Bell's Principles and the accession of moveables to moveables in contemporary Scots Law

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Introduction

> That of two substances, one of which can exist separately, the other not, the former is the principal: That where both can exist separately, the principal is that which the other is taken to adorn or complete: That in the absence of these indications, bulk prevails; next value. And in all such cases where there can be no separation, the property is with the owner of the principal, leaving to the other a claim for indemnification.[1]

This article is about the joining together of two or more items of corporeal moveable property. After a discussion of the forms of original acquisition known to Scots law and similar legal systems as accession and specification, the article will examine the above extract from Bell's *Principles* in two respects. Firstly, in regard to the test as laid out for the identification of principal and accessory. This is of unique importance in the case of the accession of moveables to other moveables. As Bell recognises in a system that follows the maxim *accessorium sequitur principale*, 'the only difficulty is to fix which is principal.'[2] This is a question that need not be posed in the much more common case of the accession of moveables to land where land is always considered the principal[3]. This article will subsequently deal with the necessary property considerations that arise in the case of the accession of moveables, drawing on recent recommendations for reform in this area. Both the work of the Scottish Law Commission (SLC)[4] and the Draft Common Frame of Reference (DCFR)[5] will be discussed at length in this work.

Although limited in scope, it will be necessary to attempt to provide a brief overview of this area of law. The accession of moveables is a narrow application of a subset of original acquisition. Original acquisition, being itself far less common than derivate acquisition, involves acquiring rights in property independent on any act of will on the part of the previous owner, if the object was subject in the first place to previous ownership.[6] Gloag and Henderson give the examples of occupation, accession, specification, confusion and prescription.[7] Evidently this paper will focus with the second of these categories, although it will be necessary to consider specification. The Scottish Law Commission have proposed that the two be treated alike.[8]

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[1] Bell, *Principles*, s 1298.
[2] ibid.
[3] Stair, *Institutions* II.1.40, Following the Roman rule *inaedificatum solo, solo cedit* as authority for the position that' all things fixed to the ground… are accounted as parts of the ground.'; *Brand's Trustees v Brand's Trustees* (1876) 3 R (UKHL) 16,20, Lord Cairns affirmed that there is no exception to this rule.
[4] *Corporeal Moveables: Mixing, Union and Creation* (Scot Law Com Consultative Memorandum no.28) (1976).
[5] Study Group on a European Civil Code, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Volume V, New York: Oxford University Press, 2010).
[6] Carey Miller and David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Thomson/W. Green, 2005) 16.
[7] Hector L. MacQueen et al. (eds), *Gloag and Henderson: The Law of Scotland* (15th edn, Thomson/W. Green, 2012) 31.03.
[8] Scot Law Com (n 4) para 30-32.

Part A – Joining corporeal moveable items

Accession

Accession occurs when two pieces of corporeal property become joined in such a way that one is considered to have been consumed by the other.[9] This is a mechanical doctrine and occurs regardless of circumstances or intention.[10] It is not possible to contract out of the rules of accession.[11] The rules are derived largely from Roman law and there exists little case law except for the accession of moveables to land.[12] In the case of accession of moveables to land there have developed three rules for determining whether accession has taken place. These being physical union, functional subordination and permanency.[13] Accession operates between a combination of these three elements; the weak presence of one factor may be made up by the strength of another.[14] There are no such defined rules in the case of the accession of moveables.

The lack of case law in this area reinforces Stair's position that controversies of this nature have seldom moved up.[15] Yet, it is for this very reason that commentary is required on this topic. As recognised by the Scottish Law Commission this is an area of law requiring reform. They cite the confusion that exists in terminology and doctrine both in the case of accession and specification.[16] It will be put forward that this has led to the development of a series of unwelcome case precedents in Scotland. Judges have been apt to criticise this area of law, as adopted from Roman law, for its incongruities and its inability to be reconciled in a coherent manner, yet a coherent system has failed to develop in its place.[17] This paper will aim to reaffirm the place of the accession of moveables to moveables as one distinct in Scots law. Indeed, one whose foundations in Scots law are firmly set by George Joseph Bell. By reframing Bell's *Principles* alongside modern proposals for legal reform, it will put forth that a coherent body of law lies closer to hand than may have been first thought.

