SCOTTISH LAW COMMISSION

MEMORANDUM No: 28

CORPOREAL MOVEABLES:

MIXING UNION AND CREATION

31 August 1976

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This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

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MEMORANDUM NO 28
CORPOREAL MOVEABLES:
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A: INTRODUCTION AND DESCRIPTION OF THE PRESENT LAW

1. Introduction

1. In this Memorandum we consider a number of problems which arise in such situations as where the moveable property of two or more persons is mixed together, or where the property of one is welded or fixed onto or is incorporated into the property of another, or where one person by his skill or labour makes a new thing out of materials belonging to another. The problems with which we are concerned relate not only to who is or should be owner of the outcome of the mixing, union or creation, but also to what recourse should be available to those who are deprived of their property, or of the fruits of their skill or labour.

2. The Law of Scotland

(a) Industrial accession - general

2. Until recently there has been little Scottish case law concerned with the problems of specificatio, accession and adjunction of materials. On the other hand, such case law as there has been has disclosed considerable disharmony of opinion among the commentators on the Roman law and our own institutional writers who base their views on these sources. In Wylie and Lochhead v. Mitchell[1] all the judges who delivered opinions, including Lord President Inglis, noted the difficulties and controversies in this area of the law. Lord Ardmillan indeed observed:[2]

> "I cannot venture to enter on that alarming field of juridical conflict. I shrink from even treading on the edge of
>
> ' ... that Serbonian bog,
> Betwixt Damiata and Mount Casius old,
> Where armies whole have sunk'."[3]

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[1](1870)8 M 552.

[2]Ibid p. 561.

[3]Milton Paradise Lost, Book 2, line 592.

Our statutory duties under the Law Commissions Act 1965 preclude us from following his Lordship's example, and we must face squarely the problems presented by anomalies and the need to simplify and modernise the law in this field. A study which deals with title to corporeal moveables must necessarily take account of title created by specificatio, by union and by accession.

3. Though specificatio is clearly an aspect of industrial accession, attempts have recently been made in the sheriff court[1] to use it as a form of remedy imposing liability without fault for dealing innocently with motor vehicles sold under the provisions of the Hire-Purchase Act 1964. This seems in effect to amount to the introduction into Scots law of doctrine derived from, or closely analogous to branches of, the English law of torts[2] - and in particular the proprietary tort of conversion - in place of the doctrines of restitution and recompense which have no real counterpart in English law. However, in North West Securities Ltd v. Barrhead Coachworks Ltd[3] Lord McDonald has rejected this development in an opinion which seems to us convincing and well-founded in principle. Lord McDonald, in the course of his opinion, observed:[4]

> "The pursuers' second submission was that they were entitled to a remedy based upon the doctrine of specificatio applied either directly or by analogy. It is at first sight startling to find this doctrine of the civilian jurists being relied upon in a case relating to the modern law of hire-purchase, but it has been applied in the sheriff court (F.C. Finance Ltd v. Langtry Investment Co Ltd, 1973 S.L.T. (Sh. Ct.) 11). The

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[1] e.g. F.C. Finance Co Ltd v. Langtry Investment Co. 1973 S.L.T. (Sh. Ct.) 11.

[2] See Crossley Vaines Chapter 19 p.430 et seq; English law imposes tort liability without fault in several situations where Scots law and most systems in the civilian tradition protect the bona fide possessor dealing with another's property, e.g. the tort of conversion. Contrast also the action for "mesne profits" in English law (Salmond on Torts, 16th ed., p. 576) with the protection of the bona fide consumer of fruits in other systems. See also on the history of conversion and detinue Milsom, Historical Foundations of the Common Law, pp. 231-4, 321-32.

[3] 1976 S.L.T.99; see also 1975 S.L.T. (Sh. Ct.) 34.

[4] 1976 S.L.T. 99 atpp. 100-01.

pursuers' basis in their pleadings for such a case is an averment that section 27 of the Act of 1964 operated to change the character of the pursuers' property and that this change of character was brought about by the defenders' act of sale. This is not specificatio in its literal sense. That involves the forming of a new species from materials belonging to another, a change being produced in the substance (Bell's Principles, para. 1298). It envisages a physical change and there is no question of that in the present case. Where specificatio occurs it has certain consequences in law and I conceive the pursuers' argument to be that the same consequences should by analogy flow from the facts of the present case.

"In the case of F.C. Finance Ltd v. Langtry Investment Co. Ltd ... the material facts were similar to those of the present case except that the circumstances of the defenders' disposal to a private purchaser were such as to infer negligence on their part. This was the primary ground upon which they were found liable to the pursuers, the true owners. Sheriff Principal Walker, however, also held that the principle of the doctrine of specificatio applied exactly to the circumstances surrounding the defenders' transactions with the vehicle. I regret that I cannot agree, although I am reluctant to differ from a distinguished and experienced sheriff. Specificatio is a branch of the law of industrial accession (Bell, para. 1298 supra). The rules which govern it are now part of the law of Scotland, although they provided a rich field of controversy among the civilian philosophical jurists (Wylie and Lochhead v. Mitchell (1870) 8M.552). It is expressly stated in that case by Lord President Inglis that it would be unwise to extend any one of these rules to new cases on the ground of fancied resemblance. It respectfully appears to me that this is precisely what the learned sheriff principal has done in F.C. Finance Ltd v. Langtry Investment Co. Ltd. There may be some resemblance to the consequences of specificatio in the sense that an innocent bona fide act on the part of the possessor of an article has had the legal result of debarring the true owner from vindicating his real right to it. But there the resemblance ends. It is of the essence of specificatio that the original article disappears. In the F.C. Finance case it continued to exist in forma specifica. Indeed, it was not so much the act of the defenders which defeated the pursuers' right as an Act of Parliament. This is almost implicit in the pursuers' averment in the present case that the statutory provision operated to change the 'character' of the property, whatever that may mean. It certainly cannot mean the creation of a new species and that is fundamental to specificatio. In my opinion this submission by the pursuers also fails."

We accept Lord McDonald's construction of the scope of the present law of industrial accession. We would, however, welcome views on whether its scope should be extended.

4. It is not our concern to attempt to fashion from the available sources a coherent and complete statement of the existing law, since such a result could not be achieved from these sources. We shall, however, summarise the present law as we see it in general terms. Industrial accession (or, as Erskine calls it, artificial accession) is a means of acquiring an original title to property, moveable or heritable. Jurists have distinguished a number of manifestations of industrial accession, as follows: confusion, commixtion, contexture, adjunction, specification, conjunction, inedification and implantation.[1] These categories are not necessarily mutually exclusive and classification varies from author to author. In broad terms, the legal effect of the "union" of things (as viewed hitherto) may either be (i) union in the narrower sense, when the "new" thing is the same in kind as both the pre-existing things, and these former things continue to exist in the new thing, e.g. silver fused with silver; or (ii) the new thing is identical in kind with only one of the pre-existing things, e.g. a new leg is added to a table - and by accession the table "consumes" and determines the character of the new thing; or (iii) when a new thing, created by specificatio, is different in kind from its former components - ownership of which is destroyed in the process. (Specificatio may occur without union of materials, e.g. the making of wine from grapes.)

