horse) and *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544 (cutting fishing nets).

[7] *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 (HL), 809, per Lord Brandon ('in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of *or a possessory title to* the property concerned at the time when the loss or damage occurred' (emphasis added)).

[8] eg *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] 1 QB 27 (CA) (D held liable for negligently interrupting power supply to C's factory, and in so doing damaging ingots owned by C that were inside the factory).

[9] *Armory v Delamirie* (1721) 1 Stra 505.

[10] S Douglas, 'The Nature of Conversion' (2009) 68 CLJ 198. See too, eg, *Clerk & Lindsell* (n 3) 16.07.

transferring possession of the chattel to the interest's purchaser. Battersby and Preston have convincingly demonstrated that this follows from the provisions of the Sale of Goods Act 1979.[11] The Act defines a 'contract of sale' as 'a contract by which the seller transfers or agrees to transfer *the property in the goods* to the buyer for a money consideration'.[12] The proper interpretation of this provision is that the term 'the property' refers both to ownership and to a general property interest of the sort acquired by B. This is so for a number of reasons.

First, s5 of the Act clearly provides that a contract of sale's subject matter can consist in goods 'owned or possessed by the seller'. If one can only alienate ownership by way of sale, then it follows that the words 'or possessed' become meaningless. Second, ss24 and 25 allow a person, in certain circumstances, to pass a title better than her own to another under a contract of sale. These provisions cannot make sense if contracts of sale must involve a transfer of ownership, which is, by definition, the best title. Third, s12 purports to imply an undertaking as to the seller's having the best title, and so a 'right to sell', the goods that are the subject of a contract of sale. It would seem that this provision would be redundant if a contract of sale must be one to transfer ownership of the goods, because any contract that purported to transfer a lesser title would simply not be a contract of sale.[13]

Thus, it follows that B acquires, upon taking possession of a chattel that is owned by A, a general property interest that consists of a right to exclude the world from that chattel, and which is alienable. In this sense, B acquires a legal interest that is of the same quality as A, the owner of the chattel, although B's right is exigible against a smaller class of persons.

Before moving on to explain the indeterminacies that remain in the law's rules, it is necessary to address one further argument about the nature of B's interest that commentators often assert; namely, that B acquires no *right* of any sort when he takes possession of the umbrella, but instead benefits from a rule of law that says that B is *deemed* to be the owner of the umbrella for the purposes of bringing a claim against C. So, on this view, were C to dispossess B, the law does not hold C liable to B because C has committed a legal wrong against B, but instead because B is to be treated as if he is the umbrella's owner. It is only A

[11] G Battersby and AD Preston, 'The Concepts of "Property", "Title", and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 MLR 268, 272-74. See too G Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603, 605; Rostill, 'Possessory Title' (n 4) 418-20; Rostill, *Possession* (n 4) 109-11.

[12] s2(1) (emphasis added).

[13] This conclusion is supported by *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24, in which the House of Lords accepted that s25 of the Sale of Goods Act governed a purported sale of a thief's general property interest to another. If this was not a contract of sale at all, then the Act could not have been relevant: Battersby (n 11) 605.

who has any sort of *right* to exclude C from the umbrella. Rostill has shown that this claim has a certain degree of support in the case law.[14] A typical example of judicial reasoning that supports the view comes from *The Winkfield*.[15] Two ships collided, and as a result one ship – *The Mexican* – sank along with mail that the ship had been transporting. The Postmaster-General brought a claim in negligence, and argued that he was entitled to damages calculated in accordance with the value of the mail that had been lost. The Court of Appeal allowed this claim, even though the Postmaster-General was not the owner of the mail aboard the ship. Collins MR claimed that, where a bailed chattel is converted or damaged it is 'deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss'.[16] This line of reasoning has been endorsed in a number of cases,[17] and so it is common to see commentators claim that B's general property interest, properly understood, is not a 'right' at all, but is instead the benefit of a 'presumption' that B has a right.[18]

The better view, however, is that the claim that B is 'deemed' to be the umbrella's owner in *Finder* or in *Mistaken Possessor* is a false one, and so should not be repeated. This is so for a number of reasons. First, there is also a great deal of support in the case law for the claim that B acquires a *right* of some sort, and does not simply benefit from an evidential presumption.[19] Typical is the statement by Donaldson LJ, made in *Parker v British Airways Board*,[20] that the finder of a lost bracelet 'whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep' the bracelet. Similar endorsements

[14] L Rostill, 'Relative Title and Deemed Ownership in English Personal Property Law' (2015) 35 OJLS 31, 39-45.

[15] [1902] P 42 (CA).

[16] ibid 60 (emphasis added).

[17] For a detailed recounting of cases in which 'deemed ownership' reasoning has been adopted, see Rostill, 'Deemed Ownership' (n 14).

[18] See, eg, D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 331 ('The enforcement of titles to an asset is governed by evidential presumptions about the existence of claims to that asset and by the rules of joinder of parties applying to disputes over it'). cf F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon 1888) 25.

[19] Rostill, *Possession* (n 4) 103-04.

[20] [1982] QB 1004 (CA), 1017.

of the view that B acquires a genuine right can be found in *Bridges v Hawkesworth*,[21] *R v D'Eyncourt and Ryan*,[22] and *Gough v Chief Constable of the West Midlands Police*.[23]

Second, it is clear that B is entitled to bring a claim against an interferer with the chattel in circumstances where it is known that B is not the chattel's owner. A case of this type is the classic case of *Armory v Delamirie*,[24] where a chimney sweep found a valuable jewel set in a ring. The finder took the ring to be valued by a goldsmith, who later refused to return the jewel to the finder when he demanded its return. It was reasoned that the finder 'does not by such finding acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover'. All that is needed to dismiss the plausibility of the argument that the finder was successful in his claim against the goldsmith because he was deemed to be the jewel's owner is to note that the court expressly accepted that the finder was not the owner of the jewel. There is a long line of cases – *Parker*, *Bridges* and *Gough* among them – where the same was accepted to be true, where a party, B, was able to bring a claim against another, C, even though it was accepted as true that some unknown party had a better claim than B to the chattel.[25]

Against this background, it is perhaps tempting to endorse instead the view that B acquires a genuine right to exclude the world of some sort (either that is of the same nature as ownership, or that persists only while B is in possession), but that B is *also* deemed to be the owner of the chattel in some circumstances. In particular, it might be argued that B is deemed to be its owner when it comes to assessing C's liability for tortiously interfering with the chattel.[26] Suppose

[21] (1851) 15 Jur 1079, 1082.

[22] (1888) 21 QBD 109, 125.

[23] [2004] EWCA Civ 206 at [15].

[24] *Armory* (n 9).

[25] It might be objected that – under s8(1) of the Torts (Interference with Goods) Act 1977 – C will be able to resist B's claim if C is able to *identify* A as the owner of the chattel: see CPR 19.5A; Rostill, 'Deemed Ownership' (n 14) 50-52. This, however, is no true objection. First, if B is, prima facie, deemed to be the chattel's owner, all that is needed to show this to be false is that B is not the owner. There is no need to identify the owner to make this out. Second, the Act does not purport to alter the underlying common law principles that govern rights in relation to chattels; it may be that, at common law, a defence of this sort could not be maintained, even if C could identify A as the owner. Third, it is not clear whether C's identification of A as the owner of the chattel works as a *defence* or as a *denial*: see, on this distinction, eg, J Goudkamp, *Tort Law Defences* (Hart 2013) ch 3. If it is a defence, then C will escape liability notwithstanding that C breached a duty owed to B; if it is a denial, then C will escape liability by showing that C breached no duty owed to B, because B is not the chattel's owner. It is only if the latter view is correct that a rebuttal of liability by virtue of s8(1) has anything to say about whether or not the 'deemed ownership' argument is correct. Otherwise, it is perfectly consistent to maintain *both* that B has a right to exclude others from the chattel, *and* that B will not obtain a remedy where that right is breached if the owner of the chattel is known and identified by C.

[26] Rostill, *Possession* (n 4) 116-17. For fuller discussion, see L Rostill, 'Possession and Damages for Tortious Interferences with Chattels' (2021) 41 OJLS 459.

that C negligently destroys the umbrella in B's possession; C will be liable to compensate B for the full market value of the ownership of that umbrella. One might try to rationalise this rule of law, at least in part, by arguing that B is, for the purposes of valuation of liability, deemed to be the chattel's owner, but not for the purposes of establishing the cause of action. A resolution to this debate is not necessary for the purposes of this thesis, which is concerned only with B's primary rights against C.

3.1.2 Persistence

The previous section explained that B acquires a general property interest which comprises a right to exclude, and which is alienable. It follows that this general property interest mimics that of the owner, A, in its content. This statement, however, omits a number of less certain elements of the *later possession rule*. The first concerns the *persistence* of B's interest: is B's interest more easily lost than A's? This question has been the subject of some debate in the academic literature, and it will be shown below that the law on this point is unclear.

The question of whether B's interest persists after B's own loss of possession is one that has been asked before in different language. This debate most commonly takes the form of an inquiry into whether B and A have the *same* interest. Commentators who subscribe to the view that A's ownership and B's general property interest are the same will then claim that both consist of, say, a 'right to exclusive possession forever',[27] or 'ownership'.[28] Despite the different terms, both endorse the same proposition as a matter of English law: that B's interest is not merely a right to exclude the world from a chattel in B's present possession, but is instead a right to exclude that is capable of lasting indefinitely, and that continues beyond the loss of B's possession.[29] We can call this the *pro-persistence view*.

An alternative account of English law – the *anti-persistence view* – usually takes the form of an argument that A and B have interests that are not the same. Thus, it is often said that A has 'ownership' of or, perhaps, 'the legal title' to the chattel, while B has instead a 'mere right to possession', a 'possessory right', or a 'possessory title'. On this view, B's right to exclude others persists only while B remains in possession of the chattel; A's right is not so limited,

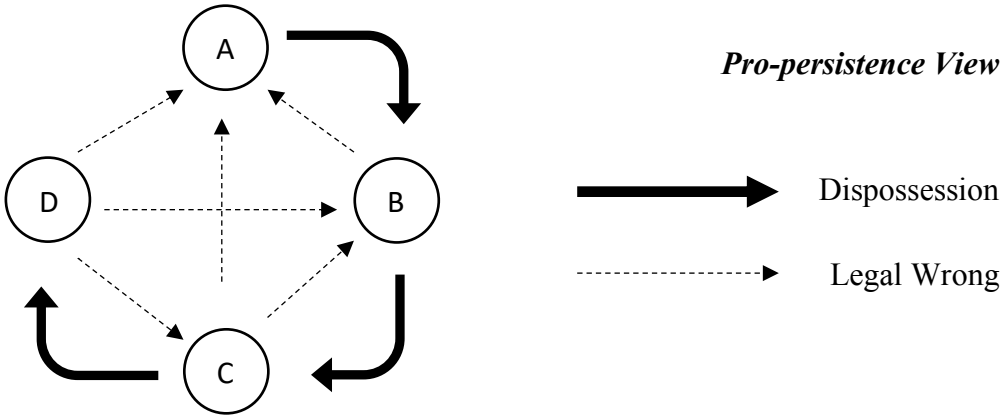
[27] WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.131.

[28] See, eg, B McFarlane, *The Structure of Property Law* (Hart 2008) 140-44; S Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 30-33.

[29] cf L Katz, 'The Concept of Ownership and the Relativity of Title' (2011) 2 Jurisprudence 191, 199.

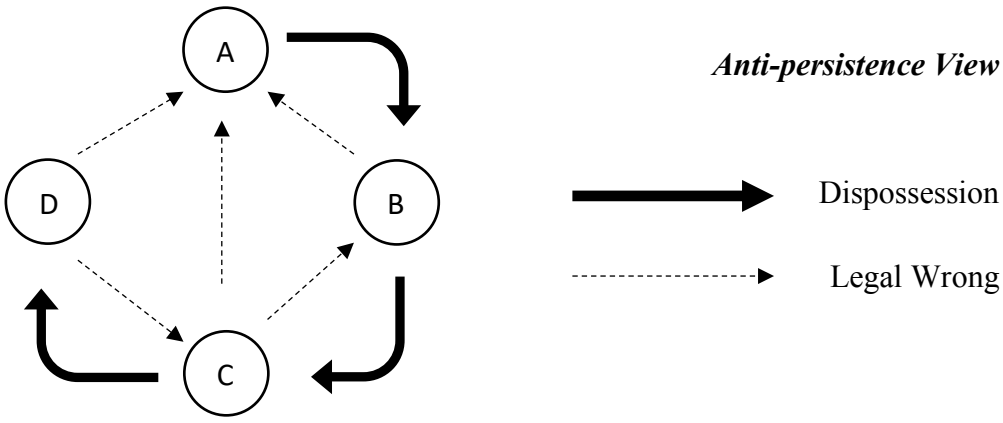
and so, in both *Finder* and *Mistaken Possessor*, A retains a right to exclude C. This is, however, not the entirety of the *anti-persistence view*. Supporters of this view also add that there are certain exceptions to it, the most important of which is that B will have a right to exclude from the chattel in question those whose own possession of it 'derives from' B's actual dispossessor.[30] Thus, if C were to steal the umbrella from B, and then pass the umbrella on to another person, D, by way of gift or sale, B will be able to bring a claim against D. In contrast, were D instead to *steal* the umbrella from C, B will be unable to bring a claim against D.[31]

It is in this latter case where the *pro-* and *anti-persistence views* produce different results. According to the *pro-persistence view*, B will be able to bring a claim against D, regardless of whether D's possession 'derives from' C, because B's general right to exclude the world at large from the umbrella persists after its theft by C. In contrast, the *anti-persistence view* denies B a claim against D, at least where D's possession does not derive from C, because B's general right to exclude the world at large from the umbrella was extinguished when C dispossessed him. The diagrams below are intended to demonstrate this contrast between the two views.



[30] Fox, 'Relativity of Title' (n 18) 345-46.

[31] ibid.



It is helpful at this stage simply to set out the evidence that has been offered in favour of the *pro-persistence view*. Rostill sets out two classes of case that, he claims, demonstrates that the *pro-persistence view* is correct.[32] The first is where B voluntarily relinquishes possession to another person; the second is where B's possession is lawfully divested from him by another person. In both classes of case, B is able to bring a claim against interferers with the chattel, and the *pro-persistence view* explains these cases in an elegant way. However, it is submitted that this is inconclusive evidence to conclude that the *anti-persistence view* is necessarily false; that view is able to accommodate both classes of case, albeit in a less elegant way. In addition to these two classes of case, that B's interest is alienable by way of sale also plausibly suggests that the *pro-persistence view* is correct, because, as will be shown below, the *anti-persistence view* struggles to make sense of this part of the *later possession rule*. However, to say that one view is more elegant than another is not to say that it is necessarily an accurate description of the law's rules. Without a conclusive determination of a case which states that B is (or is not) able to bring a claim against D, where D's possession does not derive from B's dispossessor, it seems to be the case that we cannot determine which view is a true description of the *later possession rule*. This section briefly concludes by dismissing as unhelpful a number of cases that, prima facie, support the *anti-persistence view*.

[32] Rostill, 'Terminology' (n 4) 410-16; Rostill, *Possession* (n 4) 104-07.

(1) *Voluntary relinquishment*.[33] The first class of case that is often cited in favour of the *pro-persistence view* are those cases where B voluntarily hands over possession of the chattel to another, C. We have already seen one case of this type: *Armory v Delamirie*.[34] There, B handed over a found chattel to C, who later refused to return the chattel when B demanded that C restore possession to him. B was able to bring a claim in trover, on the basis that C had breached a duty owed to B when C refused to hand the chattel back to him. It follows that B's general property interest appears not to have been lost when he lost possession of the chattel (which was when he handed over the chattel to C).

Similar support might be derived from *Bridges v Hawkesworth*,[35] and *Hannah v Peel*.[36] In *Bridges*, B found a parcel of cash on C's shop floor, and handed the parcel over to C for safekeeping until the true owner returned to claim it. Later on, when the true owner had failed to claim the parcel, B returned to the shop and demanded that C restore possession to B. C refused, and it was held that C was therefore liable to B. The case is similar to *Armory*; C committed a legal wrong against B in refusing to restore possession to B, and that wrong was committed at a time when B was no longer in possession of the chattel. In *Hannah*, B found a brooch hidden in a crevice above a window in a house owned by the defendant. B then handed the brooch over to the police, who, after failing to locate the brooch's true owner, gave the brooch to the defendant. B successfully sued the defendant, even though B had lost possession of the brooch when he had handed it over to the police.

These cases clearly demonstrate that B does not *always* lose any and all rights in relation to the chattel whenever B loses possession. However, it goes too far to suppose, as some have,[37] that they must demonstrate that B's general property interest persists in precisely the same way as ownership does. In both *Armory* and *Bridges*, the defendant received the chattel in question *from B*. It would seem to be arbitrary for the law to draw a distinction between cases where C dispossesses B, and cases where B relinquishes possession to C on the basis of qualified consent to that relinquishment. It is plausible to suppose that, in such a case, C may come under a duty owed to B to respect B's qualifications. We could then conceptualise these cases as involving two steps: first, B loses his general property interest upon handing over possession

[33] See too PS Atiyah, 'A Re-Examination of the *Jus Tertii* in Conversion' (1955) 18 MLR 97, 107.

[34] *Armory* (n 9).

[35] *Bridges* (n 21).

[36] [1945] KB 509.

[37] eg Douglas (n 28) 24-26 (apparently relying only on *Armory* in defence of this view).

of the chattel to C; second, B acquires in place of that interest a personal right against C. C's liability in *Armory* and *Bridges* would then follow from a breach of that personal right. In this way, the *anti-persistence view* is able to account for both cases.

Of more interest is *Hannah*, where B was able to bring a claim not against the police, but rather against the person to whom the police later gave the chattel. If the point made in the last paragraph is accepted, then the claim in *Hannah* must be rationalised by an *anti-persistence view* supporter as an example of the exception noted above:[38] the defendant derived their possession from the police, who – like the defendants in *Armory* and *Bridges* – can be treated in a similar fashion to a dispossessor of B because of the qualified nature of the voluntary transfer from B to them. It follows that the exception within the *anti-persistence view* may be able to rationalise the result of *Hannah*; B may have had a right against the defendant in relation to the brooch, but not a general property interest in the brooch. Thus, on this view, B would have been unable to bring a claim against, say, a person who stole the brooch from the police, because that thief could not be said to have derived their possession from the police. Larissa Katz has argued that this exception can be rationalised in the following way: 'Any story that [the defendant] can tell about how he came to be in possession of the thing thus necessarily takes as its starting point [the police's] own right to possess. This means that [the defendant], once put in possession by [the police], cannot claim a new basis for his possession that is independent of [the police's]'.[39] Thus, the exception is said to act like an estoppel; where D has acquired possession from B's dispossessor, D cannot explain their own possession to the court without admitting that it derives from a wrongful dispossession from B.[40] This analysis may be complicated, but it is conceptually coherent and is able to reconcile the *anti-persistence view* with the outcomes found in this line of case law.

(2) *Lawful divestment*. The second class of case that provides support for the *pro-persistence view* are those cases where B is lawfully divested of his possession of a chattel by the police under statutory authority. B will be able to bring a claim in tort against the police if they fail to

[38] Above, at n 30.

[39] L Katz, 'The Relativity of Title and *Causa Possessionis*' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 211-12.

[40] Alternatively, it might be thought that this exception follows from the rule *nemo dat quod non habet*. It might be argued that, if C is liable to B because C dispossessed B, then D – where D is a transferee from C – must also be 'bound' by B's interest because C cannot transfer to D a better interest than her own: Battersby (n 11) 605. However, this conclusion does not follow from the *nemo dat* rule. Upon dispossession by C, B's interest does not 'bind' C, but is instead extinguished and replaced with a personal right. Thus, C could transfer her interest in the chattel to D without D being subject to such a personal right and this would not contradict the *nemo dat* rule.

return the chattel to B once that authority has expired.[41] Again, B here loses possession of the chattel before any wrong is committed against him, and so it appears to follow that B's general property interest is not extinguished along with B's possession.

As with the *voluntary relinquishment* cases, however, a plausible case can be made that the *lawful divestment* cases do not amount to convincing evidence in favour of the *pro-persistence view*. David Fox has offered an account of these cases as part of a defence of the *anti-persistence view*.[42] He argues that the liability of the police in cases of *lawful divestment* is based on the proposition that a 'defendant who has a limited statutory authority to dispossess [B] without incurring tort liability should be open to liability in respect of his later dealings with the chattel once his statutory authority expires'.[43] This is a public law concern – ensuring proper control of the police – and Fox therefore appears to adopt the view that, in a *lawful divestment* case, the police are held liable to B despite B having no right that the police not interfere with the chattel that was seized when their statutory authority expires.[44]

Perhaps a more plausible rationalisation of Fox's view is one that coheres with the analysis of the *voluntarily relinquishment* cases that we considered above. In such a case, B voluntarily transfers possession to another on a qualified basis; it would seem arbitrary to endow B with a right that others not dispossess him, but not with a right that others who take possession from him on a qualified basis must adhere to those qualifications. To do so would plausibly empty B's general property interest of much of its force. The same can be said of the *lawful divestment* cases: the police took possession from B in virtue of a statute that endowed them with a power to do so, but that power was inherently limited. Thus, on this version of the *anti-persistence view*, the police's divestment of possession from B did act to extinguish B's general property interest – and so the rest of the world no longer owed general duties to B not to interfere with the chattel – but the police then came under a duty owed to B to adhere to the limitations inherent in their statutory power. This analysis avoids Fox's unattractive view that B might be awarded a remedy despite having no right against the police, and is grounded in the plausible

[41] See, eg, *Costello v Chief Constable of Derbyshire Police* [2001] EWCA Civ 381; *Webb v Chief Constable of Merseyside Police* [2000] QB 427; *Gough* (n 23).

[42] D Fox, 'Enforcing a Possessory Title to a Stolen Car' (2002) 61 CLJ 27.

[43] ibid 29. For similar arguments, see, eg, *Webb* (n 41) 446; R Hickey, 'Possession Taken by Theft and the Original Acquisition of Personal Property Rights' in N Hopkins (ed), *Modern Studies in Property Law: Volume 7* (Hart 2013) 407-09.

[44] Fox, 'Stolen Car' (n 42) 29 ('the court, for pragmatic reasons, was willing to allow [B] an action in conversion… [T]he availability of the remedy determined the existence of [B's] substantive right, not the right of the remedy').

argument that the police ought not to be able to divest a person of any and all rights in relation to a given chattel on the basis of an inherently limited statutory authority.

Again, the key difference between the *pro-* and *anti-persistence* views would here be whether B could bring a claim against a third party who interfered with the chattel while it was in the possession of the police. On the *pro-persistence view*, B may be able to do so, because that third party will breach a duty owed to B not to interfere with the chattel. In contrast, the *anti-persistence view* would lead to a different conclusion, because that third party would owe no such duty to B according to that view. In the absence of conclusive authority on this specific point, it is difficult to see how either view can be decisively proven to be correct as a descriptive statement of the law's rules.

(3) *Alienability*. It is also difficult to square the *anti-persistence view* with B's power to transfer his general property interest to another, Z, by way of sale.[45] We can readily understand how B can bring about a state of affairs whereby B loses his interest and Z gains one: when B hands possession of the chattel to Z, B will lose his general property interest, and Z will gain her own by virtue of Z's taking possession of the chattel that is handed over to her.[46] But if it is correct that B can transfer his general property interest to Z by way of sale, and so *without* B physically delivering the chattel to Z, then this conceptualisation of the transfer is not possible. In such a case, the event that explains Z's acquisition of a general property interest in the chattel is the agreement between B and Z, not Z's taking possession of that chattel. What interest does Z acquire? It is usually thought that the purchaser of a property right acquires the seller's right. If this is correct, then, on the *anti-persistence view*, Z acquires the interest that B previously had, and this is an interest that only exists while *B* is in possession. It would appear to follow that Z's newly-acquired interest will be extinguished not when Z loses possession of the chattel, but rather when B loses possession. Thus, if the *anti-persistence view* is correct, the transfer would appear to consist of the following steps: B and Z agree to transfer B's interest to Z; Z then acquires B's interest, while B loses that interest (and, plausibly, immediately gains another general property interest – that does not bind Z – on the basis of B's continued possession of the chattel); B then later delivers the chattel to Z, and, at this point, Z's original general property interest is extinguished and replaced with a new general property interest that is caused by Z's

[45] cf Rostill, *Possession* (n 4) 30-31.

[46] This is roughly the explanation of a transfer of property rights that Penner calls 'directional abandonment': JE Penner, 'On the Very Idea of Transmissible Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 246-47.

taking possession of the chattel. While this explanation of the transfer seems to work, it is, again, far more complicated an analysis than that demanded by the *pro-persistence view*, according to which, when the sale is completed, Z simply acquires B's general property interest, which is not extinguished by a loss of possession by either party.

It follows from points (1)-(3) that a plausible case can be made for both the *pro-* and *anti-persistence* views of English law. The former appears to be a more elegant fit with the law, but this is not a concern that can determine whether it is in fact part of the *later possession rule*.

Before moving on, it is worth briefly dismissing the relevance of one case, *Buckley v Gross*,[47] to our inquiry. It has been argued that the case supports the *anti-persistence view*,[48] but Robin Hickey has convincingly shown this to be false.[49] A fire broke out in a warehouse on the banks of the Thames, and tallow, owned by a number of parties, melted and worked its way into the river. There, the molten tallow mixed together and formed into solid lumps.[50] Possession of the lumps of tallow was taken by a passer-by, who then sold the tallow to the claimant. The police, suspecting the tallow to be stolen, took possession of it. A magistrate then heard the case against the claimant, and held that, by virtue of his power under s29 of the Metropolitan Police Courts Act 1839, the police were entitled to keep the tallow as against the claimant. The police later sold the tallow to the defendants, and the claimant argued that his prior possession was sufficient to ground a right to exclude the defendant from the tallow. The claimant was unsuccessful. Prima facie, this supports the view that, when the police divested the claimant of possession, the claimant also lost his general property interest. While this would undoubtedly explain the outcome of the case, it is clear from the court's reasoning that the *anti-persistence view* is not necessary to rationalise this outcome. Instead, it was reasoned that it was the order of the magistrate, not the divestment of the claimant's possession, that was responsible for the extinction of the claimant's general property interest.[51] As such, *Buckley* provides little support for the *anti-persistence view*. The better view remains that either interpretation is a plausible descriptive account of English law.

[47] (1863) 3 B&S 566. See too *Irving v National Provincial Bank Ltd* [1962] 2 QB 73.

[48] See, eg, Fox, 'Relativity of Title' (n 18) 346-48; Katz, '*Causa Possessionis*' (n 39) 218.

[49] R Hickey, *Property and the Law of Finders* (Hart 2010) 118. See too Rostill, 'Terminology' (n 4) 416-18.

[50] On the case's treatment of the mixture, see 4.1.2.1 and 4.1.2.2.

[51] *Buckley* (n 47) 572, per Cockburn CJ.

3.1.3 Theft

A second difficulty that ought to be highlighted here is the effect of B's status as a wrongdoer on the application of the *later possession rule*. Consider, in contrast to *Finder* and *Mistaken Possessor*, the following case:

> *Thief*: A leaves his umbrella in an umbrella stand at a museum. B, knowing the umbrella not to be his, deliberately takes possession of the umbrella and leaves the museum with it.

It is settled on the strength of existing authority that, in this case, the *later possession rule* will apply in the same way as it does in both *Finder* and *Mistaken Possessor*. B will acquire an alienable general property interest that consists of a right to exclude all the world, except A, from the umbrella. This follows from the *lawful divestment* cases discussed above.[52] Typical of these cases is *Costello v Chief Constable of Derbyshire Police*, in which Lightman J explained such an outcome on the basis that the causative event of 'taking possession' had been made out – the claimant had both custody and control and an intention to possess – and this 'itself gives to the possessor a possessory title and the possessor is entitled to rely on such title without reference to the circumstances in which such possession was obtained'.[53]

It follows that there is here no indeterminacy in the law's rules. However, the law's response to *Thief* does call for particular attention, for at least two reasons. First, to say that, in *Thief*, B acquires a right to exclude the world from the umbrella appears, at least intuitively, to be particularly difficult to justify.[54] For this reason, theorists of the *later possession rule* often consider themselves either to be under a particular obligation to explain how their account can explain B's general property interest,[55] or to be able to dismiss those cases similar to *Costello* as being poorly reasoned and, therefore, (at least arguably) wrongly decided.[56]

Second, there is some reason to suppose that, if an appropriate case came before the Supreme Court, the rule that a general property interest arises in B in *Thief* may be removed

[52] Above pp 77-79.

[53] *Costello* (n 41) at [14].

[54] It has been argued that the rule appears to contradict well-established principles of law, in particular that one ought not to be able to profit from wrongdoing: eg Hickey, 'Possession Taken by Theft' (n 43) 403.

[55] See, eg, S Green and J Randall, *The Tort of Conversion* (Hart 2009) 84-86.

[56] cf Fox, 'Stolen Car' (n 42).

from English law, or at least its force may be considerably diluted.[57] A number of points demonstrate that this is the case. First, judges consistently express concern that the law as it stands is undesirable. In *Gough*, Potter LJ went so far as to claim that the effect of the rule – that the court might restore a stolen chattel to its thief – is 'inherently rebarbative'.[58] Second, some other common law jurisdictions do not permit a thief to bring an action against an interferer with a stolen chattel.[59] Third, the decision in *Costello* was in part premised upon the existence of the so-called 'reliance' test of illegality, as set out in *Tinsley v Milligan*.[60] Because a thief need only prove that they had possession of a chattel, and so need not prove how that possession came about, it was thought that the wrongdoing of a thief could not be taken into account in determining the liability of the defendant. The Supreme Court, however, has revisited the doctrine of illegality since *Costello*, and has rejected the 'reliance' test as a rule of English law.[61]

It follows from the points made in this section that it is worth giving particular attention to the justifiability of the *later possession rule* as it applies to *Thief*. We have reason to doubt that the outcome of *Costello* will remain good law. It may be either that an appropriate appellate court will remove from English law the rule that B acquires a general property interest in *Thief*, or that, if B does acquire a general property interest, a person who breaches B's right to exclude them from the stolen chattel will now be able to raise the illegality of B's possession as a defence to any tortious claim brought against them by B. Given the aims of this thesis as set out in 1.2.1 and 1.2.2 – to offer descriptive and *pro tanto* justificatory accounts of existing legal rules governing the acquisition of proprietary interests – a defence of the existing rule, that B acquires a general property interest, is offered below in section 3.3.2.

3.2 Justification

The purpose of this section is to consider purported justifications for the *later possession rule*, understood as a rule that bestows upon B a general property interest upon B's taking possession

[57] For a convincing argument that demonstrates that there was little authority directly on this point prior to *Costello*, see Hickey, 'Possession Taken by Theft' (n 43) 404-07.

[58] *Gough* (n 23) at [48]. Carnwarth LJ claimed to apply the rule only 'with some reluctance' because, in all cases of *lawful divestment*, the police had acted in an 'entirely reasonable' way: [39].

[59] See, eg, *Baird v British Columbia* (1992) 17 BCAC 315 (Canada).

[60] [1994] 1 AC 340.

[61] *Patel v Mirza* [2016] UKSC 42.

of a chattel that is owned by A. It is only with an appreciation of the reasons why B ought to acquire any such right that we can safely move on to clarify the problems of persistence and theft. The section begins by subjecting to criticism two prominent instrumental justifications of the rule. It will be shown that these purported justifications are either unconvincing or only demonstrate that the law has very weak reason to bestow upon B a general property interest of any sort. In 3.2.3, it is argued that the *later possession rule* can be better justified for much the same reasons as the *first possession rule*, as set out in 2.2.3.

3.2.1 Social Disruption

The first instrumental justification of the *later possession rule* that must be considered here is what can be termed an argument from social disruption. This argument has taken on a particular prominence in the literature that examines the rule. The argument claims that, were B not to gain a general property interest upon taking possession of a chattel that is owned by A, this would have the undesirable effect of leading to 'social disruption'. Something like this claim appears to have motivated the explanation of the rule offered by Lord Campbell CJ in *Jeffries v Great Western Railway*, in which he claimed that it is 'most reasonable law, and essential for the interests of society, that peacable possession should not be disturbed by wrongdoers'.[62]

We might here note a number of difficulties in trying to understand this proposition as a justification of the *later possession rule*. First, it seems that Lord Campbell limited that justification to cases where the possessor is actually dispossessed, where he has the chattel in question taken from him. As discussed above, it is clear that B's general property interest goes beyond a right to maintain present possession, and consists of a wider right to exclude. Second, it is hard to discern how the proposition can be taken to offer an *argument* in defence of the rule, as opposed to a statement of the rule, coupled with the assertion that the rule is in the interests of society. Lord Campbell offers no explanation of what those interests are, or how the *later possession rule* may serve them. Most modern commentators endorse the view that Lord Campbell 'seems primarily to have been motivated by a decision to restrain violence',[63]

[62] (1856) 5 El & Bl 802, 805.

[63] R Hickey, 'Possession as a Source of Property at Common Law' in E Descheemaeker (ed), *The Consequences of Possession* (Edinburgh UP 2014) 82. See too, eg, CD Baker, 'The *Jus Tertii*: a Restatement' (1991) 16 University of Queensland LJ 46, 50; Battersby (n 11) 603, n 1; Fox, 'Relativity of Title' (n 18) 339; Rostill, 'Deemed Ownership' (n 14) 49-50. The widespread adoption of this argument has plausibly been influenced by a similar debate in the German legal literature, many of the participants in which endorse an argument from social

although it is not at all clear, from the words of Lord Campbell alone, that this was in fact his motivation. The view does gain support from the explanation of the *later possession rule* offered by Donaldson LJ in *Parker*, who feared that, without the rule, lost chattels 'would be subject to a free-for-all in which the physically weakest would go to the wall'.[64] Again, however, it is difficult to understand precisely what this form of the social disruption argument is supposed to mean. When we ask in what sense the *later possession rule* might work to prevent violence, it becomes clear that the argument does not stand up to scrutiny. We can usefully distinguish between a number of different interpretations of the argument.