Specification

As alluded to, one of the reasons why there exists such uncertainty in this area of law lies with the doctrine of specification. Specification being the production of a new species from materials belonging to another.[18] In part, confusion surrounding the doctrine dates from its Roamn law origins. The terms itself is one foreign to the Roman texts.[19] Instead, the doctrine arises from *speciam facere* – the making of a thing.[20] This is treated in the texts as one of the

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[9] Kenneth G.C. Reid, *The Law of Property in Scotland* (Edinburgh: Butterworths, 1996) 457.
[10] Stair, *Institutions* II,I,38,39.
[11] *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82, 94.
[12] Reid (n 9) 457.
[13] ibid 457; L P W van Vliet, 'Accession of Movables to Land: I' (2002) 6(1) ELR 67, 78-81.
[14] ibid 458.
[15] II.1.39.
[16] Scot Law Com (n 4) para 23.
[17] *Wylie and Lochhead v Mitchell* (1870) 8 M 552, 557.
[18] Bell, *Principles*, s 1298.1; Reid (n 9) 450.
[19] C van der Merwe, 'Nova Species' (2004) 2 Roman Legal Tradition 96,98; Douglas Osler, 'Specificatio in Scots Law' in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995) 100.
[20] ibid.

three main modes of industrial accession, alongside adjunction and commixtio/confusio.[21] The question that occupied Roman jurists – captured by the Sabinian/Proculian dispute – centred on the property consequences of such accession;[22] whether ownership should rest with the owner of the original materials or the manufacturer of the goods.[23] Bell chastises the 'imaginary and vain distinctions' made by both schools of thought. [24] He thought no higher of the middle way, handed down by Justinian and followed in Scots law, that ownership be decided on the question of whether the new thing can be restored to its original materials. If so then ownership rests with the owner of the materials; if not, the manufacturer acquired ownership. Bell remarks that this 'rule [is] as distant perhaps from plain sense, or any useful purpose, as the opinions which it professed to reconcile.'[25] It appears sounder that if restoration can be affected then specification has not occurred. As such, the later rule that ownership rests with the manufacturer overrules any professed middle way. Yet, given the scope of this paper, more attention will be paid to the extent to which jurists have misapplied the rules of specification to that of the accession of moveables to moveables.

It is understood that specification shares many similarities with that of accession. Both usually involve the manufacture of a single entity out of two or more constituent parts. Bell gives the examples of producing flour out of corn, or wine out of grapes.[26] We may also think of baking a cake using another's materials. The essential difference between the two modes of original acquisition being the requirement of a *nova species*. This will usually involve the destruction of the principal parts. Evidently grapes cannot be restored from wine, likewise the eggs and flour from a cake. Conversely, in accession, whilst the accessory use may be subsumed in that of the entity, it will remain identifiable in its entirety. Take the common examples of a diamond in a ring or an engine in a car. Thus, the difficulty then of affixing the principal is one only arises in the case of the accession of moveables. This article will suggest that for this reason it is imperative that the two categories are analysed separately, according to their own merits. In certain cases, the distinction maybe unclear. Often cited is the case of painting or drawing on another's canvas. However, this author would agree that accession should take precedence here.[27]

Part B: The problem of identification

Roman Law

The centrality of the problem of identification to the case of the accession of moveables to moveables is one recognised in the Roman texts. Craig Anderson notes that greater attention is paid to this problem than to what type of attachment constitutes accession.[28] Whilst varied and conflicting tests emerge, a central consideration appears to be as to what part makes up the overall character of the unified object. Thus, if something be added, it becomes part of the

[21] Osler (n19) 100; D.41.1.
[22] Craig Anderson, *Roman Law for Scots Law Students* (Edinburgh University Press, 2021) 232.
[23] Ibid.
[24] *Commentaries* I,295.
[25] Ibid.
[26] *Principles*, s.1298.1.
[27] Miller and Irvine (n 6) 83.
[28] Anderson (n 22) 227-8.

