Establishing Theftuous 'Appropriation' of Mistakenly Transferred Sum in Three Typical Scenarios

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Abstract

Where the defendant receives a sum by mistaken bank transfer, there are three subsequent typical scenarios where it is – perhaps counterintuitively – difficult to establish the element of 'appropriation' for the theft offence. The first scenario is where the defendant does nothing to the sum. Despite the failure to return may seem blameworthy to some, it is insufficient for establishing appropriation. The second scenario involves mixed funds of both the defendant and the victim. The question of 'whose money is appropriated' touches on complicated issues of property and tracing. The third scenario concerns overdrawn accounts, and given that there is no property left, any morally censurable attempt to withdraw or transfer money does not constitute 'appropriation.' Should the law find 'appropriation' in a more straightforward manner solely based on common-sense perception? In all three, the difficulty in proof and the complicated legal issues are justified by the need to conform with the legal nature of bank transfer and/or the civil law of property. Given the established nature of civil law in guiding our lives and transactions, there is an arguable need for criminal law and civil law to be consistent as far as possible.

Keywords

Theft Act 1968; restitution; private law; bank balance.

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I. INTRODUCTION

This article focuses on a specific bank transfer situation, where the defendant receives a sum by mistaken transfer. It will explore three specific scenarios selected based on their typical and problematic nature. In those three, it is, perhaps counterintuitively to some, difficult to establish the element of 'appropriation' for the theft offence under the Theft Act 1968 (TA 1968).[1] Should the law find 'appropriation' in a more straightforward manner solely based on common-sense perception? If not, why not? This article argues that the difficulty in proof and the complicated legal issues are justified by the need to conform with the legal nature of bank transfer and/or the civil law of property.

It is helpful to explicitly acknowledge that there are two groups of thought: one which believes that criminal law needs not be consistent with civil law; whilst another one thinks that they should be consistent as far as possible.[2] This article takes the position that, irrespective of the exact extent that civil law is applicable to criminal law contexts, the issues should be explored given their arguable and potential relevance. This is not a paper which discusses which position is more meritorious. In terms of the original contribution of this article, it fills the gap of literature by justifying the criminal approach to establishing 'appropriation' in the three scenarios. It explores the underexplored, yet highly significant, relevance of the civil law of property, tracing, and bank transfer to criminal law in the present context.

Section III discusses the first scenario where the defendant does nothing to the mistaken sum. Whilst the failure to return the sum may seem blameworthy to some, it should not be sufficient for establishing 'appropriation as owner.' Otherwise, the offence will become theft by omission. Putting the blame on the defendant is not entirely persuasive because the mistake originates from the victim him/herself. Besides, if such a low threshold for appropriation is set, the proof of the offence will become largely based on the element of dishonesty. The new test of dishonesty does not excuse misunderstanding of moral standards; yet the concept of dishonesty remains elusive. Moreover, the defendant is not *directly* under a legal duty to return, so the moral justification for establishing 'appropriation' upon a mere failure to return is even weaker.

Section IV discusses the second scenario where mixed funds are involved. The issue is whether the defendant appropriates his/her own money, or the victim's money. The issue inevitably touches on the law of property and becomes slightly complicated. There is a need to ensure that civil law and criminal law are consistent as far as possible. Section V highlights the scenario where the account is overdrawn with no further overdraft facility. In those circumstances, the balance is the asset of the bank, and the bank will not honour any withdrawal or transfer request. Any morally censurable act of attempting to withdraw money does not constitute appropriation. This is consistent with the legal nature of bank transfer.

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[1] As matter of context, the theft offence is established if one "dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". See Theft Act 1968 (TA 1968), s.1. The element of 'appropriation' is defined broadly by s 3 of the TA 1968 as any assumption of the rights of an owner. Importantly, s 3 TA 1968 further provides that even where one has come by the property innocently without stealing it, 'appropriation' is established upon "keeping or dealing with it as owner."

[2] The convergence and divergence of civil law and criminal law were notably discussed in *R v Hinks* [2001] 2 AC 241. Afterwards, different commentators have taken the two positions. See David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (OUP 2020) 367; Nicola Monaghan, *Criminal Law Directions* (OUP, 2020) 238; Mischa Allen, Caroline Derry and Janet Loveless, *Complete Criminal Law: Text, Cases, and Materials* (OUP 2020) 571; Stuart P Green, 'Theft by Omission' in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 172.

