SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 93)

CRIMINAL LAW

ART AND PART GUILT OF STATUTORY OFFENCES

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

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**Report on a reference under section 3(1)(*e*)
of the Law Commissions Act 1965**

To: The Right Honourable George Younger, M.P.,
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on Art and Part Guilt of Statutory Offences

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
25 April 1985

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Introduction

1. On 20 August 1984 we received from you a reference under section 3(1)(*e*) of the Law Commissions Act 1965 in the following terms:

> "To examine the concept of art and part guilt in relation to statutory crimes and offences under the law of Scotland and to advise."

The background to the foregoing reference is as follows.

2. Towards the end of 1983 this Commission, along with the Law Commission for England and Wales, became involved in the preparation of a Joint Report on the Consolidation of the Road Traffic Regulation Act 1967 and certain related enactments.[1] One of the relatively few purely Scottish provisions which fell to be considered in the course of that consolidation concerned the subject of aiding and abetting the commission of statutory offences.

3. Section 88 of the Road Traffic Regulation Act 1967 provided:

> "As respects Scotland, a person who aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of this Act or any regulations made thereunder, except an offence against section 31(3), 43(2) or (3) or 80(8), shall be guilty of an offence and shall be liable on conviction to the same punishment as might be imposed on conviction of the first-mentioned offence."

When the consolidation of that provision came under consideration, two questions presented themselves. The first was whether any re-enactment should continue to provide for certain exceptions,[2] and the second was, more fundamentally, whether any re-enactment of section 88 was necessary at all standing the fact that there are general statutory provisions applying to Scotland[3] which provide that a person may be guilty of any statutory offence notwithstanding that he is guilty art and part only.

4. In the course of considering the second of these questions for the purposes of the Road Traffic Regulation Act consolidation some doubts were expressed as to whether the general statutory provisions in the Criminal Procedure (Scotland) Act 1975 are in fact sufficiently wide to cover art and part guilt in the whole range of offences embraced in the road traffic legislation. The time-scale of the consolidation exercise did not permit a thorough examination of the problem, and consequently the Report recommended the re-enactment of section 88 of the 1967 Act subject to certain modifications.[4] It was thought, however, that it might be useful to examine this whole question at an early date, and as a result the Commission in due course received the reference mentioned in paragraph 1 above.

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[1]Subsequently published in February 1984 (Law Com. No. 133, Scot. Law Com. No. 85).

[2]The 1967 Act, including s. 88, was to a large extent a reconsolidation of much of the Road Traffic Act 1960, but the exceptions mentioned in s. 88 were offences derived from sources other than the 1960 Act.

[3]Criminal Procedure (Scotland) Act 1975, ss. 216 and 428; and see para. 17 below.

[4]Report, para. 12. The consolidation was given effect in the Road Traffic Regulation Act 1984; s. 119 of that Act is the modified re-enactment of s. 88 of the 1967 Act.

5. On receipt of the reference we prepared a Consultation Paper which was circulated to a limited range of consultees. Many of those responded to our invitation for comments, and we are grateful for all the advice which we have received. A list showing the consultees who responded to the Consultation Paper is given at the end of this Report.

Art and part guilt

6. The concept of art and part guilt has probably always been a part of the common law of Scotland, and it, or something like it, no doubt forms a part of most, if not all, systems of criminal law. At its simplest it involves an application of the principle that, where two or more people engage together in the commission of a crime, each is equally guilty of the whole crime regardless of the part played by each individual. Thus, in the example that is often used to explain art and part guilt to juries, the man who stands at the door of a bank keeping watch during a robbery is as guilty of the robbery as the man who actually removes the money from the safe. However, the degree of involvement that may render a person liable art and part can vary greatly from, at the one extreme, mere instigation or counsel to, at the other extreme, full participation in every part of the *actus reus* of the crime.[1] While the law recognises anything within these extremes as constituting art and part guilt, it may be thought that such a wide concept does not draw an appropriate distinction between, on the one hand, minor involvement by way of prior assistance without any active participation in the actual crime itself and, on the other hand, full participation as a principal at the time when the crime is committed. Indeed, at the latter extreme full, joint participation in a criminal act is often not seen as an example of art and part guilt at all but simply as joint wrongdoing with all concerned being equally involved as principals. So, for example, in a case where two or more people were charged with having both broken into a house and having stolen its contents, we think it unlikely that a judge would find it necessary to charge a jury on the principles of art and part guilt. That art and part guilt is often seen as involving something short of full participation in a crime is, we think, reflected in the words of the general statutory provision in sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975 which speaks of being "guilty art and part only". On the other hand, as has been pointed out, the authorities seem clear that the concept of art and part is equally appropriate for cases of full joint participation, and this view has on occasions been echoed by some judges.[2]