whole. Examples given include a foot or hand added to a statue, or a base or handle to a goblet.[29] Value is often referred to, but only to reiterate the primacy of the overall character test. Therefore, writing accedes to the paper it is written on, even if written in gold.[30] Similarly thread, even if far exceeding in value to the cloth it is weaved into, would become part of the cloth by accession.[31]

The Justinianic Exception

As alluded to, the tests become far more conflicted owing to the intervention of Justinian on the matter. A rather unwelcome exception to the general rule is made in the case of painting. Value here takes precedence to prevent, for Justinian, the absurdity of an artistic masterpiece becoming accessory to a worthless canvas.[32] Indeed, the incongruity of this exception is fleshed out by George Colman in the invented case of *Cuspidor v Ant*.[33] Here an artist, given the moniker the 'Picasso of Prieska,' acquires ownership of a rented car by painting a mural on it. Alternatively, we may consider the consequences if the famous English street artist, Bansky, were to graffiti on the side of a skip; certainly a piece of moveable property. Subject, to the Justinianic exception, it would appear the artist has an almost divine ability to acquire property through accession. The answer to this problem may lay in the work of one of our institutional writers.

Stair

Stair reaches the same conclusion as Justinian that a canvas should accede to a painting. Indeed, he rejects the Roman rule that writing accedes to paper. In both cases the canvas or paper is the accessory as its design and use is for writing or painting, thereafter its use is consumed and lost.[34] However, in line with this reasoning Banksy would not be able to acquire property rights of other moveable objects by graffitiing on them. A car or skip would evidently not lose its purpose if it was drawn on. Erskine, on the other hand, suggests that the artist would acquire ownership through specification. The work and skill of the artist in effect transforming the board or canvas whereby a new species is created.[35] It appears doubtful that the requirement for acquisition by specification that a new species be created would be met in this case.

Stair's reasoning here is one coherent with his dominant role principle. One is to look at the 'design of the artefact' when determining the principal.[36] This outweighs the separate value interests of each item. Thus, a precious stone set in a ring, its value exceeding that of the rings, remains accessory to the ring. However, for Stair, in cases of doubt the most valuable thing is to be regarded as the principal. A difficulty arises here in how to equate these two opposing tests. One of essence versus value. As evident in the example given by Stair, to apply the first principle necessarily excludes the latter. Furthermore, Stair suggests that the doctrine is one subject to

[29] D.41.1.26.
[30] D.1.41.9.
[31] J.2.26.
[32] J.2.26.
[33] George Colman, *22 Quaint Cases in the South African Law*, (Juta & Company: Cape Town, 1980) 83.
[34] II.i.39.
[35] II.i.15.
[36] II.i.39.

'equity and utility.'[37] Yet it is again difficult to level such an overriding objective with the mechanical doctrine that exists in the case of accession: *accessorium sequitur principale*. Indeed, in the same paragraph Stair sets out that accession occurs regardless of the use of *bona* or *male fides*, including stolen materials.[38] Here questions of equity are notably absent. Stair is guilty of not developing a coherent formula to the problem of the accession of moveables to moveables; perhaps not surprising given his own opinion that debates of this nature are unlikely to prevail.[39]

Bell

Bell's response to the difficulty of affixing the principal has its merits in putting forth a sequential order of inquiry. Bell's first test 'that of two substances, of which can exist separately, the other not, the former is the principal,' would only apply in the most obvious of cases.[40] For example, paint applied to a bike. It is rather the latter of Bell's three rules that would apply in cases of doubt. The second of which that 'the principal is that which the other is taken to adorn or complete' follows Stair's dominant theory analysis.[41] Thus, clearly according to this rule, Bell would agree that an expensive diamond would accede to a ring; we are to look at the overall use of the object.