II. MISTAKEN TRANSFER

The situation in concern occurs when a victim has mistakenly and unknowingly transferred an inflated amount without any deception on the part of a defendant. On first sight, the defendant could not be charged with theft, given he/she has no control over the victim's account and the funds were transferred voluntarily, despite the mistake. However, section 5(4) of the TA 1968 ameliorates this problem.

Section 5(4) of the TA 1968 provides that where a defendant has obtained property by mistake, the property shall be treated as belonging to the person entitled to restoration. In other words, the mistaken sum in the defendant's bank balance would be treated as the victim-transferor's property. When the defendant withdraws the mistaken sum, there will be direct 'appropriation' of the victim's property. In relation to mistaken bank transfer, there have been two direct section 5(4) TA 1968 cases which successfully establish theft, namely *R v Ngan*[3] and *AG's Reference (No 1 of 1983)*[4].

However, there remains three typical scenarios where it is difficult to establish 'appropriation.'

III. THE FIRST SCENARIO: DOING NOTHING TO THE SUM

First, it is difficult to prove 'appropriation' where the defendant leaves the mistaken amount in his/her account but without withdrawing or dealing with that sum (of course also not returning the sum). In both *R v Ngan* and *AG's Reference (No 1 of 1983)*, it was stressed that the requirement of 'appropriation' still has to be proved, even though section 5(4) TA 1968 was applicable.[5]

Although keeping the mistaken amount as an owner legally amounts to 'appropriation' under section 3(1) TA 1968,[6] it remains difficult to prove that the defendant has indeed kept it *as an owner*. Merely keeping the sum 'which does not manifest any decision to treat the property as D's own will not count as an appropriation.'[7] This would require the prosecution to prove the intention of the defendant.[8]

There are two difficult aspects in proving the intention to keep 'as owner'. First, the keeping may be lawfully explained by a failure to notice the mistake itself or the mistaken sum at all. Second, the defendant may not have yet formed an intention to keep 'as an owner' as in *Broom v Crowther*.[9] In that case, it was held that there was no appropriation when the defendant was undecided as to what to do with the property (by putting the watch under his bed) when he was apprehended.[10]

William Wilson has commented on what is required to be proved beyond merely keeping the sum:

> "In cases involving bank accounts it is probable that theft must require something more than a decision simply not to repay the excess since an appropriation requires some act

[3] *R v Ngan* [1998] 1 Cr App R 331.
[4] *AG's Reference (No 1 of 1983)* [1985] QB 182; [1984] 3 WLR 686.
[5] See (n3) and (n4).
[6] Section 3(1) TA 1968 provides that 'appropriation' "includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."
[7] AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Bloomsbury, 2016) 543.
[8] Richard Card, *Card, Cross and Jones Criminal Law* (OUP, 2016) 392. See also AP Simester and others (n7) 543.
[9] *Broom v Crowther* (1984) 148 JP 592.
[10] *ibid*.

> directed against the relevant property. Griew has suggested that the appropriation could be found in some use of the bank account which was inconsistent with honouring the payee's obligation to make restoration, for example, by reducing the credit balance or overdraft facility below the amount that ought to be paid to the payer."[11]

The same view has similarly been recognised in *R v Ngan*[12] and *R v Gresham*[13], both of which concerned section 5(4). In particular, the counsel in *Ngan* has expressly argued that the failure to return should be sufficient to amount to an 'appropriation.' However, the Court did not accept this as sufficient to prove 'appropriation' and instead held that 'appropriation' only occurred when the cheques were presented.[14] The courts explained that:

> "'Keeping' as owner in relation to a bank account may be *difficult* to prove in a case where a defendant does no more than refrain from bringing the mistake to the attention of the Bank."[15]

Although the court in *Ngan* acknowledged that 'appropriation' can occur earlier before a cheque is presented, the tenor of the above quote suggests that the court refuses to find 'appropriation' based on inchoate acts.[16]

a. The Justifications for the difficulty in establishing 'appropriation' in the first scenario