5. The result of industrial accession may be either to make several owners of different objects owners in common of pro indiviso shares, or to make one person the owner of a new entity, composed of parts formerly the property of several persons - subject, however, to the obligation to pay money representing his enrichment (in quantum lucratus est) or to make good the incidental loss to the others. Where one becomes the owner of the whole, the principle applied is that the accessory merges in the main subject (accessorium sequitur principale), although it may not always be easy to determine what is accessory and what is principal.

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[1] The final three categories concern the conversion of moveables into heritage.

(b) Confusion and Commixtion

6. Confusion and commixtion are somewhat similar. Strictly, confusion is applied to liquids and fluids in general, while commixtion is confined to solids. Stair treats them quite separately[1], while Erskine considers that they frequently fall under the description of specification;[2] and Bankton also links them closely with specification.[3] If it is thought worthwhile to maintain discrete categories with separate rules regulating each, it would seem desirable to keep the categories quite distinct, or as distinct as possible, so that a given set of circumstances would be described by the same term at all times. This would avoid, for example, the making of statements to the effect that in certain circumstances the rules of specification will apply to confusion or commixtion.[4] Stair's view is that in the case of confusion of liquids, if they are not afterwards separable, the several owners of the constituent liquids become the owners in common of the resulting product, their interest depending on the value of the shares contributed. This is so, he holds, no matter whether the confusion is brought about by the consent of the parties, by accident, by mistake or by fault. Erskine and others, however, go into much more detail, applying the rules of specification in certain cases. Thus, briefly, their view is that, if the substances are of different kinds, the mixer is the owner, whether he be one of the original proprietors or a third party. If, however, the substances are of the same kind, the mixer acquires no property in them, as the species continues, and the owners of the parts become owners in common of the whole, in proportion to the value of their contribution. When grain or other solids - scrap metal might be a modern example - are mixed together, or worked together into a single mass, and cannot be easily separated (commixtion), the owners of the constituent substances become owners in common of the whole. The possibility of separation is to be treated realistically.

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[1] II. 1. 36 and 37.

[2] II. 1. 17.

[3] II. 1. 14 and 15.

[4] e.g. as in Bankton, II. 1. 14; Erskine, II. 1. 17; and Bell, s.1298(2).

7. These solutions to the problems of confusion and commixtion will be practicable only when the constituent substances are virtually identical in quality. If they are not, the result will generally be a *nova species* and the problem of ownership will have to be settled by having regard to the rules of specification. The development of technical skills may result in what is commixtion today being specification tomorrow, depending on the science of quality determination and the making of sorting or separating devices at moderate cost.

(c) Contexture

8. Stair discusses contexture at length[1] and Bankton also gives it some space.[2] The simplest example is when materials belonging to one person are worked into cloth or other manufactured product belonging to another. If separation is not feasible, the latter is owner of the whole. It does not matter, in a question of ownership, if the materials were used *bona fide* or *mala fide*, nor even if they were stolen. The *labes realis* which normally attaches to stolen goods does not prevent their appropriation by this form of industrial accession. However, the new owner is liable to the original owner, according to Stair, not only for recompense *in quantum locupletior factus est*, but also in reparation of the damage caused to him. Here, good or bad faith will be in issue. If the other's material is used in good faith, the ordinary value is due; if not, the value put on the material by their former owner *per pretium affectionis*. Bankton considers that there may be liability in delict according to the nature of the intromission. In cases of contexture, accession and adjunction there may well be dispute as to which thing is principal and which accessory.[3] The test, according to Stair, is the design of the manufactured product. Thus a precious stone, such as a diamond, is an accessory to a ring, be it of gold or any other metal. But gold will be a mere accessory to a gem set in it. In cases of doubt, he assumes that the part of greater value

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[1] Stair, II. 1. 39. The basis for reparation in the absence of *culpa* is obscure, and this statement may be in desuetude.

[2] Bankton, II. 1. 17 and 18.

[3] Bell *Principles* s. 1298; Walker *Principles of Scottish Private Law*, 2nd ed., p. 1553.

would carry that of less. He comments that "controversies of this nature have been seldom moved with us". Bell considers[1] that in instances of industrial accession such as adjunction, the first principle is accessorium sequitur principale, i.e. the property of the principal thing draws after it that of the accessory and the only difficulty is to fix which is the principal. The relevant rules are (1) whichever of two substances can exist separately while the other cannot, is principal; (2) where both can exist separately the principal is that which the other adorns or completes; (3) in the absence of these indications bulk prevails, next value. The consequences of adjunction of two things which are not capable of discrimination by these tests are not discussed. Stair considers under the heading of contexture the attribution of ownership of painting by one person on another's canvas, board or ornament, and of writing by one person on another's paper. Again the answer must be based on the design of the finished product. Since the Roman authorities are contradictory, Stair was free to adopt the solution which seemed to him most equitable. A painting on canvas or board designed for being painted on is the principal, and the canvas or board the accessory. But a painting which is merely for the ornamentation of a moveable such as a cabinet is analogous to a painting applied for the ornamentation of a wall; and so just as the latter accedes to the immoveable, or heritable, property, so the former accedes to the moveable. Nevertheless in all cases the owner of the principal object is liable to the former owner of the accessory in quantum lucratus est. Even if the painter is in bad faith in adorning a cabinet or similar moveables of another, he has a claim for recompense, according to Stair, and is not presumed to have done the work animo donandi.

9. The same principle is adopted by Bankton[2] and Stair[3] in relation to writing on paper or parchment. The Roman rule that the writing accedes to the paper is rejected, except where the

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[1] Bell Principles s. 1298; Walker Principles of Scottish Private Law 2nd ed., p. 1552.

[2] II. 1. 18.