7. At the other extreme the concept of art and part guilt is, as has been mentioned, apt for cases involving no more than relatively minor assistance in the commission of a crime, even where that assistance involves no participation at all at the time of commission of the crime. Thus, for example, a person who supplied the housebreakers mentioned in the previous paragraph with a ladder in order to facilitate their entry to the house in question, and with knowledge of their plan, might well be found guilty art and part in the housebreaking even although he was nowhere near the house at the time.[3]

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[1]See Macdonald, Criminal Law of Scotland (5th edn.) p. 3 *et seq*; Gordon, Criminal Law of Scotland (2nd edn.) p. 138 *et seq*.

[2]See, e.g. *Stoddart and Ors* v. *Stevenson* (1880) 4 Couper 334, referred to in para. 12 below.

[3]Cf., e.g. *H.M.A.* v. *Semple*, 1937 J.C. 41, a case involving the supply of abortifacients to a woman; and see *Little* v. *H.M.A.*, 1983 S.C.C.R. 56.

This sort of extreme example seems to arise only rarely in relation to common law crimes and, when it does, appears not to give rise to great problems. On the other hand it may be thought that in such cases the truly accessory nature of the criminal activity concerned might better be reflected by a separate charge of aiding and abetting the commission of the principal crime. This course is available in England under section 8 of the Accessories and Abettors Act 1861, but, although there seems to be no reason why the Scots common law should not recognise a charge of this type, such a course has very seldom been followed and, so far as we can tell, the principle of art and part has nearly always been relied on in cases of complicity by accession in common law crimes.[1]

8. That said, there may occasionally be circumstances in which the concept of art and part ceases to be entirely appropriate for common law crimes. In the recent case of *Melvin* v. *H.M.A.*[2] two men were jointly charged with murder. At the conclusion of the trial one was convicted of murder, and the other was convicted of culpable homicide. The accused who had been convicted of murder appealed on the ground that the verdicts were inconsistent in that two persons could not be guilty art and part of different crimes. In rejecting the appeal Lord Cameron (with whom the other Judges concurred) found no logical inconsistency. As he put it, the jury was entitled to return "a verdict of homicide" against both accused, but then to discriminate as to the degree of recklessness displayed by each. His Lordship did not say that the resultant verdicts were verdicts of guilt art and part of different crimes; and we are disposed to think that the effect of the decision is that the two accused were in the result simply found guilty as individuals of separate crimes notwithstanding that they were originally charged with being art and part in the crime of murder.

9. Statutory crimes and offences have, however, disclosed a number of problems over the years in cases of accessory participation, and in particular there has been (and may still be) uncertainty as to the extent to which the common law principles of art and part are applicable or appropriate.

Art and part in statutory offences

10. At a time when, admittedly, statutory offences as we know them today were still largely in their infancy, Hume expressed the view[3] that:

> "the charge of art and part is suitable alike to accusations of every sort; to an indictment on a British statute, which creates some new offence, as to one laid at common law or on any of our old Scottish Acts."

Although that statement of principle seems perfectly clear, judicial decisions later in the nineteenth century began to put the matter in doubt, although it seems that in none of these subsequent cases was any reference made to the above quoted passage in Hume.