First, it is plausible that the violence that the *later possession rule* aims to prevent is physical violence committed against B by the interferer with the chattel. There are two different variants of this argument that might be distinguished. The first claims that C, in interfering with the chattel, also interferes with B's right that C not interfere with B's body;[65] the second claims that there is a risk – that ought to be minimised – that, if the law permits C to interfere with a chattel in B's possession, C will also interfere with B's body in her attempts to exercise her liberty to make use of that chattel.[66] The first view equates interference with the chattel with interference with B's physical person; the second fears that an increase in interferences with B's physical person will be the result of a system of property law that does not permit B a right to exclude C from the chattel in question.

Neither of these views are convincing. The first interpretation of the argument seems to amount to an endorsement of a fiction that the chattel is a part of B's body, and so that B's general property interest is simply an extension of his bodily right. What must be justified is the adoption of that fiction; the fiction itself does no justificatory work. The argument gains much of its strength from the thought that a dispossession *must* involve infringement of B's bodily right: we might think of C prising an apple from B's grasp. However, in this case, there is no need for the law to recognise any kind of right in relation to the apple in order to render such activity wrongful; C commits the tort of trespass to the person. There can, too, clearly be infringements of B's right to exclude the world from a chattel that do not involve an

disruption based on the need to prevent violence: see J Gordley and U Mattei, 'Protecting Possession' (1996) 44 American Journal of Comparative Law 293, 294-95.

[64] *Parker* (n 20) 1009. This explanation of the rule has been endorsed in *Costello* (n 41, at [29]), and in the New Zealand High Court: *Tamworth Industries Ltd v Attorney-General* [1991] 3 NZLR 616, 621.

[65] eg Katz, '*Causa Possessionis*' (n 39) 210-11. cf SC Wheeler, 'Natural Property Rights as Body Rights' (1980) 14 Nôus 171.

[66] eg N Palmer (ed), *Palmer on Bailment* (3rd ed, Sweet & Maxwell 2009) 4.122; Rostill, *Possession* (n 4) 29-30.

interference with B's person in any meaningful sense. Suppose that B is in possession of a bowl of soup, and that C, without B's consent, places a straw into the bowl and drinks some of the soup within it.[67] C does so without touching B or the bowl. There is here a dispossession without wrongful interference with B's person. The same point can be made in relation to a case where C damages an apple in B's possession with a knife, again without touching B. This is clearly a legal wrong – a trespass – but it cannot be said, at least without considerable elaboration, to be an infringement of B's right that C not interfere with B's body.

The second view is also undermined when it is remembered that B has an independent right that C not tortiously interfere with his body. There is no need to recognise a general property interest in B in order to ensure that the legal norms to which C is subjected demand that C not interfere with B's body. Two further points demonstrate the implausibility of the argument as a defence of the *later possession rule*. First, C's (tortious) duty not to interfere with B's body is paralleled by a similar duty owed as a matter of criminal law. It seems unrealistic to suppose that B's general property interest will have any deterrent effect that adds to that already created by the possibility of criminal sanction. Second, any interference with the chattel in which B has a general property interest may also amount to a wrong against A, the chattel's owner; C is, regardless of the existence of B's general property interest, under a duty not to interfere with the chattel. It follows that the deterrent effect that the *later possession rule* has on C can only be that which is created by an increase in the number of people whom C may legally wrong by interfering with the chattel (and so not that created by rendering an act legally wrongful that C would otherwise be at liberty to perform). It follows that this form of the social disruption argument gives us very weak reason to suppose that the *later possession rule* is defensible. The rule has only a very minimal deterrent effect – if it has a deterrent effect at all – and so it seems implausible to suppose that there would be an increase in physical violence against possessors if the rule did not exist.

The second understanding of the 'violence' that the *later possession rule* might be said to prevent is the very act of dispossession from B, or of interference with the chattel, regardless of whether that dispossession or interference involves physical interference with B's body. We might return to the example of C drinking soup in B's possession through a straw; on this interpretation of the argument from social disruption, C's act is here 'violent' and so ought to be prevented.[68] This argument fails because it is circular. To say that C's actions are violent in

[67] A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard UP 2009) 94.

[68] At times, this appears to be Hickey's interpretation of Lord Campbell: see, eg, Hickey, 'Possession as a Source of Property' (n 63) 82 (equating Lord Campbell's explanation of the rule with 'the proposition that it is worthwhile

this example is to say no more than that C's actions are wrongful. This is a statement of the *later possession rule*, and not a defence of it.

Third, 'violence' may be taken to mean dispossession of, or wrongful interference with, chattels that are presently possessed by their *owners*. The fear is that, if the law says that C commits no legal wrong against B, a non-owner possessor, in interfering with a chattel, citizens will be more likely to interfere with chattels as a general matter, and thus the security of true owners' interests will be reduced.[69] This argument fails for the same reason that we rejected the claim that the *later possession rule* is justified because it deters interferences with B's person: the rule, as a matter of fact, has little or no deterrent effect. This is because C will owe duties not to interfere with a chattel in B's possession to that chattel's owner, and because these duties are tracked by similar rules of criminal law that create a risk of penal sanction. It is, too, only in those cases where C knows that B is not the owner of the chattel in B's possession that, in the absence of the *later possession rule*, C may consider herself able to make use of that chattel without incurring liability. However, it seems reasonable to suppose that this kind of case will be rare; in the majority of instances, C will assume the possessor of a chattel to be its owner. It seems, therefore, false to suppose that a society whose legal system contains the *later possession rule* will be a society that contains fewer acts that amount to wrongful interference with chattels possessed by their true owners than one that has no such rule.

The fourth understanding of the 'violence' that may be understood as the concern of the *later possession rule* is physical violence that B may inflict upon C, after C has interfered with a chattel that B has earlier possessed.[70] We might expect that, were C to snatch a chattel from the hands of B, B's instinctive response will be to snatch the chattel back from C. Thus, the *later possession rule* acts as a concession to the inevitability of B's desire to retaliate against C; the law steps in, providing B with a remedy, and so B need not resort to this kind of self-help, which brings with it a risk that the situation will escalate and harm will be inflicted upon either the possessor or his dispossessor.

This interpretation of the social disruption argument is also unconvincing. In order for the argument to provide us with reasons that might form part of a justification of the *later*

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to restrain wrongful disturbance of possession'). See too RA Epstein, *Simple Rules for a Complex World* (Harvard UP 1995) 66.

[69] For a clear endorsement of this form of the social disruption argument, see Green and Randall (n 55) 83.

[70] See, eg, OW Holmes, *The Common Law* (1881, Belknap Press 2009) 192-93; *Anderson v Gouldberg* 51 Minn 294 (1892) at 296; Katz, '*Causa Possessionis*' (n 39) 210; NJ McBride and R Bagshaw, *Tort Law* (6th ed, Pearson 2018) 470.

possession rule, it must first be shown that, as an empirical matter, non-owner possessors would commit retaliatory acts of violence against those who commit actions that the *later possession rule* deems to be legally wrongful if the *later possession rule* were not a rule of English law. This claim is surely implausible,[71] for at least two reasons. First, such retaliatory acts are already condemned by other rules of law. If B were to commit an act of physical violence against a dispossessor, C, those acts will amount to trespass to the person, or, possibly, a criminal act. If these rules of law are insufficient to deter B's retaliation, then it seems implausible to suppose that the grant of a general property interest in B will do so. Second, there are many acts that are legally wrongful as a result of the *later possession rule* that would be unlikely to lead to such a strong sense of outrage in B, such as where C innocently commits the tort of conversion, or where C interferes with the chattel in an insignificant way. Again, then, the social disruption argument fails because it ascribes to the *later possession rule* a deterrent function that the rule does not, as a matter of fact, perform.

However, even if we grant this empirical claim – that a consequence of the *later possession rule* is that B will not commit violence against an interferer with the chattel that B otherwise would commit – it is hard to see how this fact, *in itself*, provides us with any particularly convincing reason to think that the rule is a good thing. Clearly, a world in which there are fewer acts of physical violence is a better one, and so this says something in favour of the *later possession rule*. But whatever reason the argument generates must be a weak one, unless we have reason to suppose that, independently of B's urge to do violence, the law ought to treat B as having suffered a wrong. No one could plausibly argue that rules that are demonstrably unjust, such as rules discriminatory against a minority, ought to be retained because otherwise the racist majority may sometimes take it upon themselves to enforce that rule through acts of violence. This is because that urge to do violence is itself unjustified. Where this is so, we would do better to attempt to change the view of the majority – not to give in to them – and, of course, one way in which this might be done is for the law to reflect not what citizens think ought to be the law, but instead what in fact ought to be the law. So, to determine the strength of the reasons that this interpretation of the social disruption provides in favour of the *later possession rule*, we must ask not whether, as a matter of fact, B *feels* wronged, or feels entitled to retaliate against C, but instead whether B *was* wronged, and so whether B has good reason

[71] My argument here is that it seems false to suppose that B will commit acts of violence against C, not that it seems false to suppose that B will take himself to have been wronged (in some sense) by C. As mentioned above, at 2.2.2.2, n 84, there is a wealth of psychological literature that seems to show that people place some kind of value on the mere fact of possession. This suggests that B will feel harmed by C (and so, plausibly, 'wronged').

to feel as he does. If so, then it is those reasons that justify B's desire for revenge that do the work to justify the *later possession rule*, and not the desire itself. The social disruption argument therefore drops out of the justification.

In sum, the social disruption argument, whatever its precise form, amounts to a poor justification of the *later possession rule*, and so the argument ought not to be adopted in future. It relies on unconvincing assumptions, and, in its most promising form, is, upon proper analysis, all but redundant as a justification of the rule. Plausibly, it is only because of the social disruption argument's vagueness, and the absence of other serious judicial attempts to rationalise the *later possession rule*, that the argument has garnered significant attention in the academic literature. This section has shown that this attention is unwarranted; the argument has very little to recommend it.

3.2.2 Economic Efficiency

Thomas Merrill has recently offered a defence of the *later possession rule* on the grounds of its ability to bring about efficient outcomes, primarily on the basis of the saved administrative costs that the rule brings in comparison to alternative rules.[72] In order to see this benefit, consider, in contrast to a system of personal property law that protects possessors, one that protects only owners. Here, even in the most basic of cases – such as where a defendant steals a chattel that is owned by the claimant – there are substantial burdens placed on the claimant and on the court to resolve such a dispute. The claimant must prove that he is the stolen chattel's *owner*, and this will be difficult to do without, say, a title registration system of the sort that exists in relation to land.[73] The claimant would presumably be required to trace the provenance of the chattel, back to its creation or first occupation. Thus, there will be a significant cost involved in proving a negative proposition – that no one else has a better claim than the claimant to the chattel. The *later possession rule* helps to alleviate this problem, since an owner may be able to rely simply on his prior possession to establish that he had a right that the defendant not interfere with the chattel, and it is likely to be significantly easier to prove earlier possession than it is to prove absolute ownership.[74]

[72] TW Merrill, 'Ownership and Possession' in Y Chang (ed), *Law and Economics of Possession* (CUP 2015).

[73] ibid 23. Similar arguments have been made elsewhere: eg F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I: Volume II* (2nd ed, CUP 1898) 42; Fox, 'Relativity of Title' (n 18) 338-39.

[74] A similar point has been made by scholars of Roman law in discussion of the Roman concepts of 'ownership' and 'possession', which, prima facie, were very different from each other and were protected in different ways.

One difficulty with this defence of the *later possession rule* is that it overlooks some costs that the rule brings, and so the defence is open to the objection that it is indeterminate.[75] First, it must be the case that the *later possession rule* risks an increase in the administrative burden on courts by allowing non-owner possessors to bring claims against interferers with the chattel that they would not otherwise be able to bring successfully. Plausibly, these additional costs could outweigh the benefits that come from saving owners the costs of proving ownership. Second, the rule also may create further unwanted costs that do not arise from the process of litigation. For this reason, Richard Posner has doubted the efficiency of the *later possession rule* – at least as applied to *Finder* – and instead (tentatively) suggests that it would be more economically efficient to grant B only a personal right to a reward from the owner for returning a lost chattel.[76] This is so because B's acquisition of a general property interest in the chattel may be too generous; it plausibly incentivises non-owners to invest in concerted attempts to abscond with chattels that are already owned, and, consequently, incentivises owners to invest in safeguarding their chattels. Both of these factors indicate that the *later possession rule* leads to a certain amount of waste, and so casts doubt on the rule's purported efficiency.

A deeper problem with the defence of the *later possession rule* on the grounds of its efficiency is that it appears to assume that, at least in an ideal world, only owners ought to have a right to exclude others from the chattel in question. B's ability to bring claims against wrongdoers is not justified on the grounds that this is a good thing in itself, but rather because it furthers other values by saving administrative cost that would be caused by a system of law that protected only ownership.[77] It is therefore hard to see how the arguments canvassed in this section could plausibly be used to justify the *later possession rule* as it has been described above. Instead, the law plausibly ought to adopt a rule of 'deemed ownership', whereby a non-owner possessor is deemed to be the chattel's owner – and so can recover against an interferer with the chattel – unless the contrary can be established.[78] The rationale of the rule is said to

(Hence Ulpian's famous statement that 'ownership has nothing in common with possession': D.41.2.12.1.) In reality, however, an owner could often rely on his prior possession of a chattel against a dispossessor under the 'possessory interdicts'. This would mean that the chattel would be restored to him, and the dispossessor would then be forced to show that he was instead the chattel's true owner. Due to the comparative ease of claiming under the interdicts, there was often no need for the owner to rely directly on his ownership. See, eg, H Scott, 'Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments' (2011) Acta Juridica 23, 28.

[75] cf 2.2.2.

[76] RA Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 Virginia LR 535, 555-57.

[77] For this reason scholars have suggested that a registration system for chattel ownership may remove the economic need for the *later possession rule*: eg, Merrill, 'Ownership and Possession' (n 72) 21.

[78] It seems that many law and economics scholars – including Merrill – believe that the *later possession rule* is one of deemed ownership, rather than one that generates in B genuine legal rights: see, eg, ibid 19 ('the

be that it saves owners the costs of proving their ownership, but there is no such cost to be saved where we know that B is not an owner. As we have seen, however, the *later possession rule* is not one that states that courts are to treat possessors as if they are owners.[79] Instead, possessors acquire a legal interest of their own.

Merrill offers one further argument that plausibly may provide support for the *later possession rule* as it exists in English law. He argues that the rule minimises information costs that are placed on citizens subject to the law, with the attendant benefits that litigation is minimised because the law is self-applied and easily followed. Again, we might compare two alternative norms of property law: first, one that states that citizens ought not to interfere with chattels that are possessed by others, and, second, one that states that citizens ought not to interfere with chattels that are owned by others. The first is the norm that English law (supposedly) adopts,[80] and, argues Merrill, it does so because the 'informational burden' that the second norm would place on citizens would be 'overwhelming'.[81] That norm, to be followed, would demand that citizens discover the provenance of each and every chattel with which they come into contact; in contrast, one can tell at a glance that a chattel is possessed, and so one can quickly process information and know that the law demands that the chattel not be interfered with.

This final argument ought to be rejected. The claim that the second norm places a great informational burden on citizens is simply false. All a particular citizen needs to know in order to comply with that norm is that the chattel in question is not owned by them; this is all the information that is required for that citizen to know that they are under a duty not to interfere with the chattel. The real difficulty, in terms of information costs, with a legal norm that protects only ownership seems instead to be that a citizen may be unable to know whether a given chattel is in fact *unowned*, and so no duty of non-interference exists in relation to that chattel. However, to suggest that this kind of difficulty could justify the rejection of the norm as a general rule of law surely goes too far. Given the relative scarcity of chattels that are

finder/possessor is deemed to have rights in the object superior to the entire world except the owner'). At other points, however, Merrill clearly endorses the view that B acquires a genuine right of his own, that is not simply the benefit of a presumption of ownership: eg ibid 32 (possession 'operates both as a social norm and as a legally protected right'). Plausibly, Merrill may believe that the two interpretations of the law are interchangeable; if so, his understanding of the law is not correct.

[79] 3.1.1.

[80] As a matter of fact, I doubt that English law can be said to adopt this norm. It is clear that an owner of a chattel can have a right to exclude others from that chattel even when it is not obviously subjected to their physical custody or control. It follows that the law sometimes does impose demanding information costs on citizens.

[81] Merrill, 'Ownership and Possession' (n 72) 30.

unowned, one is likely to assume that a chattel that is currently being possessed is the subject of ownership. It is only those rare cases where a chattel is neither obviously possessed nor obviously owned that causes a significant informational burden, such as where a chattel left unattended may plausibly have been abandoned. It follows that there is little to support the *later possession rule* purely on the basis that the rule reduces the information costs the law places on citizens; the law could reject the rule, refusing to grant B any right to exclude others from a chattel, and this is unlikely to lead to any increase in administrative costs on the basis that the rule will not be self-applied by citizens.

3.2.3 Goal Pursuit

The defence of the *first possession rule* made above indicates a relatively straightforward way in which we can show that the law has good reason to recognise a general property interest in B, a non-owner possessor: that interest will carve out a space for B, whose legal right to exclude others from the chattel allows B to pursue the goals that B has adopted and intends to use the possessed chattel to fulfil. From the perspective of other non-owner citizens, there is no difference on the *goal pursuit* account between a first and a later possessor; both form plans on the basis of the chattel in their possession, and, in both cases, we have reason not to interfere with those plans because the fulfilment (and pursuit) of them means that B will be able to engage in a life that contains more value than B otherwise would.

With this theory in mind, we can flesh out a prima facie plausible argument that has often been made in defence of B's general property interest, which is unconvincing in the absence of some further normative argument. This is that the *later possession rule* performs a valuable redistributive function where the true owner of a chattel cannot be found.[82] For all practical purposes, where this is so, B becomes the chattel's owner, given his right to exclude all others, and, after the expiration of the six year limitation period from the time of B's first converting act, the owner will be unable to bring any claim against B and his ownership of the chattel will be extinguished.[83] The difficulty with this argument is that, without more, it offers us no reason to suppose that the law ought to redistribute the chattel in question to B, rather than to some other person, or to the state. It is here that the similarity between the *later* and the *first*

[82] See, eg, DR Harris, 'The Concept of Possession in English Law', in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 92; Battersby (n 11) 610; Hickey, *Finders* (n 49) 156-57.

[83] Limitation Act 1980, s3.

possession rule can be seen most clearly; the redistributive function of the *later possession rule* is justifiable on the basis that it recreates the effect of the *first possession rule*. It follows that the rule can be best justified by reference to the same reasons that were canvassed above in defence of the *first possession rule*.

One objection to this justification of B's general property interest is that it appears to lead the law to subscribe to a contradiction. To say that *both* A and B have standing to make decisions as to how a chattel is to be used appears to undermine their ability to make such decisions; in particular, it undermines the exclusivity of the owner's ability to decide how his or her chattel is to be used.[84] The better view, however, is that this is, upon proper analysis, no real objection. The owner's own legal interest is not undermined by the existence of B's general property interest. This is primarily for the simple reason that B's interest does *not* lead to a right to exclude A. A therefore remains, as a matter of law, entitled to pursue whatever goals A had adopted in relation to the chattel before B's taking possession of it. Indeed, B is subjected to duties owed to A not to tortiously interfere with the chattel; B's normative position – understood as an aggregate of B's rights and duties – is quite clearly of a different order to A's position, in that B is not free, as against A, to put the chattel to whatever use B may desire. So, while, from the perspective of C or D, B and A are normatively equal, this is not so all things considered. From the perspective of A, B is a potential wrongdoer like any other.

A number of other practical considerations confirm this point. First, B's right to exclude others will lead, indirectly, to a greater vindication of A's similar right.[85] This is so because, where C breaches a duty owed both to A and to B in relation to the chattel, B is able to bring a claim and obtain a remedy against C. B will then be forced to account over to A the value of that remedy.[86] Second, there is some authority that suggests that B will owe to A, in addition to duties of non-interference with the chattel, a positive duty to 'take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile'.[87] Third, one ought to bear in mind the parallel workings of the criminal law, which may consider certain actions of B to amount to a criminal wrong, and so worthy of penal sanction.[88] It is a denial to a charge of theft that the

[84] See, eg, Katz, 'Concept of Ownership' (n 29).

[85] It has even been argued by some commentators that B's general property interest is justified *because* it leads to a greater protection of A's ownership: see, eg, Gordley and Mattei (n 63) 332.

[86] Torts (Interference with Goods) Act 1977, s7.

[87] *Parker* (n 20) 1017.

[88] See Hickey, *Finders* (n 49) 152-56.

possessor genuinely believed that the true owner of the possessed chattel could not be found by taking reasonable steps.[89] The existence of this denial means that B is incentivised to take those steps, and so it is likely that a chattel in B's possession will be returned to its true owner.

3.3 Clarification

Now that we have in place a justification of the *later possession rule*, we can move on to ask what that justification has to say about the indeterminacies identified in section 3.1. It will be argued, first, that the *pro-persistence view* ought to be adopted, and, second, that the thief's general property interest is consistent with that justification.

3.3.1 Persistence

The *pro-persistence view* of B's general property interest ought to be adopted as the correct interpretation of English law. This view is a neater fit with existing law, is normatively more appealing than the alternative, and ensures that the *later possession rule* is relevantly consistent with the *first possession rule*. Each of these three points will be discussed in turn.

The first claim – that the *pro-persistence view* is a more elegant way of understanding existing, settled law – should be obvious from earlier discussion in section 3.1.2. To say that B acquires a general property interest that is the same as ownership (with the exception that B's right to exclude does not bind the owner) can easily rationalise those cases where B has been held able to bring a claim against another to whom B has voluntarily relinquished possession, or who has taken possession from B under a limited statutory authority. In each such case, B retains a right to exclude the world at large at the moment when C refuses to return the chattel that B previously possessed, or when D subsequently interferes with the chattel. These cases can then be understood as a straightforward application of the *later possession rule*, and do not need to be explained as being exceptional. Similarly, that B can alienate his general property interest makes perfect sense – since B's interest is not lost when B loses possession, the law is not forced into contortions to rationalise the mechanics of the transfer.

The second point in defence of the *pro-persistence view* flows from our adoption of the possessor's projects as the justification of the rule, and mirrors those argument made in

[89] Theft Act 1968, s2(1)(c).

response to the objection considered in 2.2.3.2, that the first possessor of an unowned chattel ought to acquire a mere usufructuary right and not one of ownership. Namely, the plans or goals that B may adopt and use the possessed chattel as a means to bring about are not necessarily limited by B's own physical possession of the chattel. Since people have reason not to interfere with B's plans – and so not to interfere with the chattel – even when B is not in possession of the chattel, it follows that B's right to exclude others from it ought not to be extinguished whenever B loses possession. Instead, B's general property interest ought to be extinguished whenever it is the case that B no longer has plans in relation to the chattel, and when the legal system can recognise this to be the case: that is, when B chooses to abandon his general property interest in the chattel.

The third, and related, consideration that shows that the law has good reason to adopt the *pro-persistence view* is that to do so would allow relevantly like case to be treated alike. From the perspective of C, there seems to be no difference of normative importance between a person, A, whose ownership arises as a result of the *first possession rule*, and B, whose general property interest arises from the *later possession rule*. Both legal interests arise in order that the person who holds their interest can pursue their goals in respect of the chattel free from the interference of others. Thus, if A becomes a chattel's *owner*, and so acquires a persistent proprietary interest of his own, then so too should B. Of course, one might object that this argument shows only that A and B ought to acquire the same interest, and not necessarily that A and B ought to acquire a *persistent* interest. This objection is a good one, but, when coupled with the points made above, both in Chapter 2 and in this chapter in sections 3.2.2 and 3.2.3, it can be seen that that law has good reason to achieve that consistency by awarding A and B persistent rights to exclude, and not simply rights to exclude that exist only while they remain in possession of, or while they are presently using, the chattel.

3.3.2 Theft

Of more difficulty is the case of *Thief*. Clearly, in this case, B has adopted goals or plans in relation to the chattel that B has stolen, and it seems that we plausibly have reason to give effect to those goals because B's own identity depends upon their fulfilment. It is, however, also clear that whatever goals that B has adopted are of less value – or are so in the eyes of the law – because those goals are necessarily incompatible with the stolen chattel's owner's, and because B has shown a disregard for that owner's goals.

Nonetheless, a relatively strong case can be made that our justification of the *later possession rule* suggests that there are good reasons for the law to recognise a general property interest in the thief. Two positive arguments to this effect can be made. The first, as we have seen, is that the thief will have goals that require the chattel in question for their fulfilment. To say that these goals are less valuable than those adopted by an innocent possessor is not to say that they are of *no* value in any and all cases. Second, a rule that distinguishes between thieves and innocent possessors will lead to a significant increase in costs.[90] In particular, such a rule would require courts to investigate the mental state of the possessor in order to determine whether they knowingly breached their duty owed to the chattel's owner, and, plausibly, whether the plans they have adopted in respect of that chattel are worthwhile. We can expect this process to be one considerably more difficult than an inquiry into whether B had custody and control of a chattel and the requisite intention to exercise that control for his own benefit.

In addition to these positive points, a number of negative arguments might be made that attempt to show that the recognition of a thief's general property interest will not necessarily lead to unwanted consequences.[91] First, the actions of the thief are, of course, likely to amount to a crime, and this brings with it the risk of penal sanction. It therefore seems unlikely to suppose that granting a thief a general property interest will lead to an increase in thefts as a general matter. Second, the thief is subject to a range of duties – owed both to the owner of the chattel and to the public at large – that determine that certain uses to which the thief might put the stolen chattel are unlawful (either amounting to tortious or further criminal wrongdoing). Third, statutory interventions have made the value of a general property interest considerably less. If the true owner is known at the time of trial, the wrongdoer will be able to raise the owner's legal interest as a defence to B's claim,[92] and, if the true owner is discovered later, the thief will have to hand over any damages awarded to him to the true owner.[93] A claim brought by an owner against a person who stole from that owner is also not subjected to a limitation period.[94] Fourth, the new duties that are imposed upon citizens, owed to B as a result of B's

[90] See, eg, SE Sterk, 'Property Rules, Liability Rules, and Uncertainty about Property Rights' (2008) 106 Michigan LR 1285, 1313-14; Merrill, 'Ownership and Possession' (n 72) 22. The point made here is that the award of a general property interest in a thief will lead to an increased informational burden on courts, not that it will lead to an increased informational burden on citizens. It has been argued that it is a desire to avoid burdens on citizens that justifies the thief's interest: MJR Crawford, *An Expressive Theory of Possession* (Hart 2020) 176-79. As I have argued in my review of Crawford's book, this argument is unconvincing: (2021) 84 MLR 923, 926.

[91] cf *Costello* (n 41) at [31] (the thief's title is 'of likely limited value').

[92] Torts (Interference with Goods) Act 1977, s8(1).

[93] ibid s7.

[94] Limitation Act 1980, s4(1).

taking possession of the chattel, are not particularly onerous. This is so because citizens already owe duties not to interfere with the chattel to its owner, and, given that it is often reasonable to assume that the possessor of a chattel is its owner, there is little informational cost that is imposed on citizens as a result of B acquiring a general property interest in *Thief*. Fifth, if it can be shown that B has in fact committed the crime of theft in taking possession of an owner's chattel, there exist a range of confiscatory powers that might be exercised to divest B of possession.[95]

Taken together, these points suggest that the orthodox understanding of the law, that a thief does acquire a general property interest, may well be justifiable. It is only in relatively rare cases where that interest will be of any real value to B, and, even where this is so, the law does have some good reasons to recognise that B has been wronged by a person who interferes with the chattel.

3.4 Conclusion

The primary aim of this chapter was to clarify the nature of the legal interest that is acquired when a person takes possession of a chattel that is owned by another. In order to do so, the reasons that the law has to afford this possessor any sort of right to exclude others from the possessed chattel were considered, and a justification that centres on the possessor's (non-legal) interest in pursuing goals was offered. That justification suggests that the *pro-persistence view* is to be preferred.

[95] See, eg, Proceeds of Crime Act 2002.

4. LEGAL MIXTURE

The purpose of this chapter is to offer an account of the causative event of 'legal mixture', which will take place where chattels that are owned by A are intermingled with identical chattels that are owned by B,[1] such that it becomes impossible to determine which party owned any particular chattel before the mixture. The chapter consists of two main sections. The first section aims to describe, as accurately as possible, the response of English law to the event of legal mixture. The event is defined, and three classes of legal mixture are considered: accidental or consensual legal mixtures of chattels, legal mixtures of chattels brought about by the wrongdoing of one of the contributors to the mixture, and legal mixtures of cash. There are two plausible interpretations of the law that have been argued for in the literature. The first is the *co-ownership view*, which claims that A and B acquire new legal interests in relation to the mixed mass, becoming tenants in common of each and every constituent part.[2] The second view – the *continuing ownership view* – instead claims that A and B retain ownership of whatever chattels they owned before the legal mixture took place. It will be argued that both views have a degree of fit with the cases, but that neither can be decisively proven to be an accurate description of English law.

It follows that this chapter also aims to serve a clarificatory purpose, by prescribing which of those two views ought to be adopted. This is the aim of the second section. As explained in 1.2.3, this is to be done by asking which of those views the law would do better to adopt. It will be argued below that both views are instrumentally justifiable, because both work to bring about states of affairs that appear to be equally desirable. However, it is further argued that the law does nonetheless have good reason to prefer the *co-ownership view*, because that view would render the law more intellectually satisfying than would the *continuing ownership view*. It is demonstrated that this view is compatible with existing legal materials governing each class of legal mixture.

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[1] For the purposes of this chapter, I focus on the case where the legal interests that are held by A and by B are ownership of the mixed chattels, rather than a lesser general property interest like that of a finder of a lost chattel. The conclusions reached, however, suggest that a similar solution ought to govern cases of that sort.

[2] I leave to one side the possibility that the contributors become joint tenants of the mixed chattels. 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, too, 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.

4.1 Description

This section offers a description of the rules of English law governing legal mixtures.

4.1.1 The Event

There are two important points that emerge from the literature and that must be explained here. The first is that it should be stressed that a given event only amounts to a 'legal mixture' where there exists an *evidential* difficulty in determining the mixed chattels' owners. Thus, the term does not neatly align with lay understandings of the word 'mixture', nor with all uses of the term that exist in academic writing. The second is that English law does not follow Roman law in drawing a distinction between rules of *confusio* and *commixtio*, which governed, respectively, so-called 'fluid' and 'granular' mixtures. This is a distinction that is sometimes drawn in the literature on English law, but this ought no longer to be done. The distinction is not followed in the case law and adds nothing to a normative analysis of the law.

4.1.1.1 The Definition of a Legal Mixture

A 'legal mixture' will occur where A's chattels are intermingled with B's in such a way that it is impossible to prove to whom any given chattel in the resultant mass belongs. A clear example is provided by *Gill & Duffus v Scruttons*.[3] 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*.[4] 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 markings washed off. It was, therefore, impossible to determine who had, prior to the ship's foundering, ownership of any particular unmarked bale.

[3] [1953] 1 WLR 1407.

[4] (1868) LR 3 CP 427.

It is important to note that there will only be a legal mixture – on the definition used in this thesis – 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', there will be no change in the parties' legal interests in relation to the chattels. 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. This point is shown by *Colwill v Reeves*.[5] 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 chattels. 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 a right that they not physically interfere with 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 they would no longer be distinguishable from one another.[6] It was therefore possible that the defendants could have 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 'mixture' of sorts,[7] but no legal mixture, because the evidential difficulty with which we are presently concerned did not arise. The proprietary interests of the parties therefore remained unchanged in relation to those bales.

4.1.1.2 Two Kinds of Legal Mixture?

A purportedly useful distinction is often drawn between 'granular' and 'fluid' legal mixtures.[8] In a granular legal mixture – as in the above cases *Scruttons* and *Spence* – individual, separable chattels are mixed. The mixture itself creates purely evidential difficulties, and has no further effect on the individual chattels 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

[5] (1811) 2 Campbell 575.

[6] ibid 576-77. Pieces of furniture would have been made individually at that time, and so each would possess 'individual characteristics'. This is now less likely given 'modern methods of mass production': P Birks, 'Mixtures' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd ed, LLP 1998) 244.

[7] Elsewhere, I have used the term 'factual mixture' to describe those cases where chattels have been intermingled, but where there need not be a legal mixture because the evidential difficulty with which we are here concerned may not arise: A Waghorn, 'Sorting Out Mixtures of Property at Common Law' (2021) 84 MLR 61, 64.

[8] See, eg, Birks (n 6).

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 oil 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 *commixtio* – granular legal mixtures – and *confusio*, cases of fluid legal mixtures.[9] 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*'.[10] 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.[11] 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.[12] 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 legal interests of the parties occurred, because the individual grains or sheep were said to 'continue to exist in their own separate entities'.[13]

It appears then, that, for the Romans, a change in the ownership interests of the parties was thought to be 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 thing: one mass of oil, where before there had been two. It would be 'utterly meaningless' to think of 'existing rights' continuing through the legal mixture in such a case, in much the same way as it would appear to be meaningless to talk of rights in the ingredients continuing to exist after the baking of a cake.[14] 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

[9] See, eg, JAC Thomas, *Textbook of Roman Law* (North Holland 1976) 169; WW Buckland, *A Textbook of Roman Law* (3rd ed, CUP 1963) 208-09.

[10] RWJ Hickey, 'Dazed and Confused: Accidental Mixtures of Goods and the Theory of Acquisition of Title' (2003) 66 MLR 368, 370 (emphasis added).

[11] Birks (n 6) 232.

[12] J.2.1.27.

[13] J.2.1.28.