[3] II. 1. 39.

writing is on a wall or on other moveables, when it may be presumed that it is designed to adorn them. In normal circumstances, where paper is designed for writing, and is, in a manner of speaking, consumed by the writing, it accedes to the writing.[1] An example of this principle is possibly found in Rollo v. Thomson[2], although the opinions of the court are brief and not closely reasoned. The defenders, former employers of a draughtsman, were held to be the owners of notebooks purchased by him at his own expense (although he had been authorised by them to order the notebooks at their expense). The notebooks contained sketches made by him in his employers' and his own time, and by fellow employees, and from these sketches finished drawings were made for the employers. Some time after the draughtsman had left their employment taking the notebooks with him, the defenders claimed them as their property. The First Division found unanimously in favour of the defenders. No authorities for their decision are cited, but Lord President McNeill and Lord Deas appeared to base their judgments on the facts that it was unnecessary for the pursuer to buy the notebooks at his own expense, and that the sketches were the combined work of the pursuer and the defenders, and were made under the latters' direction. It might have been thought that the writings of an employee under his employer's directions and in furtherance of the tasks given him by his employer, as in this case, become the property of the employer by contexture, even though the paper on which they are made is not the employer's. In a modern context it is likely that ownership of the corporeal moveable property would have been subordinated to the "know-how" or "intellectual property" of the employers in any event. This aspect of the law we intend to study in a different context.

[1] See also Grotius, Introduction to the Jurisprudence of Holland (translated by R.W. Lee) 2.8.3. and Voet Commentary on the Pandects (translated as The Selective Voet by P. Gane) 41.1.26, who states that "the modern custom" is for the writer to keep the paper on condition that he gives the original owner another paper which is clean and equally good.

[2] (1857) 19 D. 994.

10. The case discussed may be contrasted with H M Advocate v. Mackenzies[1] where the panel was charged on indictment with stealing a book containing valuable secret recipes of his employers, and with making copies of these recipes in breach of his agreement of service, with the intention of disposing of them onerously to trade rivals of his employers. Lord Salvesen, holding the second charge to be irrelevant, denied[2] that it is a crime for a clerk to make copies from an employer's book, which copies he neither discloses nor makes use of in any way, although he has no legal right to make such copies and they would fall (according to Lord Salvesen) to be given up by him to his employer or destroyed. But this surrender or destruction of the copies would appear to be a consequence of a civil wrong, the breach of his contract of employment.

(d) Specification

11. Specification is the term applied to the making of a new species or subject from materials belonging to another. As Stair indicates, positive law or custom may choose from a number of solutions to the problem of ownership of the new subjects. The law of Scotland has followed Justinian's media sententia.[3] Thus, where the new subject can be reduced to its original materials, e.g. by melting down a metal vase, the owners of these materials continue as common owners of the new object, the maker being compensated by them in quantum lucrati. Where reduction is not possible, the maker of the new thing is held to be the owner, whether or not he contributed any of the materials used, and he is liable to restore to the former owners a like quantity and quality, or the price of the material. Cases involving specification in the proper sense of the term are rare, and there is perhaps a tendency for the courts to hold that on each former occasion the circumstances were somewhat special. However, successful criminal prosecutions

[1] 1913 S.C. (J.) 107.

[2] At p.113.

[3] Institutes, 2.1.25; Stair, II.1.41; Erskine, II.1.16; Bell, s.1298; Bankton, II.1.13.

for stealing scrap metal are by no means infrequent, and the consequences of the "cannibalising" of motor vehicles have recently given rise to difficult legal problems. As Lord Kinloch remarked of this area of the law,[1] "whilst no topic of the law has been the subject of more frequent annotations, or more eager disputes, or more dogmatic contradictions, it has been left almost entirely to the domain of philosophic discussion, and has scarcely, if at all, had the light of judicial decision thrown on it."

12. In Oliver & Boyd v. The Marr Typefounding Co. Ltd.[2] a quantity of type had been stolen from the premises of the pursuers, and subsequently sold by various dealers to the defenders at a price not so substantially at variance with the usual price paid by typefounders as to raise any suspicion that it had been dishonestly come by. On the thefts having been discovered, some of the type had been seized by the police before the defenders had melted it down, and the latter did not dispute this seizure. However, they denied that they were liable to account to the pursuers for the value of the type which had been melted down and whose identity was now completely lost. Lord Stormonth Darling held that whereas a bona fide sale of the type would have been a good answer to a demand for restitution, (because in principle the demand should be made to the subsequent purchaser, although the defenders would have still been liable to account for any profit thus made), in the present circumstances, seeing that restitution in forma specifica was impossible, the defenders were liable to the pursuers in restitution for the full value of the type at the time of the theft. He saw no greater hardship in the defenders' having to account for the value of the melted-down type, than in their having to give up the metal which had not yet been melted down. In Faulds v. Townsend[3] the court had

[1] Wylie and Lochhead v. Mitchell (1870) 8 M. 552 at 564.

[2] (1901) 9 S.L.T. 170.

[3] Faulds v. Townsend (1861) 23 D. 437 especially at p. 439 per Lord Ardmillan.

considered the specificator to have been so lacking in care, although *in bona fide*, as to make him liable for the proved value of a horse which had been sold to his servant late at night and boiled up before the next morning. There are dicta in the case to the effect that had he acted with the due care and caution required in his business, he would have been liable only *in quantum lucratus*. Lord Stormonth Darling, however, rejected this view as being inconsistent with the principle exemplified in *Ferguson* v. *Forrest*,[1] where the purchaser of a stolen mare in the open market at a public fair was found liable to restore the price to the owner when the intervening death of the mare prevented its return.

13. These cases were among those discussed in *International Banking Corporation* v. *Ferguson, Shaw and Sons*,[2] where a quantity of refined cotton-seed oil had been mixed with other materials by *bona fide* purchasers to make a lard compound subsequently sold and delivered by them to their customers. In an action for delivery (or failing that, payment) raised by the banking corporation and the shippers of the oil, neither the pursuers nor the defenders stated any plea dealing with *specificatio*, the question on which the decision nevertheless ultimately turned. Though the sheriff-substitute, rejecting Lord Stormonth Darling's approach in *Oliver & Boyd* v. *Marr Typefounding Co Ltd*, had found the defenders liable only for the profit which they had made, the Second Division held them liable for full value of the oil. They took the view that by the doctrine of *specificatio*, derived from Roman law and accepted by all the Institutional writers, the defenders by creating a new species had become owners thereof and were liable for the value of the oil which they had used. Had they resold it in its original state they would have been liable only for profit on the principle of recompense. Nevertheless Lord Ardwall, while concurring in the result, did not accept the view that liability could be founded on the proposition that

[1] (1639) Mor. 4145.

[2] 1910 S.C. 182.

the defenders, albeit innocently, had deprived the owner of his right to "vindicate" his property, and declined to express an opinion on the soundness of Lord Stormonth Darling's opinion in Oliver & Boyd.