11. In the case of *Isabella Murray and Helen Carmichael or Bremner*[4] a woman was held to be not guilty art and part under a statute which forbade

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[1] In two old cases persons were charged with aiding and abetting the crime of rape; see *James Hughes* (1842) 1 Broun 205; *George Kerr and Others* (1871) Couper 334.

[2] 1984 S.C.C.R. 113.

[3] *Commentary on the Law of Scotland respecting Crimes*, ii. 239.

[4] (1841) 2 Swin. 559.

the possession of base coin on the ground that the statute struck only at the person actually in possession. Subsequently, in the case of *Colquhoun* v. *Liddell,*[1] where three men were prosecuted under a statute prohibiting trespass in pursuit of game, two of the men who ran up and down a public road adjoining the field in question with the purpose of preventing the escape of a hare being chased by the third man inside the field were, by a majority, held not to be guilty art and part along with that third man. The ground of the majority decision was that, where a statute renders criminal an activity which would not otherwise be so regarded, then the statutory offence is only committed by acts having the necessary qualities or incidents; if, however, a statute merely regulates the procedures or penalties for that which is itself criminal, guilt by accession may arise in the ordinary way.[2]

12. Within a very short time the decision in *Colquhoun* v. *Liddell* was again considered by the court. In *Stoddart and Ors* v. *Stevenson*[3] several men were charged under the same statute as had been in issue in *Colquhoun's* case. The facts were, however, slightly different. In this case all the men sat on a fence surrounding a field and, from that position, directed the activities of dogs which were searching for game in the field. Convictions were sustained in respect of all the men and, for reasons which are not perhaps wholly convincing, *Colquhoun* was distinguished in that, in the present case, the men, by directing their dogs, were for all practical purposes inside the field and thereby committing the offence. The report records that all were guilty art and part and, while that is strictly accurate, modern practice would, as suggested in paragraph 6 above, probably regard each accused simply as a joint principal participant.

13. Ten years later alleged offences under the same Act again came to the attention of the High Court in the case of *Wood* v. *Collins.*[4] On this occasion the facts were virtually identical to those in the case of *Colquhoun,* but this time the court decided to follow the decision in *Stoddart.* All the men were convicted and considerable doubt was cast on the decision in *Colquhoun.*

14. Despite the apparent demise of *Colquhoun* as an authority, it seems that uncertainty about art and part guilt in statutory offences continued for many years. In part, this was probably because of the effect of another decision which was given in the years between *Stoddart* and *Wood.*[5] In part, rather surprisingly, the uncertainty may have been because the qualifications of, and doubts about, the *Colquhoun* decision as expressed in *Stoddart* and *Wood* seem to have escaped general notice. Certainly, as recently as 1948, the editors of the 5th edition of Macdonald[6] quote at length[7] the opinion of the Lord Justice Clerk in *Colquhoun* as authority for the proposition that guilt by accession is not permitted in the case of every statutory offence: they make no reference at all in that passage to the decisions in either *Stoddart* or *Wood.*[8]

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[1](1876) 3 Couper 342.
[2]See opinion of Lord Justice Clerk Hope at p. 351.
[3](1880) 4 Couper 334.
[4](1890) 2 White 497.
[5]*Robertsons* v. *Caird* (1885) 5 Couper 664, discussed further in the following paragraph.
[6]*The Criminal Law of Scotland.*
[7]At p. 236.
[8]Though these cases are mentioned elsewhere: see p. 7.