[14] Hickey (n 10) 381. cf D Hume, *A Treatise of Human Nature* (1739, DF Norton and MJ Norton (eds), 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').

as necessarily becoming a single entity. Because there was no such change, the Roman jurists saw no need to alter the ownerships of the parties.

Given the scientific knowledge of the Roman jurists, this division appeared sensible and rational. We should, 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'.[15] This is because a legal mixture of fluids does, in fact, behave in the same way as a legal 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.[16] Certainly, that it was practically impossible to restore contributors to a legal mixture to their original positions was not seen as an issue, or else even legal mixtures of grain 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 that demands the law to draw a distinction between *confusio* and *commixtio*. If this is done, it can only be for some other reason.

4.1.2 Accidental and Consensual Legal Mixtures of Chattels

We can now move on to ask what the effect of a legal mixture is in English law. As mentioned above, there are two competing interpretations of the law in the literature: the *co-ownership view* and the *continuing ownership view*. In this section, I consider the state of the law in relation to the particular problem of legal mixtures of chattels that are brought about by accident, or by consent where the agreement of the contributors does not determine the legal interests of the parties.

[15] Birks (n 6) 234.

[16] ibid.

4.1.2.1 Rejection of the *Res Nullius* Solution

First, however, it is useful to note the explicit rejection by English courts of the claim that a legal mixture will render the mixed chattels unowned by anyone, *res nullius*. In *Buckley v Gross*,[17] 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 in purchasing the tallow from the police.[18] 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'.[19] Similarly, Crompton J argued that it could not be sustained that a 'third person does not commit a crime in taking' mixed chattels.[20] This reasoning was later endorsed, *obiter*, by Lord Sumner in the House of Lords in the case of *Sinclair v Brougham*,[21] where it was explicitly asserted that mixed chattels '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'.[22]

[17] (1863) 3 B&S 566.

[18] For discussion of this particular aspect of the case, see 3.1.2.

[19] *Buckley* (n 17) 575.

[20] ibid 574.

[21] [1914] AC 398, 459.

[22] *Spence* (n 4) 437. See, to similar effect, *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680 HL, 695, per Lord Moulton.

4.1.2.2 The *Co-Ownership View*

In cases of accidental and consensual mixtures, a co-ownership rule is often said to apply.[23] This has been baldly stated in a number of leading recent decisions where parties have consensually mixed their chattels. In *Mercer v Craven Grain*,[24] 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 for D's failure to return the full amount. In response, D sought to argue that C had lost their ownership of 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 ownership of 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 proportion to their respective tonnages'.[25] This argument was made without the citation of any authority. The same solution was endorsed on the similar facts of *Glencore v MTI*.[26] C had deposited a quantity of oil for storage with D. D stored that oil in a legal mixture with oil deposited by others,[27] 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 reasoned 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'.[28]

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

[23] 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.

[24] [1994] CLC 328.

[25] ibid 329.

[26] [2001] 1 Lloyds Rep 284.

[27] The legal mixture in issue here consisted of a mixture of oil of the same grade. The case also considers the effect of the mixture of oils of different grades, where that mixture creates a new thing: see 6.1.2.2.

[28] *Glencore* (n 26) at [159].

the House of Lords. In *Sandeman v Tyzack*,[29] 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'.[30] Similarly, in *Sinclair v Brougham*,[31] Lord Sumner approvingly quoted the view expressed by Blackburn J in *Buckley v Gross* that the effect of an accidental legal mixture would 'probably' be to 'make the owners tenants in common in equal portions of the mass'.[32]

The leading case where the *co-ownership view* was accepted is *Spence v Union Marine*,[33] which concerned a legal mixture of unmarked bales of cotton. 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 remaining mass of 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.[34]

The same result has been applied in the *Indian Oil* case, albeit a case of a legal mixture brought about by wrongdoing.[35] There, D wrongfully mixed his oil 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

[29] *Sandeman* (n 22).

[30] ibid 695-96.

[31] *Sinclair* (n 21) 459.

[32] *Buckley* (n 17) 574.

[33] *Spence* (n 4).

[34] ibid 437-38 (emphasis added).

[35] *Indian Oil Corp v Greenstone Shipping Co SA* [1988] QB 345. 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. See further 4.1.3 below.

they cannot in practice be separated, the mixture is held in common'.[36] 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 the mixture is fluid or granular.[37] 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.

4.1.2.3 The Defence of the *Continuing Ownership View*

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 each co-owner's contribution to the mixed mass. Thus, read at face value, the case law seems clearly to support the *co-ownership view*. Some commentators, however, reject this analysis of the law, and instead endorse the *continuing ownership view*. By far the most detailed defence of this interpretation of the law is that offered by Lionel Smith.[38] In a case of legal 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'.[39] The process of following is not concerned with the assertion of *new* proprietary interests, 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:

> *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.

[36] ibid 370.

[37] For this reason, most leading textbooks on personal property law endorse the *co-ownership view*: see, eg, AP Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989) 72; WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.443; M Bridge et al, *The Law of Personal Property* (2nd ed, Sweet & Maxwell 2018) 16.017; M Bridge, *Personal Property Law* (4th ed, OUP 2015) 134; D Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 28.

[38] L Smith, *The Law of Tracing* (OUP 1997). Others have endorsed the *continuing ownership view*: eg C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) 7.20; S Worthington, 'The Myth of Common Law Tracing' in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart 2020) 324. Samuel Zogg appears to adopt a hybrid view. He accepts Smith's arguments, considered below, but concludes instead that A and B acquire genuine, but 'mutated', co-ownership interests: S Zogg, *Proprietary Consequences in Defective Transfers of Ownership* (Intersentia 2020) 32-35.

[39] Smith (n 38) 71.

According to the *co-ownership view*, A and B become tenants in common of each and every sheep present in the mixture. Their legal interests have changed, and the legal mixture acts as a causative event bringing about new interests 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. A is said to be 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, therefore, as a matter of law, no change to the ownership interests of A and B brought about by the mixture.

Smith's argument is made up of two key steps. First, he claims that the substantive rules that English law applies to cases of legal mixtures are not consistent with those rules governing tenancies in common. Second, he claims that – given that the response to a legal mixture is not to recognise a tenancy in common between the parties – the only options that the law might adopt in response to the legal mixture are either to endorse the *continuing ownership view* or to 'give up' in the face of an accidental legal mixture:

> 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.[40]

It is the first step that is crucial for present purposes. It is only if Smith's claim that the substantive rules of law that govern a mixed mass are inconsistent with the view that the mass is the subject of a tenancy in common that Smith's argument can work. Otherwise, it might be the case that A and B become tenants in common of the mixed sheep; if so, it cannot be said that the law has 'given up' on them in any plausible sense.

[40] ibid 72 (emphasis in original).

Smith makes a number of arguments that purport to show that A and B are not truly co-owners of each individual sheep.[41] Each will be discussed in turn.

(1) *Unilateral partition*. First, he 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 the mixed mass. 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.[42] It is odd to suppose that the weight of these comments should outweigh those numerous, explicit acceptances of a tenancy in common.[43] 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'.[44] 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. This was the interpretation of that comment initially endorsed by Birks.[45]

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, because no reasonable party could justifiably reject this arrangement.[46] This appears to be the most natural interpretation of the statement of Bovill CJ in *Spence*, on which Smith also relies in favour of a unilateral power of partition:

[41] ibid 75-76.

[42] See too M Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018) 2.44.

[43] See, eg, text at n 32 and n 34 above; *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.

[44] *Indian Oil* (n 35) 370-71.

[45] P Birks, 'Mixing and Tracing' (1992) 45 CLP 69, 74-75.

[46] This was Birks' rationalisation of *Re Stapylton Fletcher* (n 43). In this case, purchasers bought wine from the general stock of a company. The company would store a mass of purchased bottles together in a legal mixture, and it was reasoned that this led to those purchasers co-owning each and every bottle of wine stored in that mixture. In order to deliver those bottles to the individual purchasers, a division of the bottles was obviously necessary, so that the bottle could be withdrawn from the mixed mass and sent to the individual purchasers. Given his acceptance of a rule preventing unilateral partition of a co-owned mass, Birks argued that this was explicable on the basis of an inference that all co-owners consented to deliveries of this sort: Birks (n 6) 235.

> 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.[47]

It follows that there is insufficient evidence from these statements alone to establish that this power exists such that the legal interests of A and B in *Sheep* cannot be conceptualised as those of co-ownership.

One might also doubt Smith's argument because it must rely on the existence of a second rule of law, which holds that a mass of chattels subject to a tenancy in common cannot be unilaterally partitioned by a single co-owner. If no such rule exists, that contributors to a legal mixture may partition the mass unilaterally must tell us nothing at all about the nature of the interests that they hold in the constituent parts of that mass.

Although accepted by some commentators,[48] it has been argued that the existence of this rule in English law 'is not entirely clear' and that it is likely to cause 'problems in ordinary commerce' where it appears sensible to allow co-owners to divide a co-owned mass without seeking the consent of the other co-owners.[49] Otherwise, it would appear that in those cases where no co-owner's interest is of a great enough proportion to be able to ask a court to order a division under s188 of the Law of Property Act 1925, and where a single other co-owner refuses to accept a partition, the other co-owners have little choice but to partition the co-owned mass in any case and to commit a legal wrong in doing so. As we have seen, the way to avoid this problem is to invoke a doctrine of 'deemed consent', whereby a co-owner is, in effect, permitted to unilaterally partition a co-owned mass of chattels because no reasonable party could fail to agree to a division that respected the proportions in which the co-owners hold the mixed mass. This move is not necessary if we simply accept that one may unilaterally partition a mass of chattels that is subject to a tenancy in common.

(2) *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, despite the existence of a common law rule which prevents co-

[47] *Spence* (n 4) 437.

[48] See, eg, Birks (n 6) 237-38; P Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (Clarendon 1995) 44; Zogg (n 38) 33-34.

[49] Bridge et al (n 37) 19.028. Swadling similarly says that 'there seems to be very little law in this area', and offers no view as to the existence of a power of unilateral partition: Swadling (n 37) 4.392.

owners from successfully suing each other for disposing of the common property.[50] This common law rule has now been removed by statute.[51]

Smith's argument relies primarily on the authority of *Jackson v Anderson*.[52] 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 tort 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 dollars that had been sold 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'.[53]

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.[54] 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 for disposing of the co-owned mass except where there had been a destruction of that mass. 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

[50] '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.

[51] Torts (Interference with Goods) Act 1977, s10.

[52] (1811) 4 Taunt 24.

[53] ibid 30.

[54] Most notably, Birks (n 6). See further the works cited at n 97 below.

mass of dollars. Due to statutory intervention in England,[55] the bar has been removed and therefore the authority of *Jackson* is considerably weakened.[56] In fact, in the New Zealand case of *Coleman v Harvey*,[57] 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.[58]

(3) *Remedies*. Suppose, in *Sheep*, that C takes all twenty sheep, and is subsequently sued by A in tort. 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 view*: it follows that A will receive compensation for ten sheep, and C will remain entitled to possess the remaining ten sheep (as against A).[59] 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 interest. Here, A ought to be awarded compensation 'relating to the *value* of his interest' in the mixed mass of sheep.[60] 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,[61] or that A account to B for his proportion of the damages award.[62]

It follows that Smith provides no entirely convincing reason to suppose that the *co-ownership view* must be an inaccurate description of the law, particularly given the explicit acceptance of

[55] Above, n 51.

[56] Birks argues that the statutory removal of the bar has 'removed' this reason in favour of continuing ownership: Birks (n 6) 246.

[57] [1989] 1 NZLR 723.

[58] 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.

[59] Smith (n 38) 76.

[60] J Hill and E Bowes-Smith, 'Joint Ownership of Chattels' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd ed, LLP 1998) 261 (emphasis added).

[61] Torts (Interference with Goods Act) 1977, s8.

[62] ibid s7.

that analysis of the law in much of the leading recent case law. Once that claim is dismissed, the force of the *continuing ownership view* 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. It is the aim of section 4.2 to resolve this debate.

4.1.2.4 Paul Matthews' Hybrid Account

There is one further account of the law governing accidental legal mixtures that ought to be considered, which has been defended by Paul Matthews.[63] Matthews argues that the legal interests of the contributors to the mixed mass will depend upon whether one of the contributors to it is in possession of the mass. Where this is the case, argues Matthews, the result will be continuing ownership; on the other hand, if the mixed mass is in the possession of a third party, the contributors become co-owners of the mass. The latter position is demanded by the cases discussed in 4.1.2.2 above, each of which concerned the issue of the interests of the contributors to a legal mixture where the mixed mass had found its way into the hands of a third party.

Two cases, however, prevent Matthews from endorsing the *co-ownership view* in its entirety as a description of the English law governing accidental legal mixtures of chattels. The first is *Jackson v Anderson*.[64] We have, however, already noted a number of reasons to doubt the force of *Jackson*.[65] Namely, the reasoning of the case can be limited only to legal mixtures of money, and the outcome of the case could be reached on similar facts without necessarily rejecting the view that A and B become co-owners of a mixed mass.

The second case on which Matthews relies is *Wiles v Woodward*.[66] In that case, A and B were co-owners of a mass of paper, and executed a deed by which they claimed to have divided the co-owned mass into two separate quantities, each of which was owned separately by A and by B. A then later refused to deliver the agreed quantity of paper, and attempted to defend

[63] P Matthews, 'Proprietary Claims at Common Law for Mixed and Improved Goods' (1981) 34 CLP 159, 163-71. See too Matthews, 'Common Law Tracing' (n 48) 42-45.

[64] *Jackson* (n 52).

[65] Above, pp 109-10.

[66] (1850) 5 Exch 557.

himself against the claim brought by B on the basis that A and B were, in fact, co-owners of the paper. Parke B held that A could not invoke this co-ownership defence:

> A recital, when it is of a fact agreed upon by both, binds both… It is, therefore, an estoppel on both. The parties have agreed with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and part to the stipulated amount delivered to the plaintiff; and being in that situation, the question is what their respective rights are.[67]

Parke B then went on to consider what would have happened had A converted only a part of the mass of paper:

> If there had been a conversion of part only by the defendant, it would have been impossible, notwithstanding that agreement, to have said that the particular portion mentioned in the declaration was set apart for the plaintiff, and the plaintiff could not have recovered; he would have been in the same position as if, after the paper had been delivered, he had so confused it with the rest of the stock of paper as to make it impossible to ascertain it, and he could not have recovered for that conversion; but if the whole of the paper is converted the same difficulty does not arise, for there the part belonging to the plaintiff, whatever it is, must have been converted.[68]

Given that the whole of the mass of paper had been detained by A, it followed that there was no such problem, and so A was held liable to B. Matthews concludes that this amounts to 'direct authority *against* co-ownership of a mixture of separate goods in the hands of one of the owners'.[69] This appears to be because he endorses the view that A and B, by virtue of estoppel, were 'to be treated as contributors to a mixture',[70] and so, because legal mixtures lead to continuing ownership where the mass is in the possession of a contributor, A and B were to be treated as if they owned separate quantities of paper within the mass.

This interpretation of *Wiles* overstates the authority of the case in the context of legal mixtures, because Parke B does not make the argument Matthews attributes to him. Instead,

[67] ibid 563-64.

[68] ibid 564.

[69] Matthews, 'Proprietary Claims' (n 63) 171.

[70] Matthews, 'Common Law Tracing' (n 48) 44.

the better view is that Parke B argued that: (1) A was estopped, because of the deed, from denying that the mass had in fact been divided into two separate quantities, owned individually; and that (2) this meant that the deed created the same effect as would have occurred if chattels initially owned by A and by B had been subject to a legal mixture. Undeniably, (2) amounts to an endorsement of the *continuing ownership view*. However, it is not the case that Parke B relies upon a rule of law which states that, by virtue of the estoppel, A and B were to be treated as if they were contributors to a legal mixture. Instead, A and B were prevented, by virtue of the estoppel, from arguing that they did not individually own separate quantities of paper. Parke B simply *compares* the effect of (1) to the effect of legal mixtures. It follows that his endorsement of the *continuing ownership view* as an interpretation of the law governing legal mixtures was *obiter*. *Wiles* is authority for a rule of law which governs attempts to divide a mass of chattels that is subject to co-ownership, but the case is not authority for anything more.

It follows that we are not compelled to endorse Matthews' hybrid view as a descriptive account of the law. Nonetheless, the arguments considered above equally do not prove that the view must be false. Again, then, we must be willing to fall back onto some form of clarificatory argument to determine whether the account should be accepted. It is argued below, in 4.2.1.3, that the account is normatively unappealing.

4.1.3 Wrongful Legal Mixtures of Chattels

There was a time when it was accepted orthodoxy that a legal mixture brought about by the wrongdoing of one of the contributors would lead to that contributor forfeiting any and all rights in relation to the mixed mass of chattels. Blackstone, for example, wrote that:

> [I]f one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge… our law, to guard against fraud… gives the intire property, *without any account*, to him, whose original dominion is invaded, and endeavoured to be rendered uncertain, without his consent.[71]

Call this the *forfeiture rule*. The *forfeiture rule* has received some judicial endorsement. In *Sandeman*, Lord Moulton argued that it was undoubtedly the law that, where A's goods are

[71] 2 Bl Comm 405 (emphasis added).

mixed with B's, and 'the mixing has arisen from the fault of B, A can claim the goods'.[72] Authority for the rule was said to come from Blackstone, as well as a number of older cases.[73]

There is an immediate problem that needs to be addressed, which is the meaning of the term 'wrongful' in the application of this rule. There are two plausible interpretations which might be adopted. First, the *forfeiture rule* might apply where B *breaches a duty* owed to A in mixing their chattels together. B may do so even where he mixes A's chattels with his own in the reasonable belief that he owns those chattels, because conversion is a tort of strict liability.[74] Second, the rule might apply where B is in some sense *blameworthy* or at fault for the occurrence of the mixture. This seems to have been Blackstone's view. This is a considerably higher bar than the first sense of 'wrongful', and necessarily imports an element of uncertainty into the rule; there are many shades of 'fault' that might be set as the threshold for the rule's application, and it is not easy to distinguish between them on any given set of facts. Is it sufficient, for example, that A suspects that the chattels that he is mixing belongs to B, but A does not make any enquiries to discover whether this suspicion is correct?

It is also worth noting two ways in which a forfeiture rule might be said to work apparent injustice. The first turns on the *degree of fault* required for the rule to come into effect. It is undeniable that a strict application – such as that which demands only a breach of duty owed to the innocent party – could work injustice in certain cases, where we could not expect the tortfeasor to know of her breach, for example if she reasonably believed all the chattels to be hers. The second turns on the *quantity of property* that is mixed by the wrongdoer. A legal mixture may consist of a large amount contributed by the wrongdoer, and only a very small amount taken from the innocent party; the *forfeiture rule*, if strictly followed, would lead to the forfeiture of the wrongdoer's ownership in any case. This second point was of concern to Lord Moulton in *Sandeman*, who, despite endorsing the *forfeiture rule*'s existence, worried that in 'extreme cases' the rule would lead to 'substantial injustice' and so ought to be disapplied.[75] Where a wrongdoer, B, mixes only a very small amount of A's chattels with his own, the law would be fairer, he argued, were B to become owner of the mass, liable to A for converting his chattels, rather than stripping B of any and all rights in relation to the mixed mass.

[72] *Sandeman* (n 22) 695.

[73] *Warde v Aeyre* (1613) 2 Bulstrode 323, 80 ER 1157; *Lupton v White* (1808) 15 Ves Jun 432.

[74] 'Consistently with [conversion's] purpose of providing a remedy for the misappropriation of goods, liability is strict': *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 (HL) at [78], per Lord Nicholls.

[75] *Sandeman* (n 22) 695.

These doubts motivated a substantial reassessment of the rule in *Indian Oil*.[76] The defendants' vessel had been chartered by the claimants to transport a quantity of their crude oil from Russia to India. The defendants mixed the oil with their own, which was already on board the ship. It is not precisely clear what kind of wrongfulness was at issue. Staughton J claimed that there was 'no more than a hint' that the legal mixture had been brought about deliberately for some commercial motive.[77] The defendants later failed to deliver the full quantity that the claimants had consigned, and so were liable to pay damages for that short delivery (approximately $46,000). The claimants, however, sought to take advantage of Blackstone's *forfeiture rule*, and argued that they were in fact entitled – as legal owners – to delivery of the entire quantity of oil on board the ship, the value of which was considerably more than their original consignment ($388,000).

The claimants' argument was dismissed. This was a clear example of the second kind of injustice at work, one of the 'extreme cases' about which Lord Moulton had worried in *Sandeman*. Rather than adopting a qualified forfeiture rule, which would only result in ownership of the entire mass vesting in the innocent party where the quantity mixed was not such that forfeiture would lead to injustice, Staughton J preferred to adopt a simple and clear rule to govern all cases.[78] The choice was between a strict rule of forfeiture, and the co-ownership rule that, it was thought, governs accidental and consensual legal mixtures. For several reasons, Staughton J argued that the latter was preferable.

First, where the wrongdoer had created uncertainty as to the quantities of each contribution to the legal mixture, the least favourable outcome that fit the existing evidence would be presumed against him.[79] This rule would be sufficient to act as a deterrent to those who would wrongfully mix others' chattels with their own.

Second, it was said not to be 'the function of civil justice to punish or discourage crime by awarding the victim more than he has lost'.[80] Where – as in *Indian Oil* – we know the quantities of each contribution to the mixture, it was thought to be unjust to grant the innocent party a windfall where his prior ownership could be protected through a tenancy in common. This

[76] *Indian Oil* (n 35).

[77] ibid 356-57.

[78] ibid 367D.

[79] *Armory v Delamirie* (1722) 1 Str 505. In that case, D was held liable for refusing to return the jewel in a ring handed over to D by C. The jewel could not be found, and so could not be accurately valued. It was held that damages would be assessed assuming the jewel to be the finest jewel that could fit in the ring's empty socket.

[80] *Indian Oil* (n 35) 369D.

point was particularly stark on the facts of *Indian Oil*, where the claimants sought to claim ownership of a quantity of oil that was more than eight times the value of the damages award to which they were otherwise entitled.

Third, and relatedly, the *forfeiture rule* was thought to work too harshly on the wrongdoer, and too bluntly to provide justice in any given case. For the rule to be satisfactory, it would need to take into account, amongst other things, the level of fault of the wrongdoer and their motive for the mixing.[81] This would render the rule radically uncertain.

Fourth, and finally, Staughton J suggested that 'modern and sophisticated methods of measurement' meant that it would be considerably less likely that a case would arise where the quantities of each contribution could not be known than it would have been when the rule was first established. That was a time where a 'primitive' rule was 'the best that the law could find', because juries and witnesses might be 'illiterate or ignorant'.[82] In effect, the strict *forfeiture rule* of the past was best regarded as always being an application of the rules of evidential presumptions against the wrongdoer. Because of the lack of sophistication of the parties, in almost all cases the wrongdoer would be unable to establish his own contribution, and so the rule had worked in effect as one of forfeiture.

It follows that a wrongful legal mixture will be treated in the same way as an accidental one. Staughton J clearly considered that the contributors would become tenants in common of the mixed mass of oil. This is the interpretation of the law accepted in most of the leading textbooks on personal property law,[83] and has been endorsed in case law subsequent to *Indian Oil*.[84] This is so regardless of the sort of 'wrongdoing' that is in issue, whether that be a breach of a (strict) duty or blameworthy conduct.[85] Staughton J argued that it ought to 'be one rule for all cases', and that the same rule ought to apply both 'where [the defendant] deliberately mixes the property with a view to stealing it' and 'where [the defendant] does so purely for convenience of carriage without any intention to harm anybody'.[86] It follows that all kinds of wrongful legal mixture are to be treated in the same manner.

[81] ibid 370A.

[82] ibid 370E-G.

[83] See, eg, Bridge et al (n 37) 16.026; Swadling (n 37) 4.443.

[84] eg *Glencore* (n 26) at [159].

[85] It has been (incorrectly) suggested that Staughton J understood wrongfulness only in the sense of a breach of duty: I Brown, 'Admixture of Goods in English Law' [1988] LMCLQ 286, 288.

[86] *Indian Oil* (n 35) 370C.

4.1.4 Legal Mixtures of Cash

It has been argued that legal mixtures of cash may lead to a different result than a legal mixture of ordinary chattels. Some commentators endorse the interpretation of the law that a legal mixture of chattels will lead to co-ownership, but that a legal mixture of cash will lead to continuing ownership.[87] The purpose of this section is to set out the doctrinal arguments that have been made in the existing literature in relation to legal mixtures of cash, and to assess those arguments as a matter of their doctrinal potency. It is argued that no single existing interpretation can be decisively be proven to be correct as a matter of existing law, but that at least one popular interpretation of the law is demonstrably flawed and so should be rejected.

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 thesis.

There are at least four competing accounts of the proprietary effect of 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 v Anderson*,[88] the facts of which have been outlined above. Importantly for our purposes, recall that C's Spanish dollars were mixed with D's, and that C was able to bring a claim in tort against D for the subsequent sale of those dollars. This was so despite the received wisdom that a common law rule existed which prevented one co-owner from suing the other where there had not been a destruction of the co-owned property. The

[87] eg Swadling (n 37) 4.443, n 649.

[88] *Jackson* (n 52).

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 an account of legal mixtures of cash must deal is the established common law rule that a legal mixture of money defeats the 'common law tracing' exercise.[89] 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, A can now claim some sort of proprietary interest in the book itself. This cannot be done, however, in a slightly different case, where there has been a mixed substitution of money.[90] 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 proprietary interest in the book.

The important question for our purposes is what interests of ownership – if any – exist in relation to those four notes in B's wallet. Call this legal mixture *Wallet*. Most accounts of those interests take the form of 'logical inferences' drawn from our two classes of case.[91] There are four such accounts in the literature.

(1) *Ownership extinguished*. The most straightforward account of the effect of a legal mixture of cash is that the party whose cash has been mixed loses the ownership they had over it. This appears to be the view of Lord Goff, who suggested in *Lipkin Gorman v Karpnale* that 'at common law, property in money, like other fungibles, is lost as such when it is mixed with other money'.[92] The same view is endorsed by Graham 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'.[93] If this view is correct, the rule that no new proprietary interests follow from a mixed substitution is easily explained: A has no proprietary interest in any of the four notes in B's wallet, and so can have no such 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 v Anderson*; if C did not have ownership of the dollars

[89] This rule is said to be derived from *Taylor v Plumer* (1815) 3 M&S 562. It has since been reaffirmed in recent case law: eg *Agip (Africa) Ltd v Jackson* [1991] Ch 546, 566.

[90] See 1.1.2.1.

[91] Birks (n 6) 242.

[92] [1991] 2 AC 548, 572D.

[93] G Virgo, *The Principles of the Law of Restitution* (3rd ed, OUP 2015) 615.

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 problems in its application. It is not clear how the law is to determine whose ownership – 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 ownership stem from his earlier ownership of three of the notes, or from his possession of the mass? If the latter, it surely follows that legal mixtures of cash may become unowned. Where A's and B's cash is mixed without either being in possession of the mixed mass, does the mass belong to A or to B? It seems implausible that the cash becomes unowned, since that would allow a third party to take it without committing any legal wrong. Such an outcome has been dismissed as unacceptable, in the context of ordinary chattels, in a number of cases.[94] 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 proprietary interests. 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.[95] One way around this issue may be to treat a legal mixture of cash as an example of *accession*;[96] the party whose contribution to the mixture is the lesser loses their ownership, 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.

It follows from this discussion that the *ownership extinguished* account of legal mixtures of cash should not be accepted.

(2) *Continuing ownership*. A more plausible account is offered by Birks.[97] 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 wallet and exchanges it for a book, A must prove that it was *his* note that was used in the exchange in order to be able to claim a new

[94] See 4.1.2.1 above.

[95] R Goode, 'The Right to Trace and its Impact in Commercial Transactions' (1976) 92 LQR 360, 394.

[96] See 1.1.2.2.

[97] Birks (n 6) 239-42. See too J Ulph, 'Retaining Proprietary Rights at Common Law Through Mixtures and Changes' [2001] LMCLQ 449, 455; S Gleeson, *Personal Property Law* (Pearson 1997) 60-63.

interest in relation to the book. Where the notes are indistinguishable from one another, A will be unable to do so.[98] Similarly, were C to take one note out of B's possession, A will be unable to bring a claim against C for taking that 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 over which A had ownership. There is no evidential problem here, and so C will be liable to A for disposing of his note. However, it should be noted that an important practical consequence follows in the context of common law tracing.[99] 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 that A's note has made to its purchase. It is, however, questionable whether the law allows A to do this. There appears to 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.[100] It is, therefore, plausible to suppose that in such a case tracing will not be possible, and A will be unable to claim an interest in relation to the wine. If so, we have reason to doubt the accuracy of *continuing ownership*.

(3) *Hybrid account*. David Fox has attempted to incorporate the outcome of *Jackson* into the *ownership 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 ownership of his money survives within a legal mixture 'for a time'.[101] The liability of the defendant in *Jackson* means that the claimant's ownership must still have existed at the time when the defendant took the entire mass of dollars. Nonetheless, Fox argues, A's ownership 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,

[98] 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 mixed substitutions, while still holding that legal mixtures of cash lead to continuing ownership: Goode (n 95) 395-96.

[99] Birks (n 6) 241.

[100] For the clearest statement of this view, see J English and MJ Hafeez-Baig, *The Law of Tracing* (Federation Press 2021) 4.16. See too, eg, *Shalson v Russo* [2003] EWHC 1637, [2005] Ch 281 at [103], per Rimer J.

[101] D Fox, *Property Rights in Money* (OUP 2008) 7.22.

> 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.[102]

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 *ownership extinguished* argument. By what logic can we rationalise relegating the interests of A and B to purely personal rights because of the wrongdoing of a third party? The second, more important, difficulty with the *hybrid* account of the law is that it is conceptually flawed. Fox claims that A's ownership 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 whether a certain duty has been breached that that duty no longer exists. It is more plausible to suppose that the duty in question – the duty that the world owes to A not to interfere with his note – continues to exist. For this reason, we have some reason to prefer Birks' *continuing ownership* account as the explanation of the common law's inability to allow claims to substitute chattels after mixed substitutions of cash.

(4) *Co-ownership*. There is one further plausible interpretation of the legal interests in *Wallet*. This is that A and B are co-owners of each note, in proportion to their respective contributions to the combined mass.

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 view* in relation to legal mixtures of cash. First, the force of the court's logic in *Jackson* can be doubted. As discussed above,[103] the court's reasoning was necessary to avoid the common law bar preventing co-owners from bringing claims in tort 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.

The second class of authority which poses difficulty for a co-ownership rule are those cases which suggest that tracing at common law is not possible after a legal mixture. Birks argues that the inability of the common law to trace through a mixed fund is 'incompatible' with a

[102] ibid 7.21.

[103] Above, pp 109-10.

rule of co-ownership of cash.[104] Were the notes co-owned in *Wallet*, A would have a legal interest in *each* note. It follows that, were B to use a single note to purchase a book, the law could allow A to trace into the book, because there can be no doubt of the interest A held in the note with which the book was acquired. 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.[105] There are three reasons we have to doubt Birks' argument.

First, it may be that the limitation on common law tracing is not a result of evidential difficulty caused by the legal interests of the contributors to the mixed mass, but is rather the result of a substantive rule of law which denies the making of claims to substitutes after a legal mixture has taken place. As noted above,[106] some statements of the limitation on common law tracing appear to rule out such claims even where the entirety of the mixed mass is exchanged for some other asset. On Birks' analysis, it is difficult to reconcile those statements with the view that A and B retain ownership of the notes which they owned before the mixture took place, because there can be no doubt of their respective contributions to the substitution.

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 mixture, but rather may prevent the claiming of proprietary interests in substitutes after a legal mixture of *cash*. This rule may exist regardless of whether the interests 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.[107] 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 cash. This may done in the hope that such a rule will encourage commercial activity.[108] 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.[109]

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[104] Birks (n 6) 240.

[105] As Birks seems to recognise; he suggests that inferences drawn from tracing may not be 'watertight': ibid 242.

[106] Above, n 100.

[107] 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 chattels are converted, although there are a limited number of exceptions to that general position: see, eg, Sale of Goods Act 1979, ss24 and 25.

[108] See, for one explanation of private law's unique treatment of money, Fox (n 101) ch 8.

[109] 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: eg S Khurshid and P Matthews, 'Tracing Confusion' (1976) 95 LQR 78; Smith (n 38) 162-74.

Third, and finally, it has been questioned whether there exists a power to acquire proprietary interests at common law at all in relation to substitutes, even in the case of *clean* substitutions. While there is clear authority that states that this is possible,[110] it has been convincingly shown that this authority has seriously misunderstood previous case law,[111] and it has also been argued that any power to claim proprietary interests at common law in substitutes has no plausible normative justification.[112] Given these arguments, it is plausible to suppose that any inability to claim an interest at common law in an asset acquired through a mixed substitution of money may rest on a deeper proposition: namely, that one is unable to claim such interests at common law after any substitution. It is beyond the scope of this thesis to offer a resolution to that particular debate. However, it does follow that the common law's limitation on tracing out of a legal mixture of cash need not flow from the nature of the interests held by the contributors to the mixture at the time of the substitution. If so, that limitation can give us no reason to reject the *co-ownership* analysis of a legal mixture of cash.

The discussion of this section has set out the cases that might be made for four competing interpretations of the law governing legal mixtures of cash. It has been shown that the *ownership extinguished* account cannot be accepted, because it is inconsistent with the outcome of *Jackson*. The other three accounts are each plausible descriptions of the law's rules, because they are capable of explaining that case, as well as other problematic features of positive law.

4.2 Clarification and Justification

This section prescribes how the uncertainties identified in 4.1 ought to be remedied. The section focuses first of all on accidental and consensual legal mixtures of chattels, and it is argued that the *co-ownership view* ought to be preferred to the *continuing ownership view* because it is more intellectually coherent. It is then argued that the *co-ownership view* also ought to be adopted in relation to legal mixtures brought about by wrongdoing, and legal mixtures of cash.