Bulk v Value

It is the qualification that 'in the absence of these indications, bulk prevails; next value' that has come under most scrutiny.[42] Bell here goes against Stair who favours value in the cases of doubt.[43] Likewise, Carey Miller has suggested that the modern view would prefer value over bulk given it's applicability to all property, whereas bulk has no universal relevance.[44] This author would suggest that bulk is actually a far better indicator when determining the principal. In fact, a test of bulk accords far more with the overriding rule, expressed by both Stair and Bell, of the overall use or essence of the object. When one determines the function of an object, one necessarily excludes the value of the component parts. Hence, the repeated example of the diamond in the ring. A system that admits of both design and value is one that cannot be reconciled coherently. The two are mutually exclusive. Value considerations whilst evidently important are accounted for in the determination of compensation. Furthermore, for the avoidance of legal complexity bulk is preferable. Take the diamond ring; there may exist several discrepancies in valuation based on market conditions and imperfections in quality. Indeed, value would need to be quantified by an expert with knowledge of the market. Whereas bulk can be assessed in a much more objective manner. Thirdly, a preference towards bulk over value is one in line with the principle of accession in Scots law as it applies to moveables to land. The general idea, phrased simply, that small accedes to big is one that triumphs here.

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[37] II.i.39.
[38] ibid.
[39] II.1.39.
[40] *Principles*, s 1298.
[41] ibid.
[42] ibid.
[43] II.i.39.
[44] Miller and Irvine (n 6) 79.

A case where bulk was given some importance is the South African case of *Khan v Minister of Law and Order*.[45] Here, a car was formed using parts from two different BMW cars. It was held that the engine and front portion of the car acceded to the rear part which came from a stolen vehicle. With regard to the test for determining which thing is principal and accessory the court stated that the matter will ordinally be one of 'common sense'.[46] Du Plessis J held that the principal is that which 'gives the ultimate thing its character, form and function.'[47] This is a useful formulation of the overall design test as defined by both Stair and Bell. In this case it was held that the engine and smaller parts of the body had been added to the stolen car.

However, a case very similar in its facts, *McDonald v Provan (of Scotland Street) Ltd,*[48] was incorrectly analysed by the Scottish courts as one of specification. The case likewise considered a car constructed from two separate parts; the front part from a stolen vehicle, including half the chassis, the engine, and the gears, were welded to the rear of another. The defenders sought to rely on the doctrine of specification to hold that the car was in effect a new entity belonging to the manufacturer, of which they held a right to sell. Yet the qualification that a *nova species* be created appears to be far from met. Instead, the two cars have merely been joined and the case should be seen as one of accession.[49] Specification was in the end rejected in this case on the basis that it was deemed practical to separate the component parts and as such no *nova species* could be said to have been created. This appears questionable on the Roman law grounds that welding be sufficient to affect accession where soldering was not.[50] Further debate remains over Lord President Clyde's judgement that specification was an equitable doctrine rather than a strict rule of law.[51] As such, it could not apply where complete bona fides did not exist on behalf of the manufacturer, and the original owner was entitled to recover the stolen property. The SLC question whether such a solution serves any useful purpose.[52] If analysed according to the rules of accession, it would appear, as with the case of *Khan*[53], that the principal would be that of the stolen part of the vehicle, making up the bulk of the vehicle, half the chassis and the engine and gears. The bad faith acquirer, Mr Feldman, would be required to pay monetary compensation to the owner of the accessory. This seems a far more useful outcome than the restitution of half a vehicle. The SLC reiterate this point.[54] This way, any good faith third party acquirers are unaffected. The composite vehicle would be maintained, and ownership passed from Mr Feldman to both parties in turn.

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[45] 1991 3 SA 439.
[46] ibid.
[47] ibid 443.
[48] 1960 SLT 231.
[49] David L Carey Miller, Malcolm M Combe, Andrew J M Steven, Scott Wortley, 'National Report on the Transfer of Movables in Scotland' in Wofgang Faber and Brigitta Lurger (eds), *National Report on the Transfer of Movables in Europe* (Volume 2, Sellier, 2009) 414-415.
[50] D.6.1.23.5.
[51] *McDonald* (n48) 232.
[52] Scot Law Com (n 4) para 17.
[53] (n 45).
[54] ibid.