Offences committed by persons in special capacity

15. As has just been mentioned the case of *Robertson* v. *Caird* was also decided in the 1880's, and it introduced a new area of uncertainty into the matter of art and part guilt in statutory offences. That case involved the prosecution of a debtor and another person under section 13 of the Debtors (Scotland) Act 1880 which provides that a "debtor in a process of sequestration . . . shall be deemed guilty of a crime" if he does certain things such as concealing his assets. The facts in that case clearly showed that the debtor and the other person had been jointly involved in the concealment of certain of the debtor's assets but the court held that only the debtor could be convicted since the statute rendered criminal only acts done by a "debtor in a process of sequestration" and, of the two accused, only the debtor satisfied that particular requirement of capacity. In other words the statutory description of the crime was not appropriate for the second accused in a material respect; for that reason he could not be guilty of the crime as a principal; and consequently he could not be guilty art and part. Whatever the legal justification for this approach, it may be thought to be objectionable on the basis that concealment of a debtor's property in order to defeat the claims of his creditors is a fraud at common law as well as under the statute, and in the former case guilt by accession is clearly possible.[1] The common law seems never to have concluded that a person cannot be guilty of a crime art and part simply because for one reason or another he does not possess the capacity actually to commit the principal act. Thus a woman can be guilty art and part of the crime of rape on another woman, where she assists a man to perform the act, although obviously incapable of performing it herself.[2] This sort of approach did not commend itself to the court in *Robertsons* v. *Caird.*

16. During the early part of the twentieth century further grounds for distinguishing certain types of statutory offence continued to appear though the cases involved were rather more concerned with establishing liability as principals under particular statutes than expressly with problems of art and part guilt. This may be an illustration of the tendency, previously remarked upon, to regard art and part guilt as something less than full participation as a principal. Thus in *Phyn* v. *Kenyon,*[3] a prosecution under the Salmon Fishery Act 1861, two fishermen were acquitted of using a fixed engine for the purpose of fishing on the ground that the statutory provision was expressly directed at "the owner of any engine" and it had been shown that the two fishermen were not the owners of the engine in question. In very different circumstances, in *Lawson* v. *Macgregor,*[4] where bye-law prescribed the maximum number of people to be carried on an omnibus, convictions in respect of exceeding that maximum were sustained against the owner of the omnibus, its driver and its conductress, it being said by Lord Justice General Clyde[5] that:

> "when there is a general prohibition against a particular act, it seems to me to be indisputable that anybody who is concerned in a contravention of the general rule is liable to the penalty attached to the general rule".

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[1]See *Sangster and Ors* v. *H.M.A.* (1896) 2 Adam 182.

[2]See, e.g., *H.M.A.* v. *Matthews and Goldsmith*, Glasgow High Court, December 1910; *H.M.A.* v. *Walker and McPherson*, Dundee High Court, March 1976; both unreported.

[3](1905) 4 Adam 528; and cf. *Fishmongers Company* v. *Bruce*, 1980 S.L.T. (Notes) 35.

[4]1924 J.C. 112.

[5]At p. 116.

By contrast to that case the later case of *Graham* v. *Strathern*[1] was at first sight similar since it also involved an allegation of overcrowding on a public service vehicle. Here, however, it was a regulation which was in issue; the regulation was expressly directed to the tramway authority; and the penalty provided for in the regulation was exigible only against the authority concerned. Consequently an appeal against conviction by the tram conductor was allowed.

A general statutory provision

17. Against all of the foregoing background, provision was finally made by section 31 of the Criminal Justice (Scotland) Act 1949 as follows:

> "For the removal of doubts it is hereby declared that a person may be convicted o[r] and punished for, a contravention of any statute or order, notwithstanding that he was guilty of such contravention as art and part only."

That provision (though without the opening 10 words) now appears in sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975.[2] As has already been suggested[3] it appears from the use of the word "only" in the foregoing provision that Parliament saw art and part guilt as appropriate for cases of subsidiary rather than principal participation in a criminal act.

18. The Parliamentary debates for 1949 relating to the passage of the Criminal Justice (Scotland) Bill do not reveal any discussion of this provision,[4] but it may be presumed, particularly in view of the opening words, that it was enacted in an attempt to resolve the doubts and uncertainties which, as has been seen, had been accumulating during the previous hundred years or so. It would seem, however, that the intended resolution of doubt was not quite as successful as might have been hoped. There are perhaps several reasons for this.

Doubts not removed

19. The first reason concerns the problem which was identified in the case of *Robertsons* v. *Caird*[5] where a statute prohibits certain conduct on the part of a person having a particular position or capacity. The first case which might have dealt with that problem after the passing of the 1949 Act did not in fact do so. In *McIntyre* v. *Gallacher*[6] a foreman was charged under section 188 of the Burgh Police (Scotland) Act 1892 with failing adequately to light a hole that had been made in a street. On appeal it was held that the statute imposed the duty of adequate lighting on the responsible contractors and not on their workmen, with the consequence that the foreman's appeal against conviction was allowed. It was not argued that the foreman might have been guilty art and part and accordingly that possibility was not considered by the court.