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

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

[112] See, eg, T Cutts, *The Role of Tracing in Claiming*, DPhil Thesis (University of Oxford 2015) ch 6; A Nair, *Claims to Traceable Proceeds* (OUP 2018) ch 8.

4.2.1 Accidental and Consensual Legal Mixtures of Chattels

The focus of this section is accidental and consensual legal mixtures of chattels. As we have seen, there are two plausible interpretations of the law that fit our existing legal materials: the *co-ownership view* and the *continuing ownership view*. It is argued below that either view is justifiable on instrumental grounds, because they both bring about states of affairs that the law has good reason to secure. It is, however, further argued that the *co-ownership view* is more intellectually coherent, and so ought to be preferred.

Recall the 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 each individual sheep belonged before the mixture. *Sheep* will be the focus of discussion below.

4.2.1.1 Instrumental Justifications

Three main arguments have been offered in the existing literature which purport to justify the law as it is found, whatever it may be. In this section, it is asked whether any of those arguments suggest that the law has good reason to adopt one of the *co-ownership view* or *continuing ownership view* in preference to the other. It is argued that those arguments are either unconvincing as a justification of either view, or fail to give us any reason to prefer one of the two competing views over the other. A fourth argument is put forward that builds upon the theoretical work outlined in Chapter 2. Although convincing as a defence of *either* view of the law, that argument again is not helpful in generating prescriptions as to which view the law should adopt.

(1) *Proprietary vacuum.* The first argument to consider is what might be termed the *proprietary vacuum* argument. The claim is 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 items of property are the subject of ownership.[113] Numerous commentators have suggested that this abhorrence might explain certain rules governing the acquisition of ownership, most commonly in the context of the taking possession of chattels,[114] but also in relation to manufacture,

[113] OW Holmes, *The Common Law* (1881, Belknap Press 2009) 214.

[114] See, eg, DR Harris, 'The Concept of Possession in English Law' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 92; G Battersby, 'Acquiring Title by Theft' (2002) 65 MLR 603, 610.

accession and legal mixtures.[115] 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'.[116]

This argument, however, is incomplete. It can tell 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 chattels to be owned rather than unowned, it follows that the *proprietary vacuum* argument cannot, without more, do sufficient work for our purposes.

(2) *Economic efficiency*. A second sort of instrumental argument that we might consider is that based on economic efficiency. There are two strands of thought that might be separated out here. The first is that the law ought to allocate ownership to whomever will make the most efficient use of the mixed chattels, and so will extract the most value from them. The second is that the law has good reason to adopt rules that have the effect of saving costs for the legal system by encouraging fewer disputes.[117] Plausibly, this will be so where the law is intuitively fair, because it will be self-applied by citizens.

The first argument from economic efficiency does not map neatly onto the existing law, regardless of whether the *co-ownership view* or *continuing ownership view* is correct. This is so because it is unlikely to be the case that a mixed mass of chattels will be used efficiently where the law requires the contributors to the mass to work together to manage or divide the mass.[118] 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 mass as she saw fit.

The second argument fares little better as a justification of existing law. As we have seen, either the *co-ownership view* or the *continuing ownership view* is likely to lead to disputes as to the management or division of the mixed mass of chattels. It is unclear whether the costs placed on the legal system by those disputes will outweigh the costs of disputes that would be

[115] P Millett, '*Jones v Jones*: Property or Unjust Enrichment?' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 272 (quoting personal correspondence from Peter Birks).

[116] R Hickey, 'The Problem of Divesting Abandonment' [2016] Conv 28, 38. A similar point is often made by law and economics scholars: see, eg, RA Posner, 'Savigny, Holmes, and the Law and Economics of Possession' (2000) 86 Virginia LR 535, 551.

[117] cf 2.2.2.1.

[118] RA Epstein, *Simple Rules for a Complex World* (Harvard UP 1995) 117. See too Y Chang, 'An Economic and Comparative Analysis of *Specificatio*' (2015) 39 European Journal of Law & Economics 225, 230, n 29.

incurred were some other rule, such as one that rendered mixed chattels unowned, to exist. Moreover, this argument from economic efficiency does not seem capable of differentiating between the *co-ownership view* or the *continuing ownership view*, because both views seem to be as intuitively fair as each other. Certainly, most legal commentators appear to consider the law's rules to be justified,[119] even though, as demonstrated above, those rules are unclear.

(3) *Unjust enrichment*. It has been argued that English law responds to legal mixtures in order to prevent the 'unjust enrichment' of the contributors to the mixture. Each party's legal interest, it might be argued, works to prevent the possible unjust enrichment of the other, which would arise were they to acquire sole ownership over all of the sheep.[120]

There are, however, real difficulties with this argument. First, the argument provides no explanation of what kind of legal interest A and B should acquire.[121] A 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, a justification from unjust enrichment collapses into incoherence; new rights are recognised 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

[119] See, eg, Brown (n 85) 287; P Stein, 'Roman Law in the Commercial Court' (1987) 46 CLJ 369, 371.

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

[121] 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 contributor acquires ownership of the entire mass, while the other acquires a 'persistent right' against the other's ownership: B McFarlane, *The Structure of Property Law* (Hart 2008) 161-62, 298-99, 331-32. 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 chattels have been mixed and third parties who deal with the party in possession on the reasonable assumption that he is the true owner of those chattels. 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 chattels on a strict basis. It is odd to suppose that protection ought *only* to apply in aid of those third parties dealing with chattels that have 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.

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 reasons that we might use in an attempt to justify the law as it is.

(4) *Preservation of the status quo*. It is submitted that the best justification 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 *ownership* of the mixed chattels – that is, a right that all others not physically interfere with the mixed mass – their positions would be weakened by the legal mixture. Their rights in relation to the chattels will be exigible against a smaller class of persons, and they may also lose priority in insolvency.[122] 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. This is particularly obvious in the case of an accidental legal mixture, which will have been brought about by factors beyond their control.

The second, positive, aspect of this claim focuses on the management of the mixed chattels, and builds upon the account of ownership developed in 2.2.3.2. As argued in that section, the law has good reason to see that goals that a person has adopted are not interfered with by others, and this concern can give the law reason to afford people rights that others not interfere with particular chattels. To interfere with a given chattel may be to interfere with a goal that the owner of that chattel is using the chattel to pursue. By definition, a legal mixture does not damage or destroy those chattels, and so they remain available for use by the contributors. It follows that third parties – as they did before the legal mixture – have good reason not to interfere with the chattels in question.

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 chattels restored to them, so that plans formulated in respect of them 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 chattels, since this would have the effect of interfering with those plans, where they require the specific chattels 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

[122] cf Goode (n 95) 394.

protection against third parties, or forcing them to abandon the course of action that had been undertaken in respect of their chattels. Of course, however, both of those solutions to the problem are equally capable of bringing about those benefits.

The discussion in this section has attempted to demonstrate that the law appears to have good reason to adopt either the *co-ownership view* or the *continuing ownership view*, but that neither appears to be instrumentally more justifiable than the other. This is because both views bring about very similar states of affairs. The existing literature on the topic gives us no reason to think that one rule will bring about more value – be that value in the form of social wealth or something else – than the other. Nor does a defence of the law based on goal pursuit.

4.2.1.2 Intellectual Coherence

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 of each. One such metric is that of intellectual coherence: we might ask which rule leads to the most clear, satisfying way of understanding the law. Here, the *co-ownership view* is undeniably superior. The *continuing ownership view* imports a large degree of artificiality. This is so for at least 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 position, with ownership of the precise chattels that they previously owned. The *co-ownership view* does not lead the law to subscribe to a blatant fiction in this regard.

Second, and more importantly, the *continuing ownership view* poses significant conceptual difficulties where a third party, C, takes only a part of the combined mass, rather than the whole. It is not clear how the *continuing ownership view* 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 the facts of *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. Suppose that C now takes one sheep from the mass of twenty. Under a model of continuing ownership, neither A nor B can definitively 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 chattels become *res nullius* is given short shrift by the courts precisely because it would allow a third party to take chattels from the mass without incurring liability. Under the *continuing ownership view*, 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 view*, to award damages in such a case to both parties (either in full or in proportion to their contribution to the mixture) must inevitably confer a windfall on one party, who has suffered no wrong.

This argument is 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 Funeral Services*,[123] 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.[124] 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 the outcome reached in *Fairchild* can also be applied to *Sheep*. Three such justifications can be considered:

[123] [2002] UKHL 22, [2003] 1 AC 32.

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

(a) *Deterrence*.[125] One might argue that allowing C to escape without sanction will encourage C to commit a wrong; the law ought to 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 an injured – and wronged – claimant uncompensated.[126] 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*, because we know C to have committed a legal wrong, and so *C* is left no worse off as 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 to exclude others from their chattels, 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.[127] This argument holds sway regardless of whether making the defendants liable would in fact have any deterrent effect on potential wrongdoers. Arguably, one aim of the law of torts is to demarcate and protect certain interests of citizens which are deemed to be of particular importance.[128] Where the general rules of evidence risk defeating this aim – as is possible on the facts of *Sheep* – those rules ought to give way so that the primary aim of tort can be achieved.

It is submitted that these arguments, taken together, are convincing. 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 view* appears to allow C to do so, therefore, amounts to convincing reason for the law to prefer the *co-ownership view*. Under the latter view, the law is able to maintain the coherent claim that C is liable both to A and to B *because*

[125] See S Steel, *Proof of Causation in Tort Law* (CUP 2015) 269-75.

[126] ibid 185-89, 285-87.

[127] *Fairchild* (n 123) at [62], per Lord Hoffmann, and at [155], per Lord Rodger.

[128] See, eg, R Stevens, *Torts and Rights* (OUP 2007); JN Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253.

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.[129]

For this reason, it is submitted that the best interpretation of the response of English law to an accidental or a consensual legal mixture of chattels 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. It also aligns with the language of the courts.

4.2.1.3 Paul Matthews' Hybrid Account

The previous section argued that the *co-ownership view* is superior to the *continuing ownership view*, on the basis that it allows us to say that both A and B are wronged by C, where C takes a single sheep out of the mixed mass. It might be thought that the hybrid account offered by Paul Matthews, discussed in 4.1.2.4, could resolve this difficulty. That account claimed that the legal interests of A and B change depending upon who is presently in possession of the mass. Where either A or B is in possession, they continue to own the individual sheep which they contributed to the mass; in contrast, where a third party takes possession, A and B become co-owners. Matthews expressly reasons that this outcome is 'eminently justifiable' because it permits A and B to bring separate claims against C, on the basis that C's continued possession of a single co-owned sheep is wrongful against both A and B.[130]

Matthews' hybrid account, however, cannot entirely escape the criticism raised against the *continuing ownership view* in 4.2.1.2. Suppose, for example, that, rather than taking possession of a single sheep, C instead carelessly damaged or destroyed it while it was in A's possession. Under the hybrid account, B would be unable to bring an independent claim against C, because the sheep were in the possession of A – and so were the subject of continuing ownership – at the time of C's tort. This outcome goes against the rationale offered by Matthews in explanation

[129] A conceptually similar problem might arise where one of the mixed chattels produces fruits. Suppose, in *Sheep*, that one of the sheep gives birth to a lamb after the legal mixture has taken place. As discussed at length below, in Chapter 5, it is usually said that the owner of the mother will own that lamb. Under the *co-ownership view*, the (intuitively fair) conclusion that the lamb is co-owned by A and B follows naturally and easily.

[130] Matthews, 'Proprietary Claims' (n 63) 165.

of his hybrid view, which is purportedly necessary to allow A and B independent claims against third parties. Under the hybrid view, if A refuses to bring a claim against C, B will be able to sue C independently if C is in possession of a single sheep, but not if C carelessly damages or destroys that sheep without dispossessing A of it. There seems to be no reason to think that this distinction might be justified, and it shows that the hybrid account should not be accepted.

4.2.2 Wrongful Legal Mixtures of Chattels

As argued above, in 4.1.2, it seems clear that a wrongful legal mixture will lead to the same result as an accidental one. This follows from the analysis of Staughton J in *Indian Oil*, and the endorsement of that analysis in subsequent cases concerning legal mixtures. It appears to follow from the argument made above, in 4.2.1.2, that the better view is therefore that the contributors to the legal mixture ought to become tenants in common of the mixed chattels, and so they ought to acquire new legal interests. As we have seen, however, the present legal rule to this effect does differ from the earlier legal rule set out by Blackstone. It is, therefore, worth considering explicitly in this section whether the current law may be justified.

There are three plausible responses that the law might adopt to a wrongful mixture. The first is the *forfeiture rule* of Blackstone, which would lead to the wrongdoer losing their ownership of the mixed chattels, and the innocent party acquiring ownership of the entire mass. Alternatively, the rule may be one of *continuing ownership* or *co-ownership*.

It is submitted that Staughton J's normative critique of the *forfeiture rule* is compelling.[131] There are two main difficulties with the rule. The first is that is works excessively harshly against a wrongdoer in at least some circumstances, where the wrongdoer mixes only a very small amount of the innocent party's chattels with her own. This is particularly so given that the wrongdoer is likely to commit a tortious wrong against the innocent party in bringing the mixture about, and may even commit a crime in doing so. Even where the wrongdoer mixes a large quantity of the innocent party's chattels, it is not clear why we ought to rely on the *forfeiture rule* to act as a deterrent, rather than relying on the criminal law or an award of damages. Second, it is not clear why it should be the case that the innocent party should acquire ownership of the whole mixed mass. Suppose that A steals ten sheep from B, and intermingles them with her own ten sheep such that a legal mixture occurs. If the *forfeiture rule* were to apply, B would become owner of all twenty sheep. It seems clear that this is a windfall to B,

[131] See 4.1.2 above.

who may have no knowledge of or plans for those sheep which he did not own prior to the legal mixture. Even if we were to accept that A ought to forfeit whatever legal interest he held in the sheep prior to the mixture, there appears to be no good reason to award ownership of the sheep to B in particular, rather than to any other person.

It follows that either the *continuing ownership* or *co-ownership* solution is to be preferred. Both outcomes ensure that the innocent party is protected, and both outcomes ensure that the wrongdoer's interests do not vanish. This latter conclusion can be defended in both negative and positive terms. Negatively, there seems to be no good argument to suggest that a wrongful contributor to a mixture ought to have their own interest diluted or lost. The most plausible argument to this effect is that offered by Blackstone, who claims that, in our example, A ought to lose ownership as a deterrent, to 'guard against fraud'.[132] The main difficulty with this argument is that it is doubtful that a rule of forfeiture – or any rule that affords A an interest that is weaker than full ownership, such as a personal right to a monetary award against B, or an equitable interest under a trust of the mixed mass – actually performs a deterrent function. This is because of the parallel rules of criminal law, and because of the likelihood that A will commit a tort against B in the act of creating a legal mixture. It is, therefore, unlikely that a world in which a rule of *continuing ownership* or *co-ownership* exists would be a world that contained more wrongful mixtures than a world in which some other rule existed.

Positively, our goals-based account of accidental and consensual legal mixtures suggests that the law does have good reason to bestow upon the contributors to the mixture a right that others not physically interfere with the mixed property. This is so even where one of the contributors acts in a blameworthy manner. It may be true to say that the goals of a wrongful contributor to the mixture are of *less* value than the goals of an innocent contributor, but this is not to say that those goals are of *no* value in any and all cases. It follows that the law may have good reasons, at least in some cases, to see that the contributor is able to pursue those goals. This would also lead to consistency with the law as presently understood in relation to the wrongful taking of possession of another's chattel, which quite clearly does generate a general property interest in that possessor.[133]

[132] 2 Bl Comm 405.

[133] cf 3.3.2. There is a difference between these two cases: in the context of later possession, the question is whether the wrongdoer ought to acquire a new general property interest that they did not have before; in the context of legal mixture, the question is whether the wrongdoer ought to retain their prior legal interest (or have that interest replaced with one that binds third parties to the same extent). It seems plausible to suppose that the latter can be more easily justified than the former.

These reasons suggest that either the *co-ownership view* or *continuing ownership view* can be defended after a wrongful legal mixture on the same grounds as those views were defended in relation to accidental and consensual legal mixtures. Because of the coherence of the *co-ownership view*, it is submitted that that view is to be preferred – if a third party were to steal a chattel from a wrongfully created legal mixture, that third party will breach a duty of non-interference owed jointly to both contributors to the mixture. This view also has the benefit of ensuring that accidental, consensual and wrongful legal mixtures are treated in the same manner. It follows that courts need not attempt to distinguish between different kinds of legal mixture, and so the potential administrative costs that would be incurred were English law to draw such a distinction will be saved. These are costs that would be incurred either in attempting to determine the mental state of the wrongdoer in particular cases, or in attempting to flesh out the precise meaning of 'wrongfulness' for the purposes of the rule.

There is one further point that requires clarification, which is to do with the depletion of the mass of chattels left after a wrongful legal mixture. Suppose that A steals ten sheep from B, and mixes them with ten of his own sheep, and then four of these sheep are killed by a bolt of lightning. It is, because of the legal mixture, impossible to determine to whom those four sheep belonged before the lightning struck. What legal interests do A and B now hold in relation to the sixteen remaining sheep? If the *co-ownership view* is correct, it appears to follow that A and B co-own each sheep, and so are able to divide the sheep equally between them. This is because there is no evidential uncertainty here. Before the lightning struck, A and B were tenants in common of each sheep in equal proportions, and there is therefore no doubt about the interests held in respect of the destroyed sheep. Under the *continuing ownership view*, however, it might be argued that B remains the owner of ten sheep, and A becomes an owner of six. This may follow from the rule of evidence discussed above,[134] that uncertainty is resolved against the wrongdoer: we are to assume that the sheep that have been destroyed were those belonging to A.[135] Thus, it might be argued, if the law demands that the sheep be partitioned with a ten-six split in B's favour, the *continuing ownership view* is superior because it makes sense of this outcome in a more intellectually satisfying way.

This view, however, is mistaken. Several points are worth making here. First, it is not clear that the law does in fact deny that A and B hold equal interests in relation to the surviving

[134] Above, at n 79.

[135] For the clearest statement of this interpretation of the law, see Nair (n 112) 2.50-2.67. See too Smith (n 38) 77-85; *Goff & Jones* (n 38) 7.22; Zogg (n 38) 34-35.

sheep. There seems to be no clear authority in the context of legal mixtures that holds to the contrary, and works that assert that this is so usually make this claim by analogy with equitable tracing rules.[136] Indeed, a close reading of the reasoning within the case law on legal mixtures suggests that the better view is that the evidential principle – that uncertainty is resolved against the wrongdoer – only applies in determining the *initial* contributions to the legal mixture.[137] Second, the acceptance of the view that A is able to claim ownership of ten sheep seems in part to depend upon the prior question of which of our two views of the law is correct. It is only if we accept the *continuing ownership view* that this consequence seems to follow naturally and easily. Third, this ultimate outcome is not beyond the reach of the *co-ownership view*. If that view is correct, it may be that the event of the destruction of the sheep alters the proportions in which A and B hold their tenancy in common. This would mean that, when it came to splitting the mass of surviving sheep between them, B would acquire ten and A six. It follows that, even if this is the final position of the parties, that fact alone need not force us to conclude that the *continuing ownership view* is to be preferred. In fact, the *co-ownership view* appears to be superior on this measure. Consider the case where ten gallons of A's oil are mixed with ten gallons of B's, and then one gallon of that oil is destroyed in a fire. If the law were to hold that A is able to claim ownership of ten of the remaining gallons, this would be rationalised on the *continuing ownership view* on the basis that every molecule of oil destroyed in the fire was owned by B.[138] This is not an inference of fact that anyone could plausibly draw from this scenario. Why should we subscribe to such a blatant fiction when the logic of the *co-ownership view* can get us to the same result? Instead, we can simply reason that the fire has had the effect of altering the respective proportions in which A and B hold their tenancy in common.[139]

It follows that the issue of a depletion to a mixed mass cannot convincingly demonstrate that the *continuing ownership view* is a superior interpretation of English law. We do, too, have good reason – on the basis of intellectual coherence – to think that the *co-ownership view* is preferable in any case.

[136] See for instance *Goff & Jones* (n 38) 7.22, n 46.

[137] See *Indian Oil* (n 35) 369B, 370F; *Glencore* (n 26) at [185].

[138] Nair (n 112) 2.61.

[139] The same analysis is able to explain the case where a wrongful contributor to a legal mixture wrongfully dissipates some of the mixed mass. It seems that, in such a case, the wrongful dissipation alters the respective rights of the parties, and so the innocent contributor is ultimately able to claim ownership of chattels left in the mass up to the amount they initially contributed, unless the amount that the wrongdoer has dissipated means that all of the wrongdoer's share must have been lost: see *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 107-10. This outcome is easily reached on the *co-ownership view* if we accept that the innocent co-owner may elect to treat the dissipation as an act of partition.

4.2.3 Legal Mixtures of Cash

It was argued above, in 4.1.4, that the effect of a legal mixture of cash is unknown in English law. However, it should be clear from that discussion, and the normative discussion of the rest of this chapter, that the *co-ownership view* should be adopted. This is so because the alternative views that fit our existing legal materials are either logically confused, or suffer from the same lack of intellectual coherence that was criticised in 4.2.1.2 in relation to accidental and consensual legal mixtures of ordinary chattels. There is no existing law that demands the *co-ownership view* to be false in the case of legal mixtures of cash, and there is therefore no reason to reject that view in this context.

4.3 Conclusion

This chapter has demonstrated a number of things. First, it has shown that there is no decisive way to prove either the *co-ownership view* or the *continuing ownership view* to be correct as a descriptive account of English law. Second, it has shown that the *co-ownership view* is to be preferred. This is so in the context of all legal mixtures, be they mixtures of ordinary chattels or of cash, or mixtures brought about by accident or by the wrongdoing of a contributor to the legal mixture.

5. NATURAL REPRODUCTION

This chapter offers an account of the causative event that is known as 'natural reproduction',[1] or 'increase'.[2] Although different labels have been used to describe this event, the central example is generally accepted to be the creation of fruits from a chattel which is already owned by some known party. The classic cases are the birth of offspring from their mother, or the generation of apples from an apple tree. In both cases, a new chattel is said to be created, and the law must determine the legal interests held in relation to that new chattel. Importantly, the process of creation occurs through the physical creation of the chattel from some other chattel, and without the destruction of that initial chattel.[3]

The chapter consists of three parts. The first sets out, as accurately as possible, the law governing the event of natural reproduction ('NR'). It is commonly said that a (default) legal rule exists that holds that the product will be owned by whoever was the owner of the principal at the time the event occurred.[4] It is demonstrated below that this statement of the law may be inaccurate, simply because there does not exist a sufficient body of determinative case law. If, however, it is true that this is the general or default position, then there clearly exist exceptions to it, and those exceptions are uncertain in their scope.

The second part of the chapter is justificatory. That part seeks to set out the best justification of the law that can be found that might justify the 'central case' of NR, which is where the owner of the principal has both ownership that is unencumbered by some other legal interest held by another person (such as a lease or trust in respect of the principal) and possession of the principal. In such a case, it cannot be doubted that the owner of the principal will acquire ownership of the product. A number of defences of that position are considered, and a justification of the law in this central case is offered.

The third part of the chapter seeks to clarify the law, by examining those cases which do not appear to be subject to any clear legal rule. These are those cases where the ownership and the possession of the principal are held by different parties. The reasons drawn out in the

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[1] WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.434.

[2] TW Merrill and HE Smith, *Property: Principles and Policies* (2nd ed, Foundation Press 2012) 161.

[3] For the rest of this chapter, the new chattel will be referred to as the 'product', and the initial chattel from which it was created will be termed the 'principal'.

[4] eg D Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 25; S Worthington, 'Revolutions in Personal Property: Redrawing the Common Law's Conceptual Map' in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018) 231.

justificatory part of the chapter are applied to those cases. It will be argued that these cases should be governed by the orthodox rule: ownership of the product should vest in the owner of the principal, and not its possessor. This default rule, however, may be displaced if the parties agree to that effect.

5.1 Description

This section offers a descriptive account of the rules of English law governing NR. It is commonly said that there exists a general rule to the effect that the 'offspring of animals belong to the owner of the mother', which is qualified by two exceptions: first, where the animal in question is a swan, and, second, where the mother has been leased to another.[5] This section considers the central case of NR – where the owner of the principal also has possession of it – before moving on to discuss those purported exceptions. It will be seen that the precise scope of the second exception is unclear. Before offering that account, however, it is helpful to begin with a clarificatory note about the relationship between NR and 'accession'.

5.1.1 'Accession' and Natural Reproduction

On some accounts of the law, NR is said to be an example of an accession. This description of the law, however, is best avoided because it is liable to create confusion. There are two reasons which explain the continued and unhelpful use of the term 'accession' in this context. First, the term 'accession' has taken on three meanings in the current literature on personal property; failure to distinguish these meanings clearly has led to considerable confusion as to the proper understanding of the event of NR. Second, Blackstone is often relied upon in an incomplete, or inaccurate way. Once we have addressed these two problems, it becomes clear that NR is best treated as a distinct causative event, which sits alongside those, like taking possession and manufacture, that are considered in this thesis. It is in this way that the law as it is found can best be understood.

There are three distinct meanings of the word 'accession' present in the academic literature on personal property law. We can consider each in turn.

[5] See, eg, M Bridge et al, *The Law of Personal Property* (2nd ed, Sweet & Maxwell 2018) 16.033, n 133.

(1) *The 'principle' of accession*. First, accession is used to describe a general 'principle'[6] that governs those cases where 'ownership [of a new or unowned chattel] is established by assigning resources to the owner of *some other thing* that is already owned'.[7] On this view, the principle of accession competes with that of first possession as a general method for establishing ownership over a new or unowned chattel, and 'operates like a magnet',[8] assigning ownership of that chattel to a person connected to it – by virtue of their connection to a different, pre-existing asset – in the way required by law. Under a doctrine governed by the principle of accession, the ownership of the new chattel is created automatically; there is no need for some action to be performed, as in the case of first possession. Clearly, according to this definition of an 'accession', NR might be classed as a particular example of a doctrine governed by the principle;[9] if the ownership of the product automatically passes to the owner of the principal, then that new ownership is caused by and attributable to the prior ownership in the sense relevant to the principle.

(2) *The 'doctrine' of accession*. There is, however, a second sense of the term 'accession', which is more widely used in the literature on English personal property law.[10] This is sometimes called the *doctrine* of accession, or (adopting the Roman terminology) *accessio*, so that its distinction from the principle of accession can be maintained.[11] The doctrine of accession governs those cases where A's chattel is combined with B's property in such a way that A's chattel 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.[12] There can, too, be accession of one chattel into another. So, thread stitched into a coat may cease to exist independently from the coat; planks and nails used to repair a ship may become a part of the

[6] It is hard to see in what sense this can usefully be termed a 'principle', rather than a 'category' or 'class' of distinct legal rules. However, the term is widely used, particularly in the American law and economics literature, and so is adopted here. Nothing of substance turns on this terminology.

[7] TW Merrill, 'Accession and Original Ownership' (2009) 1 Journal of Legal Analysis 459, 460 (emphasis in original).

[8] ibid 463.

[9] See, eg, ibid 464-65; Merrill and Smith (n 2) 161-62.

[10] See, eg, S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon 1996) 136-38; Swadling (n 1) 4.472-76; Bridge et al (n 5) 16.032.

[11] EC Arnold, 'The Law of Accession of Personal Property' (1922) 22 Columbia LR 103, 118.

[12] *Holland v Hodgson* (1872) LR 7 CP 328.

ship.[13] The ownership of the thread or planks is lost, while the ownership of the coat or ship simply persists unchanged.

(3) *Accession 'by natural means'*. A third sense of the term is intended to capture those cases where A's property is improved or expands naturally. In such a case, A remains owner of the improved property. For example, an apple might grow on a tree owned by A. While the apple is attached to the tree, we might treat the tree as remaining a single, improved chattel, and so A's ownership simply persists over the tree, apples and all. This is one sense in which Blackstone used the term 'accession':

> [I]f any corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was intitled by his right of possession to the property of it under such its state of improvement.[14]

The argument in this passage is simply that a chattel that grows or improves remains owned by the party who owned the chattel before that growth or improvement. In some sense, this appears to be an obvious truth: if A owns a tree, he still owns the tree as it grows, produces leaves and fruits. On this understanding of the term, to say that a chattel benefits from an 'accession' is simply to say that it has grown or been worked on, but that it remains the same chattel and so the ownership of that chattel does not change.

The existence of conflicting understandings of the term 'accession' has led to two errors in some doctrinal accounts of the law governing NR which ought to be addressed here. The first is that NR is sometimes thought to be equivalent to 'accession by natural means'.[15] This is, however, an unhelpful conceptual analysis. 'Accession by natural means' concerns the case where one chattel is improved or grows, whereas NR concerns the case where one chattel produces another separate chattel. Blackstone himself was aware of this distinction; in an earlier passage, he deals with the event of the birth of offspring and makes no mention of

[13] *Appleby v Myers* (1867) LR 2 CP 651, 659-60, per Blackburn J.

[14] 2 Bl Comm 404.

[15] This appears to be Sheehan's understanding of the law. He claims that a 'sheep-owner owns the lambs; the owner of an apple tree, the apples; this is known as accession by natural means': Sheehan (n 4) 25.

'accession' at all, preferring instead to label the event a 'brute creation'.[16] It follows that the passage quoted above is of no assistance to an account of the law governing NR.

The second difficulty is that NR is sometimes thought to be a specific application of the doctrine of accession, equivalent to the stitching of a thread into a coat or nails hammered into a ship. One leading textbook on personal property claims that the 'concept of accessio is where a subordinate item is joined to a dominant thing, and its identity is submerged in the dominant', and then goes on to claim that, as an application of this rule, the 'offspring of animals belong to the owner of the mother'.[17] However, this analysis is not correct. The doctrine of accession applies where two chattels – or a chattel and land – become one. In contrast, the event of NR occurs where one chattel creates another, and so becomes two chattels.[18] There is therefore no conceptual overlap between these doctrines, and to assert otherwise will lead to error.

5.1.2 A Central Case

The most straightforward case of NR is where the owner of the principal chattel's ownership is 'unencumbered' – in the sense that no other person has a legal interest of any sort in relation to that chattel – and is held while the owner is also in possession of the chattel. In such a case, it is clear that the owner of the principal will own the product. Authority for this proposition of law can be found from Blackstone:

> First then of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any moveable chattels… such may be all *inanimate* things… such also may be all *vegetable* productions, as the fruit or other parts, when severed from the plant, or the whole plant itself, when severed from the ground…[19]

[16] 2 Bl Comm 390. Those descriptive accounts of the law that (correctly) treat NR as an event conceptually distinct from 'accession by natural means' rely only on this earlier passage, and make no mention of the later one. See, eg, Swadling (n 1) 4.434; B McFarlane, *The Structure of Property Law* (Hart 2008) 163.

[17] Bridge et al (n 5) 16.032-33.

[18] Although it is conceptually inaccurate, it is plausible that confusion about the relationship between NR and the doctrine of accession is commonplace because the orthodox view – that the owner of the principal will own the product – is taken to be correct. For instance, it was argued in *Henry v Dillard* 68 Miss 536 (1891) that a mare and her offspring are 'so necessarily and intimately connected together as to constitute one whole', and that, therefore, the owner of the mare ought to own the offspring. This is, however, fictional. The mare and the offspring are discrete entities, and so it is possible that ownership of the two is held by different people.

[19] 2 Bl Comm 389 (emphasis in original).

> Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "[the issue follows the belly]" in the brute creation… And therefore in the laws of England, as well as Rome, "[if your horse makes my mare pregnant, the offspring is mine and not yours]".[20]

The same general rule has been endorsed throughout the common law world.[21] Thomas Merrill and Henry Smith, distinguished scholars of American property law, claim that the rule exists 'in every known legal system that addresses the issue'.[22] Perhaps because of the authority of Blackstone, and this apparent widespread acceptance of the rule, there is little explicit judicial analysis in England. Further support for the rule, however, can be found from the case of *Mills v Brooker*.[23] The branches of C's tree had grown such that they overhung D's land. D cut the branches, and sold the apples that were attached to those branches to a third party. It was held that D had converted the apples in selling them, but had acted lawfully in cutting C's tree to abate the nuisance that its branches had created. This result was reached on the basis that the apples were 'equally [C's] property after [they had] been detached from the tree, whether [they had] fallen from being ripe, or been blown off by the wind, or been severed by the act of man'.[24]

5.1.3 Swans

The first exception bites even where ownership and possession are held in tandem. This is where the principal chattel in question is a swan.[25] In *The Case of Swans*,[26] it was held that the offspring of the swan would be co-owned by the owners of the mother and the father in equal proportions, because the male swan 'holdeth himself to one female only'.[27]

[20] 2 Bl Comm 390.

[21] See, eg, *Carruth v Easterling* 150 So.2d 852, 855 (Miss 1963) (Mississippi); *Dillaree v Doyle* (1878) 43 UCQB 442, 1878 CarswellOnt 205 (Canada).

[22] Merrill and Smith (n 2) 162.

[23] [1919] 1 KB 555.

[24] ibid 558.

[25] 2 Bl Comm 390-91.

[26] (1591) 7 Co Rep 15b, 77 ER 435.

[27] ibid 437.

5.1.4 Leases

The second exception to the purported general rule of English law is said to be where the principal chattel has been leased by its owner to another. The leading case is *Tucker v Farm and General Investment Trust*.[28] D leased 84 ewes to T on hire-purchase terms, and those ewes gave birth during the period of the lease. T then purported to sell the ewes – in breach of the agreement with D – together with the lambs, to a third party, C. D then took possession of the ewes and the lambs, and C brought an action against D, claiming that D had committed the tort of conversion. It was accepted that C could not maintain that claim against D in relation to the ewes, because C had no right that D not interfere with them. It was, however, held that D had committed the tort of conversion in relation to the lambs. D had argued – relying on the authority of Blackstone – that he had a right that C not interfere with those lambs because they had such a right in respect of the ewes. The Court of Appeal, however, rejected this argument, and held instead that T had acquired ownership of the lambs upon their birth. It followed that T could sell that interest to C, and that D therefore had no proprietary right of any sort in relation to the lambs.