The first scenario is premised on a fundamental feature: the defendant fails to return the mistaken sum. There are three justifications supporting that a mere failure to return should not be sufficient to establish 'appropriation.'

i. Theft by omission

First, the requirement for proof of something beyond mere keeping is justified, because otherwise "the offence would become one of theft by omission and there is a risk that mere inactivity, pardonable inertia, might be treated as theft."[17]

The victim's harm was caused by his/her own mistake, but not by the failure to return. It is therefore unpersuasive to contend that there is moral culpability on the defendant. Stuart Green rightly makes the moral differentiation between "failing to return misdelivered property" and "commissive theft."[18] By merely letting the sum sit in the balance, the defendant does not positively assume the victim's right.

ii. Setting a low threshold for 'appropriation' leaves the element of 'dishonesty' as the only safeguard

Second, if 'appropriation' is satisfied by failing to return, coupled with the effect of section 5(4) in automatically satisfying the requirements of proving 'property belonging to another' and the

[11] William Wilson, *Criminal Law* (Pearson, 2020) 415, citing Edward Griew, *The Theft Acts*, (Sweet & Maxwell, 1995) 37.
[12] *Ngan* (n3).
[13] *R v Gresham* [2003] EWCA Crim 2070.
[14] *Ngan* (n3) 335.
[15] *ibid* 336 (emphasis added).
[16] *ibid* 336.
[17] David Feldman, *English Public Law* (OUP, 2009) 1128. See also AP Simester and others (n7) 543.
[18] Green (n2) 164.

'intention to permanently deprive,' the only element left for proving theft is 'dishonesty.' This may not be sufficient for ensuring reliable conviction because the concept of dishonesty remains "elusive."[19]

The new test of dishonesty in *Ivey v Genting Casinos* – which replaced the *Ghosh* test[20] – *objectively* assesses the defendant's belief after ascertaining the knowledge or belief of the defendant as to the facts.[21] It omits the subjective limb in *Ghosh*. In terms of the implications, the *Ivey* test does not excuse the defendant's misunderstanding of prevailing moral standards.[22] Also, it can sometimes be problematic because the lack of a subjective limb will lead to the failure to take proper account of the honesty standard of specific sector.[23] Certain sectors may be prone to frequent and substantial bank transfers, and errors may not be discovered in time before the midterm or yearend audit. Setting a low threshold based on failure to return may unfairly expose them to greater risk of questionable theft convictions.

iii. Questionable duty to return

Third, if the defendant is found liable based on the failure to return, it in effect creates a legal duty to return the property. However, the imposition of this duty is questionable. Section 5(4) TA 1968 merely requires a determination on who is entitled to restitution, but it does not impose a legal duty to return. Other provisions do not impose such a duty either. Section 24A TA 1968 arguably has imposed a duty to restore, but as will be elaborated below in Section V, it is irrelevant to our present situation. That provision concerns the retaining of *stolen* sum, but not theftuous appropriation of *mistaken* sum. Similarly, although section 2(1) TA 1968 provides that a person is not dishonest "if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps," it does not impose a legal duty to take reasonable steps to return. It merely provides for the definition of dishonesty.

Moreover, even the law of restitution does not *directly* impose a legal duty to return. Andrew Burrows explained that it "is most helpful to view unjust enrichment as a *cause of action* rather than as a principle or concept."[24] As a cause of action, it requires judicial determination *before* it can be ascertained who is entitled to be returned. Besides, it was held in *Gilks* that a mere moral entitlement to restitution is not sufficient to establish a cause of action.[25] Thus, it is untenable to suggest that a defendant is under a legal duty to return if a cause of action has not yet been established.

In addition, imposing an unascertained duty to return would cause problems in practice. The defendant does not legally know who he/she should return the sum to, and also whether he/she is the person responsible for returning.