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[1] 1927 J.C. 29.

[2] The provision appears twice in the 1975 Act because that statute deals separately, though often in identical terms, with solemn and summary procedure. Hereafter in this Report the provision is referred to simply as "section 216" rather than repeatedly referring to both sections.

[3] Para. 6 above.

[4] Apart from an unanswered query from an English Peer about the meaning of art and part.

[5] See para. 15 above.

[6] 1962 J.C. 20.

20. There having been no further relevant case before the court prior to 1978, Sheriff Gordon, in the second edition of his work on criminal law published that year, while disapproving of the decision in *Robertsons* v. *Caird,* appears to indicate that there is still some lingering doubt in "special capacity" cases.[1] In the very next year, however, the issue came before the court in the case of *Vaughan* v. *H.M.A.*[2]

21. In that case an accused, who was not related to the mother and son concerned, was charged with, and convicted of, causing the son to have incestuous intercourse with the mother, contrary to the Incest Act 1567. On appeal it was argued that he could not be guilty of incest as actor since he was not within the forbidden degrees; that the Act of 1567 itself made no provision except for persons within these prohibited degrees; and that section 216 of the Criminal Procedure (Scotland) Act 1975, while being a general provision covering art and part guilt, could not derogate from the restrictive terms of a particular statute. In refusing the appeal the court, in its Opinion, stated:[3]

> ". . . the argument that the generality of the provisions of section 216 do not derogate from the restrictive provisions of the Act of 1567 proceeds on a misconception and is ill-founded. The act and the classes of actors remain the same and are in no way extended. All that section 216 does is to make a person who has abetted in the commission of the act between the actors a person who has also to accept responsibility for the offence, in accordance with the general principle of our law. On that ground alone we are satisfied that the argument advanced by counsel for the applicant must fail."

22. While the Opinion of the court in *Vaughan* v. *H.M.A.* appears at first sight to put the problem of special capacity cases beyond doubt, it is worth noting that elsewhere in their Opinion the court said:[4]

> "The Advocate Depute conceded that a statute might be so framed that only a person in a special capacity could be charged, as in *Robertsons* v. *Caird* which turned on the exact provisions of the Debtors (Scotland) Act 1880, section 13 . . ."

The court did not suggest that this was a mistaken concession nor did they suggest that *Robertsons* v. *Caird* would have been differently decided if section 216 of the Criminal Procedure (Scotland) Act 1975 had been in force at the time. While it would obviously be wrong to take this as confirmation that special cases will continue to cause difficulties in future, it at least suggests that in some cases they may do so.

23. Another point that may be worth making is that, although the case of *Vaughan* was concerned with a statutory crime, the statute in question is one of such antiquity that the crime of incest might well have developed as a common law crime in Scotland, as has happened with many other common law crimes which originally had a statutory foundation. On that basis it is difficult to distinguish as matter of principle guilty participation in the crime

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[1]Para. 5.–09 *et seq.*
[2]1979 S.L.T. 49; this case is now noted in the 1984 Supplement to Sheriff Gordon's work.
[3]At p. 51.
[4]At p. 50.

of incest by one who is not within the forbidden degrees and such participation in the crime of rape by one who is not a man, a contrast which was adverted to by the court in *Vaughan*.[1] All of this may be the more readily distinguishable from the host of modern statutes which, subject to penal sanctions, impose duties and prohibitions on particular classes of person such as, for example, licencees, traders, shop-keepers, company directors, users of motor vehicles and so on.

24. The possible consequences of any lingering doubts that remain after the decision in *Vaughan* will be examined later.[2] For the present, however, we turn to a second reason which may have contributed to the continuing uncertainty that appears to have survived the passing of section 31 of the Criminal Justice (Scotland) Act 1949. That concerns the practice, in particular statutes, of inserting an express provision relating to aiding and abetting.