The rule of law that was applied in *Tucker* is subject to some debate. There are two views that we ought to consider. First, it might be said that the case recognises an exception to the general rule set out earlier, that the ownership of offspring will vest in the owner of their mother. Second, it has been argued that *Tucker* is better explained on the basis that the court applied a general rule that 'fruits belong to the *possessor* of the asset from which the fruits were born'.[29] If this is right, it follows that the 'general rule' considered earlier does not in fact exist: instead, ownership of the product in our central case – where ownership and possession are both held by a single person – vests in the owner of the principal in virtue of their possession of the principal, and not in virtue of their ownership of it. On this latter view, *Tucker* is not to be rationalised as creating an exception to a rule of law; it is instead a straightforward application of a general rule.

In order to determine which of these views of the case are correct, it is helpful to analyse the reasoning of the case. The Court of Appeal began with an analysis of Blackstone's texts,[30] but concluded that the general rule formulated there did not apply to the case of lessor and

[28] [1966] 2 QB 421.

[29] M Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018) 4.59 (emphasis in original).

[30] Above, n 20.

lessee. Lord Denning MR claimed that Blackstone 'is not dealing with lessor or lessee at all', but was rather concerned solely with disputes between the owners of the mother and the father to offspring.[31] Similarly, Diplock LJ was willing to assume that Blackstone's rule governed our central case, but went on to say that Blackstone 'was only dealing with a case where the owner had the possession', whereas in the case of a lease 'property and possession are divided'.[32] It followed that the Court could not adopt Blackstone's rule, and considered themselves bound to follow the earlier authority of *Wood v Ash and Foster*.[33] That case already provided an answer to the problem of NR in the context of a lease, and that case represented 'direct authority' which conclusively determined that ownership would vest in the lessee.[34] Owen's report of *Wood* contains the following passage in summary of the court's reasoning:

> the increase of the stock of sheepe should be to the lessee, and the lessor shall never have them at the end of the terme… [I]n case of a stock of cattle, which hath an increase, as calves and lambs, there these things are severed from the principle, and lessor shall never have them, for then the lessor shall have the rent, and the lessee shall have no profit.[35]

Because of this authority, there was no further discussion needed to resolve the dispute before the court in *Tucker*. It is, however, important to note that it was reasoned that this was not because of the application of a term implied into the lease contract. Instead, the court clearly thought that there exists a rule of law to the effect that ownership of the product will vest in the lessee, unless agreement is made to the contrary. The judge in the lower court had followed Blackstone's rule, and had held that ownership of the lambs vested in the lessor because he could not imply a term to the contrary. Harman LJ was critical of this mode of reasoning, and claimed that there is 'no need to talk of implied terms. It is a question of a certain number of ewes demised, and the produce of the ewes during the term of the hiring passed to the lessee of the ewes'.[36] Lord Denning MR also seemed clearly to accept that this was a default rule of

[31] *Tucker* (n 28) 426G.

[32] ibid 431A-B. See similarly at 430C, per Harman LJ.

[33] (1586) Owen 139, 1 Leon 42, 78 ER 69.

[34] *Tucker* (n 28) 429G, per Harman LJ. Similarly, both Lord Denning MR (at 427G) and Diplock LJ (at 431C) considered that *Wood* (n 33) conclusively settled the matter. It had been argued by counsel for D that *Tucker* could be distinguished from *Wood* on the basis that the lease in *Tucker* was part of a hire-purchase agreement, but that the lease in *Wood* was not.

[35] (1586) Owen 139, 140.

[36] *Tucker* (n 28) 430E.

law, and the result was not reached because of the intentions of the parties. The explanation for that rule was said to be that 'if the progeny did not belong to the lessee, it would mean that the lessor would have the rent and the lessee no profit – which would be absurd'.[37] The lessee of sheep or cows could be expected to sell the wool or milk produced in order to make profit from the lease, and so the lessee in *Tucker* could sell the lambs in order to finance the lease of the ewes. Thus, the default rule of law – that the ownership of the product vests in the lessee – '*coincides* with what must have been the intentions of the parties' in the present case.[38]

This explanation of the law is hard to understand, because it does seem to be premised upon an analysis of the parties' intentions, despite the claims made to the contrary. Clearly, the thought underlying the analysis is that the parties *must* have intended the lessee to take ownership of the lambs, otherwise the lessee would not have agreed to it because he would be unable to sell those lambs and make a profit from the lease. This will, however, not always be the case, such as where a person leases their horse to another for a short period so that the lessee might ride it for leisure. Under the analysis adopted in *Tucker*, however, it would seem that ownership of a foal birthed during the period of the lease would vest in the lessee. Lord Denning MR clearly contemplated that the law need not always coincide with the actual intentions of the parties, and all endorsements of the existence of a rule of law vesting ownership of products in a lessee were made in *Tucker* without qualification.

If we accept that, in a case like that of a short lease for purposes of leisure, the lessor – and not the lessee – will become the owner of the product after NR,[39] then the rule of law suggested in *Tucker* ceases to be a strict rule, and instead becomes, at most, a starting point that might be displaced if it can be shown that the parties intended otherwise. Thus, it is submitted that the

[37] ibid 428E. Lord Denning MR also thought his conclusion to be supported by Roman law, where 'the usufructuary – that is, the person who is entitled to the enjoyment of the use of the animal – becomes entitled not only to the jus utendi, the right of using it, but also the jus fruendi, the right of having the fruit or progeny of it' (ibid 427E). Given the authority of *Wood*, there was no need to rely on this Roman rule, although it seems clear that the court would have done so in the absence of settled English authority. However, this cannot alone be a convincing way of defending the outcome of *Tucker*, since it is simplistic to assume that a chattel lease is the modern equivalent of the usufruct. Roman law recognised a range of different methods of 'splitting' the 'bundle of rights' to which an owner is ordinarily entitled; a usufruct was simply one method among others: WW Buckland, *A Textbook of Roman Law* (3rd ed, CUP 1963) 271-77; JAC Thomas, *Textbook of Roman Law* (North Holland 1976) 202-10. *By definition*, a usufruct would only be created if the purported 'usufructuary' was granted a right to the fruits of the chattel. If there was no right to fruits, there was no usufruct, but rather some other legal interest. That a lease ought to be treated in the same manner as the usufruct, therefore, ought to be a conclusion to some argument that shows why the lessee ought to be entitled to the product.

[38] ibid 429D (emphasis added). See too at 429B, where Lord Denning MR again said that the general law 'coincides' with the purpose of the agreement of the parties.

[39] For similar reasons, Palmer doubts that *Tucker* could plausibly be taken to create the strict rule that the Court of Appeal appears to endorse: NE Palmer, *Palmer on Bailment* (3rd ed, Sweet & Maxwell 2009) 21.086.

most plausible interpretation of the case is that the ownership vested in the lessee on the basis of a term implied into the contract of hire. This is a term implied 'at law', meaning that it is represents the prima facie position in all contracts of chattel leases – at least in the commercial context – but may be displaced if it can be shown that this is contrary to the intentions of the parties.[40] This analysis is able to make sense of the confusing explanations of the law offered in *Tucker*, and seems to ensure that sensible results can be reached in individual cases. The rejection by the Court of Appeal of the existence of an implied term may well have been caused by the confused state of the authorities at the time, which did not yet draw the now well-established distinction between terms implied 'at law' and terms implied 'in fact'.[41]

5.1.5 Conclusion

An important consequence follows from the analysis of *Tucker* offered above, which is that the case seems to have nothing to say about disputes between parties who are not in a relationship of lessor and lessee. Thus, the claim that there exists a general rule vesting ownership of the product in the possessor of the principal is one based on very shaky foundations. This is so because the case appears to rely on the existence of an implied term, and the explanation for the outcome of the case offered by the Court of Appeal clearly only applies to situations in which a lessee requires ownership of the product in order to make profit from a lease. The case itself, therefore, seems to be silent on sets of facts that do not involve contracts of hire. Even in cases involving such contracts, the precise scope of *Tucker* is open to a number of interpretations, because the outcome of the case is explicable in a number of ways.

This analysis leaves us with a number of different classes of case where NR occurs, which may call for separate treatment. First, we have the central case described above, where the owner of the principal also has possession of it. It is clear that the owner will become owner of the product. Second, there are the cases of leases, where it seems that the default position is that the lessee takes ownership of the product, unless the lessor and lessee are objectively taken to have agreed otherwise. There are, however, other situations in which possession and ownership might be split. One example is where the possessor has stolen the principal from its

[40] HG Beale (ed), *Chitty on Contracts* (33rd ed, Sweet & Maxwell 2018) 14.015; E Peel (ed), *Treitel on The Law of Contract* (15th ed, Sweet & Maxwell 2020) 6.070.

[41] The leading authority at the time – *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 – has been shown to muddle the distinction: *Treitel* (n 40) 6.072.

owner, or has possession to which she is not entitled and knows of her lack of entitlement. Another is where the possessor possesses another's chattel wrongfully (in the sense that the possessor breaches a strict duty owed to the owner), but does so in good faith. A third is where the possessor's possession is not legally wrongful, such as where the owner has created a gratuitous bailment or pledge in respect of the chattel. In each of these three classes of case, English law does not offer a clear solution.[42] There is no case law directly on the matter, and *Tucker* offers little guidance.

It is the aim of section 5.3 to clarify the law in respect of these three classes of case. In order to do so, it is important to understand the reasons that we might use to assess the candidate legal rules which could govern each case. Section 5.2 attempts to distil those reasons, by offering a justification of the rule in our central case. If we can understand why it is that an owner presently in possession of the principal should acquire ownership of the product, then we will be on much surer footing when we return to these harder cases.

5.2 Justification

This section explains and criticises a number of purported justifications of the law governing NR in our central case. It is argued that there are some convincing arguments in the literature, which do show good reasons in favour of the law as it is. It is further argued that a goals-based argument drawn from the theoretical work done in 2.2.3 is also convincing.

5.2.1 Labour

The first argument to consider, and one that is commonly raised in the literature, is a labour argument.[43] There are two ways in which the owner of the principal may have laboured on it. First, he may have spent time and effort caring for the principal so that it is able to create the product. Second, the principal may have become less useful during the process of reproduction.

[42] Other jurisdictions do have relevant case law. In Canada, it is clear that the owner of the principal, and not the bailee, will own the product if that bailment is gratuitous: *Dillaree* (n 21). In Roman law, the product would be owned by a possessor of the principal, and not by the principal's owner, so long as that possessor acted in good faith, without knowledge of the owner's claim: D.41.1.48pr.

[43] See, eg, 2 Bl Comm 390; S von Pufendorf, *De Jure Naturae et Gentium Libri Octo* (CH Oldfather and WA Oldfather trns) (Clarendon 1934) Book IV ch 7 §4; FS Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers LR 357, 367; Raczynska (n 29) 4.59.

The most straightforward way of understanding this argument is one based on desert: because the owner of the principal will have laboured on it, that owner ought to be rewarded for that labour with ownership of the product.[44] Part of the strength of this justification lies in the fact that it appears able to shed light on the exceptions to the general rule discussed above. Thus, where the product is a cygnet, Blackstone argues that 'the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other' because the parents of the cygnet will remain together.[45] Similarly, it is likely to be the lessee, and not the lessor, who has spent time and effort in caring for a leased chattel. For this reason, the rule of law formulated in *Tucker* has been praised for being 'sensible and fair' because it works to 'reward the labour, work and skill that went into breeding animals'.[46]

Despite its intuitive attractions, the *labour* argument is unconvincing as a justification of the law. This is so for at least two reasons. First, it seems clear that there is no necessary connection between the labour of a person and the product that is produced by NR. That product may come into existence 'due to the sole operation of nature without human cultivation and labour'.[47] It may also be the case that a person other than the owner did the labouring on the principal; for instance, the owner may have purchased the principal from another shortly before the product is produced.[48] In both of these instances, the owner of the principal will own the product despite the labour argument suggesting that this represents an unjustified windfall. It follows that the labour argument can, at best, only claim that the law governing our central case is justified because it leads to the 'correct' outcome in the majority of cases.[49]

Second, the argument fails to explain why the proper reward for labour ought to be ownership of the product, rather than the acquisition of some other kind of right, such as a personal right to a reward from the product's first possessor.[50] A right of that sort would be able to be tailored to reflect the contribution of the principal's owner, whereas ownership is indiscriminate and may over- or under-reward depending on the context.

[44] There is some endorsement of this argument in the Roman texts: D.22.1.45.

[45] 2 Bl Comm 391.

[46] Raczynska (n 29) 4.59.

[47] Pufendorf (n 43) Book IV ch 7 §3. See too Merrill (n 7) 497-99.

[48] Thomas relies on this example to criticise the labour-based explanation of Roman law found in the Digest: Thomas (n 37) 177.

[49] Cohen (n 43) 368. cf ER Claeys, 'Productive Use in Acquisition, Accession, and Labour Theory' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 28-32.

[50] cf RA Epstein, 'Possession as the Root of Title' (1979) 13 Georgia LR 1221, 1226.

5.2.2 Proprietary Logic

That the product must come physically from the principal is sometimes thought to explain why it is that the ownership of the product follows that of the principal.[51] Suppose that an apple falls from A's apple tree. We might think of the event in one of two ways: first, as a separation or subdivision of the tree itself; second, as the creation of an entirely new thing from the tree.[52] To some extent, this seems to offer a justification of the law governing NR. Before a fruit is removed from a tree, or before a calf is born from its mother, the fruit and the calf are a physical part of the tree or mother. Thus, it seems that there is no such thing as a 'clean' natural reproduction, understood as being an event logically distinct from a subdivision of a chattel. In all cases, the product must have been part of the principal, and so must have been owned by the owner of the principal. Naturally, we might think that it follows that the product ought still to be owned by that person.[53]

This argument has been made most clearly by Muireann Quigley in a different context. Writing in defence of the view that a person who produces biomaterial (such as sperm or urine) ought to be taken to be the owner of that biomaterial, she argues that the fact that a person had a right to exclude others from the biomaterial before it was severed from their body generates a 'presumption' that they ought to have a right to exclude others from it after severance:

> It is not… for the source to prove why they should hold on to the rights which they had only moments before. In this context, we should be suspicious not of arguments which seem to justify the power of individuals to create binding duties, but of those which seem to justify the power to remove already existing ones.[54]

Thus, to adapt Quigley's argument to the present context, the argumentative 'burden of proof' lies with those who would argue that the orthodox rule governing NR ought not to exist,

[51] See, eg, Pufendorf (n 43) Book IV ch 7 §4 ('The reason for this [rule] is… because the young was at one time a part of the dam, but never of the sire').

[52] Lionel Smith draws the distinction most clearly, but, contrary to the view adopted here, asserts that there is a relevant conceptual distinction to be drawn between a subdivision and a natural reproduction: L Smith, *The Law of Tracing* (OUP 1997) 21-22.

[53] This is one understanding of an argument in favour of the law made by Blackstone, who suggests that fruits cannot be 'moved out of the owner's possession without his own act or consent, or at least without doing him an injury', and so the fruit continues to be owned 'when severed from the plant': 2 Bl Comm 389.

[54] M Quigley, *Self-Ownership, Property Rights and the Human Body* (CUP 2018) 239.

because that orthodox rule ensures that the owner of the principal does not forfeit a pre-existing right to exclude the world from the product. Unless it can be shown that there are convincing countervailing reasons in particular instances to vest ownership of the product in a party other than the owner of the principal, the orthodox rule is presumptively justified, in precisely the same way that it seems obviously true to say that, if B were to tear a page out from A's book, A will remain the owner of that page. This is because, as a conceptual matter, there is no difference between a chattel's subdivision and that chattel physically creating a product through NR. If the orthodox rule – that ownership of the product vests in the owner of the principal – is to be justifiably departed from, what must be justified is not simply the creation of an interest of ownership in some other party, but *also* the loss of a right to exclude the world from the product in the owner of the principal.[55]

It is submitted that this argument is convincing, and ought to form part of our justification of the law. However, its force risks being overstated; taken in isolation, it amounts to a relatively weak defence of the law. This is because the argument can only create a presumption that ownership ought to vest in the owner of the principal. That presumption might well be displaced in the face of countervailing reasons. It follows that, if we are to find the best possible justification of the law that can offered, we ought to consider further defences of the law that might help to sure up that initial presumption.

5.2.3 Compassion

A further argument that shows good reasons for the law that governs our central case can be called an argument from compassion. This argument claims that the law has reason to ensure that offspring are owned by the owner of their mother, because to do so will help to preserve (or, perhaps more accurately, will not contribute to the damage of) their familial bond.[56]

This thought has been put forward most prominently in the literature concerning the legal rules that determined the ownership of the children of slaves.[57] Roman law adopted a unique

[55] Note that the chattel itself is not destroyed, but only the prior owner's right to exclude others from it. This differentiates the event of NR in a significant way from the event of manufacture: cf 6.2.1.3.

[56] Of course, this argument can have no application to cases where either the product or the principal are inanimate objects, such as where wool is taken from a sheep or an apple from a tree.

[57] For a discussion of American law, see AE Evans, 'Some Applications of Title by Accession' (1942) 16 U Cincinnati LR 267, 286-87. It seems that most, but not all, slave-holding states held that ownership of the child vested in the owner of their mother, and not her lessee. This was an exception to the exception to the general rule – in the context of leases of ordinary chattels, ownership of the products would vest in the lessee.

set of rules in this context,[58] which have been condemned for apparently encouraging the separation of a new-born slave from their mother. Ordinarily, the usufructuary of the principal – and not its owner – would become the owner of fruits, but this was not so where the chattel in question was a slave. Instead, the owner of the mother would acquire 'a full, beneficial, and immediate ownership' of the child upon birth.[59] The precise rationale for this rule is the subject of debate, although the Institutes of Justinian claim that it was based on the view that it would be wrong to treat human beings as 'fruit'.[60] Nonetheless, the effect of the rule appears to be that it in fact encourages the separation of mother and child: the mother would stay under the control of the usufructuary for the time being, while her child would be subject to the control of the mother's ultimate owner.[61] This outcome would have been avoided by holding that the child was owned by the owner of the mother, but subject to a usufruct.

A similar criticism might be made of a rule of law that encouraged the separation of a mother from her offspring where they are not human beings. It seems true to say that the law has good reason to ensure that the offspring falls into the same proprietary condition as their mother because this would help to prevent their separation as a matter of fact.[62]

5.2.4 Economic Efficiency

Thomas Merrill has recently offered an extended defence of the law governing our central case on the basis of its efficiency.[63] He emphasises a number of benefits that the rule brings.

(1) *Administrative costs*. Merrill argues that rules governing the acquisition of ownership ought to be 'simple, intuitive, and easy to grasp', such that they are capable of self-application.[64] A rule that is self-applying is likely to place a relatively low administrative burden on the legal system, for two reasons. First, disputes between citizens will be minimised, and, where a

[58] For an outline of the unique Roman laws in the context of slavery, see P Birks, 'An Unacceptable Face of Human Property' in P Birks (ed), *New Perspectives in the Roman Law of Property* (Clarendon 1989).

[59] ibid 62.

[60] J.2.1.37.

[61] A Watson, 'Morality, Slavery and the Jurists in the Later Roman Republic' (1968) 42 Tulane LR 289, 291-95.

[62] This argument also may help to justify the exception where the product is a cygnet. Because the father naturally remains close with the mother, we might expect the law to seek to ensure that the cygnet is able to develop a familial bond with both mother and father.

[63] Merrill (n 7).

[64] ibid 476-77.

dispute does arise, the law can work out a solution without recourse to complicated questions. Second, the rule will effectively guide people's actions. By making ownership of the product clear, those people who are subjected to a duty not to interfere with that product are able to understand that they are under such a duty, and to act accordingly.

A further benefit from efficiency is highlighted by Blackstone, who suggests that, in relation to the offspring of animals, the father would often be unknown, and so we can understand the rule as seeking to minimise the evidential burden on the courts and the parties.[65] In the case of swans, however, this concern is less potent, because the father is – by virtue of his close proximity to the mother – easily identifiable. It follows, however, that where the father is known – or the owner of the father, which may be easier to ascertain – the law has no reason to adopt its default rule on this basis.[66]

(2) *Elimination of waste*. The *administrative costs* argument, of course, suggests that the law has similarly good reasons to recognise other rules, so long as that rule is easy to understand and to apply.[67] Adopting the view that the product is unowned, and so will become owned by its first possessor, is one such candidate rule.[68] Merrill draws out the comparative strength of the orthodox rule in comparison to a rule of first possession, which can be criticised on the grounds that it creates economic waste.[69] The orthodox rule removes the element of a 'race' that leads to that waste: ownership of the product is assigned to a person by virtue of their status as owner of some other chattel, and so people need not expend resources trying to acquire the product upon its creation; the owner of the principal need not expend resources putting himself in a position to take possession of the product when it is created; and conflict between competitors is eliminated.[70]

(3) *Selection of a fit owner*. If the above arguments are convincing, we are still not in a position to defend the law as it stands. We might satisfy the concerns of (1) and (2) by awarding

[65] 2 Bl Comm 390. The law is defended on a similar basis by Rudden, who argues that the law 'saves time and effort' by holding that the owner of the principal owns the product because it is likely to be easy to prove ownership of the principal: B Rudden, *The Law of Property* (3rd ed, OUP 2002) 51.

[66] cf JH Baker, *Introduction to English Legal History* (5th ed, OUP 2019) 407-08 (suggesting that, at one point in history, the common law rule 'may have been different if the father was known').

[67] Cohen (n 43) 367.

[68] cf 2.2.2.1.

[69] cf 2.2.2.2.

[70] Merrill (n 7) 482-88.

ownership of the product to one of any number of people. For this reason, Merrill argues that the owner of the principal is likely to be a particularly sensible choice of owner, given their characteristics.[71] This is so for three reasons. First, she will have capital (in the form of the principal) that can be used to develop the product. Second, she is also likely to have physical access to the product. Third, she is, by virtue of the fact that she is already owner of the principal, likely to have special knowledge relevant to the product. The law, argues Merrill, must balance these concerns with the benefits brought through a rule of first possession in selecting owners who are able to win the race to take possession of the product. In the context of NR, the owner of the principal is more likely to be a 'better' owner than anyone else.

Taken together, Merrill's argument is largely convincing, although it must be open to the objection that, at least in certain contexts, greater economic benefits may be brought about through the adoption of some other rule. In the majority of cases, however, it seems undeniable that the orthodox rule does work to bring about a state of affairs that is more economically efficient than competitor rules. It follows that this gives the law good reasons to adopt that rule.

5.2.5 Goal Pursuit

There is one further argument that ought to be considered, which builds upon the foundations laid in the previous chapters and centres again on the relationship between ownership of chattels and the (non-legal) interest people have in using those chattels in pursuit of their goals. The closest existing argument of this sort in relation to NR is one made by Pufendorf, who claims that 'there are many things, the possession of which is all in vain if their fruits belong to others'.[72] The suggestion made in this quotation is that, at least in relation to certain chattels, part of the point or value of owning those chattels is that they produce fruits. This has an obvious resonance with the classic examples of NR, such as the birth of offspring from animals or the production of apples from a tree. In each of these cases, it seems true to say that part of the purpose of a person's desire to have a right to exclude others from those chattels is so that that person might cultivate them to produce fruits.

We can understand this intuitive claim with the background developed earlier in this thesis, in particular in section 2.2.3. It was there argued that the acquisition of ownership can be

[71] ibid 488-91.

[72] Pufendorf (n 43) Book IV ch 7 §2.

justified in the context of first possession in order to secure the plans or projects that the possessor has adopted in relation to the chattel, and has begun to pursue by subjecting the chattel in question to their custody and control. People have important interests in seeing that those projects are not interfered with by others, and the interference by another with the particular chattel that is being used is likely to have the effect of interfering with the project. A very similar justification can be offered in relation to the products produced after the event of NR: people have reason not to interfere with the product when it comes into existence as a discrete entity, because to do so is likely to interfere with the projects that the owner of the principal has adopted and plans to use the product to pursue.

5.3 Clarification

The previous section set out a number of arguments that purported to demonstrate that, in our central case, the law has good reason to bestow ownership of the product upon the owner of the principal. Most importantly, this outcome can be justified through a combination of the *proprietary logic*, *compassion*, *economic efficiency*, and *goal pursuit* arguments.

These arguments straightforwardly suggest a justification for the exception that has been carved out for lease, because the *goal pursuit* argument indicates one compelling way in which we might be able to rebut the presumption raised from the *proprietary logic* and *compassion* arguments that the ownership of the product should follow the principal. If it can be shown that the lessor has no goals or projects in mind for the product, but that the lessee does have goals that require the product's use for their fulfilment or pursuit, then it follows that the law has good reason to vest ownership in the lessee. On this view, the intentions of the parties become important to determine in which party the *goal pursuit* argument suggests that ownership of the product should vest. *Tucker* can then be understood to create a presumption that, in certain circumstances, the parties intend the possessor, rather than the owner, to take ownership of the product. Given the *proprietary logic* and *compassion* arguments, those circumstances should be narrowly defined. The presumption from *Tucker* should be limited to those circumstances where it is reasonable to assume that, in the majority of cases, the parties will in fact have the requisite intention. Thus, we can say that the presumption should govern commercial leases.

The same structure of analysis ought to govern the other cases where the law is presently unclear, as set out in 5.1.5. These are those cases where ownership and possession of the principal are split: (1) where P is in possession of O's chattel, and is aware that O has a right

that P not interfere with that chattel; (2) where P is in possession of O's chattel, although acting in good faith and without O's consent; and (3) where P is in possession of O's chattel and commits no legal wrong in doing so because O has consented to that possession.

Scenarios (1) and (3) are the most straightforward. It seems clear that, in (1), ownership of the product should vest in O, and not P. This is because neither the *goal pursuit* nor the *economic efficiency* arguments indicate that the starting presumption that O should be the product's owner can be displaced. This is so because we have no reason to think that O has no projects in mind in relation to the chattel, and because the goals that P adopts in respect of it are not particularly valuable.[73] It also seems true to say that economic efficiency will not be promoted by a rule that vests ownership in a bad faith possessor. Such a rule is likely to lead to an increase in disputes because it lacks intuitive appeal, and it is implausible to suppose that P is likely to be an owner with more attractive characteristics than O.

Scenario (3) falls to be determined in a similar fashion to the cases involving a lease. The starting position should be that the ownership ought to vest in O, following the *proprietary logic* and *compassion* arguments. That assumption ought to be displaced if it can be shown that P had – and that O lacked – plans to use the chattel in future goal pursuit. This will turn on an interpretation of the agreement reached between P and O.[74]

The most difficult case is (2), because it seems true to say that the *goal pursuit* argument suggests that there is here a conflict between two equally valuable projects, and there is, by definition, no agreement between the parties that might show that the *goal pursuit* argument suggests good reasons to vest ownership in P. Nonetheless, it is submitted that O ought to be the owner of the product. This follows from an application of the *compassion* and *proprietary logic* arguments. It is commonly said that a dispute of this sort is one between two innocent parties and that there may be no 'correct' answer to be found.[75] It follows, then, that the argumentative burden cannot be discharged, and that the presumption should be followed. In the absence of conclusive further reasons, the ownership of the product ought to fall to the owner of the principal.

[73] cf 3.3.2.

[74] This analysis coheres with Palmer's analysis of NR where the principal is the subject of a gratuitous bailment: Palmer (n 39) 10.044.

[75] See, eg, *Bishopsgate Motor Finance Corp v Transport Brakes Ltd* [1949] 1 KB 322, 336-38, per Denning LJ.

5.4 Conclusion

This chapter has defended the orthodox view of English law, as set out by Blackstone, both as a descriptive and prescriptive matter. Descriptively, there is no case law that demonstrates that view to be false; instead, there are a (very) limited number of exceptions to it. In pursuit of the justificatory and clarificatory aims of this thesis, it was argued that there are a number of arguments that convincingly demonstrate that this rule has good reason to exist in the majority of cases, but that those reasons could be outweighed in particular circumstances.

6. MANUFACTURE

This chapter offers an account of the causative event that will be termed 'manufacture'.[1] This event can initially be defined as occurring where one party creates a new chattel, and does so by subjecting some other chattel – or chattels – to a process that has the effect of destroying the initial chattel or chattels. There are two sorts of manufacture that are in issue. The first is where a party, M, manufactures a new chattel from chattels that initially belonged entirely to another person, O.[2] This is an example of a manufacture which will be called *Single Property Manufacture*:

> *Single Property Manufacture*: M uses ingredients owned by O to make a cake.

The second kind of case is where M contributes some of her own property in the process of creation, combining it with a chattel or chattels initially owned by O:

> *Two Property Manufacture*: M uses eggs and flour owned by O, along with other ingredients of her own, to make a cake.

In both cases, the cake that is created is a 'new thing', and so the event of manufacture has occurred. The important question for present purposes is in which party, if any, ownership of the cake vests. The answer to this question may vary depending on whether or not M acts in good faith in the process of manufacture.

The chapter contains two main sections. The first offers a detailed descriptive account of the rules of English law that govern our two classes of case. As we shall see, it is usually claimed that the effect of a manufacture will be that the ownership of the newly created chattel will vest in its manufacturer, at least where the manufacturer acts in good faith. Such a rule is supported in most leading textbooks on personal property law,[3] and some support can be

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[1] The doctrine is sometimes known as 'specification', a term derived from the Latin term *specificatio*.

[2] Alternatively, M may manufacture a new chattel from a combination of chattels owned by different initial owners, O1 and O2. The important point here is that, in cases of this sort, M contributes no chattels which she owned before the manufacture took place.

[3] See, eg, AP Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989) 69; M Bridge et al, *The Law of Personal Property* (2nd ed, Sweet & Maxwell 2018) 16.034; WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.436; D Sheehan, *The Principles of Personal Property Law* (2nd ed, Hart 2017) 27.

derived for this proposition of law from the case law.[4] Call this the *orthodox view*. It is demonstrated below that a plausible case can be made that the *orthodox view* is incorrect. That view has been questioned by a number of commentators, and certain cases are difficult to understand in a fashion that coheres with orthodoxy.

The second section, therefore, aims to clarify the rule of law that English law ought to adopt in response to the event of manufacture. Few modern commentators have directly tackled this question, but those who have generally conclude that the *orthodox view* is mistaken from a normative standpoint, and that some other rule would be preferable. In this chapter, however, it will be argued that, properly understood, the *orthodox view* is to be welcomed. On the balance of reasons, the law generally ought to award ownership to the manufacturer. Those arguments that suggest otherwise will be shown to be unconvincing, and a positive case for the *orthodox view*, which builds upon the goals-based justifications of the law considered throughout this thesis, will be put forward.

With that defence in place, it will be possible to clarify two further points of contention that our descriptive account of the law reveals. The first is the effect of the bad faith of the manufacturer. There is some indication in the case law that the *orthodox view* will be displaced where M destroys O's chattels in the knowledge that they are owned by O. It will be argued that this interpretation of the law should be rejected: all cases of manufacture ought to lead to the manufacturer acquiring ownership of the newly created chattel. The second point in need of clarification is the definition of the event of manufacture itself, which will be held to have occurred wherever a 'new' chattel is produced. With a sound understanding of the underlying reasons that justify a manufacturer's acquisition of ownership, it is possible that a test for the creation of a 'new' chattel can be formulated that is more intellectually coherent than any such test that has so far been offered in the literature on manufacture.

Before moving on, however, some clarification of the relationship between retention of title clauses, products clauses, and the event of manufacture is necessary. It is accepted that an agreement between the parties is able to determine where ownership of a chattel that is subjected to a manufacturing process is to vest, as well as, if ownership is to pass from one party to another, the time at which that transfer of ownership is to occur.[5] Where such an agreement has been struck, it is the task of the court to interpret it to determine its legal effect. It follows that many cases where a manufacture has occurred are decided through an

[4] See further 6.1.2.1 below.

[5] *Clough Mill Ltd v Martin* [1985] 1 WLR 111.

application of rules governing contractual interpretation, and not through an application of a general rule of law that governs the event of manufacture.

Suppose that a party, O, sells some leather to M, who intends to use that leather to fashion items of clothing. The contract between O and M might contain one, or both, of the following sorts of clause. The first is a simple retention of title clause, which states that O will remain the owner of the leather until some specified event occurs – usually payment of the full purchase price of the leather. This is done to ensure that O will acquire benefits in the event of M's insolvency; M's trustees in bankruptcy will convert the leather if it is sold off to meet M's debts. The second is a products clause, which may state that O is to become the owner of the clothes that M creates with the leather, with the ownership of those clothes passing to M once M has paid for the purchase price in full. As a theoretical matter, O and M are able to create an arrangement of this sort, so long as this is what they have objectively agreed.[6]

That much of the recent case law is concerned with interpretations of products clauses creates difficulties for an analysis of English law that seeks to determine a rule of law governing non-contractual manufacture, for several reasons. First, where a products clause is interpreted, the resulting ownership of a chattel vests either in M or in O because of the consent of the parties. The generation of a right of ownership is not caused by the event of manufacture itself. Second, the parties are free to determine the point at which ownership might vest in M. It follows that a products clause may define when a new thing is produced, but this is only for the purposes of that particular contract. That interpretation has no application outside that context. Indeed, the contracts in issue in these cases tend to be uniquely worded, and fall to be read against a unique set of facts, and so there is little in the way of general principle that can be drawn out from these cases.[7] For these reasons, it is important to remember that a case that deals with the interpretation of a products clause can be of no more use for the purposes of this thesis than acting as a helpful guide as to how a court might reason when faced with a manufacture the effect of which is not determined by a term within the parties' contract. This is so both in regards to the question of when a 'new' chattel is deemed to have been produced, and in regards to the question of in which party ownership of that new chattel is to vest.