14. In North-West Securities Ltd. v. Barrhead Coachworks Ltd.[1] Lord McDonald likewise rejected the argument that, in Scots law, a defender can be held liable because, though in good faith, he had by his actings deprived an owner of his right to reclaim property. He observed:[2]

> "The pursuers' first proposition was that they were entitled to recover the value of the vehicle from the defenders although they no longer had possession of it because by disposing of it to the statutorily protected private purchaser they had, albeit innocently, effectively deprived the pursuers of their right to recover the vehicle from that purchaser. In my opinion this extends the doctrine of restitution beyond the limits contained in the passages from the institutional writers referred to. Counsel for the pursuers argued that the passage in Stair at I.7.2 extended the obligation to a haver who had fraudulently put the article away and that it was his once having had the article which created the obligation, not the fraudulent away-putting. The obligation so created, it was said, remained and could be enforced if, for any reason, recovery from the ultimate possessor became impossible. If this is correct it is difficult to see why no mention of such a rule can be found in the institutional writers. The whole tenor of the passages cited is that once possession is lost, liability to make restitution flies off save in the case of fraud. In Faulds v. Townsend (1861) 23 D. 437 Lord Ardmillan stated that in such circumstances the former possessor, except in so far as lucratus, would be free, and added the words 'and the owner would be left to seek restitution from the possessor.' I cannot, however, read from these words the further proposition that if the owner is unable to obtain restitution from the possessor, the obligation of the former possessor revives. In Oliver & Boyd v. The Marr Typefounding Co Ltd. (1901) 9 S.L.T. 170, Lord Stormonth Darling accepted that a bona fide sale to a third party is a good answer to a demand for restitution but said that it was on the principle that the demand can be, and ought to be, made against the person to whom the possession has been transferred. This may well be but again I do not think it follows that if such a demand cannot be satisfied the bona fide sale ceases to be a good answer. In International Banking Banking Corporation v. Ferguson, Shaw & Sons, 1910 S.C. 182, 1909 2 S.L.T. 377 Lord Ardwall demurred to the proposition favoured in the lower court that where the true owner is deprived of his right to vindicate his property by the action, however

[1] 1976 S.L.T. 99.

[2] At p.100.

innocent, of a bona fide possessor, the latter must bear the loss in a question with the former. I respectfully agree with Lord Ardwall because I consider that such a proposition is inconsistent with the principle laid down by the institutional writers that liability to make restitution disappears with loss of possession except in so far as the former possessor is lucratus. For these reasons, I do not consider that the pursuers have averred a relevant case based upon restitution."

15. In McDonald v. Provan (of Scotland Street) Ltd.,[1] though the facts are such as may reasonably be expected to recur, the opportunity was not taken of reviewing the relevant authorities fully. The defenders had purchased bona fide, and resold to the pursuers, a motorcar of which the front part had been taken from a stolen vehicle and welded to the rear of another by a dishonest dealer. Subsequently the police removed the whole composite vehicle from the pursuers' possession on the ground that it was stolen property. In an action of damages based on an alleged breach of the warranty implied in the Sale of Goods Act 1893, section 12(1), that the seller had a right to sell the car, the defenders invoked the doctrine of specificatio. The defenders contended that the welding created a new entity, and the dealer had thus transmitted to them a complete right to sell it to the pursuers. In South Africa, it had been held that wheels supplied to a wagon by a man who had borrowed and returned it acceded to the wagon and became the property of the owner of the wagon.[2] Yet wheels are notoriously detachable, and their separation from the wagon would present no difficulty and do no damage of any significance. Lord President Clyde, sitting in the Outer House, rejected a like solution. He considered that, prima facie, a vehicle constructed by welding together two halves could be cut into two once more. Accordingly, in his view, it could not be contended that a new entity had been created by specificatio.

16. In fact the Roman jurists clearly distinguished welding from soldering,[3] and concluded that accession follows welding, because this operation produces "confusio", whereas soldering does not do so. Voet accepted this doctrine, but is silent as to the effect of bad faith.[4] The distinction is based on the view that

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[1] 1960 S.L.T. 231.

[2] Cooper v. Jordan, 4 E.D.C. 181, (1884) 1 Cape Law Journal 282.

[3] D.6.1.23.5.

[4] Commentary on the Pandects (translated as The Selective Voet by P. Gane) 41.1.27.

soldering is merely a cementing together of two objects of perhaps even dissimilar material, while welding produces a homogeneous mass. Even if parts are separated by a similar process, one cannot be certain that they are composed of molecules identical with those of the original constituent parts.

17. Lord Presidemt Clyde went on to assert that in any event the doctrine of specificatio was an equitable doctrine, which was excluded because of the absence of bona fides on the part of the manufacturer.[1] He took no account of the relevance of bona fides on the part of the defenders who had acquired from the dealer. The original owner was therefore entitled to recover the stolen property, no matter into whose hands it had fallen. It may be doubted whether this restitution of half a vehicle (assuming the process of cutting through the welding did in fact restore the parts to their original state) serves any useful purpose. If a vehicle has been broken up to provide spare parts for half a dozen others, or if several have been used to make one composite vehicle, in neither case will the owners (or their insurers) welcome the restitution of the fragments. Monetary recompense would be more satisfactory to all, and is clearly not excluded by Bell.[2] In the comparable situation of "contexture" Stair,[3] in the interest of commerce, excluded the relevance of labes realis.

18. In any event, as Lord McDonald has recently reasserted, specificatio is not based upon principles of equity at all. In North-West Securities Ltd. v. Barrhead Coachworks Ltd.[4] he observed:[5]

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[1] Relying on Bell Principles s. 1298(1), which does not in fact seem to provide authority for the Lord President's conclusion.

[2] Principles s. 1298.

[3] II.1.39.

[4] 1976 S.L.T. 99.

[5] At p. 101.

> "It was suggested on this branch of the case that what was sought was a remedy similar to that provided by the doctrine of specificatio but without expanding that doctrine. This is an unstable foundation for an argument based on equity, since it is seriously to be doubted whether the rules of industrial accession are really based on natural equity (Wylie & Lochhead v. Mitchell, per L.P. Inglis, at p. 557). An expression of opinion to the contrary by Lord President Clyde sitting in the Outer House in McDonald v. Provan, 1960 S.L.T. 231, would seem to be inaccurate."

19. We are inclined to agree with certain comments made by Mr. H. McN. Henderson in a note[1] on McDonald v. Provan (of Scotland Street) Ltd.[2]:

> "The treatment of industrial accession by the Civilian and Institutional writers is on the whole expressed in general terms and unsystematically. In dealing with its various manifestations, e.g., specificatio, confusio, commixtio, adjunctio and contexture, they are by no means clear about the appropriate classification of a given set of circumstances. In the present case, arguments may be made to classify them under specificatio or adjunctio. Nor are these authorities agreed as to the influence, if any, of mala fides. So it seems that the way is open to our courts to exercise their discretion in favour of a solution in keeping with the social and economic needs of today."

In this context he notes the inconvenience of attaching a vitium reale to small, unmarked parts of a motor vehicle.