In a mistaken transfer situation, there are conceptually two types of mistake, namely mistakes on (1) the identity of the recipient and (2) the amount. Further, the mistake can be committed by the bank or by the transferor. To take an example based on a mistake on the identity of the intended recipient, there are conceptually four parties involved, namely (1) the

[19] Richard Spearman QC, 'Ivey v Genting Casinos and Dishonesty: New Dawn or False Horizon?' (2018) 9 The UK Supreme Court Yearbook 256, 289.
[20] *R v Ghosh* [1982] EWCA Crim 2.
[21] *Ivey v Genting Casinos* [2017] UKSC 67. Its applicability to the criminal context was confirmed by the Court of Appeal in *Barton and Booth v R* [2020] EWCA Crim 575.
[22] Katherine Hardcastle, 'Righting another 'wrong turn'? Dishonesty in Ivey v Genting: Part II' (6KBW College Hill Blog, 10 December 2017), https://blog.6kbw.com/posts/righting-another-wrong-turn-dishonesty-ivey-v-genting-part-ii.
[23] David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (OUP, 2018) 883-84.
[24] Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP, 2012) para 1(3) (emphasis added).
[25] *R v Gilks* (1972) 56 Cr App R 734.

payor, (2) the banks, (3) the defendant-payee, and (4) the intended recipient. Under the law of restitution, it is possible for (1) the payor[26], (2) the banks[27] and (3) the intended recipient[28] to have a claim on unjust enrichment against the defendant. Given the complication, one should note that it is unlikely that the defendant will know (1) which type of mistake it is, (2) whose mistake caused the transfer and (3) the number and identity of the parties (*e.g.*, which bank is involved, the identity of the intended recipient). Where there are multiple claimants with valid claims of restitution, it would require the court to decide on who is entitled and the amount for each entity.[29]

On top of this, some of the parties involved – including the defendant him/herself – may have a valid defence against the restitutionary claim, such as change of position.[30] There may also be circumstances where it should be the bank – instead of the defendant – to be the one to return the sum. Given these circumstances, it does not seem right to find 'appropriation' merely based on a failure to return when it is unknown whether the defendant has a legal, as opposed to moral, duty to return.

b. Refuting potential counterarguments that suggest a duty to return

Other possibilities which suggest a duty to return can too be refuted. First, a person who receives a mistaken sum is not a bailee, because a bailment must be accepted by the bailee voluntarily.[31] Therefore, there is no duty to return based on bailment.

Second, one can make a relevant analogy to situations involving lost property, because (1) the defendant does not know the true owner of the mistaken sum, and (2) the mistaken sum "could be considered 'lost', at least to the extent that their loser knew nothing of their separation from his control" (when the transferor is unaware of his/her mistake).[32] In those circumstances, the finder only has an obligation to take measures to find the owner, and the law "does not expressly contemplate that the finder will return the goods to the loser."[33] Besides, for *misdelivered* property, the moral justification for theft conviction is even weaker than situations involving *lost* property. This is because the conduct of holding the misdelivered property is passive – and hence less culpable – than actively picking up a lost property.[34]

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[26] An unjust enrichment claim requires one person to be enriched at the expense of another. The payor can satisfy the requirement of 'at the expense of' – and hence make a claim – by relying on the rule of agency. The payor's bank is the agent of the payor, and the payee's bank is the agent of the defendant-payee. An example can be seen in *Agip v Jackson* [1990] EWCA Civ 2, where the court held: "It seems to me, however, BdS [bank] plainly intended to pay as agent of Agip [account-holder]." Regarding the rule of agency, see Graham Virgo, *The Principles of the Law of Restitution* (OUP 2015) 111. For the view that a bank is the agent of the parties, see E P Ellinger, E Lomnicka, and C Hare, *Ellinger's Modern Banking Law* (OUP, 2017) 218, which provides that "in the case of any account...the customer can give instructions to his bank, such as an instruction to pay sums to a third party, and the bank is obliged *as agent* to obey these" (emphasis added).

[27] If the mistake is caused by the victim-payor's bank, the defendant would be enriched 'at the expense of the bank', because the bank has to account for the mistake, and it increases its debt owed to the defendant by mistakenly increasing the defendant's bank balance. See Virgo (n26) 105. See *eg Banque Belge pour l'Estranger v Hambrouck* [1921] 1 KB 321 where the victim's bank had a successful claim against the defendant.