The requirement for accession

The biggest flaw in Bell's formulation appears to the wording of the requirement that 'no separation' be possible for accession to take place.[55] This appears to be incorrect according to the Roman law position and has not been followed in modern Scots law. As Craig Anderson notes, this goes well beyond of what is required in Roman law where accession can take place where the accessory clearly is capable of removal; as in the case of thread sewn into a garment.[56] Bell's formulation, strictly interpreted, would place severe constraints on the applicability of the principle. In most cases, separation is physically possible if difficult to enact. Stair talks of accession taking place if 'without destruction thereof, or considerable detriment thereto, such material could not be separated.'[57]

Even if separation could be effected without damage, if such separation be economically unreasonable this may be another reason to hold that accession had taken place.[58] This appears to be the position taken in the South African case of *J L Cohen Motors SWA (Pty) Ltd v Alberts*[59]*,* where it was held that tyres did not accede to a truck.[60] The fact that the tyres could be replaced easily and without any diminution in value of the either the tyres or the truck was instructive here. In *JL Cohen*, Strydom J accepts the requirements for the accession of moveables to include not only the fact that the two must not be easily separable, but also the need to distinguish accession here from specification.[61]

To this end, one must be able to distinguish a principal and accessory thing.[62] It is this distinction that best serves to underly the key difference between specification and accession; one of two or more objects becoming mixed or joined. It is only with regard to the latter, accession, that the question of principal and accessory becomes relevant. To ignore the distinction, as Scottish jurists have been prone to do, erases this fundamental question. A question that, in the work of George Bell, a coherent and reasoned formula was developed.

Part B of this paper has sought to reaffirm the centrality of Bell's *Principles* on this subject as one that continues to have relevance in the modern day. The rules as set forth by Bell provide a clear and reasoned approach to the problem of identifying a principal and accessory item. Part C will now seek to engage with the necessary question that remains once principal and accessory have been identified; that of the property consequences of such a union. In a system that follows the position that *accessorium sequitur principale* such consequences are absolute. This position will be questioned; in part through considering modern proposals for reform in this

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[55] *Principles,* s 1298.
[56] Anderson (n 22) 227-8.
[57] II.i.39.
[58] Such a position is adopted by the DCFR; 'Goods owned by different persons are "combined" in the sense that separation into their original constituents would be impossible or economically unreasonable' DCFR (n 5) 5140.
[59] 1985 2 SA 427.
[60] C. G. Van Der Merwe, 'Law of Property (Including Mortgage and Pledge)' (1985) Ann Surv S African L 243-44.
[61] ibid.
[62] ibid.

area. Part C will aim to provide a conjoined and modern approach that takes account of the interests of the accessory owner.

Part C: Property Consequences of the accession of moveables

The reason why the identification of principal and accessory is so important in the case of the accession of moveables is because of the stark property consequences that arise from the position that *accessorium sequitur principale*. A position clear in Bell's work is that 'the property is with the owner of the principal, leaving to the other a claim for indemnification.'[63] As Carey Miller notes it is an unavoidable consequence that the owner of the principal acquires ownership given the identity of the accessory is subsumed and lost.[64] Yet, jurists have appeared reluctant to follow such stark property consequences in the case of the accession of moveables to moveables. The fear of inequity has led judges to apply novel, yet incorrect, legal solutions. Thus, common ownership was favoured in both *McDonald*[65] and *Wylie and Lochhead*.[66] Such decisions appear in contrast to the principles upon which accession is based in Scots law. It appears sounder to the current author that questions of equity be considered separate to the problem of identification of principal and accessory. This paper will now consider in turn the proposals for reform recommended by both the SLC and the DCFR.

Scottish Law Commission

The proposal favoured by the SLC (Alternative A) is one of common ownership of the final product between parties.[67] The categories of specification and accession are treated alike here. The court is also granted extensive power to make equitable adjustments of the parties' rights. Alternative B retains a divide between the two categories of specification and accession.[68] For the latter, if a principal can be identified, or if one part is of substantially greater value, sole ownership is awarded to its owner. If it is not possible to distinguish a principal and accessory co-ownership is favoured.