20. Mr Henderson's view that the courts would be free to formulate a new body of doctrine regarding title resulting from union or creation of corporeal moveables is, however, too optimistic in our opinion. Indeed, a strong First Division presided over by Lord President Inglis[3] seems to have felt that to some extent the courts were only free to act according to equitable principles and to disregard illogical and unintelligible distinctions where specific rules had not gained recognition. Unlike Lord President Clyde, who supposed that the

[1] "Specificatio" 1961 Jur. Rev. 60 at p. 61.

[2] 1960 S.L.T. 231.

[3] Wylie and Lochhead v. Mitchell (1870) 8 M. 552.

concept of specificatio was based on a principle of equity, the First Division recognised it for what it is in fact[1] - a somewhat arbitrary creation or destruction of rights as a rule of thumb solution to practical problems. Thus Lord President Inglis commented that, though common property would be the most just solution where two or more persons had contributed materials or skill or labour to the production of a new subject[2]:

> "We are not entitled to follow this philosophical doctrine to all its just results, and to hold that the same rights of common property will arise from specificatio as from confusio, because we are restrained by the rules of law fixed as applicable to these particular categories. But when we are called upon to adjudicate in a case which cannot be brought within any ordinary and known category, we are, I apprehend, at liberty to adopt that principle of equity which will be most just in its results, without inquiring too curiously or balancing too nicely to which of several categories the new case has most general resemblance."

As we shall suggest presently for consideration, the courts should be freed from restrictive categories in determining disputes in this area of the law. Though in many areas of property law certainty as to which way the scales of justice will fall is desirable, so that a party may know whether he should win or lose his claim, in the field under discussion distributive justice has much to commend it. The situations which the courts have to consider do not normally result from premeditation or advice.

(e) Where the courts have gone beyond the categories

21. There was considerable discussion of the authorities on union and creation of corporeal moveables by the First Division in Wylie and Lochhead v. Mitchell. A firm of funeral undertakers had employed a coachbuilder to build a

[1] See also North-West Securities Ltd. (sup. cit.)

[2] Wylie and Lochhead v. Mitchell (1870) 8 M.552 at p. 558.

hearse for a certain sum, with materials and workmanship supplied partly by themselves and partly by him - the contribution of the undertakers being greater in money value.[1] On the occasion of the builder's supervening bankruptcy, the question arose as to whether the firm could claim delivery of the hearse (which was completed at the expense of the sequestrated estate) on payment of the contracted sum, under deduction of a lesser sum, being the price of goods supplied during the currency of, but in the course of dealings unconnected with, the contract. Lord President Inglis examined the rules of industrial accession as expounded by the civilian authorities, but found it impossible to bring the facts of the present case satisfactorily within any ordinary or known category; accordingly, he found that the court had "no resource but to call in aid the principles of natural equity",[2] the materials being still physically separable and capable of being distinguished and identified, although practically inseparable, since separation would impair the value of the materials and extinguish the value of the labour and skill of both parties. He concluded, on the authority of the civilians, that the parties were the joint (or more correctly, common) proprietors of the new subject - one not practicably capable of division - in proportion to the value of their contributions. Thus the petitioners were entitled to take delivery of the hearse as their property on payment to the trustee in bankruptcy of the value of his share of the subject.

22. The result of this case is most important from an economic point of view. The petitioners obtained performance of the bankrupt's contract. Had the court upheld the respondent's argument that the whole hearse was his property as trustee for the bankrupt's creditors, the petitioners would have ranked as mere creditors on the estate, entitled to a dividend according to the value of their contributions. However, it may be

[1] The fact that the ornaments on the vehicle were worth more than the vehicle itself was a factor in excluding the ordinary doctrine of accession.

[2] At p. 558.

observed that so satisfactory a result for the petitioners was, in a sense, fortuitous. They had in fact received delivery of the hearse on consigning the contract price into court pending a decision on the legal questions in dispute. As the Lord President pointed out[1], where parties are held to be joint (common) owners of a subject which is not capable of division, they must bring it to sale and divide the proceeds[2] in proportion to the value of their contributions, or the one must buy off the other by paying him the value of his contribution. Had the bankrupt's trustee been altogether uncooperative, the hearse might have been sold to a third party on the principle nemo invito in communione detineri potest for a larger or smaller sum than the contract price. It may not be unreasonable to suppose that the First Division would not have found this an altogether acceptable result.

(f) Conclusion

23. There is no need to labour the confusion in terminology and doctrine which underlies current solutions in Scots law regarding union and creation of corporeal moveables. This largely results from the adoption and adaptation of solutions worked out in Roman law on a pragmatic basis in very different social and economic conditions from those which obtain today. For example, it would be difficult to justify applying the present Scots law of specificatio to a case in which ownership of sophisticated aircraft engines (constructed with metal stolen from an importer and sold to aircraft manufacturers) was conferred on the importer because the materials could be reduced to a mass of metal of the original kind.

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[1] At p. 559.

[2] On division and sale see Brock v. Hamilton, reported as a note to Anderson v. Anderson (1857) 19 D.701.

3. Comparative law

24. We have considered the solutions of various legal systems to the problems of union and creation. Those which have elaborated rules have derived them in the main from Roman law. Some systems have very detailed rules; others are satisfied with a few broad provisions; others subject the rules specified to overriding principles of equity. In some common situations the creator of a product is favoured by the legislator at the expense of the owner of the materials from which it was made, while the legislator in another system would protect the owner.

25. French law provides in Article 565 of the Civil Code that right to moveables by accession

> "is entirely subordinated to principles of natural equity. The following rules shall serve as examples for the judge to determine unforeseen situations according to their particular circumstances."

Twelve Articles which follow lay down rules which were believed (in some cases erroneously) by the redactors to reproduce the relevant rules in Roman law. These Articles have been severely criticised by French authors[1] as too complex and often useless - especially because of the operation of the concept that, in matters concerning moveables, possession is equivalent to title. Significantly Professor R. David, the distinguished French jurist who drafted the Ethiopian Civil Code of 1960, dealt with matters more concisely, as follows (freely translated):

"Art. 1182 Specification

(1) When a person has produced or transformed materials which do not belong to him, the new thing belongs to the producer if the work involved was worth more than the materials.

(2) If the producer did not act in good faith, the court may award ownership in the new thing to the owner of the materials, even though the work involved was worth more than the materials.

(3) The Articles of the Code relating to delictual liability and unjustified enrichment are not affected.

Art. 1183 Mixture of Adjunction

(1) When moveables belonging to different owners have

[1] E.g. Mazeaud et Mazeaud Leçons de Droit Civil vol. 2(2) Biens 4th ed., 1969 ss. 1610-11; Planiol Civil Law Treaties vol. 1(2) s. 2739, translated by Louisiana State Law Institute.

been mixed or united in such a way that it is impossible to separate them without causing substantial damage, or if this would involve excessive work or expenditure, those interested become co-owners of the new thing in proportion to the value which the constituent parts had at the time of mixture or adjunction.