25. Although examples can be found of United Kingdom statutes which contain aiding and abetting provisions which apply both in England and Wales and in Scotland,[3] in the main the aiding and abetting of statutory offences, committed in England and Wales appears to be covered by the English counterpart of section 216 of the Criminal Procedure (Scotland) Act 1975, though the English provision is quite differently expressed being in terms of aiding and abetting, counselling or procuring.[4] There are, however, several instances of express aiding and abetting provisions applicable only to Scotland appearing in United Kingdom statutes. It was indeed the consolidation of one of these which gave rise to the present enquiry.[5] One example of this sort of provision—and possibly the one that is most commonly used in practice—is section 176 of the Road Traffic Act 1972.

It is in the following terms:

> "As respects Scotland, a person who aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of this Act or any regulations made thereunder shall be guilty of an offence and shall be liable on conviction to the same punishment as might be imposed on conviction of the first-mentioned offence."

26. It is not at all clear why it should have been thought necessary to make such provision. It seems to have been introduced for the first time in the Road Traffic Act 1930,[6] but a desire to give Scotland the benefit of a separate offence of aiding and abetting the commission of road traffic offences does not appear to have inspired the provision in question. It was introduced into the then Road Traffic Bill only at its Report state in the House of Lords and was described as a drafting amendment made necessary because what ultimately became section 10(5) of the Act was not appropriate to Scotland. Section 10

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[1] At p. 50; and see para. 15 above.

[2] Para. 31 *et seq* below.

[3] See, e.g., Explosive Substances Act 1883, s. 5; Official Secrets Act 1920, s. 7; Representation of the People Act 1949, s. 47; Prohibition of Female Circumcision Bill, 1985, cl. 1(1)(*b*).

[4] Accessories and Abettors Act 1861, s. 8, as amended by the Criminal Law Act 1977, s. 65(7) and Sch. 12. Other statutes make similar provisions for proceedings in Magistrates' Courts.

[5] It is possible that such aiding and abetting provisions are to be found only in road traffic legislation.

[6] s. 119(8).

of the 1930 Act, which was otherwise applicable to Scotland, provides for certain penalties for the offence of speeding, but subsection (5) provides that if, under the relevant statute applicable in England, a person is convicted of aiding, abetting, counselling or procuring any person who is employed by him to drive a motor vehicle to commit an offence under the section, then he is to be liable to greater penalties than the principal offender. In light of this the subsection added for Scotland was in two parts. The first was substantially in the terms which now appear in section 176 of the 1972 Act[1] and the second was a proviso to the same effect as section 10(5).

27. Although there can be no certainty about this it rather looks as if the first Scottish aiding and abetting provision in road traffic legislation was introduced not because it was thought necessary to create a separate accessory offence for Scotland but simply to create a statutory framework, comparable to that already generally available for England and Wales, within which special provision, analogous to that in section 10(5), could be made for Scotland. The subsequent history of this provision does nothing to dispel that view.

28. The next major piece of road traffic legislation after 1930 was the Road Traffic Act 1960 which was a consolidating enactment. That Act repealed[2] the proviso to section 119(8) of the 1930 Act while leaving the first part of that subsection intact. It also, however, made new provision[3] which was substantially to the same effect as the whole of section 119(8) of the 1930 Act, including the proviso. The first part of section 119(8) was then left as a provision authorising for Scotland the separate offence of aiding, abetting, counselling or procuring the commission of an offence under what remained of the 1930 Act.