[6] An analysis of the case law demonstrates that it will be very difficult for a party to convince a court that, objectively interpreted, the parties intended a contract to vest ownership in M in such a case. See below, at p 176.

[7] For this reason, this line of case law has been criticised for creating an incoherent body of legal rules that govern the interpretation of retention of title and products clauses: L Gullifer, '"Sales" on Retention of Title Terms: Is the English Law Analysis Broken?' (2017) 133 LQR 244, 249-50.

6.1 Description

In this section, a descriptive account of the rules of English law governing manufacture is offered.

6.1.1 The Event

At an abstract level, the causative event of manufacture can be defined in relatively straightforward terms: it will occur where one party, M, creates a new chattel, and does so by subjecting some other chattel – or chattels – to a process that has the effect of destroying the initial chattel or chattels. The obvious gap to fill in this definition is what is meant by the claim that a 'new thing', or new chattel, has been created. There appear to be some cases, like that of baking a cake, where manufacture is clearly made out, and others that are more difficult, such as where a statue is carved out from a block of marble.

In this section, I demonstrate that English law has not settled on any single test for manufacture. We can consider a number of plausible tests that have been adopted, either in the case law governing the interpretation of products clauses, in foreign jurisdictions, or in the academic commentary on manufacture. This discussion demonstrates that the law lacks coherence and intellectual rigour. It seems that the most accurate interpretation of English law is that a court faced with a difficult set of facts will attempt to balance any number of a range of factors in determining whether a 'new thing' has been created. The result is little more than a discretionary exercise that is neither predictable nor structured by clear principles. The reason for the unsatisfactory state of the law, it is submitted, is that the doctrine of manufacture has not been subjected to any sustained theoretical criticism. Without any knowledge of *why* the law might treat the event of manufacture as a causative event which may generate new proprietary interests, we cannot hope to give the test for the creation of a 'new thing' any sort of structure. This task is returned to below, in 6.2.3.

There are four plausible tests for the existence of a 'new thing' that can be discerned from the existing literature and case law. Each will be discussed in turn.

(1) *Transformation*. The first test that can be swiftly dismissed is that of 'transformation'. According to this test, the court must ask itself simply whether the initial chattel in issue has

undergone a 'transformation', such that the initial chattel has been consumed.[8] This is not a test at all, but is rather a restatement of the rule that a new thing must be produced.

(2) *Change in value*. Another purported test is that a new thing will be created where it has sufficiently increased in value due to the process to which the initial chattel has been subjected.[9] This factor was of particular importance in the American case of *Wetherbee v Green*.[10] M had purchased timber from a third party belonging to O, and had then fashioned the timber into barrel hoops. Cooley J held that a new thing had been produced, and that M had acquired the ownership of the hoops when he had created them. This was so because the hoops (worth approximately $700) were 'immensely more valuable' than the original timber ($25), and that the 'reason of the law' dictated that ownership should vest in M where it was M's labour that had given the chattel in question its value.

There are, however, a number of flaws with a test that rests solely on the difference in value between the initial chattel and the final product. First, the test seems to risk putting the cart before the horse. That a newly manufactured chattel has a different value to the initial chattel appears to be an incidental effect brought about by the product's difference. The values may be substantially different because the product is a new thing; it need not be a new thing because there is a difference in value. Second, it seems obvious that a new thing might be created that has the same, or lesser, value as the initial chattel, but is nonetheless a new thing. M might, for instance, bake a cake made from the ingredients of O that is of such poor quality that it is worth little more than the initial ingredients.

For these reasons, the better view is that a focus on the difference in value of the chattel before and after its being subjected to a process can offer little more than guidance to a court. It may serve as an indication that the event of manufacture has occurred, but it is of no use as a test to determine that fact.

[8] See, eg, EC Arnold, 'The Law of Accession of Personal Property' (1922) 22 Columbia LR 103, 105-06; D Webb, 'Title and Transformation: Who Owns Manufactured Goods?' [2000] JBL 513, 524; Y Chang, 'An Economic and Comparative Analysis of *Specificatio*' (2015) 39 European Journal of Law & Economics 225, 228; M Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018) 2.34.

[9] See, eg, Arnold (n 8) 106-07; Chang (n 8) 228.

[10] 22 Mich 311 (1871).

(3) *Chemical change*. A third test, considered by Paul Matthews, is that of 'chemical difference'.[11] According to this test, a new chattel will be produced when what is created is of a different molecular composition than the initial chattel. A test of this sort may be able to help rationalise a number of decisions concerning the application of simple retention of title clauses. Thus, it has been held that sellers of sheets of steel,[12] and sellers of logs,[13] remain owners of the strips of steel or timber that exist after the sheets or logs have been cut by the purchaser.

(4) *Reversibility*. The final test that has been suggested in the existing literature is that of reversibility.[14] According to this test, a new chattel will be created wherever the product of the process to which the initial chattel is subjected cannot be restored to its original form.

Support for the reversibility test can be found from two sources. The first is the Roman doctrine of *specificatio*. Under Roman law, however, it was not the case that a new thing would be produced wherever an irreversible change was made to a chattel. Instead, the Romans divided newly created chattels into two classes, depending on whether the process of creation was reversible or not.[15] If the change was reversible, that new chattel would be owned by the owner of the initial materials from which the new chattel had been produced; if the change was irreversible, then the new chattel would be owned by its manufacturer.[16] It appears that this was necessary in Roman law, because the formulation of the *vindicatio* claim required the claimant to provide a detailed description of the disputed chattel in order to recover it from the defendant.[17] Even in cases where a reversible change had occurred, this could not be done, given that the chattel that was being claimed would have taken on a new appearance.

A second source for the reversibility test can be found in American case law. In *Lampton v Preston*,[18] for example, Lampton had fashioned bricks from Preston's soil. It was held that those bricks that had been burnt were owned by Lampton, while those that had not yet been burnt were owned by Preston because they could easily be returned to soil.

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[11] P Matthews, '"Specificatio" in the Common Law' (1981) 10 Anglo-American LR 121, 124-25.

[12] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339.

[13] *Pongakawa Sawmill Ltd v New Zealand Forest Products Ltd* [1992] 3 NZLR 304.

[14] See, eg, Matthews, 'Specificatio' (n 11) 123-24; Webb (n 8) 523-24; G McCormack, 'Mixture of Goods' (1990) 10 LS 293, 304.

[15] See JAC Thomas, *Textbook of Roman Law* (North Holland 1976) 176; WW Buckland, *A Textbook of Roman Law* (3rd ed, CUP 1963) 215.

[16] D.41.1.7.7.

[17] P Stein, 'The Two Schools of Jurists in the Early Roman Principate' (1972) 31 CLJ 8, 18.

[18] *Lampton's Executors v Preston's Executors* 24 Ky 255 (1829).

A crucial difficulty that is often raised by commentators in relation to a test that centres on reversibility is that the test may lead to the imposition of extortionate costs, in particular where it is technically possible to reverse a manufacturing process, but that reversal would come at a cost greater than the value of the chattels in issue.[19] It appears to follow that any plausible test that is based on reversibility must have factored into it some sort of assessment of the feasibility of the process of reversal.

Moreover, it seems that a test that focusses solely on the reversibility of a change made to a chattel has the potential to rob the causative event of accession of any force. An accession will take place where one person's chattel is attached to another's, such that the ownership of that chattel is lost.[20] As presently understood, an accession cannot take place if the attachment of the lesser chattel is easily undone.[21] If a distinction between the doctrine of accession and manufacture is to be maintained, it follows that a test for manufacture that relies primarily on a test of reversibility must also contain some other element that is able to determine whether a reversible change is significant enough such that the event in question is to be classified as being an example of a manufacture, rather than of an accession.

It follows that a strict test of reversibility is unattractive. The case law concerning simple retention of title clauses helps to confirm this point. As we have seen, it has been held that ownership of logs or sheets of steel remains in the prior owner after those logs and steel have been cut, despite the fact that a change of this sort is likely to be practically irreversible.[22]

The discussion above demonstrates that there is no clear test that courts across the common law jurisdictions have adopted in asking when the event of manufacture has taken place. For this reason, commentators tend to claim that a 'range of factors' approach is likely to be taken, but that, ultimately, the test is one of common sense or intuition, and all that can usefully be done is to list examples where courts have given a concrete answer.[23] Nonetheless, there are some central cases – the baking of a cake is one example – where it seems undeniable that the event has taken place. If we can gain a firm grasp of the reasons that the law might have to

[19] See, in particular, Matthews, 'Specificatio' (n 11) 124 and Webb (n 8) 524.

[20] See 1.1.2.2.

[21] See, eg, *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485. It was held that engines attached to generating sets did not accede into the sets because those engines were easily removed.

[22] *Armour* (n 12) and *Pongakawa* (n 13).

[23] See, eg, Webb (n 8) 525; L Smith, *The Law of Tracing* (OUP 1997) 111.

award ownership of a new thing to its manufacturer,[24] then we will be able to come up with a more concrete, and useful, method to work out when the event has taken place.

6.1.2 Good Faith Manufacture

We can now turn to consider the effects of a manufacture in English law. In this section, the case law governing a manufacture performed by a party in *good faith* will be the focus of attention. As will be recalled, there are two sorts of manufacture that must be borne in mind: first, a case where M manufactures a new chattel purely by subjecting chattels that are owned by O to some manufacturing process; second, a case where M contributes some of her own property to the final product. It will be shown in this section that English law is, perhaps surprisingly, unsettled. This conclusion is surprising because it appears to be widely accepted that, in both sorts of case, ownership of the newly manufactured chattel will vest in M.[25] This will be referred to as the *orthodox view*.

This section moves in two main parts. The first part sets out, as clearly as possible, the evidence that can be marshalled in support of the *orthodox view*, understanding that view as a purely descriptive account of English law. It will be seen that there is little authority directly in issue, and that this authority is open to more than one plausible interpretation. Other arguments that might be made in favour of the *orthodox view* are not conclusive. The second part of the section sets out two recent challenges that have been raised against the *orthodox view*. It will be seen that these challenges do not decisively prove that the *orthodox view* is incorrect, but they do cast serious doubt on it as an interpretation of existing legal materials.

Before setting out this evidence, a clarificatory note is in order. Suppose that a person, M, purchases a block of marble from a third party that was in fact earlier stolen from O. M then carves a beautiful statue from that block. Who owns the statue? In order to answer this question, we must deal with two questions. First, it must be asked whether the statue is a 'new thing', or whether it is instead the same chattel as the marble block. Second, if it is held to be a new thing, we must then ask whether ownership of it vests in O or in M. It follows that a court might reason that O is the owner of the statue, but that this conclusion may not contradict the *orthodox view*. This will be so if it is determined that the event of manufacture has not occurred in answer

[24] Of course, it may be that ownership ought to vest entirely in the initial owner. If so, the question of when the event of manufacture occurs loses much of its importance; regardless of whether the event has occurred, the initial owner will be the owner of the chattel in question, and not its manufacturer.

[25] See the works cited above, at n 3.

to the first question, and so O's ownership persists unchanged. In the *Case of Leather*,[26] the claimant complained of a trespass by the defendant, who had taken boots out of the claimant's possession. In response, the defendant argued that the claimant had no right to exclude him from the boots, because they had been made from the defendant's leather. This argument was accepted by the court, but was done on the grounds that no 'new thing' had been produced: 'if one take a piece of cloth and make himself a coat, the owner may rightfully retake it, for the reason that it is the same thing, and not different'.[27] It follows that the *Case of Leather*, and those cases decided for the same reason, can be of little help in attempting to flesh out the default rule of law that governs the event of manufacture. These cases are primarily of importance in asking whether a new thing has been produced.

6.1.2.1 The Doctrinal Case for the *Orthodox View*

It is helpful to begin discussion with the position of Blackstone, who is often cited in support of orthodoxy in the absence of many express cases on the matter.[28] Blackstone was certainly of the opinion that the *orthodox view* is correct:

> By the Roman law… if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, in the reign of king Henry III; and have since been confirmed by many resolutions of the courts.[29]

We have already seen the solution that Roman law, ultimately, adopted: a new chattel would, if the change to it was irreversible, be owned by its manufacturer.[30] This was the 'middle way' set out in the Institutes of Justinian, and represented a compromise between two schools of

[26] (1490) YB Hil 5 Hen 7, Brooke's. Abr.*tit.* Propertie, 23.

[27] ibid.

[28] See, eg, ELG Tyler and N Palmer, *Crossley Vaines on Personal Property* (5th ed, Butterworths 1973) 430.

[29] 2 Bl Comm 404.

[30] Above, p 162.

Roman jurists who had earlier been in dispute about the law's response to manufacture.[31] As we have seen, for the Romans, it was only if the new chattel that had been created was changed irreversibly that ownership of it would vest in its manufacturer. It seems that Blackstone was not aware of this subtlety; his commentaries make no mention of this gloss.

There have not been many cases in English law that are directly in issue. It seems that the only clear-cut example of a non-contractual, good faith manufacture comes from *Thorogood v Robinson*.[32] The manufacturer, M, was in possession of land that belonged to O, believing that he was entitled to be in possession of it. M had dug chalk from the land, and burnt it to create lime. After M had vacated the land, and O had retaken possession of it, the question was raised whether O's removal of M's servants from the land amounted to conversion of the lime. It was held that this was not a wrongful act, but that, had M demanded the lime's return, O would then have come under a duty to hand the lime over to M, or to allow M to collect it, because M 'certainly had a right to the goods'.[33] Thus, it follows that the court must have accepted that M, and not O, had ownership of the lime. Otherwise, it cannot have been the case that O (the owner of the chalk when it was removed from his land) owed a duty to M that he not interfere with the lime. This seems to have been accepted by the court on the basis of Blackstone's text, which was cited in argument and not challenged in the judgments.

Apart from this case, supporters of the *orthodox view* are left to piece English law together from (1) invocation of case law from other jurisdictions, (2) a collection of *obiter* statements, and (3) interpretation of those cases that deal with simple retention of title clauses. Each of these three sources will be discussed in turn.

(1) *Other jurisdictions*. We have already seen that Roman law, at least where the change brought about was irreversible, adopted a rule that said that ownership of the product would vest in the manufacturer. It is clear that Roman law, in the absence of clear English authority, is of much evidential weight in personal property law; we have seen in other chapters that courts are willing to accept the Roman solution as their own in the absence of good reason to depart from the Roman doctrine.[34] It is also clear that some modern civilian legal systems have

[31] D.41.1.7.7. There is some debate in the modern literature about the explanation for this division between the jurists. For an overview of the literature, see TG Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Martinus Nijhoff 2010) 78-83.

[32] (1845) 6 QB 769, 115 ER 290.

[33] ibid 772, per Lord Denman CJ.

[34] See the citations in 1.2.1, at n 32.

adopted a similar rule to govern cases of manufacture.[35] This fact gives support – albeit necessarily very limited support – to the view that such a rule exists in English law (or, perhaps more accurately, that such a rule would be held to exist by an English court were it asked to resolve the matter).

Of arguably more importance for present purposes is the relatively settled acceptance of the *orthodox view* in other common law jurisdictions. There is a large body of American case law on the issue, and there is no doubt that the *orthodox view* accurately represents American law. The most famous case on manufacture is the decision of the Supreme Court of Michigan in *Wetherbee v Green*.[36] M, in good faith, bought timber from T that in fact belonged to O, and fashioned the timber into barrel hoops. It was held by Cooley J that the general rule of law that governed the case was that M would become the owner, if the hoops could be regarded as an 'article substantially different' from the timber. It was reasoned, primarily because of the substantial increase in value between the raw timber and the barrel hoops, that a new thing had been created.[37] It followed that O could not have the hoops restored to him, and that he was limited to a claim in damages representing the value of the timber that had been destroyed.

(2) *Judicial dictum*. The most commonly cited case that offers further judicial support for the rule is *Clough Mill v Martin*.[38] O sold a quantity of yarn to M, who would use the yarn to manufacture fabric. The parties' contract stated that ownership of the yarn would remain with O, and that ownership of any products created with the yarn would also vest in O, until M had paid for the yarn supplied. Goff LJ appeared to accept that the default rule was that suggested by Blackstone, but that this rule could be displaced by the parties if they so agreed:

> Now it is no doubt true that, where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of this own, the property in the new goods will

[35] See, eg, *International Banking Corporation v Ferguson Shaw and Sons* [1910] SC 182 (Scotland); DJ Osler, '*Specificatio* in Scots Law' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society 1995); §950 BGB (Germany); A Rahmatian, 'A Comparison of German Moveable Property Law and English Personal Property Law' (2008) 3 Journal of Comparative Law 197, 227-29.

[36] *Wetherbee* (n 10). Other cases where such a rule has been adopted include: *Lampton* (n 18) (Kentucky); *Potter v Mardre* 74 NC 40 (1876) (North Carolina); *Lewis v Courtwright* 77 Iowa 190 (1889) (Iowa); *Werner Stave Co v Pickering* 55 Tex. Civ. App. 632, 119 SW 333 (1909) (Texas). See generally Arnold (n 8) 104-09. The doctrine has been described by leading commentators on American property law as 'venerable': TW Merrill and HE Smith, 'The Morality of Property Law' (2007) 48 William & Mary LR 1849, 1878.

[37] For discussion of this aspect of the case, see 6.1.1 and 6.2.3.

[38] *Clough* (n 5).

> generally vest in B, at least where the goods are not reducible to the original materials: see Blackstone's Commentaries.[39]

The difficulty caused by this passage is that there appear to be two plausible interpretations of the Goff LJ's formulation of the law. First, it may be taken to mean that the law gives effect to Blackstone's default rule, *unless* contrary agreement indicates that the parties intended some other rule to apply. Second, Goff LJ can be read to mean that ownership of the products will vest wherever the parties intend it to lie, and that this will *usually* be taken to be with M. In essence, which of these two views is correct depends upon the meaning of the word 'generally' in the quoted passage.

Given this ambiguity, it seems that this dictum does not provide unequivocal support in favour of the *orthodox view*. Instead, it is plausible to suppose that Goff LJ simply attempted to set out a more general guideline to aid in the process of contractual interpretation. For this reason, Goff LJ's statement of the law does not amount to particularly convincing authority in favour of the *orthodox view*, despite its apparent endorsement of Blackstone's passage.

(3) *Simple retention of title*. There is, however, some support for the *orthodox view* that can be taken from *Borden v Scottish Timber Products*,[40] a rare case where no contractual clause expressly attempted to govern the ownership of the products. O supplied resin to M, which was used in the process of manufacturing chipboard. The contract simply stated that '[p]roperty in the goods supplied hereunder will pass to the customer' when M had paid to O the amounts due under their contract. Counsel for O did not argue that a term ought to be implied that ownership of the chipboard would vest in O; instead, it was argued that a 'tracing remedy' would arise because the resin, which was owned by O, was used to manufacture the chipboard, so that 'an appropriate proportion of the chipboard now represents [O's] security for moneys due'.[41] In other words, it was argued that the mere fact that O owned the resin at the time the manufacture of the chipboard took place was enough to generate a new proprietary interest of some sort in relation to the chipboard. It was, however, reasoned that O's title to the resin ceased to exist when the chipboard was produced, because the resin had been consumed or

[39] ibid 119.

[40] [1981] Ch 25, CA.

[41] ibid 35-36.

destroyed, and that tracing into the chipboard was not possible. Most clearly, Templeman LJ reasoned that:

> When the resin was incorporated in the chipboard, the resin ceased to exist, the plaintiffs' title to the resin became meaningless and their security vanished. There was no provision in the contract for the defendants to provide substituted or additional security. The chipboard belonged to the defendants.[42]

To similar effect, Buckley LJ claimed that it was 'impossible for the plaintiffs to reserve any property in the manufactured chipboard, because they never had any property in it; the property in that product originates in the defendants when the chipboard is manufactured'.[43] Given that there was no term in the contract purporting to transfer ownership, or to create a trust or charge of the chipboard, it followed that O had no security.

The most natural reading of these arguments is that the court thought that no new legal interest was generated in O when the chipboard was produced because there is a rule of law that holds that, after the event of manufacture, a new ownership interest is created in M.[44] Because the parties did not make any express provision that contradicted this outcome, and because it was not necessary to imply a term that O ought to have some sort of proprietary interest in the chipboard, the default rule of law governed. This is the understanding of the case that is often offered in the leading commentaries, many of which explicitly rely on *Borden* as purportedly helping to confirm the accuracy of the *orthodox view*.[45]

Taken together, these three factors, combined with the authority of Blackstone and *Thorogood v Robinson*, amount to prima facie compelling arguments that the *orthodox view* accurately represents English law. It is a combination of these arguments that explains the popularity of the *orthodox view* in the academic literature. In almost all discussions of the law governing manufacture, it has been taken as a given that orthodoxy is correct, and that the more interesting

[42] ibid 44.

[43] ibid 46. See too at 41, per Bridge LJ.

[44] See P Birks, 'Mixtures' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd ed, LLP 1998) 228, n 3 (arguing that *Borden* 'is most easily explained' as 'declining to award title to the owners of the materials' from which a new thing was produced on the basis of such a default rule).

[45] See, eg, Bell (n 3) 69; P Birks, 'Mixing and Tracing' (1992) 45 CLP 69, 98; Swadling (n 3) 4.436; Sheehan (n 3) 27.

question is therefore at what point a new chattel has been created in the eyes of the law.[46] The substantial body of literature that asks this question makes little sense if the law simply holds that O will always be owner of the chattel, be it a new thing or simply improved; if this is the law, ownership will vest in O in either case, and so the point becomes academic.

6.1.2.2 Paul Matthews' Challenge to the *Orthodox View*

Nonetheless, the fact that an assumption exists in the academic literature, and perhaps underlies the reasoning of some cases, does not establish that the assumption is correct. The last section outlined the positive case that can be made in favour of the *orthodox view*, as a descriptive account of the law as it stands. This case, however, can be challenged, and has been challenged from two sources. The first such challenge is the focus of this section, and is that raised by Paul Matthews.[47] Matthews has argued that none of the points made above, in section 6.1.2.1, are sufficient to establish a rule of law in England that holds that, where a new chattel is made by M from O's materials, ownership of the new chattel will vest in M. The better view, argues Matthews, is that ownership will vest in O.

Before considering Matthews' argument in detail, it should first be noted that Matthews expressly limits his position only to a single type of manufacture, where M brings about 'changes of form or nature' in O's chattels 'without the addition of any other material'.[48] Thus, Matthews' only concern is with the case of *Single Property Manufacture*, such as where M uses ingredients entirely owned by O to make a cake.

It is helpful to start with Matthews' discussion of *Thorogood v Robinson*,[49] which appears to be strong authority in favour of the *orthodox view*. Without a convincing reason to dismiss the case, Matthews' argument is severely weakened. He makes two arguments in an attempt to demonstrate that 'the authority of the case does not stand overhigh': first, that 'the argument in that case was all on one side (that of [M] and not the original owner)', and, second, that 'the only authority cited on the point was Blackstone'.[50] It is hard to understand why this first argument ought to lead us to reject the authority of the case. The judgments given in *Thorogood*

[46] See, eg, A Hicks, 'When Goods Sold Become New Species' [1993] JBL 485; Webb (n 8).

[47] Matthews, 'Specificatio' (n 11). See too P Matthews, 'The Moral and Legal Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (Clarendon 1995) 45-46.

[48] ibid 121.

[49] *Thorogood* (n 32).

[50] Matthews, 'Specificatio' (n 11) 126.

are, typically of the time, very short, and are mostly concerned with the issue of whether conversion of a chattel can be committed by a defendant where they prevent the owner of the chattel in question from entering land possessed by the defendant to collect that chattel.[51] Plausibly, the reason the law governing manufacture received little attention is that it was taken to be uncontroversial that the *orthodox view* is correct.

More important, then, is Matthews' objection to the authority of Blackstone. It should first be noted that Lord Denman CJ's judgment in *Thorogood* does not rely expressly upon Blackstone, although it is the only source recorded as being cited in argument before the court. Again, Matthews relies on two points to show that Blackstone misunderstood English law. First, Matthews argues that Roman law cannot be 'copied' into English law in the way that Blackstone suggests.[52] This is because of a fundamental difference between Roman and English law: 'whilst Roman law concerned itself largely with question of title (vital in order to resolve an action brought by way of "*vindicatio*") the common lawyers looked at these issues from the point of view of personal wrongs, interferences with possession, and so part of the law of tort'.[53] This argument, however, does not give us reason to reject the *orthodox view*, for at least two reasons. First, if we accept that English law is concerned purely with 'possession' (understood as a *right*, rather than a fact), it is not clear that we could not conclude simply that the event of manufacture extinguishes O's 'possession' and creates a new 'possession' in M.[54] Second, Matthews' distinction between English and Roman law is overstated. The difference between these two systems is simply that liability in the chattel torts can only be established in English law if the defendant has breached a legal duty owed to the claimant, whereas, in Roman law, all a claimant need do is show that the defendant is in possession of his chattel.[55] Thus, we can simply say that, after the event of manufacture, M acquires a right that others not physically interfere with the newly produced chattel, and that this right binds all third parties (including O), who may, therefore, commit a legal wrong against M in their dealings with that chattel. If the *orthodox view* is correct, O loses a similar right to non-interference upon the occurrence of the event of manufacture.

[51] See MA Jones (ed), *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell 2020) 16.23.

[52] Matthews, 'Specificatio' (n 11) 121-22, 126.

[53] P Matthews, 'Proprietary Claims at Common Law for Mixed and Improved Goods' (1981) 34 CLP 159, 171-72.

[54] As argued in 1.3, this language should be avoided because it is obfuscating.

[55] See P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1, 4.

Matthews' second argument against Blackstone is that the cases he references 'simply do not support his argument' in favour of the *orthodox view*.[56] It is worth recalling the risk of confusion mentioned above,[57] that the outcome of a dispute involving M working on O's chattel might be reached in one of two ways: either on the basis that no new chattel has been created, and so the event of manufacture has not occurred, or on the basis that there is a rule of law that holds that the new chattel that has been created is to be owned by O.

Blackstone cites three cases in his discussion of manufacture. The first is the *Case of Leather*,[58] which has already been discussed, and turned on the holding that shoes made from leather hides were thought to be the same chattel as the hide. It follows that this may not be a case of manufacture. The second case is an *Anonymous Case* of 1560.[59] It was there held that planks made from trees were owned by the owner of the tree. This was said to be because the 'greater part of the substance' of the tree remains. Again, this appears to be a decision based on the conclusion that no new thing had been created. The third, and final, case mentioned by Blackstone is *Stock v Stock*.[60] This case is of no help, since it concerned a legal mixture of bales of hay and the effect of that mixture on the legal interests of the parties.

It follows that Matthews' case against Blackstone here is a good one, because none of the cases on which Blackstone relied decisively establish that the *orthodox view* is a correct descriptive statement of English law. Nonetheless, Matthews' argument is incomplete. These cases need not say anything at all about a rule of law that governs the event of manufacture. Instead, they may simply say that, on the facts of those cases, the causative event of manufacture did not occur, and so O remained owner of the particular chattels in dispute.

6.1.2.3 *Glencore* and the *Orthodox View*

The second challenge to orthodoxy comes from the more recent case of *Glencore International v Metro Trading International*.[61] It appears that the potential significance of the case to the

[56] Matthews, 'Specificatio' (n 11) 126.

[57] Above, pp 164-65.

[58] *Leather* (n 26).

[59] Moore (KB) 19.

[60] (1594) Poph. 37. The case is said to be of 'very little authority' because it is poorly recorded, and the recording that is available shows the reasoning to be confused: *Indian Oil Corp v Greenstone Shipping Co SA* [1988] QB 345, 360H, per Staughton J.

[61] [2001] 1 All ER (Comm) 103, [2001] 1 Lloyd's Rep 284.

event of manufacture is not well appreciated in the literature. Some works rely on *Glencore* to suggest that a co-ownership rule may apply where manufacture takes place;[62] while the majority of texts on personal property law regard the case purely as one concerned with legal mixtures,[63] and continue to endorse the view that a newly created chattel will be owned by its manufacturer.[64] For this reason, it is necessary to examine the case in some detail.

The relevant facts for the purposes of this chapter are straightforward. Glencore, and other claimants, had left their oil for storage with MTI. They had stored that oil in a mixed mass, and would draw on the mass to trade. This had been done without the authorisation of any of the claimants. Upon MTI's insolvency, the total oil within the mass was less than the amount of oil that the claimants had, in total, originally stored. Importantly, however, the mass was made up of a mixture of different grades of oil; the resulting mass was not the same grade, and so had different commercial value, to the oil that had originally been stored with MTI. The judgment of Moore-Bick J is concerned with setting out the relevant principles of English law that governed the issue of what legal interests existed in relation to the mass.

The first important point to note is that Moore-Bick J considered this to be a case of 'blending', rather than 'commingling'. The 'essential distinction' between the two cases is said to be that 'where blending has taken place the resultant product is *different in nature* from both its original constituents'.[65] For this reason, the facts of the case appear to be one of manufacture – the oil created by the 'mixing' of the claimants' oil was treated as a new thing, and so the question at issue was what rule of English law governs the event of manufacture. Where a straightforward legal mixture took place, which would produce no new thing, the result was said to be co-ownership held by the contributors to mass.[66]

The judgment is troublesome for the orthodox view of manufacture, because Moore-Bick J reasoned both that this was a case concerned with the causative event of manufacture, and that the outcome was that the initial contributors became tenants in common of the newly created oil.[67] Although the specific question that the court answered in *Glencore* was a narrow one – limited to blending brought about by a *wrongdoer*, and where the product brought about

[62] eg N Palmer, *Palmer on Bailment* (3rd ed, Sweet & Maxwell 2009) 8.015.

[63] Some of the case is undoubtedly concerned with the effects of a legal mixture, on which see 4.1.2.2.

[64] See, eg, Sheehan (n 3) 29; Bridge et al (n 3) 16.028, 16.034; Raczynska (n 8) 2.36.

[65] *Glencore* (n 61) at [156] (emphasis added).

[66] ibid at [159].

[67] ibid at [181]-[182].

by the wrongdoer was easily *separable* – it is quite clear from a close reading of the judgment that doubt has been cast on the *orthodox view* outlined above. Talking of the *orthodox view*, Moore-Bick J, having noted the rule's existence in Scots and Roman law, argued that 'it is less clear that [the rule] forms part of English law, at any rate in its full rigour'.[68] Although only willing to go so far as to determine the law that governed the facts at hand, the judgment casts doubt on many of the arguments outlined in 6.1.2.1 in favour of orthodoxy. It is, therefore, necessary to consider how *Glencore* dealt with each in reaching the apparently untenable position that, where M manufactures a new product from O1 and O2's material, or when M manufactures a new product from M and O's material combined, the results are respectively that O1 and O2 co-own the new thing, or that M and O are co-owners.

Before detailing the arguments made in *Glencore*, two significant difficulties with the judgment must be highlighted. The first is that the case makes no mention of *Thorogood v Robinson*,[69] an English case in which the *orthodox view* was taken to be correct. This is a peculiar omission, considering the length of the judgment in *Glencore* and its full engagement with other cases. The second problem is that Moore-Bick J's reasoning appears to be motivated by the belief that there are no distinctions of importance between the events of manufacture, accession, and legal mixture. He begins his discussion with the following statement:

> 'Mixing' and 'mixture' are ordinary words, not terms of art. They are apt to describe a range of different operations from the addition of a small quantity of one type of material to a large bulk in order to make a slight adjustment to one of its characteristics without changing its essential nature (e.g. the addition of sugar to tea or anti-knock compounds to petrol) to the blending of substantial quantities of different materials in order to produce something which in commercial, [sic] terms, and perhaps also in terms of its structure and chemical composition, is different from the original ingredients (e.g. flour, eggs, milk etc. to make a cake, or resin, glues and woodchips to form chipboard).[70]

This passage is problematic as a way of understanding these doctrines of English personal property law. It is obviously correct to say that 'mixing' is a term that might reasonably be understood to cover examples of accession, legal mixture and manufacture. However, there is

[68] ibid at [178].

[69] *Thorogood* (n 32).

[70] *Glencore* (n 61) at [177].

a clear conceptual distinction between the baking of a cake and the mixing of grain; in the latter case there is a purely evidential problem, while in the former there has been the replacement of chattels with a new chattel. Moreover, as a matter of the positive law, there is a divide between cases of accession and cases of legal mixture. As we have seen in another chapter, it is generally thought that a legal mixture will lead to co-ownership of the mass of chattels that have been mixed.[71] Although it might plausibly be argued that a legal mixture instead affects no change to the legal interests of the parties,[72] it is demonstrably not the case that, after a legal mixture, one contributor will become the owner of the entire mixed mass, while the other contributor loses any right of ownership in relation to the mass. This is, however, the result that occurs where an accession takes place.[73] It follows that the law does treat these cases differently, even though we might call both sorts of case examples of 'mixing'. The same may, then, be true when it comes to manufacture, and one cannot simply assert to the contrary without a careful consideration of existing legal materials.

With these two problems in mind, we can move on to ask how *Glencore* deals with those other arguments in favour of orthodoxy.

(1) *The* Borden *case.* The first difficulty is the reconciliation of *Glencore* with *Borden*, where it appears clear from the judgments that the court considered the makers of the chipboard to have become owners of the chipboard, *because* the resin had been destroyed and, with it, the seller's ownership of the resin. Moore-Bick J emphasises two reasons to be sceptical that *Borden* can be taken to say anything about a rule of law of general application. The first is that it was not argued by counsel for the initial owners of the resin that they had become owners, or co-owners, of the manufactured chipboard. Instead, the 'only question before the court was whether the reservation of title clause operated to create a *charge* over the goods'.[74] It follows that the court in *Borden* 'did not have to enquire closely into the basis on which title had vested in the [manufacturers]'.[75] The owners of the resin had their claim to be co-owners of the board

[71] 4.1.2.2.

[72] 4.1.2.3.