(2) If, however, on the mixture or adjunction of moveables, one should be considered the accessory of the other, the owner of the principal thing becomes owner of the whole.

(3) The Articles of the code relating to delictual liability and unjustified enrichment are not affected."

David's formulation follows almost exactly the language of Articles 726 and 727 of the Swiss Civil Code.

26. The Italian Civil Code also deals with "specification" and "union and commixtion" in two Articles (Arts. 939-940). The solution (Art. 940) to specification is as follows:

"If someone has used material that does not belong to him to make a new thing, whether or not the material can resume its earlier form, he acquires ownership by paying the owner the value of the material, unless the value of the material, substantially exceeds that of the workmanship. In that case the thing belongs to the owner of the material, who shall pay the value of the work."

Article 940 does not seem as satisfactory a solution as that of the Swiss Code or the Ethiopian Code, but Article 939 (union and commixtion), which is on similar lines to the solutions of these Codes, has an interesting divergence on the question of principal and accessory. If one of the things joined so as to become a single whole can be considered as principal or is of much greater value, the owner of that thing[1] becomes owner of the whole, under obligation of paying the value of the other thing to its former owner. Presumably, therefore, if the separated arm of a statue by a renowned sculptor of antiquity were welded to a modern copy of the rest of the statue, the owner of the accessory could assert ownership over the whole.

[1] A drafting difficulty is resolved by D. Tramontana Diritto Privato i. p.218.

27. The German Civil Code (B.G.B. Articles 947-951) is noticeably favourable to the "producer" of a new thing in competition with the former owner of materials. Article 950 deals in detail with "processing"[1]:

> "(1) A person, who by processing or transformation of one or several materials produces a new moveable thing, acquires the ownership of the new thing, to the extent that the value of the processing or transformation is not substantially less than the value of the material. The writing, drawing, painting, printing, engraving or similar treatment of a surface is also considered as processing.
>
> (2) With the acquisition of ownership of the new thing the existing rights to the material are extinguished."

The Greek Civil Code of 1946 is strongly influenced by the German B.G.B., and in Articles 1058 to 1063 largely follows the German solutions. However, by Article 1062 the Greek Civil Code provides that if the creator of a new thing was not in good faith, the court may attribute ownership in that thing to the owner of the materials from which it was made.

28. We understand that in Scandinavian law, and particularly in Danish law, (which is relevant in an E.E.C. context), detailed rules are avoided, and the judge may base his decision in questions of creation or union of moveables exclusively on principles of natural justice, having regard to the specific circumstances of the case. Thus Danish law is not bound by the Roman law distinction between specificatio and accessio. On this Vinding Kruse wrote[2]:

> "This distinction is not lucid because the foundation of the classification has not been thought out with sufficient method. Production or specificatio should be the formation of a new thing, a thing serving essentially different economic requirements from the material out of which it has been shaped, whilst accession is the change of a thing by its becoming part, an accessory, of another thing as the main thing. In

[1] See translation of The German Civil Code by Ian S. Forrester, S.L. Goren and H.-M. Ilgen as amended to Jan. 1975 (published by North-Holland Publishing Co.)

[2] Right of Property vol. 1 pp. 288-90.

the one category of this classification, production, labour competes with material, in the other material competes with material; but the conflicts of life are far more numerous than these, and even these two conflicts, that of a producer and an owner of material, and that of two or more owners of material, can rarely be separated in the pure form assumed by this Roman abstraction. Human labour also enters into the cases of accession, so that here too there is usually a conflict between labour and material, for instance, in the case of a craftsman fitting some pearls into a piece of jewellery, a ship-builder fitting a fishing-boat out with a motor or founding a steel-stern on a ship (UfR, 1914, 793); and finally it is not possible to distinguish clearly whether an essentially new thing has been produced and whether there is a main thing which is still the same regardless of the fact that a new thing has been added, for production is not limited to the creation of a thing which serves other requirements than those previously served... The fishing-vessel will be far more effective and return much more profit with a motor than without it. Altogether life presents in the individual cases a multitude of different combinations in which the elements of value, labour, and materials, undergo ceaseless changes ... whilst the economic consideration of production should probably be allowed to carry a certain weight in this domain as a whole, it should on the other hand not be the only element guiding the judge. Law is not merely economics: the ruthless violation of the neighbour's right is not better merely because it yields profit; money might perhaps be of no value to the neighbour whose property is taken to be used as material for production with a view to good profit. The guiding principle of the law is therefore not only the interest of production but also the interest of legal protection."

B: POSSIBLE SOLUTIONS EXAMINED

1. Introduction

29. The present law of Scotland regarding union and creation of moveables is unsatisfactory, partly because of confusion of terminology, and also partly because of the inflexibility of certain solutions where rules largely derived from Roman law are applied. Some of the modern codified systems, which in this field have a similar background to Scots law, contain solutions which might with advantage be adopted or adapted. It may be, however, that the solutions should be adopted in the form of guiding principles to assist the court, rather than as rules which the court must apply in every case. The disputes to be determined in general result from unforeseen or

unforeseeable situations, on which parties would be unlikely to take legal advice before they developed. Accordingly equitable considerations, rather than certainty of result, may seem entitled to prevail in the last resort, and encourage contesting claimants to reach compromise solutions. The wisdom in Solomon's celebrated judgment was that he foresaw that it would not in fact be carried out.

30. The complexity of situations which may arise are illustrated from the Scottish and comparative material. In Wylie and Lochhead v. Mitchell[1], though Lord President Inglis thought that it would be unwise to disturb by judicial decision the rules fixed for industrial accession, he was reluctant to extend any by analogy and doubted whether they were based on natural equity or could be reconciled with each other. He considered that in the case before him it would be unsafe to proceed by positive rule and invoked the aid of natural equity. The generally accepted principle which applied (in the absence of a special rule) where a new subject of property had been created by the combination of materials and industry contributed by different parties was that of common property. Had the Lord President contemplated in greater detail the inflexibility and insufficiency of the special rules in this area of the law, he might well have concluded that natural equity should be the overriding consideration in all cases of union and creation when the claimants have contributed industry or materials. The distinction between accession and specification, for example, may be unrealistic.

31. Co-ownership can only provide a satisfactory solution when, in the last resort, competing claimants can be compensated in money terms as a result of sale in default of agreement, or when the court has power to award the property to the claimant who can shew special interest in the property in dispute. As we have observed, it was only with the agreement of the trustee in bankruptcy that a satisfactory result was reached in Wylie and Lochhead v. Mitchell. It might have been thought desirable that the court should have had power to order transfer of the completed hearse to the undertakers on their paying the due sum.

[1](1870) 8 M. 552.