Specification & Accession: Towards a unified approach?

In not delineating between specification and accession in Alternative A the SLC only add to the confusion that exists in terminology and doctrine in this area of law: one they themselves highlight.[69] The SLC question the boundary that exists between these two modes of accession and quote at length the Danish jurist Vinding Kruse on the subject.[70] He suggests that the categories as derived from Roman law are reductive. Instead, it is argued, there exists much overlap between the two. Human labour is usually involved in both cases which raises the same conflict as to who ownership be awarded to, the producer or an owner of the materials. It is highlighted that to distinguish as to whether a new thing has been created is not always

[63] *Principles*, s 1298.
[64] Miller and Irvine (n 6) 80.
[65] McDonald (n 48).
[66] *Wylie and Lochhead* (n 17)
[67] Scot Law Com (n 4) para 32, 34.
[68] ibid para 33.
[69] ibid para 29.
[70] ibid para 30 It is questioned whether the distinction between accession and specification is unrealistic. On Vinding Kruse see para 28.

possible. However, it should be found that to differentiate between the two categories is both possible and necessary. And it is primarily because of the unique 'difficulty' to affix a principal and accessory in the case of the accession of moveables that such categories be retained. Even where a distinction has been retained between these modes of accession (Alternative B), the categories have not been applied correctly. The SLC appear to follow Erskine in grouping painting and writing under the heading of specification.[71] As discussed, this appears to be incorrect in Scots law as no *nova species* has been created. The two principal objects are identifiable. It would be more likely that Bell's first rule would apply here; in that the paint or writing can no longer exist separate from the canvas or paper upon which they are now attached.

Co-ownership: An equitable solution?

In the case of accession, a system of co-ownership would mark a break from the Scots law principle of *accessorium sequitur principale*. The SLC appear to acknowledge the intrinsic difficulties associated with a co-ownership model in their discussion of *Wylie and Lochhead v Mitchell*.[72] A workman was contracted by the pursuers to build a hearse, partly from his own, and partly from their materials. Ornaments supplied by the pursuer, fixed inseparably to the hearse, exceeded the value of the rest of the materials. At the point of the defender's bankruptcy, the question before the court was as to which party acquired ownership. Lord President Inglis held the present case could not be 'brought within any ordinary and known category of law,' and as such the court were at liberty to decide the case according 'principles of natural equity.'[73] In the present case, where both parties contributed a share of the materials and workmanship, it was held that they should become joint proprietors of the subject, in proportion to the value of their contributions. As noted by the SLC, the rather satisfactory result in the present case was rather fortuitous.[74] The pursuers had already received delivery of the hearse, pending the decision of the court. Had the bankrupt trustee's been uncooperative, the hearse may have been sold to a third party for a sum smaller than the contract price, under the rules of division and sale.

Not acknowledged by the SLC, is the misapplication here of the rules of accession. Douglas Osler is of the opinion that, absent to the agreement of the parties, the case is simply one of accession.[75] Ownership in this case would certainly rest with the bankrupt estate, given the mountings were used to 'adorn and complete' the fabric of the hearse, and are thus accessory thereto.[76] This is accepted, at face value, by Lord Ardmillan in his judgment.[77] However, their Lordships are quick to differentiate the present case on the grounds that such a conclusion would lead to an inequitable result. It is put that the application of accession and the principle *accessorium sequitir principale* would only create further difficulties in this case[78]; the risk that the defenders would be entitled to the hearse without paying the full contract price and the

[71] ibid para 33.
[72] (1870) 8 M 552.
[73] ibid 558.
[74] Scot Law Com (n 4) para 22.
[75] Osler (n 19) 122.
[76] *Wylie and Lochhead* (n 17) 561.
[77] ibid.
[78] ibid 557.

difficulties of getting such sums from a bankrupt estate.[79] As such a third way is necessary. One outlined in the DCFR.[80] A system that ensures greater security rights for the owner of the secondary item would certainly alleviate the concerns identified in the present case.