[73] See, in English law: *Tripp v Armitage* (1839) 150 ER 1597; *Appleby v Myers* (1867) LR 2 CP 651; *Hendy Lennox* (n 21). See too: *Rendell v Associated Finance Pty Ltd* [1957] VR 604; *McKeown v Cavalier Yachts* (1988) 13 NSWLR 303 (Australia); *Thomas v Robinson* [1977] 1 NZLR 385 (New Zealand); *Clark v Wells* 45 Vt 4 (1872) (Vermont); *Mather v Chapman* 40 Conn 382 (1873) (Connecticut).

[74] *Glencore* (n 61) at [163] (emphasis added).

[75] ibid at [166].

dismissed in the lower courts, and did not pursue the issue in the Court of Appeal.[76] Had they argued that a co-ownership rule applied, the Court of Appeal might well have held the suppliers of the resin to be co-owners of the chipboard. It appears to follow that counsel's 'uncritical acceptance' of the *orthodox view* led them to concede a vital point on which they may have been able to secure priority for the former owners of the resin upon the manufacturer's insolvency.[77]

The second supposed difficulty with *Borden* is that the manufacturing process was authorised by the sellers of the resin; there was therefore no tort committed against them when the chipboard was produced. For this reason, argued Moore-Bick J, it 'might well be said' that O had 'by implication agreed not only that the resin should be used, but that title in the resulting product should vest solely' in M.[78] Indeed, in those cases where an express products clause is included in the parties' contract, which prima facie purports to vest ownership of a new chattel in O, the products clause is usually interpreted as being objectively intended to mean that ownership was to vest in M, but that M would create a charge in O's favour over the newly manufactured chattel. This is said to be due to a combination of factors, most usually because: (i) were O to be owner of the products, a windfall would be conferred on O, since the value of the product will probably exceed the value of the original materials;[79] (ii) allowing M dominion over the original materials and the products is (supposedly) inconsistent with an intention that O become the owner of the product;[80] and (iii) ownership is agreed to pass from O to M upon payment, which is a mark of a charge.[81] These three factors have led to courts openly doing 'violence' to the language of products clauses.[82] One startling example comes from *Modelboard v Outer Box*,[83] where a clause that labelled the product 'the sole and absolute property' of O was interpreted to be ineffective to vest ownership of the newly created products in O, on the basis that to do so would confer a windfall on them.

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[76] See *Borden* (n 40) 46, per Buckley LJ ('Common ownership of the chipboard at law is not asserted by the defendants; so the plaintiffs must either have the entire ownership of the chipboard, which is not suggested, or they must have some equitable interest in the chipboard or an equitable charge of some kind upon the chipboard').

[77] This point has been raised by the practitioner Simon Rainey QC: S Rainey, 'Whose Goods Are They Anyway?' (2016) 13 International Corporate Rescue 324, 326.

[78] *Glencore* (n 61) at [166].

[79] See, eg, *Clough* (n 5) 120, per Goff LJ; *Re Peachdart* [1984] Ch 131, 142; *Ian Chilsholm Textiles Ltd v Griffiths* [1994] BCC 96, 101-02.

[80] eg *Peachdart* (n 79) 142.

[81] eg *Modelboard Ltd v Outer Box Ltd* [1992] BCC 945, 953.

[82] *Clough* (n 5) 120, per Goff LJ, and 124, per Oliver LJ; *Peachdart* (n 79) 143.

[83] *Modelboard* (n 81).

Against this background, it appears plausible to suppose that *Borden* could be rationalised on the basis that a term could be implied in fact into the parties' contract, displacing a default rule of law that all contributors to the newly manufactured chipboard would become co-owners of it. Such an implication could only take place where a contract is concluded between the parties, and where the substance of their agreement is inconsistent with the products becoming subject to co-ownership. If this is the correct understanding of *Borden*, it necessarily follows that the case itself is not authority for the *orthodox view*.

Nonetheless, this rationalisation does depend upon a strained reading of the reasoning in the case.[84] At no point does the Court of Appeal in *Borden* mention that a term in the contract is to be implied, and, as can be seen from the quotations above,[85] the court seems to believe that fresh ownership was created in M upon manufacture. Perhaps this is explicable on the basis that the *orthodox view* was assumed by all concerned to be correct. If so, it follows that the case does not amount to convincing authority in favour of the *orthodox view* because the point was not argued. However, on the most straightforward interpretation of the cases, Moore-Bick J's analysis in *Glencore* is inconsistent with *Borden*.

(2) *Blackstone*. Moore-Bick J also takes some support from the anonymous cases relied upon by Blackstone. In the first of these, M made boots from O's leather; in the second, M cut timber from O's trees. In both cases, it was held that O remained owner of the product. For this reason, it was suggested in *Glencore* that 'it is necessary to approach the proposition that a new commodity automatically belongs to its manufacturer with some care', because 'in one sense' O's chattels had been 'turned into something new' in both of these cases.[86] They reflect, it is suggested, the deeper proposition that the *orthodox view* is incorrect.

We have already seen the difficulty with this analysis. Each of these cases were explicitly resolved on the basis that the event of manufacture had not taken place, and so O's ownership persisted unchanged. There was no new ownership created, because there was no new chattel. Reliance on these cases, then, cannot be entirely convincing as an argument in support of the interpretation of the law adopted by Moore-Bick J, because they are clearly open to several plausible rationalisations.

[84] Although cf J Ulph, 'Retaining Proprietary Rights at Common Law Through Mixtures and Changes' [2001] LMCLQ 449, 451 (suggesting that *Borden* was 'rightly distinguished' in *Glencore* on this basis, because the existence of a retention of title clause 'necessarily involves a consideration of the parties' intentions').

[85] Above, at n 42 and n 43.

[86] *Glencore* (n 61) at [178].

(3) *Justice*. The final point made by Moore-Bick J in favour of a purported co-ownership rule is that to follow the *orthodox view* would 'offend many people's sense of justice in a case where the original materials belonged entirely to someone other than the maker of the new commodity, even if he were unaware of the fact; it is even more likely to do so in case where the maker of the new commodity knew that he had no right to take and use them'.[87] This is a peculiar argument as a doctrinal matter: it is an empirical claim about what most people would consider the law ought to be. It says nothing about what the law as a matter of fact is and so, at least as a descriptive claim about English law, the argument is unhelpful.

6.1.2.4 Conclusion

It follows from the above discussion that English law is in a state of deep uncertainty as to the rule of law that governs the event of manufacture. This is so both in cases of *Single* and *Two Property Manufacture*. The cases quite clearly do not speak with one voice. *Thorogood v Robinson* is ignored in *Glencore*, despite being apparent authority in favour of the *orthodox view*, and the latter case is most probably inconsistent with the reasoning of *Borden*. Indeed, as Matthews has shown, there is much to be said for the view that the belief that orthodoxy was ever correct was simply invented by Blackstone in his commentaries, and that personal property law's unusual willingness to fall back onto Roman principles has meant that much of the law has been developed on the shared assumption that it must be correct.

We might, then, usefully ask what the law ought to be. Any answer to that question is within reach on the authorities, because one of *Thorogood* and *Glencore* must be wrongly reasoned, and there seems to be no straightforwardly determinative case law. This is a question that must be answered by considering the strength of the *pro tanto* justifications that can be offered in defence of the candidate rules that might govern the event of manufacture, as explained in 1.2.3. This is the task of section 6.2.1. It is, however, worth casting immediate doubt on the only argument offered in *Glencore* that might be read as an argument that purports to show that the law has good reason to reject the *orthodox view*: that most people would think the *orthodox view* to be irrational or unjust. Plausibly, if this empirical claim is true, this would give us some sort of reason to think the *orthodox view* should not be adopted. For present purposes, however, all that need be noted is that the *orthodox view* clearly has a long standing

[87] *Glencore* (n 61) at [178].

in American and civilian law.[88] It seems implausible, therefore, to conclude, at least without any empirical analysis, that 'most people' would settle on a single view as to what the law ought to be.

6.1.3 Bad Faith Manufacture

It was demonstrated in the last section that English law does not appear to have any clear rule that dictates who is to be the owner of a newly manufactured chattel, at least where that manufacture is done in good faith. In this section, the case of a bad faith manufacture is considered. It will be seen that there are a number of doctrinal arguments that can be made, most of which attempt to make out the claim that, after a bad faith manufacture, ownership of the newly created chattel will vest in the initial owner, O. These arguments, however, are not entirely determinative of the issue.[89]

(1) *Blackstone*. The first point to note is that Blackstone does not explicitly consider the case of a manufacture conducted in bad faith. This is surprising, given that Blackstone did give an account of the effect of bad faith in relation to the causative event of legal mixture.[90] As we have seen,[91] Blackstone argued that an accidental legal mixture would lead to co-ownership, but that a legal mixture brought about deliberately by one contributor led to the forfeiture of any and all rights in the wrongdoer in relation to the mixed mass.

It has been argued that this omission suggests that Blackstone considered the *orthodox view* to govern both good and bad faith manufacture, and that he therefore saw no need to draw an explicit distinction between these two classes of case.[92] Although prima facie plausible, Blackstone's silence is a flimsy basis from which to draw any conclusions about the substantive content of English law. It seems equally plausible that Blackstone simply did not consider the problem of a bad faith manufacture because of a lack of case law on the point.

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[88] See the cases and legislation cited above, at n 35 and at n 36.

[89] This uncertainty is reflected in much of the academic literature, which cannot be said to reveal a majority view on the matter. This is in stark contrast to the popularity of the *orthodox view* in relation to a good faith manufacture. In fact, contradictory claims about the rules of English law governing the problem have been made in the same leading textbook: contrast Bridge et al (n 3) at 16.035 and at 20.027.

[90] 2 Bl Comm 405.

[91] 4.1.3.

[92] Webb (n 8) 528.

(2) *Other jurisdictions*. There is clear authority from the United States that holds that ownership of a manufactured chattel will not vest in a bad faith manufacturer. The most famous example is the New York case of *Silsbury v McCoon*.[93] M had taken O's corn and converted it into whiskey, knowing that the corn belonged to O. It was held that the whiskey was a 'new thing', and so the event of manufacture had taken place, but that M 'acquired no title to the manufactured article', which 'although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged' to O.[94] O would, therefore, be able to enforce his right that M not physically interfere with that whiskey, so long as he could prove that it was corn owned by him that was used in its production.

The American rule also may represent the law in Canada. The leading case is *Jones v de Marchant*.[95] C's husband took eighteen of C's beaver skins, and crafted a fur coat out of them for his mistress, D. The husband had also contributed four beaver skins to the coat. It was held that C acquired ownership of the coat, and was therefore not limited to a claim in conversion for the appropriation of her original eighteen skins. It was, however, reasoned that this was an application of the doctrine of accession, and not an example of the event of manufacture.[96] The court explicitly endorsed the view that the 'law of accession' refers only to those rules governing the scenario where one person's chattel or chattels are incorporated into another's. That event would cause ownership of the acceding chattel to be destroyed, while ownership of the dominant chattel would persist unchanged.[97] Indeed, *Silsbury* is explicitly discussed, and is said to go 'much further than is necessary for the case before us', because there 'the species was altered by the distillation from corn to whisky', and no such change of species was thought to have taken place in *Jones*.[98] It follows that the court did not think themselves to be formulating any sort of rule of law that governed the event of manufacture.

Nonetheless, one way to rationalise that outcome of *Jones* is that it applied the American rule that ownership does not vest in M where M manufactures a new chattel in bad faith. Some

[93] 3 NY 379 (1850). For discussion of a number of American cases concerned with bad faith manufacture, see, eg, Arnold (n 8) 107-09; JL Koh, 'From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets' (1998) 48 American University LR 271, 326-28.

[94] ibid 392, per Ruggles J.

[95] (1916) 28 DLR 561, 26 Man R 455.

[96] ibid 459.

[97] ibid. On the other plausible meanings of the term 'accession', see 5.1.1.

[98] ibid 461.

support for this interpretation of the case can be found in part of the reasoning of the court, which claimed that the same result would have been reached even if C's husband had taken only four of C's beaver skins and contributed eighteen of his own.[99] It is peculiar to think that, on those alternative facts, it could be said that the eighteen skins would accede into the other four, and so that a person's bad faith could change the causative event that has taken place in the world. Presumably for this reason, a number of commentators on English law consider *Jones* to stand as authority for a distinct rule that displaces the *orthodox view* in cases of bad faith manufacture.[100]

(3) *Judicial dicta*. There is some support for the American rule in dicta from the House of Lords. In *Foskett v McKeown*,[101] Lord Millett endorsed the outcome of *Jones*, suggesting that the 'determinative factor was that the mixing was the act of the wrongdoer'.

It is, however, submitted that this statement should be taken with great caution, for a number of reasons. First, as we have just seen, the reasoning in *Jones* is unsatisfactory, and requires greater scrutiny than it was given in *Foskett*. Second, Lord Millett clearly believed this result to be consistent with those 'principles [that] apply to following into physical mixtures', where, according to Lord Millett, the law adopts a rule that dictates that parties who knowingly bring such a mixture about forfeit any and all rights in relation to their mixed chattels. Reliance was placed on *Lupton v White*,[102] and *Sandeman v Tyzack*.[103] This is, however, no longer a correct statement of English law. In more recent cases, a strict rule of forfeiture has not been adopted.[104] That Lord Millett did not consider any authority subsequent to *Sandeman* is unexplained and must undermine, first of all, his description of English law in relation to legal mixtures, and, second, his description of the law governing manufacture, which is clearly premised on the erroneous belief that *Lupton* and *Sandeman* remain compelling authority.

[99] ibid 459.

[100] See, eg, C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) 7.25; Sheehan (n 3) 27; Raczynska (n 8) 2.36.

[101] [2001] 1 AC 102, 132-33.

[102] (1808) 15 Ves 432.

[103] [1913] AC 680.

[104] See 4.1.3.

(4) *Authority*. Finally, support for the American rule can be found from the judgment of Moore-Bick J in *Glencore*.[105] Recall that M had 'blended', without authorisation, the oil of several claimants, to produce a mass of oil that was a different grade to the contributions. It was held that the event of manufacture had taken place, but that the contributors to the blended mass co-owned it as tenants in common. As we have seen, Moore-Bick J cast considerable doubt upon the correctness in English law of the *orthodox view* – that ownership of a newly manufactured chattel vests in its manufacturer – as a general matter. A firm conclusion, however, was explicitly limited to the facts before the court, where (i) M had acted wrongfully, aware that M was under a legal duty owed to O not to perform the act of blending, and where (ii) the product that was created could be divided between the claimants without much difficulty.[106] The latter limitation was endorsed in order to remain consistent with the outcome of *Jones v de Marchant*, where the entirety of a coat was held to belong to the wife from whom the manufacturer had taken most of the furs that made up the coat. It was reasoned that, in *Jones*, co-ownership would have been an unsuitable solution, because the coat that was produced could not sensibly be divided between the wife and the mistress, nor could the court expect the two to work together to jointly manage the coat's use and enjoyment.

The upshot of the discussion in this section is that the better view is that there is no clear rule that governs the case of a bad faith manufacture. We have some reason to suppose that the manufacturer will not acquire ownership of the new chattel, but this view relies squarely upon the authority of Moore-Bick J's judgment in *Glencore*. However, that judgment is based on a number of assumptions which do not stand up to doctrinal scrutiny, and relies on the flimsy foundations of *Jones* and *Foskett*.

6.2 Clarification and Justification

The purpose of this section is to prescribe how English law ought to remedy the uncertainties identified in 6.1. These are those rules which govern the definition of the causative event of manufacture and the effect of that event on the ownerships of the relevant parties. The first part of this section considers the case of a good faith manufacture, and argues that the *orthodox view* should be adopted. The second part applies those arguments to a bad faith manufacture,

[105] *Glencore* (n 61).

[106] ibid at [184].

and concludes that, on balance, the better view is that a similar rule ought to be adopted. The third and final part considers how the theoretical framework argued for in the first two parts sheds light on the definition of the causative event of manufacture itself.

6.2.1 Good Faith Manufacture

In this section, it will be argued that English law ought to embrace the *orthodox view*, and hold that, where a manufacture has taken place in good faith, ownership in the newly created product vests in its manufacturer, unless the relevant parties have agreed otherwise.

It is helpful to recall the following classes of case, because different arguments may apply depending on the type of manufacture in issue:

Single Property Manufacture: M uses ingredients owned by O to make a cake.

Two Property Manufacture: M uses eggs and flour owned by O, along with other ingredients of her own, to make a cake.

In each case, we can assume for present purposes that that cake is treated by the law as a new chattel, and so the event of manufacture has taken place.

The argument moves in three stages. First, existing arguments that have been made in the literature that claim that the *orthodox view* should, ideally, not be the law are considered and dismissed. Second, existing arguments that purport to justify the *orthodox view* are considered. It will be seen that most existing arguments, on both sides of the debate, fail. Thus, the third part offers a novel argument that builds on the goals-based justifications of the other events considered in this thesis. With that framework in place, a straightforward justification of the *orthodox view* can be put forward.

6.2.1.1 Criticisms of the *Orthodox View*

It is helpful to begin the analysis in a negative fashion, because most writers have argued that the law would do better to reject the *orthodox view*. Instead, it is usually suggested that, in a case of *Single Property Manufacture*, either ownership ought to vest in O, or O and M should co-own the new chattel, as tenants in common. In *Two Property Manufacture*, a tenancy in

common is usually the preferred result. In both cases, the proportions in which O and M hold their tenancy in common is to be calculated according to the value of their initial chattels and the value added to them through M's labour.

Many submissions to this effect, however, take the form of assertion, rather than argument. It is thought that there is no good reason to vest ownership of the product in M, and so some other rule must be preferable.[107] In this section, three arguments will be considered that have been explicitly made in criticism of the *orthodox view*. Each will be dismissed in turn.

(1) *Fairness*. The first criticism of the *orthodox view* that one might raise is that it is unfair. The rule acts to strip O of his prior ownership, and this is done without his consent by the unilateral (and potentially tortious) actions of M.[108] There are two plausible reasons to think that the *orthodox view* might be unjustified because it is unfair. The first is that the rule seems to place an unfair detriment on O, because it causes O's ownership to be lost without his consent or fault. This may be the view of Lionel Smith, who claims that it is 'extraordinary' to think that the law might strip O of his ownership after a purely unilateral act like that of a good faith manufacture.[109] Second, it might be thought that the *orthodox view* unfairly benefits M, because it leads to the result that M may discharge himself of a duty (in this case, the duty owed to O not to physically interfere with the initial chattel) by performing an act that is a breach of that duty. Ernest Weinrib has argued – albeit in a slightly different context – that such a result would be 'absurd'.[110]

Despite their intuitive attractions, neither of these arguments are particularly convincing. For present purposes, we can cast doubt on the plausibility of the first argument by contrasting manufacture with the case where O's chattel is physically destroyed by another person, D. Suppose that D eats an apple owned by O. The apple no longer exists, and so this is an example where D has unilaterally destroyed O's ownership, by destroying the subject of it. Clearly, there is a sense here in which it is unfair that D's actions have this effect. This unfairness is

[107] See, eg, H Grotius, *On the Law of War and Peace* (SC Neff ed) (CUP 2012) Book II, ch 8, §19.

[108] We have already seen the elaborate means that Kantian theorists of private law have adopted in an attempt to get over the (supposed) problem posed by a unilateral alteration of a person's 'normative situation' by another in the context of first possession: 2.2.1.

[109] Smith, *Tracing* (n 23) 113. This concern appears to underlie the analysis of Paul Matthews, who rejects the *orthodox view* as a descriptive account of English law: see 6.1.2.2. He has claimed that it would be a 'staggering slap in the face of justice' if a person could, in effect, enforce a 'compulsory purchase order' by tortiously dealing with a chattel belonging to another: Matthews, 'Proprietary Claims' (n 53) 177.

[110] EJ Weinrib, *Corrective Justice* (OUP 2012) 90.

reflected in the law by the existence of a primary duty that D not physically interfere with O's apple, and, once that duty has been breached, the creation of a secondary remedial duty (or liability). That O does not acquire a new proprietary interest after D's eating of her apple does not appear to be extraordinary. It is, instead, a reflection of the underlying reality that there is no longer a chattel from which O might have a right to exclude others.

Similarly, after the event of manufacture, O's initial chattel is deemed in law to be destroyed by M, in the same way that O's apple is destroyed when it is eaten by D. This point is expressly accepted in *Borden*,[111] where it was thought that a manufacture was comparable to the event of feeding O's chattel to an animal, or of a party using O's fuel to generate power. In such a case, M will have committed the tort of conversion – breaching a duty not to interfere with O's chattel – when subjecting that chattel to the manufacturing process. It follows that the law does offer a response to the 'unfairness' that M's actions create, even if the *orthodox view* is adopted. There is, then, little reason to support the argument from unfairness without considerable elaboration. The mere fact that the *orthodox view* has the effect of destroying O's ownership appears to give us little reason to suppose that the rule is unjustified, rather than this being a necessary, albeit, from O's point of view, unfortunate, legal effect brought about by the underlying factual reality.

For similar reasons, the second form of the argument from unfairness should not be accepted.[112] That the legal effects of D's or M's actions may be, in some sense, regrettable does not demonstrate that those legal effects are necessarily unjustified. There is also a sense in which both D and M remain bound by the duty that they have destroyed, because they will come under a new secondary duty (or liability) to compensate O for the value of the chattel which they have destroyed.[113]

(2) *Consistency*. It has been argued that the event of manufacture ought to lead to the same result as a legal mixture because the two events are similar.[114] This argument is particularly strong in the case of *Two Property Manufacture*, where there may be marginal cases where it is not intuitively clear whether a legal mixture or a manufacture has occurred. The academic commentary on *Glencore* confirms this point; it is common to see the case analysed purely in

[111] *Borden* (n 40) 41, per Bridge LJ.

[112] cf S Steel, 'Compensation and Continuity' (2020) 26 Legal Theory 250, 255.

[113] Weinrib's argument is in fact offered in an attempt to justify D's coming under that secondary duty after destroying O's chattel: Weinrib (n 110) 90.

[114] eg M Bridge, *Personal Property Law* (4th ed, OUP 2015) 131.

the context of legal mixtures, even though it is clear from the judgment that the causative event in issue was considered to be a manufacture.[115]

Again, there are two slightly different arguments from consistency that ought to be separated. First, it might be argued that there is no difference of normative significance between these classes of case, because the reasons that bear on the two classes of case are the same. Call this the *normative argument*. The clearest statement of this argument is made by Sarah Worthington, who criticises the *orthodox view* on the basis that it 'patently' conflicts 'with the results *and rationale* underlying the common law rules which apply in the other categories' of accession and legal mixture.[116] Second, it has been argued that, although a normative difference may exist between the doctrines, it is too difficult to distinguish between them on certain sets of facts, and so – to eliminate the risk of error, either by courts or citizens attempting to self-apply the law – all such cases should lead to the same outcome, so that these distinctions need not be drawn. We can call this the *evidential argument*. The *evidential argument*, if convincing, may provide us with good reason to adopt a rule of co-ownership in the context of manufacture, even if, as a purely theoretical matter, the ideal solution would be that ownership vests in M or in O. Treating all cases in the same way would mean that the distinction between manufacture and legal mixture 'would no longer be of such great consequence', because the same outcome would be reached in either case.[117]

The *normative argument* – at least for the purposes of this thesis – is easily dismissed. This is for at least four reasons. First, in order to make any sense at all, the argument must assume that we already know the 'rationale' behind English law's response to a manufacture. Otherwise, we simply cannot conclude that that rationale is the same as the rationale lying behind English law's response to a legal mixture. However, as this thesis has hopefully made abundantly clear, there is no single accepted rationale underlying the legal rules that govern either of these causative events. Second, there is no reason to suppose that, until a detailed analysis of both legal mixture and manufacture has been done, the rationales that lie behind the legal rules governing these events must be the same. There are clear conceptual differences between them. A legal mixture concerns a purely evidential problem, while a manufacture involves the destruction of a chattel and its replacement with a new chattel. Debate as to the

[115] See, eg, Bridge et al (n 3) 16.028; Sheehan (n 3) 29.

[116] S Worthington, *Proprietary Interests in Commercial Transactions* (OUP 1996) 142 (emphasis added).

[117] M Conaglen, 'Retaining Title to Mixtures and Manufactured Goods: A Principled Re-Appraisal' (1996) 11 Denning LJ 23, 49-50. See too Worthington (n 116) 142.

legal interests of the parties after a manufacture cannot be on precisely the same terms as debate in regards to a legal mixture, because it is not possible for the law to hold that the initial interests of the contributors continue to exist unchanged. Third, to say that manufacture and legal mixture are normatively alike in this way is a conclusion. What is needed is two independent normative analyses of the two sorts of case, which establish the reasons that the law has to adopt particular rules to govern those cases. We might conclude, *after* these independent analyses have been done, that the same rule ought to govern the two events for the same reasons, but it is those independent analyses that do all the work in telling us what rules ought to govern each event. Fourth, even if we accept that both events ought to be treated in the same way, the *normative argument* cannot alone tell us how inconsistency ought to be remedied. We could eliminate inconsistency between manufacture and legal mixture with any rule, so long as that rule governed both cases.

The *evidential argument* poses more difficulty for the *orthodox view*. However, it too should be rejected as unconvincing as a rejection of the *orthodox view*, at least without a fuller analysis of its normative merits. This is so for two reasons. First, the *evidential argument* depends for its validity on the assumption that – assuming manufacture and legal mixture ought, ideally, to lead to different outcomes – the differences between the legal rules that govern these two classes of case ought to converge in the direction of co-ownership. The argument would, however, lose all force so long as we treated both events in the same way. We might hold that both events lead to the chattels in question becoming unowned, and, if so, the *evidential argument* would be of no force in criticising the law. It follows that the argument is incomplete as a criticism of the *orthodox view*. Second, the strength of the *evidential argument* depends, at least in part, upon the confused state of the law in defining the event of manufacture.[118] It is clear that there is considerable uncertainty when it comes to working out whether a 'new' chattel has been created. If, however, that uncertainty can be remedied, then the force of the *evidential argument* falls away, because we could then expect courts and citizens to be able to apply the law to a given set of facts without falling into error. It is argued below, in 6.2.3, that some of this uncertainty can be remedied once we gain an understanding of the reasons why the *orthodox view* should be accepted.

(3) *Reducing costs*. A plausible case might be made that a rule of co-ownership could have benefits from the point of view of economic efficiency. Worthington argues that 'commercial

[118] See 6.1.1.1.

sensibilities' would dictate that a co-ownership rule ought to apply to *Two Property Manufacture*, because this result would generally correlate with the reasonable expectations of commercial actors.[119] If this empirical claim is sound,[120] then it suggests that the law has good reason to adopt a rule of co-ownership, at least in *Two Property Manufacture*; this outcome would be self-applied by citizens, who would assume the law to match their intuitive judgment about the merits of the case. This would have the beneficial result of ensuring that the overall costs placed on the legal system following a manufacture are minimised.[121]

Despite this initial argument, it is generally accepted by law and economics scholars that a co-ownership rule, were it to govern the event of manufacture, would lead to undesirable consequences in terms of cost imposed on the legal system. This is because forcing the parties to cooperate to manage or divide the newly created chattel is likely to lead to conflict, and, therefore, litigation.[122] These problems are intensified where the chattel that has been produced does not readily lend itself to a pro rata division.

A co-ownership solution is also likely to lead to considerable costs where that litigation takes place. This is because such a rule would require an assessment of the contributions of each co-owner, which would presumably take into account not only the amount and the value of the physical matter contributed by each co-owner, but also the value of the labour that has been expended on the process of manufacture. For these reasons, courts clearly have competing cost-saving reasons to prefer a rule that vests ownership in a single party, be it O or M.

It follows that arguments based purely on cost-saving are inconclusive. Although initially a promising line of argument, the better view appears to be that a rule of co-ownership is likely to have negative effects in terms of administrative cost.

6.2.1.2 Existing Defences of the *Orthodox View*

It was shown in the last section that existing criticisms of the *orthodox view* are unpersuasive. In this section, existing defences of the *orthodox view* are considered. It will be demonstrated that most of these arguments are flawed or incomplete. An argument from economic efficiency, however, does seem to suggest that the law has (weak) reason to favour the *orthodox view*.

[119] Worthington (n 116) 143.

[120] cf *Glencore* (n 61) at [178].

[121] See further 2.2.2.1.

[122] RA Epstein, *Simple Rules for a Complex World* (Harvard UP 1995) 117. See too Chang (n 8) 230, n 29.

(1) *Tracing*. The first argument that we must consider, because of its prominence in the case law, can be called a *tracing* argument. Endorsement of this argument comes from the Court of Appeal decision in *Borden*.[123] As we have seen, it was argued by counsel in that case that a simple retention of title clause, which reserved ownership in O of resin supplied to M, could be understood to create a charge over the chipboard that was produced with the resin. In rejecting this argument, the Court of Appeal appeared to endorse the *orthodox view*, that ownership of the boards vested in M, because the resin had been destroyed. This was said to be so because tracing a right in a chattel could not be done once it is known that the chattel in question has been destroyed. Buckley LJ, for example, stated that 'in my judgment it is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life', and it followed that, because the resin had ceased to exist, the process of tracing would no longer be possible.[124]

This argument is unconvincing, as has been shown by other writers.[125] There seems to be no reason why O could not claim some kind of legal interest in the product brought about by M, merely because O's initial chattel has been destroyed. According to Peter Birks, the Court of Appeal's reasoning is explicable because it failed to draw a distinction between the processes of 'following' and 'tracing' an asset. The latter is (in Birks' view) a process that allows the law to identify the value of one asset in another.[126] It may be true that the destruction of the resin must logically have put an end to the process of following, but this is not true of tracing. The fact that O's resin was destroyed does not offer any reason at all to think that O could not simply acquire a new interest in relation to the chipboard.

(2) *Windfall*. Another argument that ought to be considered because of its prominence in the case law is what we can term the *windfall* argument. This is that ownership of the product ought to vest in M in order to avoid a windfall being conferred on O, who would, if owner of the product, be able to sell that product and acquire its additional value at no cost to himself.

[123] *Borden* (n 40).

[124] ibid 46.

[125] Birks, 'Mixing and Tracing' (n 45) 98; Conaglen (n 117) 37-41.

[126] ibid. The distinction is most clearly explained in Smith (n 23) ch 1.

This argument has particular prominence in American case law. In *Wetherbee v Green*,[127] M fashioned O's timber into barrel hoops, reasonably believing the timber to belong to him. It was held that a new chattel had been produced. The court reasoned that the determination of the existence of a new thing must be done with 'the purpose which the law has in view in recognizing a change of title' firmly in mind.[128] For this reason, the court concluded that the substantial value of the hoops, compared to the original timber, meant that a new thing had been created. Otherwise, the 'redress afforded to the one party and the penalty inflicted upon the other' would be out of kilter with 'the rules of substantial justice'.[129]

The worry that O will receive a windfall has also greatly influenced English courts when they have been called on to interpret the legal effect of a products clause that attempts to vest ownership of the products of a consensual manufacture in O. That the products will be worth considerably more than M will have paid to purchase the initial chattels from O has been of critical importance in establishing a presumption that such clauses are intended to create a charge over the product in O's favour, rather than vest ownership of them in O.[130]

The *windfall* argument, however, is unconvincing as a justification for the *orthodox view*. This is so for three reasons. First, it is circular. In order to know whether there has been conferred on O an unjustified windfall, we first need some argument that establishes why it is that this should be treated as an unjustified windfall to be eroded, rather than as a legitimate enrichment. Second, it is not correct to suppose that the product of a manufacture will always have a higher value than the chattel from which it was made, and that a manufacture will therefore always lead to the risk of a windfall being conferred on O. Third, it is unconvincing to rely solely on abstract value in an attempt to justify the creation of the legal interest of ownership.[131] A personal right to a monetary award would be sufficient to strip O of whatever windfall would arise in virtue of his ownership of the newly manufactured chattel.[132]

[127] *Wetherbee* (n 10).

[128] ibid 319.

[129] ibid.

[130] See the discussion above, at p 176.

[131] Compare the 'unjust enrichment' argument considered in the context of legal mixtures at 4.2.1.1.

[132] Precisely the same objection can be raised against the argument that ownership ought to vest in M as a reward for skill, effort or labour. That argument offers us no reason to think that this reward ought to be ownership of the manufactured chattel, rather than something else. See, for examples of that argument, S Douglas and I Goold, 'Property in Human Biomaterials: A New Methodology' (2016) 75 CLJ 478, 500; Raczynska (n 8) 4.59.

(3) *Possession*. There is some attempt to explain the *orthodox view* in the Roman texts. The Digest explains that the Proculian jurists considered that ownership ought to vest in M 'because what has just been made previously belonged to no one'.[133] There are two ways in which we might understand this argument as a purported justification of a rule that states that a newly manufactured chattel belongs to M. The first is an argument that we might term 'creation without wrong'. In other words, because a *new* thing has been created, no harm is done by awarding ownership of that new thing to its maker. This argument fails because it is negative; it gives us no positive reason to award ownership to M rather than to any other person.

The second interpretation of the argument is that the *orthodox view* is simply an application of a different rule – that governing first possession – and ownership of the newly created product vests in the first person to possess it. This will likely be the manufacturer because they will probably have custody and control of the chattel when it comes into existence. This view has recently been endorsed as an analysis of English law by Ben McFarlane, who claims that the *orthodox view* 'seems to be a simple application of the core principle' that ownership of a chattel can only be acquired in English law in one of two ways: either through voluntary transfer, or by taking possession.[134] On this view, the orthodox 'rule' is no rule at all. Instead, where the event of manufacture takes place, the new chattel that is created is unowned, and so will become owned by whomever is the first person to subject it to their possession. Because it is 'very hard to think of a situation in which [M] can manufacture a thing without that thing being in the physical control of [M] or someone acting on behalf of [M]', the *first possession rule* creates the appearance that the *orthodox view* is correct.[135]

This argument suffers from several flaws as a descriptive interpretation of the law. First, it is at odds with judicial reasoning in related areas. In particular, we have seen that English courts have firmly rejected the claim that chattels become unowned after a legal mixture takes place.[136] It is odd to think that that hostility would not carry through to cases of manufacture. Second, and relatedly, it does seem plausible to think that there may be examples where a chattel is manufactured by a person who is not in possession of that chattel upon its creation. An example may be where M uses an automated machine owned by another to create a new

[133] D.41.1.7.7.