32. However, when the creator of a new thing has been employed by the owner of materials, it might seem appropriate in most cases to award ownership of the thing to the employers if they claim it. Where the real problem concerns use of an employer's confidential information or trade secrets, this comes within the scope of "Breach of Confidence", with which we are not concerned in this Memorandum, but which we are studying separately.

2. The determination of ownership of a new product

33. We put forward for consideration two alternative sets of tentative proposals. They cover only those cases where the producer of a new thing using another's materials is not protected by the rules of law applicable to good faith onerous acquisition of corporeal moveables.

ALTERNATIVE A

(1) Where materials belonging to another are incorporated into a mixture of things or into a new thing in such a way that the original materials cannot be conveniently[1] separated from the mixture or from the new thing, the mixture or thing shall be deemed to be the common property of all persons who had an interest (whether a proprietary interest, a security interest or a possessory interest) in the materials, or who have contributed by their skill or labour towards the making of the thing.

(2) The court in an action by the possessor of the mixture or thing or by any person claiming an interest in them may in its discretion -

(a) award the ownership of the mixture or thing or any part thereof to any person having an interest;

(b) require the person to whom ownership has been awarded to compensate any other persons, in such manner and in such proportions as the court

[1] i.e. without causing considerable damage, or without incurring unreasonable work or expense.

may think fit, for the value of the materials they have contributed or for the value of their contribution to the making of the thing;

(c) ordain the mixture or thing to be exposed for public auction and the proceeds disposed of among the persons having an interest in the thing rateably in accordance with the value of the materials they have contributed or of their contribution to the making of the thing.

(3) In determining the value of a person's interest in the mixture or thing, the court may ignore in whole or in part the interest of a person who has acted in bad faith.

ALTERNATIVE B

1. Specification

(a) When a person has by skill or labour transformed materials which do not belong to him into a new thing, the producer becomes owner of it if his skill and labour are more valuable than the materials, but otherwise the owners of the materials become owners of the new thing.

(b) Transformation includes writing, printing, engraving, drawing, painting, photography and similar use of the surface of materials.

(c) If the value of the skill and labour and the value of the materials are equal, the producer and owner or owners of the materials become owners in common of the new thing.

(d) If the producer did not act in good faith, the court may award the new thing or its full value to the owner or owners of the materials used in its production.

(e) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

2. Adjunction and Commixtion

(a) When things belonging to different owners have been intermingled or joined together in such a way that it is not possible to separate them without causing considerable damage, or without incurring unreasonable work or expense, the parties concerned become co-owners of the new thing in proportion to the value of their contributions at the time of commixtion or adjunction.

(b) If when things are commingled or united one part can be regarded as principal and the other part or parts accessory, or if a part is of substantially greater value than the other part or parts, the owner of the principal part, or the part of substantially greater value as the case may be, becomes owner of the whole.

(c) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

34. On balance we are inclined provisionally to prefer Alternative A, but have formed no concluded view. We invite comment on these alternative proposals.

3. Where a new product has been acquired by a third party without the consent of all co-owners

35. The solution of invoking in the first place the doctrine of common property to resolve disputes between producers and those whose materials were used in production would not, without more, resolve the problems which would arise if the producer (who might have made a product in good or bad faith) had disposed of the product before the owner had asserted his claim. The product might have been acquired by a bona fide purchaser for value or by a gratuitous or mala fide transferee. In McDonald v.

Provan (of Scotland Street) Ltd.[1] it was held that good title would not be given in a composite vehicle which was partly owned by someone other than the dishonest fabricator. If in Wylie and Lochhead v. Mitchell[2] the trustee in bankruptcy had sold the hearse to a third party without the agreement of the undertakers, the same problem would have arisen. If the materials of several persons and the industry of several manufacturers are involved, the consequent legal problems resulting from co-ownership become economically intolerable.

36. One possible approach to the problems of alienation in the situation described would be to give good title to bona fide acquirers for value, even though all co-owners had not consented to disposal. They would then be restricted to remedies in delict or recompense against the co-owner who had alienated. A gratuitous transferee would remain liable on principles of unjustified enrichment (recompense), and a mala fide transferee would be liable in reparation.

37. Though the approach envisaged in the foregoing paragraph has the attraction of relative simplicity, we appreciate that it might operate injustice if (say) a thief had merely welded new fittings onto a stolen car and disposed of it. The deprived owner would, however, normally be covered by insurance, and the insurers would be subrogated to his rights against the thief - for what they might be worth.

38. We can see no clearly satisfactory solution to the problems of deprived owners of materials and bona fide acquirers for value of products made from such materials.

We invite comment on alternative tentative proposals that (a) an onerous bona fide acquirer should acquire title derived from the producer of goods who had used another's materials without his authority; or (b) in the case of such alienations the court should have power to determine disputes regarding ownership over and claims in respect of corporeal moveables produced by creation or union and thereafter alienated, according to principles of natural equity.

[1] 1960 S.L.T. 231.
[2] (1870) 8 M. 552.

4. Creation using another's Intellectual Property

39. A new thing may be made using the producer's own materials but the intellectual property, such as "know-how", trade secrets, formulae or designs of another, without his authority. This may be bona fide production, as where the producer has acquired the intellectual property of that other in good faith through a fraudulent intermediary. On the other hand, the intellectual property of another may have been acquired dishonestly. It is apparent that problems comparable to those which arise through the unauthorised use of another's corporeal moveable property may be created, and that remedies either in recompense or reparation may be available under the present law. However, we are studying these problems in the wider context of "Breach of Confidence" and do not develop them in this Memorandum.

5. Moveables Affixed to or Implanted in Land

40. In an accompanying Memorandum[1] we consider some problems of classification, including rights over crops, trees and fixtures. A person's corporeal moveables such as seed, seedling trees or girders may be affixed to heritage without his consent. It might be argued that in problems of creation and union the classification of property as heritable or moveable should be disregarded and common solutions applied notwithstanding the category. A very valuable moveable may be infixed into heritage. However, especially in a system where the rules of law applicable to heritable property on the one hand and corporeal moveables on the other are so different, it seems preferable not to explore in this Memorandum the possibility of extending some of our provisional proposals to problems when moveables have been infixed into heritage. Heritage we think must be regarded as the principal

[1] Memorandum No 26: Corporeal moveables: some problems of classification.

subject matter and the infixed moveables accessory. In this context we think it wise to preserve the doctrine accessorium sequitur principale, i.e. that rights over the principal subject comprehend accessories thereto.