[28] It can be said that the defendant was enriched at the expense of the intended recipient, because of the exception of 'interceptive subtraction.' Where a third party (the transferor) purports to transfer a benefit to the claimant (the intended recipient) – and the transferred benefit is intercepted by the defendant before the claimant receives it – this exception is applicable because the defendant is enriched. See Virgo (n26) 111.

[29] Stephen Watterson, "Direct Transfers' in the Law of Unjust Enrichment' (2011) 64(1) Current Legal Problems 435.

[30] See *eg* Struan Scott, 'Mistaken Bank Payments: Commercial Certainty Counts' (2006) 11 Otago Law Review 209; Andrew Burrows, Ewan McKendrick, and James Edelman, *Cases and Materials on the Law of Restitution* (OUP 2006) 840; David Salmons, 'The availability of Proprietary Restitution in cases of Mistaken Payments' (2015) 74(3) Cambridge Law Review 534.

[31] Norman Palmer, 'Bailment', Andrew Burrows (ed), *English Private Law* (OUP, 2013) para 16.86.

[32] Robin Hickey, *Property and the Law of Finders* (Bloomsbury Publishing, 2010) 55.

[33] *ibid* 74. *Parker v British Airways Board* [1982] 1 QB 1004, 1017.

[34] Green (n2) 171.

Third, bank transfer situations should not be mixed up with cases where a defendant borrows something and fails to return it. For borrowed property, there is clearly a legal duty to return. Failure to return borrowed property has been well-established as an 'appropriation.'[35]

Fourth, the law of trust and equity does not impose a duty to return in the present circumstances. Where the defendant is honestly ignorant of the mistake of the victim, the case of *Westdeustche* provides that there will be not be a trust (not even constructive trust),[36] and accordingly there is not an equitable duty to return. Even when the defendant becomes aware of the mistake and thereby becomes a constructive trustee, he/she is still not subject to an ascertained obligation to return the property for two reasons. First, there is not yet any instruction from the trust beneficiary to return the sum. Second, the identity[37] of the beneficiary is not yet known (which can be one of the banks or the victim-transferor, depending on who make the mistake). In *Westdeutsche*, the authority cited for establishing an institutional constructive trust on realization of mistake was the case of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*.[38] However, the facts of *Chase* involved only two parties (namely the two banks), so the beneficiary was self-evidently the claimant-bank.[39] Whereas in our present situation, it involves numerous parties (with banks involved and the victim-transferor) and the mistake could have been caused by any one of the parties. A trustee is subject to the trite duty to secure the trust property, and hence he/she should not return the property in those uncertain circumstances.

c. Summary of this section

In sum, Simester and Sullivan persuasively argued that:

> "If, through V's own error, V mistakenly gives D an unjustified windfall, prima facie his proper remedy is a civil law claim in money had and received. It is not obvious that the criminal law should wade to his rescue."[40]

Hence, the strict approach in requiring something more than mere keeping is justified to prevent section 5(4) from "making personal liability the stuff of theft" – which "surely, is a misuse of the concept of theft."[41] Unless there is a "specific duty obligating D to act," "the law is rightly reluctant to impose criminal liability for mere omissions."[42]

IV. THE SECOND SCENARIO: MIXED FUNDS AND TRACING

Where mixed funds are involved – *i.e.,* the same account containing both the defendant and victim's money), it is difficult to establish 'appropriation.' The issue is 'whose money is withdrawn first.'

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[35] See *eg* Wilson (n11) 415, which explains the general rule that appropriation includes "omitting to do something which he is under a duty to do so, say keeping it after the loan period (bailment) has ended."
[36] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12, 38. Alastair Hudson, *Equity and Trusts* (Cavendish Publishing, 2014) 615.
[37] It is interesting to note that it is not a prerequisite to ascertain the identity of the beneficiary before an institutional constructive trust arises. See Graham Virgo, *The Principles of Equity & Trusts* (OUP, 2018) 340.
[38] *Westdeutsche Landesbank Girozentrale* (n36) 38; *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105.
[39] *ibid*.
[40] AP Simester and others (n7) 533 (emphasis added).
[41] *ibid* 533.
[42] *ibid* 543 (despite speaking in the context of borrowed property, the arguments apply).