[134] B McFarlane, *The Structure of Property Law* (Hart 2008) 161, 331-32.

[135] ibid 161.

[136] See 4.1.2.1.

chattel from O's materials.[137] Third, it is not clear that there exists the 'core principle' that McFarlane advocates.[138] The general acceptance of the *orthodox view* governing manufacture may be taken to disprove the existence of such a core principle, every bit as much as that view might be taken to be incorrect because of the principle.

Nonetheless, it does seem plausible that the law might have some good reasons to adopt a rule that vests ownership of a newly manufactured chattel in its first possessor. If so, those reasons can be adapted into a defence of the *orthodox view*, on the basis that, at least in the vast majority of cases, the *orthodox view* is likely to bring about precisely the same benefits as a rule vesting ownership in the first possessor, because the manufacturer and the first possessor are (almost always) going to be the same. McFarlane does go on to offer an argument of this sort in defence of his preferred doctrinal analysis of the law. He claims that it is preferable for English law to hold that ownership vests in the first possessor of the manufactured chattel because such a rule would afford more justifiable protection to third parties, who will reasonably assume that the person in possession of the chattel is its owner.[139] Were O to be the product's owner, a purchaser from M may be (strictly) liable to O in tort were they to interfere with the product, and, McFarlane argues, it is unreasonable to expect that purchaser to discover that O, rather than M, is in fact the product's owner.

Although this argument suggests that the law may have good reasons to adopt a rule that has the effect of vesting ownership of the product in its first possessor – in both *Single* and *Two Property Manufacture* – it should be noted that these reasons are only of limited force. They depend for their existence upon a prior rule of law, that liability in conversion is strict. Although this undoubtedly represents English law,[140] there is a sizeable literature that asks whether strict liability in this context is justifiable.[141] Were a fault element introduced to the tort, McFarlane's argument would be robbed of its force. It follows that we might usefully ask whether the

[137] It might be objected that we can *deem* the manufacturer to be in possession of the chattel when it is created. However, this is not satisfactory, and in fact concedes the point that the *orthodox view* is superior. If M has no physical control over the chattel, then it is a fiction to say that M possesses it. What is needed is a justification of that fiction.

[138] The supposed principle is also at odds with the law governing legal mixtures, which McFarlane criticises, at least in part, on the basis that it contradicts the principle. However, the case law on legal mixtures could equally be taken to disprove the principle.

[139] McFarlane (n 134) 331. The same argument is relied on to dismiss the possibility of co-ownership.

[140] See *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 (HL) at [78], per Lord Nicholls.

[141] See, eg, A Tettenborn, 'Conversion, Tort and Restitution' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd ed, LLP 1998); NJ McBride, '*Vindicatio* – The Missing Remedy?' (2016) 28 Singapore Academy of Law Journal 1052, 1065-70.

argument would succeed even if the tort of conversion were reformed in this way. Indeed, it seems that McFarlane's argument is really one in favour of reforming the tort. Suppose that T innocently misappropriates a chattel belonging to C, and sells that chattel to D. It is odd to suppose that D will be given protection of the sort advocated by McFarlane only where T has first subjected the chattel in question to some sort of manufacturing process. Whether such a process is undertaken or not, McFarlane's argument suggests that D ought not to be liable, because he is equally innocent in both cases.

It follows that this defence of the *orthodox view* is very weak. The argument does appear to demonstrate that some benefits flow from the *orthodox view* on the grounds that the manufacturer is likely to be in possession of the new chattel. However, this need not always be the case, and those reasons are dependent upon the existence of another rule of law.

(4) *Economic efficiency*. We have already noted the drawbacks, from an economic perspective, of a rule that leads to manufactured chattels being co-owned. In doing so, a number of strengths of the *orthodox view* have already been drawn out. In particular, (i) the rule may be relatively easy to apply, because courts need not work out the proportions in which co-owners hold the new chattel, and (ii) the rule assigns ownership to a single party, reducing disputes about how the new chattel is to be managed.

Yun-chien Chang has recently offered an extended defence of the *orthodox view* on the further basis that it generally helps to promote allocative efficiency, because M is more likely to place a subjectively higher value on the product than O. This is so because where the initial chattel has been transformed, it is 'likely to create subjective value for improvers and eliminate subjective value for original owners'.[142] As Richard Epstein explains, 'it is most improbable that [O] would be the one person to buy the [product] if [M] had made it out of his own materials'.[143] On the other hand, we at least know that M places some value on the product, otherwise she may well not have bothered to create it in the first place.

The argument from allocative efficiency has an innate drawback, which is that the rule can only produce roughly efficient results; in some cases, it is plausible to suppose that O would place a subjectively higher value than M on the product, and so the argument would there dictate that O ought to acquire the freshly created ownership. For this reason, Chang advocates the adoption of a strict test to determine when a new chattel has been produced, and the event

[142] Chang (n 8) 234-36.

[143] Epstein (n 122) 118.

of manufacture made out, in order to ensure that the allocative efficiency argument is more likely to provide a reason in favour of the rule on a given set of facts.[144]

There is, too, a further difficulty with the *orthodox view* that is highlighted in the law and economics literature. This is that the costs imposed by such a rule on *courts* is likely to be higher than a rule that simply vests ownership in O. Such a rule would have the benefit of avoiding the difficulties of co-ownership, and would also prevent courts from needing to determine whether the event of manufacture has actually been made out, and a new chattel created.[145] Instead, we could safely assume that O owns the product in all cases and there would be no need to bring the dispute to court for resolution.

The discussion of this section has shown that existing defences of the *orthodox view* are unpersuasive. The only plausible defences come in terms of economic efficiency: because the manufacturer is likely to be in possession of the new chattel, the informational burden placed on those who deal with the manufacturer is lessened; the manufacturer is also likely to place a subjectively higher value on the chattel than most others; and disputes as to the management of the chattel are likely to be lesser than with a rule that risks the new chattel being subject to co-ownership. It should be clear that these arguments are indeterminate. They are little more than educated estimates as to the economic impact of the *orthodox view*, and there are compelling reasons to think that a different rule, which would vest ownership in O, would in fact lead to more costs being saved.

6.2.1.3 The *Orthodox View* and Goal Pursuit

The discussion of the previous two sections suggests that there is no convincing justification of the *orthodox view* to be found in the existing literature. Perhaps for this reason, it has been claimed – most colourfully by David Hume[146] – that there is no 'correct' answer to be found, and that we should therefore be content with any rule that is able to resolve disputes.

It is, however, submitted that the thread running through the justificatory parts of this thesis suggests a relatively straightforward way in which a convincing defence of the *orthodox view*

[144] Chang (n 8) 235.

[145] ibid 237.

[146] D Hume, *A Treatise of Human Nature* (1739, DF Norton and MJ Norton (eds), OUP 2014) 513. Hume claimed to 'know not from what principles such a controversy can be certainly determin'd', but considered the Roman solution to 'plainly depend upon a fancy'.

can be made. If a justification is to be found, it is important to remember the legal interest that vests in M and that calls for justification: ownership, understood as a right that all others not physically interfere with the chattel that is owned. Progress can be made by asking whether the values promoted by ownership that were set out earlier, in 2.2.3, are promoted by the *orthodox view* or instead by some other rule.

The following arguments were raised in that section. First, we have reason not to interfere with the pursuit of another person's goals, because that person has an important (non-legal) interest in seeing their goals fulfilled. As rational agents, we respond to the interests of others by appreciating that those interests create reasons that bear on our actions. Second, reasons of that sort can give rise to reasons not to physically interfere with chattels, where a person is using a particular chattel to pursue a goal, because interference with that chattel is likely to amount to interference with the goals that that person is pursuing. Third, the law has, at least in some circumstances, good reason to recognise the specific legal interest of ownership in order to give effect to the reasons that bear on our action outside the law, and because of various further considerations – most importantly administrative costs – that suggest that the law has good reason not to recognise other sorts of legal interest which might also have the effect of securing a person's (non-legal) interest in pursuing their projects or goals.

If the *orthodox view* is accepted, it follows that the manufacturer acquires ownership of the newly created chattel, and, therefore, becomes the person who is ultimately entitled to determine how that chattel is to be used. The projects that the manufacturer has adopted in relation to that chattel, and intends to use that chattel to pursue, are therefore protected through the legal interest of ownership. This insight suggests that the *orthodox view* can be justified, for at least two reasons.

First, negatively, affording O a right to exclude others from the chattel – and, with it, the liberty to use the newly created chattel in the pursuit of O's goals – will not serve this value. This is for the simple reason that the initial chattel has been destroyed and replaced with a new chattel. Whatever goals or projects that O had in relation to that initial chattel cannot now be pursued with that particular chattel, because that chattel no longer exists. Instead, O may be afforded a secondary right to compensation, because M will commit a tort in the process of manufacture. That compensation may be used by O to acquire a replacement for the initial chattel, and is designed to put O in the position she would have been had the manufacture not taken place.[147]

[147] *Livingstone v Rawyards Coal* (1880) 5 App Cas 25 (HL), 39, per Lord Blackburn.

We can draw a useful contrast here with the justificatory analysis of mixtures. Suppose that A's chattels are intermingled with B's. A's chattels remain intact, and – at least theoretically – can be restored to A. It follows that A can continue to pursue the goals that A had in respect of the chattels before the mixture took place. Where A's initial chattels can be exactly restored, there is no legal mixture for precisely this reason.[148] And, if it is not possible to restore to A the precise chattels that he owned before the mixture took place, then A's goals can still be pursued if A is to (eventually) become the owner of the same quantity of those chattels, regardless of whether they were previously owned by A or by B.[149] By definition, a legal mixture will occur only where the mixed chattels are identical and so the other chattels that went into the mixture are adequate for A's purposes.

Second, the law does have positive reason to afford M a right to exclude others from the newly created chattel, because to do so will secure M's interest in using that chattel in the pursuit of M's goals. This is so for the simple reason that M, in manufacturing the chattel, has demonstrated through her purposive activity that she has plans in respect of that chattel. It follows that the law has good reason to vest ownership of it in M, because doing so ensures that M's goals can be pursued without interference from others, who might, for example, steal or damage the newly created chattel.

6.2.2 Bad Faith Manufacture

The discussion immediately above suggests that the *orthodox view* is justified, because it works to bring about a desirable state of affairs. The projects of the initial owner are lost, but cannot be recovered through an award of ownership of the new chattel in any case, and the projects of the manufacturer are able to be protected. This section asks whether M's bad faith might change the balance of reasons, and so indicate that the law would do better to hold that, in such a case, M does not become owner of the newly created chattel and instead some other rule applies. It is argued, first, that existing arguments that have been made in an attempt to show this to be the case fail, and that, second, even where M acts in bad faith, the law still has good reason to vest ownership in M. The *orthodox view* should govern all cases of manufacture.

[148] 4.1.1.1.

[149] 4.2.1.1.

6.2.2.1 Existing Arguments

The most complete discussion of the issue comes from the judgment in *Silsbury v McCoon*,[150] in which the Court of Appeals of New York considered itself to be bound by no previous authority, and determined that the most appealing legal rule was one which vested ownership in O where M had acted in bad faith. This conclusion was reached for five reasons. It is argued below that none of the arguments put forward by the Court of Appeals is convincing.

(1) *Roman law*. It was argued first of all that the Roman solution was to vest ownership in O, and that, because 'our law has mainly derived its principles' from the Roman, the court ought to follow suit.[151] This is obviously unconvincing as a justification for a number of reasons.

First, the mere fact that Roman law adopted a particular solution tells us nothing about what rule Roman law *ought* to have adopted. Second, it is wrong to suppose that English law has simply copied Roman law in the law governing the acquisition of ownership of chattels. For example, Roman law drew a distinction in the context of legal mixtures between *commixtio* and *confusio*, which has not been followed in English law, for good reason.[152] Third, the claim may rest on a false understanding of the Roman position. JAC Thomas has argued that 'it is probable' that good faith was no requirement for the acquisition of ownership of newly manufactured chattels.[153] There are conflicting views on the matter,[154] and it is outside the scope of this thesis to offer a resolution on the better interpretation of Roman law. However, the uncertainty in the position undermines the argument as it applies to English law.

(2) *Consistency*. It was further argued that vesting ownership in O would ensure consistency with the common law rule that held that a wrongdoer who brought about a legal mixture of chattels would lose any and all rights in relation to the resultant mass, ownership of which would vest solely in the innocent contributor. This is, however, no longer an accurate statement of English law,[155] and so the argument is flawed.

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[150] *Silsbury* (n 93).

[151] ibid 390.

[152] See 4.1.1.2.

[153] Thomas (n 15) 176.

[154] See, eg, Buckland (n 15) 216 (claiming that there is a 'difference of opinion' on the matter, but offering no view on how it might have been resolved).

[155] See 4.1.3.

(3) *Deterrence*. It was also suggested that a rule vesting ownership in O will provide a 'salutary check against violence and fraud'.[156] This is best understood as an argument from deterrence. The claim is that a rule vesting ownership of chattels in their manufacturer would encourage the taking of chattels owned by others.

This argument is unconvincing, for at least two reasons. First, it is odd to suppose that the rule would, as a matter of fact, perform any deterrent function given that a deliberate taking of another's chattels will amount to both a conversion of those chattels and, at least probably, a criminal offence. Second, the argument does not explain why a rule preventing M from acquiring ownership of the chattel is the appropriate method by which we ought to deter wrongdoers. That function can be achieved through other means, such as an award of punitive damages.

(4) *Confiscation*. Perhaps the most plausible reason offered by the court in *Silsbury* is that to vest ownership in M would 'divest the true owner of his title, without his consent'.[157] This argument appears to be a repeat of the argument, discussed above in relation to a good faith manufacture,[158] which claims that it would be unfair for O to lose ownership without either giving his consent to that loss or being at fault. At least intuitively, it does seem that the argument has more potency where M is a deliberate wrongdoer acting in bad faith.

Nonetheless, the argument is unconvincing for the same reasons. The state of mind with which M destroys O's chattel cannot change the effect of her actions, which is to destroy that chattel. There is, then, no chattel left over which O's original ownership interest can 'persist', and it is somewhat misleading to think of this as a 'confiscation' or 'divestment' of rights. Instead, M's actions have simply caused O's ownership to cease to exist. This may be regrettable, but this point is reflected in the fact that M will have owed a duty not to interfere with the initial chattel, and will come under a new duty to compensate O for its breach.

(5) *Lack of reason to transfer to M*. Finally, and most importantly for present purposes, it was argued in *Silsbury* that there 'is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer

[156] *Silsbury* (n 93) 391.

[157] ibid.

[158] Above, pp 184-85.

of the title from the true owner to the trespasser'.[159] The claim here appears to be that, even if we accept that there may be no particularly good reason to vest ownership in O, there is equally no good reason to vest ownership in M.

This argument is unconvincing for at least two reasons. First, it does not follow from the argument itself that we have good reason to vest ownership in O in particular, rather than in some other person, or the state. It follows that the argument is incomplete. Second, the argument rests on the assumption that there is no reason to afford M ownership of the chattel. It is argued in the next section this claim should not be accepted.

6.2.2.2 Bad Faith Manufacture and Goal Pursuit

The analysis of manufacture set out above, in 6.2.1.3, suggests that the law does have good reason to vest ownership of a newly manufactured chattel in its manufacturer, regardless of the manufacturer's good or bad faith. This is so for three reasons.[160]

First, the mental state of M cannot alter the concrete effects of her actions. It follows that even where she acts in bad faith, O's initial chattel will have been destroyed by the event of manufacture. There will, therefore, still be no value in terms of goal pursuit that will be served by holding O to acquire ownership of that chattel rather than a merely personal right to compensation from M. Second, although it is plausible to suppose that the reasons that people have not to interfere with M's projects are weaker in the case where M's projects involve the knowing destruction of O's chattels, it does not follow that there is no reason not to interfere with those projects in any and all cases. And where those projects amount to illegal activity, persons may be able to raise the defence of illegality to excuse or justify behaviour that would otherwise amount to tortious interference with M's chattel. Third, a rule of law that requires courts to investigate the mental state of a manufacturer will lead to a significant increase in administrative cost.[161]

[159] *Silsbury* (n 93) 390.

[160] These arguments closely mirror those considered in relation to the justification of a thief's acquisition of a general property interest in relation to a stolen chattel: 3.3.2.

[161] See SE Sterk, 'Property Rules, Liability Rules, and Uncertainty About Property Rights' (2008) 106 Michigan LR 1285, 1313-14 (outlining difficulties associated with a defence of 'good faith' in the context of trespass). Although cf Chang (n 8) 233, n 38 (arguing that courts are often asked to distinguish between good and bad faith, and so to question their ability to do so in the case of manufacture also casts doubt on their ability to do so elsewhere).

6.2.3 The New Thing

As demonstrated above, in 6.1.1, there is no single method by which courts have attempted to determine whether a 'new thing' has been created, and so whether the event of manufacture has in fact taken place. In that section, four factors were identified: the transformation of the chattel; the difference in value of the chattel before and after being subjected to a process; the chemical composition of the chattel before and after the process; and the reversibility of the change made to it. We have seen that courts are likely to come to a discretionary determination as to whether the event has been made out, weighing up each of these factors against each other. The result is an exercise that lacks intellectual rigour and is difficult to predict.

One reason for this confusion is, it is submitted, that courts and commentators have not worked out any coherent rationale for the *orthodox view*. Without any understanding of why ownership of a new chattel ought to vest in that chattel's manufacturer, it is impossible to put forward a coherent and satisfying definition of when a manufacture will in fact take place. One such rationale has been set out earlier in this chapter. On this view, M becomes the owner of the new chattel so that he might use that chattel in pursuit of goals that require its use to be fulfilled, while O loses her prior ownership of the initial chattel because that chattel has ceased to exist, and so there is simply no point in O having a right to exclude others from it, because O has no uses or projects in mind to which she plans to put that new chattel.

With this framework in place, a relatively easy test can be offered – at least at an abstract level – that ought to help courts to determine whether a manufacture has taken place: the question ought to be whether the chattel can now be put to whatever uses the original owner had planned for that chattel before it was subjected to the manufacturing process by M. Thus, the event will only be made out where the crucial value that the *orthodox view* promotes will actually be brought about by holding M to become the chattel's owner.

The consequence of this test is that we ought to look, in part, to the intentions of O, rather than to any single physical characteristic of the chattel in question. This point leads to two related difficulties, in that the test appears both under- and over-inclusive as a description of the law as it stands. It should, however, be noted that the argument made in this part is that English courts ought to ask this question, not that they have in fact done so.

First, the test appears to be under-inclusive because there are cases where it has been held that no new thing has been produced, even though it seems implausible to suppose that O might still make the same use of the chattel as previously. The *Case of Leather* is a case of this sort,

where leather was made into shoes;[162] so too is the *Anonymous* case of 1560, where planks were cut from timber.[163] In both cases, the change was irreversible. It is, however, possible to rationalise these cases on the grounds that the changes made to the chattels were minor and predictable; the initial chattels had simply been cut into smaller pieces. In either case, it is not implausible to think that O might have done the same, and so perhaps would still have been able to achieve her initial plans in relation to them. Given that the *orthodox view* leads to the extinction of O's ownership in relation to the initial chattel, it is sensible for courts to adopt a high bar that must be cleared for the event to be made out.[164]

Second, the test appears over-inclusive, because it is plausible to suppose that facts may arise where O happens to have had the exact same use in mind for the initial chattel as that use to which M put the chattel. This is so even though, in terms of physical characteristics, the chattel has undergone significant change. The issue was foreseen by Pufendorf:

> [I]f a man has fashioned an object from metal belonging to another, and the form is of more value than the matter, it is just that the object be left to the fashioner, even though it can be brought back to its original and crude mass, provided the same amount of metal, or its value, is given to the owner. But it appears that the opposite decision must be rendered, *if I had intended that the metal in question be used for the same object which I greatly need*, and similar metal cannot be secured.[165]

Where this is the case, it follows from our argument that there is still positive value in vesting ownership of the new chattel in O, because those plans that had been formed on the basis of the initial chattel's existence can still be pursued. There is, then, a conflict between the goal-protecting reasons that show that the law has good reason to vest ownership in O, and those goal-protecting reasons that show that the law has good reason to vest ownership in M.

This conflict might be resolved in one of two ways. The first is to ask how strong those reasons are, and whether their relative strength suggests that one of O or M ought to be preferred. We might inquire into what their competing plans for the manufactured product actually are, and determine the strength of the reasons on that basis. It is plausible to suppose,

[162] *Leather* (n 26).

[163] Above, n 59.

[164] Compare the *proprietary logic* argument endorsed in 5.2.2 in the context of natural reproduction.

[165] S von Pufendorf, *De Jure Naturae et Gentium Libri Octo* (CH Oldfather and WA Oldfather trns) (Clarendon 1934) Book IV, ch 7, §10 (emphasis added).

for example, that we have more reason to give effect to O's plan to use a manufactured cake to feed ill children than we have to give effect to M's plan to eat the cake herself.

To contemplate that balancing exercise obviously leads us to the second way in which we might resolve this sort of conflict between O and M, which is to consider those arguments that suggest that the law, given its limitations, has good reason to adopt a rough and ready rule, that works perfect justice only in some cases. On this view, it is plausible to suppose that it is too expensive, and too difficult a task, for the sort of inquiry demanded by the argument from goal-pursuit to be undertaken. We might instead adopt a simple, clear rule that captures the just outcome on the basis of the argument in most cases, and also has the additional benefits, from the point of view of economic efficiency, of providing clarity and certainty. A rule that focuses on the general uses to which the chattel might be put – rather than the specific ones which O happened to have in mind – is considerably more likely to be successful on this measure than a rule that requires detailed investigation into O's state of mind. It is only in rare circumstances that O will have been intending to put the initial chattel to a use that can be fulfilled with the product of the process undertaken by M.

The discussion of this section indicates a new framework of analysis that courts should adopt in reasoning about the event of manufacture. This is, however, not to say that any firm rule can be posited in abstract terms. In all cases, the result of the court's inquiry will require argument and deliberation. The factors outlined earlier – in particular that of the feasibility of the change to the initial chattel being reversed – will still be likely to be taken into account. We can, however, now see more clearly *why* those factors may be of importance. They are not rigid tests or hurdles that must be cleared, but are instead a series of indicators that a court might use to reason towards a particular point. That point is to determine whether the chattel might still be used by the initial owner in the pursuit of their goals, or whether more value would be achieved by vesting ownership of it in the manufacturer. Given the sorry state of the present law, reframing the terms of the inquiry in this way can bring a significant level of intellectual coherence that does not presently exist.

It may be useful here to consider how such an exercise might be undertaken, by reference to a number of problematic examples which have been discussed in the case law or academic literature. The first example is where M carves a statue out of a block of marble which is owned by O.[166] Is this a case of manufacture or improvement? According to the framework of analysis

[166] This is a favourite thought experiment among academic commentators. See, eg, Arnold (n 8) 103; Bridge et al (n 3) 31.004; Swadling (n 3) 4.435.

outlined above, the key question to ask here is whether the projects that O might have had in mind in relation to the marble block can now be pursued with the statue. It seems clear that, in general at least, this will not be possible, because it is unlikely that O will have used the block to create a statue of the same form or artistic purpose as that which M has created. Nor can the statue be unmade so that O could still use the materials to pursue whatever project O did have in mind. In contrast, if the statue was made from some other material, which meant that the sculpting could easily be undone, the balance of the arguments canvassed above suggest that O ought to remain its owner. Thus, the American case of *Lampton v Preston*,[167] which drew a distinction between burnt and unburnt bricks made from O's soil, is correct.

A second example to consider is where M takes possession of a cup of tea owned by O, and adds sugar to it with the intention of drinking the product.[168] Here, it seems tolerably clear that there is no new thing created, because the projects to which O might put the original tea can still be fulfilled. Similarly, if M were to add tyres and an engine to O's car,[169] there is no new thing created, because the car itself can serve the same purpose, and so it is likely that it will still be able to be used by O as previously intended. The coat made from beaver skins in *Jones v de Marchant* is more difficult, and could plausibly be argued either way.[170] As we have seen, this is often considered to be an example of a bad faith manufacture.[171] However, there are good reasons to suppose that the better view may be that no new thing was created. It may have been possible to unstitch the skins from the coat and to return them to the claimant, and, in any case, it seems plausible to think that there is little else that a person in the position of the claimant might have done with the skins except fashion them into clothing.

Finally, we can consider the facts of *Glencore*, where oil of differing grades belonging to two parties was stored together in a single mass to create oil of a different value. Although some commentators consider this to have been a case of legal mixture,[172] Moore-Bick J considered it to be a manufacture, because the newly produced oil was 'commercially different' to its contributions.[173] Assuming that the uses to which that oil could be put were different before and after the mixed storage, this aspect of the reasoning is sound.

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[167] *Lampton* (n 18).

[168] This example is considered by Moore-Bick J in *Glencore* (n 61) at [177].

[169] cf *Hendy Lennox* (n 21).

[170] *Jones* (n 95).

[171] See the works cited above, at n 100.

[172] See the works cited above, at n 64.

[173] *Glencore* (n 61) at [177].

6.3 Conclusion

The account offered in this chapter is of importance for several reasons. First, it has cast considerable doubt on the *orthodox view* of English law, despite the fact that this interpretation of the law appears to be uncritically accepted in almost all textbooks on personal property law and throughout the literature on private law more generally. Second, it has argued that the *orthodox view* is preferable to the plausible alternative rules that might be adopted, and so, even if it is not an accurate description of the law, English law ought to adopt it. In doing so, a justification of the *orthodox view* was offered that demonstrates the theoretical links between the causative events that are the concern of this thesis. That theoretical framework is able to cure the law of some of the uncertainty in its application.

7. CONCLUSION

We saw in the Introduction that the causative events with which this thesis are concerned have been inadequately analysed, consigned to the scrapheap of seemingly unconnected events that Peter Birks labelled 'miscellaneous others'. The relative lack of academic engagement with these events has led to two serious difficulties. First, many of the substantive rules of English law are unclear, or are generally taken to be clear even though a close analysis of existing legal materials demonstrates that they are not. Second, there is no generally accepted account of the normative foundations of these rules. This means that there are relatively few tools that legal scholars might use in order to prescribe how the law ought to develop, and how the gaps in the law's substantive rules ought to be filled. The primary achievement of this thesis has been to go some way to remedying these defects, by highlighting where the law is indeterminate, and by relying on theoretical analysis of property law in an attempt to offer solutions to that indeterminacy.

In Chapters 2 and 3, I analysed the event of taking possession. It was argued that the best justification of the *first possession rule* that can be offered focusses on the (non-legal) interests that possessors have in making use of chattels in their possession,[1] and that these insights suggest that the *pro-persistence view* of the *later possession rule* can be defended in both doctrinal and normative terms.[2] Chapters 4, 5 and 6 examined a number of events that have not been subjected to the same level of critical analysis, either as a matter of doctrinal legal scholarship or as a matter of philosophical inquiry. In each case, a degree of uncertainty was demonstrated to exist in English law: it is not clear whether a legal mixture of chattels leads to co-ownership of those chattels, or whether it affects no change in the legal interests of the parties;[3] a plausible case can be made that the (almost) universally accepted rule governing natural reproduction does not in fact exist;[4] and there seems to be no answer given by English law to the question of who owns a newly manufactured chattel in the absence of agreement, at least where the manufacturer acts in good faith.[5] Using the insights developed in discussion of the *first possession rule*, prescriptions were offered as to how those uncertainties should be

[1] 2.2.3.

[2] 3.3.1.

[3] 4.1.

[4] 5.1.4.

[5] 6.1.2.

remedied so that English personal property law can evolve towards a more coherent, and more justifiable, body of rules. We are, therefore, now in a position to fill in the table set out in the Introduction,[6] which was intended to convey existing uncertainty in the law's rules, in order to demonstrate the body of rules that, it has been argued, ought to be taken to govern the causative events which have been the subject of discussion:

		Definition of the event	**Acquirer of the interest**	**Nature of the interest**	**Effect of wrongdoing**
Ch 2	**First Possession**	Physical control and intention to possess	Possessor	Ownership	None
Ch 3	**Later Possession**	Physical control and intention to possess	Possessor	Persistent General Property Interest	None
Ch 4	**Legal Mixture**	Evidential uncertainty as to ownership	Contributors to the mixture	Co-ownership	None
Ch 5	**Natural Reproduction**	Production of a new chattel from another	Owner of the principal	Ownership	None
Ch 6	**Manufacture**	Creation of a new chattel	Manufacturer	Ownership	None

The table does not convey the underlying justifications which have been offered in defence of these rules. One can, by way of conclusion, summarise those justifications as follows. The *first possession rule* was defended in Chapter 2 on the basis that the rule gives effect to reasons that bear on our actions outside the law. When a person makes use of a chattel in pursuit of some project or goal, we have good reason not to interfere with that goal's pursuit. It follows that, at least in some cases, we have good reason not to interfere with the chattel itself.[7] It was, however, further argued that, if we are to justify the *first possession rule* as it presently exists – as a rule which holds that the event of first possession leads to *ownership* of the possessed chattel – then some further instrumental argument is needed. That argument was offered

[6] Above, p 12.

[7] 2.2.3.

primarily in economic terms: it is desirable to adopt a clear rule that is easily applied and followed, so that administrative costs might be saved. The *later possession rule* was justified in a similar fashion. It was argued in Chapter 3 that we have good reason not to interfere with those goals that a possessor is using a given chattel to pursue, regardless of whether that chattel is owned by another.[8] Those reasons appear to exist, albeit perhaps in a weaker form, even where the possessor exits possession, or where the possessor in question is a thief.[9]

It was argued in Chapter 4 that an accidental legal mixture ought to lead to co-ownership of the constituent parts of that mixture, because its occurrence does not extinguish those reasons not to interfere with the mixed chattels that existed immediately before the mixture, and because those chattels are still able to be used as before the mixture took place. It follows that non-contributors ought to be subject to duties of the same character as those to which they were subjected before the mixture. Nonetheless, it was further argued that the law can best solve this problem by holding that the contributors become tenants in common of the mixed mass.[10] This means that third parties owe a duty of non-interference in relation to each individual part of the mixture to both parties, and so avoids difficulties caused by issues of proof. The same arguments suggest that a co-ownership solution should govern cases where cash is mixed,[11] or where one contributor to the legal mixture is a wrongdoer.[12]

Orthodox understandings of English law were also defended in normative terms in Chapters 5 and 6. Where a natural reproduction takes place, the starting presumption should be that the product is subject to the same proprietary interests as the principal from which it was produced.[13] This follows primarily by virtue of the fact that the product is not truly new, but rather was previously a physical part of the principal. There are also sound reasons for that default rule based on economic and moralistic concerns. This starting presumption, however, may be displaced if it can be shown that the relevant parties have agreed to disapply it, or where the law can safely presume that the parties would have so agreed, had they considered the problem.[14] Where a manufacture takes place, in contrast, the product ought to be owned by its manufacturer, and not by the owner of the materials from which it came. This follows from an

[8] 3.2.3.

[9] 3.3.

[10] 4.2.1.

[11] 4.2.3.

[12] 4.2.2.

[13] 5.2.

[14] 5.3.

application of the argument from goal pursuit as considered in earlier chapters: we have reason not to interfere with the product, given the goals set by its manufacturer in relation to it, while the goals of the original owner can no longer be fulfilled and so there appears no compelling reason to think that ownership, rather than some other legal interest, ought to vest in them.[15] In common with the other events considered in this thesis, that justificatory argument suggests that the same outcome should be reached even where the manufacturer acts in a bad faith, for the simple reason that their mental state cannot affect the consequences of their actions.[16]

The arguments raised throughout the thesis also have a number of interesting and important implications which cannot be explored within its confines. One such debate concerns the terminology of personal property law. As explained in 1.3.4, some commentators have argued that the legal interests that are created through the *first* and *later possession rules* ought to be given the same name, because those interests are made up of the same substantive content. That view was resisted earlier because one aim of this project was to determine whether the claim as to the similarity of those interests is sound. The conclusions offered in Chapters 2 and 3 suggest that those commentators are on the right side of that particular debate. Another debate that has not been examined is that concerning claims made at common law to unauthorised substitutes.[17] It is hoped that the insights developed throughout this thesis may be of aid in future work that questions whether such claims are, or should be, available. Much of the existing debate on this topic takes the form of a dispute about whether claims to substitutes can be understood to be examples of a remedy for an unjust enrichment, or whether they are instead better seen as sitting within Birks' category of 'miscellaneous others'.[18] This thesis has subjected many of the events within that latter category to critical scrutiny; it may be that its arguments can be of help in finding a resolution to the ongoing debate about the possible existence of common law claims to substitutes.

One further implication of the arguments presented in the preceding chapters is that many of the legal rules considered within them can be understood to be justified, at least in part, on the grounds that they help to promote a genuinely good state of affairs, because the legal interests that the rules create (or ought to be taken to create) are responsive to the value that this thesis has labelled 'goal pursuit'. This suggests not only that the law may be broadly

[15] 6.2.1.3.

[16] 6.2.2.2.

[17] 1.1.2.1.

[18] See, eg, WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd ed, OUP 2013) 4.444.

justifiable, but also that at least some of Birks' miscellaneous events have more in common than previously thought. Rather than a random collection of events united only by the fact that they happen to give rise to new proprietary legal interests, this thesis has demonstrated that the legal rules that govern these events respond to similar concerns and secure similar valuable goods. Given that it seems plausible to suppose that the principles underlying the rules that govern the acquisition of ownership ought to say something important about the content of ownership itself, the arguments of this thesis may help to provide fresh insights that can be of value to property law scholarship more generally.

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