41. However, we think that limited provision might be made for the deprived owner of a moveable merged in heritage to secure its restoration to the category of moveables. For example, the Italian Civil Code (Article 937) provides that if plantings, construction or other works have been done by using another's materials without his consent, the former owner of the materials can claim them, having previously secured separation at the cost of the party who had used them, provided that separation can be accomplished without serious damage to the works or the land. Such a claim is, however, restricted to a period of six months from the time when the owner of the materials became aware of the annexation. If, however, the separation of the materials is not requested or separation cannot be effected without serious damage, the person who annexed them and the owner of the soil who used them in bad faith are jointly liable for the value of the materials. The owner of the materials may also seemingly claim in recompense from the owner of the soil, even if he was in good faith, and has a right of reparation against a third party who used the materials without consent and from the owner of the soil who, in bad faith, authorised their use.

42. We think that at present Scots law would grant actions based on recompense for unjustified enrichment, or of reparation in cases of fault. However, we think that it might well be desirable that the court should have power to order severance of materials from heritage if these had been used without authority and by a person who had not acquired title protected by law. The severance should be effected at the cost of the person who had annexed them, and the owner of the soil should be jointly and severally liable for the cost if he had been in bad faith. Severance should not, however, be permitted if serious damage to the land or to the materials would result, unless the owner of the land had been in bad faith. When the materials had been restored to the category of moveables, they could be claimed on the principles of law applicable to that

kind of property. We consider further, that the right to claim severance should be limited in time - possibly the period of the short prescription (5 years) as the upper limit, and six months from the time when the owner of the materials knew or ought to have known of their misappropriation and annexation as the lower limit. However, we doubt whether a bona fide owner of land in which another's materials had been sown or planted should be liable to the owner of the materials except on principles of recompense, and that if severance were ordered at the instance of the owner of materials used, the bona fide owner of the soil should have a claim against the owner of the materials claiming severance (if the unauthorised user could not be made liable) for loss sustained by the use of his land and damage caused by severance. We are inclined to think that the power to order severance should be discretionary and not a matter of right.

43. We propose provisionally:

(a) When moveables have been planted in or affixed to heritage without authority of the owner of these materials, the court should be empowered in its discretion to order their severance from the heritage, provided that, if the owner of the heritage had been in good faith, severance would not result in serious damage to the land or the materials.

(b) A claim should be competent at the instance of the deprived owner or his successor in title no later than five years from the date of planting or affixing or six months from the time when the claimant became aware or could reasonably have become aware of the planting or affixing - whichever date is the earlier.

(c) The cost of severance should be borne by the person who had planted or affixed the materials and by the owner of the heritage jointly and severally, if the owner of the heritage was in bad faith.

(d) When severance is claimed by the person whose materials had been attached to heritage without his authority, it should be granted only upon condition that the claimant reimburses a bona fide owner of the heritage for damage to the heritage caused by severance. Such compensation should, however, be recoverable from the person who planted or affixed the materials.

(e) The power to order severance should not affect existing remedies in recompense or reparation, and the right to claim restitution should revive on severance.

We invite comment on these provisional proposals.

C: SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH COMMENTS ARE INVITED

1. Should the scope of the present law of industrial accession be extended? (para. 3).

2. The following two alternative sets of proposals for dealing with problems of industrial accession - of which we tentatively favour Alternative A - cover only those cases where the producer of a new thing using another's materials is not protected by the rules of law applicable to good faith onerous acquisition of another's corporeal moveables (paras. 33 and 34).

Alternative A

(1) Where materials belonging to another are incorporated into a mixture of things or into a new thing in such a way that the original materials cannot be conveniently separated from the mixture or from the new thing, the mixture or thing shall be deemed to be the common property of all persons who had an interest (whether a proprietary interest, a security interest or a possessory interest) in the materials or who have contributed by their skill or labour towards the making of the thing.

(2) The court in an action by the possessor of the mixture or thing or by any person claiming an interest in them may in its discretion -

(a) award the ownership of the mixture or thing or any part thereof to any person with an interest;

(b) require the person to whom ownership has been awarded to compensate any other persons in such manner and in such proportions as the court may think fit for the value of the materials they have contributed or for the value of their contribution to the making of the thing;

(c) ordain the mixture or thing to be exposed for public auction and the proceeds disposed of among the persons having an interest in the thing rateably in accordance with the value of the materials they have contributed or of their contribution to the making of the thing.

(3) In determining the value of a person's interest in the mixture or thing the court may ignore in whole or in part the interest of a person who has acted in bad faith.

Alternative B

(1) Specification

(a) When a person has by skill or labour transformed materials which do not belong to him into a new thing, the producer becomes owner of it if his skill and labour are more valuable than the materials, but otherwise the owners of the materials become owners of the new thing.

(b) Transformation includes writing, printing, engraving, drawing, painting, photography and similar use of the surface of materials.

(c) If the value of the skill and labour and the value of the materials are equal, the producer and owner or owners of the materials become owners in common of the new thing.

(d) If the producer did not act in good faith, the court may award the new thing or its full value to the owner or owners of the materials used in its production.

(e) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

(2) Adjunction and Commixtion

(a) When things belonging to different owners have been intermingled or joined together in such a way that it is not possible to separate them without causing considerable damage or without incurring unreasonable work or expense, the parties concerned become co-owners of the new thing in proportion to the value of their contributions at the time of commixtion or adjunction.

(b) If when things are commingled or united one part can be regarded as principal and the other part or parts accessory or if a part is of substantially greater value than the other part or parts, the owner of the principal part, or of the part of substantially greater value as the case may be, becomes owner of the whole.

(c) These rules do not affect claims in respect of unjustified enrichment (recompense) or delictual liability for culpa under the present law.

3. We invite comment on alternative tentative proposals that:
(a) an onerous bona fide acquirer should acquire title derived from the producer of goods who had used another's materials without his authority; or

(b) in the case of such alienations the court should have power to determine disputes regarding ownership over and claims in respect of corporeal moveables produced by mixing, creation or union and thereafter alienated according to principles of natural equity. (para. 38).

4. We propose provisionally:
(a) When moveables have been planted in or affixed to heritage without authority of the owner of these materials, the court should be empowered in its discretion to order their severance from the heritage provided that, if the owner of the heritage had been in good faith, severance would not result in serious damage to the land or the materials.
(b) A claim should be competent at the instance of the deprived owner or his successor in title no later than five years from the date of planting or affixing or six months from the time when the claimant became aware or could reasonably have become aware of the planting or affixing - whichever date is the earlier.
(c) The cost of severance should be borne by the person who had planted or affixed the materials, and by the owner of the heritage jointly and severally if the owner of the heritage was in bad faith.

(d) When severance is claimed by the person whose materials had been attached without his authority to heritage, it should be granted only upon condition that the claimantreimburses a bona fide owner of the heritage

for damage to the heritage caused by severance. Such compensation should, however, be recoverable from the person who planted or affixed the materials.

(e) The power to order severance should not affect existing remedies in recompense or reparation, and the right to claim restitution should revive on severance. (para. 43).