Lord Hobhouse in *R v Hinks* forcefully said that "the Theft Act has been drafted to take account of and require reference to the *civil law of property, contract and restitution*."[43] This view is particularly compelling for the current discussion, because section 5(4) of TA 1968 explicitly refers to the 'obligation to make restoration.' Logically this must be based on the only possible source of obligation: private law. Given such, the issue of 'whose money is withdrawn first' inevitably touches on civil law.

This article acknowledges that after *Hinks*, some prefer the view that criminal law needs not be consistent with civil law.[44] However, it is equally true that some favour their consistency.[45] Irrespective of the exact extent that civil law is applicable to criminal law contexts, the issues should be explored given their arguable relevance.

It becomes most problematic when the defendant spends only some, but not all, of the balance.[46] Assume the defendant's account contains his/her own £1,000 and the victim's mistaken £1,000. The defendant then withdraws £1,000 for his/her own use. Despite one of the £1,000 clearly belongs to the others,[47] there is still a potent question of whose £1,000 the defendant spent. Logically, if the defendant spent the victim's £1,000, he/she has 'appropriated' the sum; whereas if the defendant spent his/her own £1,000, he/she cannot be said to have 'appropriated' other's property.

Civil law identifies property ownership by way of tracing. In the words of Lord Millet:

> "Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant *demonstrates what has happened to his property, identifies its proceeds* and the persons who have handled or received them, and justifies his claim the proceeds *can properly be regarded as representing his property*."[48]

The starting point of tracing is to apply the 'first-in, first-out' rule.[49] The rule is derived from the *Clayton's case*.[50] However, if the 'first-in' money belongs to the defendant, the prosecution cannot prove that the defendant has appropriated the victim's sum.

Sometimes this rule will be displaced because it will result in absurd results leaving the claimant with nothing left. For example, where the victim's money was the first money in, it will be considered the first money spent, and hence there is no money left for the victim. In those circumstances, the court may instead hold that the defendant has spent his/her own share

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[43] *Hinks* (n2) 265 (emphasis added). Despite Lord Hobhouse's view was in dissent, it has received widespread support. See *eg* Monaghan (n2) 238; Allen, Derry and Loveless (n2) 571.
[44] Ormerod and Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (n2) 367.
[45] See (n43).
[46] Had the defendant spent all his/her own money together with the mistaken sum, 'appropriation' could have been readily established. See the following non-bank transfer cases as analogy. In *Moynes v Cooper* [1956] 1 QB 439, 441, the defendant "did appropriate dishonestly the whole of the second payment" which included his wage and the mistaken sum. Similarly in *R v Davis* (1988) 88 Cr App R 347, the defendant cashed his entitled cheque and also the mistaken cheque.
[47] There are three separate grounds for establishing that the property belongs to the others. First, this is the effect of s.5(4). Second, the decision of *Westdeutsche Landesbank Girozentrale* (n36) 39 establishes that where the defendant is aware of the mistake, he/she becomes a constructive trustee. In other words, the victim retains an equitable proprietary interest and hence the property belongs to the victim in this sense. However, where the defendant was ignorant of the mistake, there will be no trust (and hence no equitable tracing can be done). See Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n18) 864. Third, Graham Virgo argues that there is no need to establish a constructive trust at all, because where a property is transferred on a fundamental mistake (*eg* as to the identity of the recipient or the amount), the intention to transfer the legal (including the equitable) title is vitiated. Therefore, the title actually remains with the victim. Therefore, the property still belongs to the victim. See Virgo (n26) 574-75.
[48] *Foskett v McKeown and Others* [2001] 1 AC 102, 128 (emphasis added). In the present scenario, given that bank transfers involve multiple choses in action and even fungible cash, therefore the principles of 'tracing' are relevant, but not the notion of 'following.'
[49] Andrew Burrows, *The Law of Restitution* (OUP, 2011) 134, commenting that in situations involving mixed funds, the 'first-in, first-out' rule "has traditionally been applied", instead of the proportionate sharing approach.
[50] *Devaynes v Noble* (1816) 35 ER 781 (commonly known as the *Clayton's case*).

first.[51] Nevertheless, displacing the 'first-in, first-out' rule in those circumstances still work against the prosecution's case, because the defendant is considered to have appropriated only his/her own money.