Draft Common Frame of Reference (DCFR)

A Sole Ownership and Security Right model

The DCFR propose a novel solution to the property consequences of both specification and accession. In both cases, sole ownership is awarded, in line with the tradition of accession in Scots law[81]; either to the manufacturer in the case of specification or to the owner of the principal part for accession. Unique is the way in which the interests of the party that loses ownership rights are secured. They would be entitled to monetary compensation secured by a proprietary security right in the combined goods. This security right would be created by operation of the law at the moment of production. It would be effective against third party acquirers without requiring possession or registration.[82]

This model is to be favoured. It maintains the unitary system of Scots law in the case of accession where sole ownership is to be favoured. Indeed, the downfalls of a co-ownership system are noted in the DCFR. These are largely practical problems linked to the common administration of goods including the risk of disputes, determining each party's undivided shares, and complications selling to third parties.[83] Whilst the complexities of co-ownership are avoided, the interests of the owner of the accessory are better protected by the security right model proposed. Their entitlement to payment is secured in the property against the risk of the owner's bankruptcy. In addition, the value of the combination object is protected against any diminution in value effected by separation. Finally, following the introduction of the Moveable Transaction (Scotland) Act 2023, this position that security rights can exist without possession is one recognised in Scots law.

The model proposed by the DCFR also maintains a distinction between cases of specification and accession, where the SLC fail to do so. The difference between the two modes of original acquisition is recognised with the requirement that 'new goods' be created in the case of specification.[84] Exceptions are maintained by the DCFR, for either borderline cases where it is impossible to distinguish a principal part or in the case of a bad faith acquirer. In regard to the former, co-ownership is awarded in proportion to the value of each part.[85] With the latter, co-ownership would only be the outcome if the value of the principal part was much higher than the subordinate part. If not, one who uses another's goods without their consent would be unable to acquire any property rights.[86]

[79] ibid 559.
[80] DCFR (n 5).
[81] ibid in the case of production (specification) 5059, and combination (accession) 5139.
[82] ibid 5156.
[83] ibid 5069.
[84] ibid 5140.
[85] ibid 5139.
[86] ibid.

A combined approach

Whilst the DCFR proposals are to be praised for their comprehensive approach to the question of property rights that arises in cases of accession, one crucial factor missing is that of the difficulty of affixing to which part is 'principal.' This is a question that must be answered; in a system where sole ownership is acquired by the owner of the principal. Likewise, the SLC are themselves guilty of not considering the question of identification to its fullest extent. It is apparent that in the case of industrial accession generally, the SLC favour the use of guiding principles rather than defined rules which provide for less flexibility.[87] The reason given is that relevant situations will almost always arise from unforeseen or unforeseeable situations, on which parties are unlikely to take prior legal advice.[88] However, the two judicial aims here cannot be so neatly separated. Legal certainty is not only required in terms of providing advice but is also instructive in terms of ensuring uniformity in legal decision making.

The DCFR pays some attention to the criteria of determining the principal. The DCFR, again, favours a set of guiding principles over defined rules with "common opinion" to prevail.[89] The question of how hard such a concept as common opinion is to grasp is anticipated.[90] The authors identify criteria including what part makes up the essence of the combination.[91] This seems to accord with the second of Bell's tests. Factors that may be relevant are also if one part has only a supplementary function. Value is also to be considered as a 'certain indicator' but is not to be decisive.[92] This is in part due to the protection of value interests inherent in the security right system proposed by the DCFR.

It is by reaffirming the centrality of Bell's *Principles* in a modern Scots law system that one comes to a unified position on the subject. The perennial question of affixing principal and accessory is one of the most important in the case of the accession of moveables to moveables. The question of property rights does not arise if a principal is not firstly identified. Neither the SLC nor DCFR, whilst engaging with this area of law, adequately recognise this. By reaffirming the centrality of Bell's *Principles* to this very problem one finds a coherent approach severely lacking in a system that favours "common opinion". Legal certainty, uniformity and justice are all protected by such a system.

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[87] Scot Law Com (n 4) para 29.
[88] ibid.
[89] DCFR (n 5) 5144.
[90] ibid.
[91] ibid 5145.
[92] ibid 5146.