One may counter-argue that the above analysis – which applies the 'first-in, first out' rule or its exception – as having over-complicated the matter. This is because one may simply conceive the question of 'whose £1,000 was spent out of the £2,000' as a simple one on whether the defendant *actually intended* to withdraw the victim's money first at the time of withdrawal. In other words, it is a question of the defendant's intention. If the defendant had such an actual intention, he/she is then taken to have 'appropriated' property belonging to another.

Before replying to this counter-argument, there is a very important conceptual clarification. Whilst criminal law is about proving the intent – *i.e*., the *mens rea*, the 'intent' here is not really about the *mens rea*. The *mens rea* for the theft offence is well-established to be *only* (1) dishonesty and (2) the intention to permanently deprive.[52] Here, by contrast, the focus of the debate is on whose £1,000 was spent. In other words, the so-called 'intent' referred here and below is for ascertaining the *actus reus* of 'property' ownership and, also inter-relatedly, whose property was 'appropriated.' In any event, the focus here is about how private law will approach the matter.

Coming back to the counter-argument, it is unsatisfactory to those who support the view that civil law and criminal law should not be overly divergent.[53] If the criminal law adopts the counter approach, it would be inconsistent with the civil law. This is because the law of tracing rarely allows the defendant to argue what his/her actual intention was at the time of withdrawal. Instead of considering the defendant's actual intention, one of the guiding principles of tracing is to do justice to the case by ensuring the victim(s) is left with some money to claim.[54]

The 'first-in, first-out' rule is described by the courts as "really a rule of convenience based on so-called *presumed intention.*"[55] Whilst this rule can be displaced either by (1) proving the contrary intention or (2) by reason of justice,[56] in practice, the courts do not really consider the actual intention of the parties involved.[57]

Furthermore, it is also unrealistic to assume that the defendant has always formed an intention regarding whose £1,000 is to be withdrawn. It is possible that the defendant has given no thought as to this, even though he/she is aware of the existence of a mistaken sum.

Where the court displaces the 'first-in, first-out' rule to ensure the victim is left with some money by reason of justice, the defendant's intention is still treated as irrelevant. In those circumstances, the court applies a "presumption of honesty."[58] The actual intention is disregarded, even if the defendant has maintained a ledger or a "record of intention concerning the use of particular payments from the mixed fund."[59] In *Frith v Cartland*, it was held that:

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[51] *Re Hallett's Estate* (1880) 13 Ch D 696. See also Richard Clements and Ademola Abass, *Complete Equity and Trusts: Text, Cases, and Materials* (OUP, 2018) 443.
[52] Allen, Derry and Loveless (n2) 556.
[53] See (n43) and the accompanying texts.
[54] See *eg* Charlie Webb and Tim Akkouh, *Trusts Law* (Palgrave Macmillan, 2017) at 347
[55] *Re Diplock* [1948] 1 Ch 465, 554 (emphasis added)
[56] *Re Hallett's Estate* (1880) 13 Ch D 696, 738; *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, 42; Burrows (n49) 136.
[57] See *eg Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), where Lawrence Collins J said at [49]-[50] that "it would be an extremely onerous (and perhaps impossible task) to determine what sums IMB Morgan has paid away... I am satisfied that the rule in *Clayton's Case* should not apply here because it would be both impracticable and unjust to apply it." In other words, what Collins J meant was that it would be too onerous to determine the actual intentions of the numerous withdrawals. This shows the court does not really care about the intention.
[58] Burrows (n49) 138, citing *Re Hallett's Estate* (n51).
[59] The Hon James Edelman, 'Understanding Tracing Rules' (2016) 16(2) QUT Law Review 1, 12.

> "If a man has £1000 of his own in a box on one side, and £1000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the Court will not allow him to say that money was taken from the trust fund. The trust must have its £1000 so long as a sufficient sum remains in the box."[60]

Sometimes the law of tracing may seem to pay attention to the "express or inferred or presumed" intention of the innocent contributors.[61] In that case, it involved a common investment scheme with investors only (and no wrongdoer is involved at all). The court held that the investors could not have expected the 'first-in, first-out' rule to apply, because it would unfairly leave early investors with no claim, but subsequent investors with one. This case cannot be taken as an authority that the defendant-wrongdoer's intention will be considered, because this case involved no wrongdoer. Furthermore, in the later case of *Foskett v McKeown*, the court said that innocent investors "*must* be treated equally inter se" and "there is no basis upon which any of the claims can be subordinated to any of the others."[62] In other words, it shows the court is not really concerned about the actual intention of the innocent investors, but rather about equality/justice.

Thus, the thrust of the problem is that, where the victim's property is treated as untouched under civil law, it would be inconsistent for the criminal law to reach the contrary conclusion that the defendant has spent (and hence 'appropriated') the money belonging to the victim. Given the established nature of the law of property in guiding our lives and transactions, there is an arguable need for them to be in conformity as far as possible.

V. THE THIRD SCENARIO: OVERDRAWN ACCOUNT

The element of 'appropriation' cannot be established when it involves an overdrawn account with no further overdraft facility.[63] This is because "where the claimant's money is paid into an overdrawn bank account there will be no asset which can be considered to represent the claimant's property."[64] Accordingly, in *Navvabi*, theft was not established upon presenting a cheque, because there was no longer any chose of action against the bank, and it had no obligation to meet any withdrawal or transfer request.[65] "The overdrawn account is an asset – but it is the bank's asset, not the defendant account-holder's. It is the account-holder's liability."[66]

One may wonder whether section 24A TA 1968, a provision on 'dishonestly retaining a wrongful credit' is applicable. In particular, section 24A(5) provides that the offence is still applicable even though the account is overdrawn. However, the answer is that section 24A does not assist. This is because it requires the prior existence of a 'wrongful' credit to trigger this provision, and section 24A(2A) provides that it is 'wrongful' if the credit is obtained by, *inter alia*, theft. In other words, section 24A is about not cancelling credit obtained by theft, but not about theftuous usage or appropriation of mistaken sum at all.

To laypeople, it is perhaps counterintuitive that the attempt to use mistaken sum in an overdrawn account does not constitute 'appropriation.' The justification for this scenario is essentially the same as the second one: the criminal law should be consistent with the law of

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[60] *Frith v Cartland* (1865) 71 ER 525, 527 (emphasis added).
[61] *Vaughan & Ors v Barlow Clowes International Ltd & Ors* [1991] EWCA Civ 11, 42.
[62] [2001] 1 AC 102, 132 (per Lord Millett) (emphasis added).
[63] *R v Navvabi* [1986] 3 ALL ER 102. See also *R v Governor of Brixton Prison and Another, Ex parte Levin* [1997] QB 65, 82.
[64] Graham Virgo, *The Principles of the Law of Restitution* (OUP 2006) (this edition is intentionally cited) 632, citing *Re Goldcorp Exchange Ltd* [1995] 1 AC 74; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211.
[65] *Navvabi* (n63); Allen, Derry and Loveless (n2) 575.
[66] Duncan Sheehan, *The Principles of Personal Property Law* (Bloomsbury Publishing, 2017) 219.

property as far as possible.[67] As noted above, the court in *Navvabi* already recognised the need to respect the law of property in relation to the ownership of the overdrawn bank balance. The fact that *Navvabi* paid close attention to property ownership, instead of common-sense perception, can be seen as a support for the view that civil law and criminal law should be convergent as far as possible.

VI. CONCLUSION

The current literature has not sufficiently explained and justified why the element of 'appropriation' cannot be readily established in the three scenarios. This article approaches this issue afresh from the perspective of civil law. It establishes that the difficulty in proof and the complex legal issues are justified, because the criminal approach is in conformity with the relatively complicated law of property and the legal nature of bank transfer.

To those who argue that criminal law needs not be consistent with civil law, the above positions may not be satisfactory because the legal position is made more complicated, and perhaps contrary to common sense or lay perception.[68] However, the real focus of this opposition is not directed to criminal law, but to the slight complexity of the law of property regarding bank transfers and balances. Given the established nature of the latter in guiding our lives and transactions, there is an arguable need for them to be in conformity as far as possible.

[67] See (n43) and the accompanying text.
[68] Green (n2) 172 (who argues that uncertainty will be caused if the lawfulness of an act "is dependent on sometimes arcane rules in the civil law of property").