29. The next stage in relation to aiding and abetting provisions for Scotland came in the Road Traffic Act 1962. That Act repealed[4] section 240 of the 1960 Act and replaced it with a new section in precisely the terms which were subsequently reproduced in section 176 of the Road Traffic Act 1972. What had been the proviso to the original section 240 in the 1960 Act was not replaced. Likewise, the comparable English provision[5] was repealed without replacement by the 1962 Act.[6]

30. The Parliamentary debates on the Acts of 1960 and 1962 do not disclose any consideration having been given to the question whether it was necessary or desirable to retain, in relation to Scotland, express provision for an offence of aiding and abetting once the possible justification for such a provision in relation to speeding offences had been removed. Nor does any consideration appear to have been given to the relationship between such provision and section 31 of the Criminal Justice (Scotland) Act 1949.[7] It seems, however, to have been the general practice of prosecutors for many years now to use the aiding and abetting provisions in the Road Traffic Acts in preference to

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[1]See para. 25 above.
[2]s. 267(1) and Sch. 18.
[3]s. 240(1).
[4]s. 40 and Sch. 3.
[5]1960 Act, s. 4(4)
[6]s. 8 and Sch. 1.
[7]See para. 17 above.

the art and part provisions in the 1949 Act, and now sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975.[1]

31. There may be several reasons for this. One may simply be that it is more convenient, when a prosecutor is proceeding against both a principal actor and one who has assisted in a subsidiary way, to charge both accused under the same statute. Another reason (although this has never been commented on in any of the cases) is that section 176 of the Road Traffic Act 1972 expressly provides that the aider and abettor is to be liable on conviction to the same punishment as might be imposed on conviction of the principal offence. In the context of road traffic offences that, of course, includes, where appropriate, disqualification from driving and the endorsement of penalty points on a licence. There is no provision as to penalties in section 216 of the Criminal Procedure (Scotland) Act 1975 and it may be open to doubt whether, if that section were used in the case of a person who aided or abetted the commission of a road traffic offence, the penalties at least of disqualification and endorsement would be available to the court since, upon one view, these special penalties are appropriate only for those who commit the relevant offences as principals.

32. It is also to be noted that the Road Traffic Act 1972 in fact draws a distinction in relation to penalties between principal wrongdoers and aiders and abettors, at least as regards disqualification. Section 93 of that Act provides that, in relation to certain offences, a convicted person is to be liable to obligatory disqualification whereas, in relation to certain other offences, he is to be liable only to discretionary disqualification. However, subsection (6) provides:

> "The foregoing provisions of this section shall apply in relation to a conviction of an offence committed by aiding, abetting, counselling or procuring, or inciting to the commission of an offence involving obligatory disqualification as if the offence were an offence involving discretionary disqualification."[2]

This, it seems, must be intended as a qualification of the general provision regarding penalties contained in section 176, but it gives rise to certain questions if aiders and abettors in road traffic offences were to be prosecuted not under section 176 of the Road Traffic Act but under the general art and part provisions of the Criminal Procedure Act. Even assuming, contrary to the doubt expressed in the previous paragraph, that a person prosecuted in that way could be made subject to the penalty of disqualification, would the qualification expressed in section 93(6) then apply? That provision is expressed in terms of aiding, abetting, counselling or procuring, or inciting rather than of art and part, and this particular use of words, it is thought, might well lead to the conclusion that the qualification is to apply only where a person is charged under section 176 and not where he is charged art and part under section 216 of the 1975 Act. In other words a person charged by virtue of section 216 might find himself liable in certain circumstances to obligatory

[1]Except, possibly, in the case of offences where there are express provisions enabling a person to be charged with "causing or permitting" the commission of the offence by another.

[2]This distinction in relation to aiding, abetting, etc. has been extended to the penalty points procedure: Transport Act 1981, Sch. 7, Part I, as substituted by Transport Act 1982, s. 58.

disqualification whereas, had he been charged under section 176, any disqualification would have been at the discretion of the court.

33. The foregoing problem could have practical consequences for prosecutors. It is well settled[1] that disqualification is a penalty of which, in summary proceedings, notice must be given to a person who is charged with committing any of the offences for which disqualification may, or must, be imposed.[2] Moreover, several recent cases[3] have also made it clear that penalty points are also a penalty for this purpose. If a person were to be charged, by virtue of section 216, with being art and part in the commission of a road traffic offence, there might well be some uncertainty, in cases involving obligatory disqualification for a principal offender, about whether or not the notice of penalties served on the person charged by virtue of section 216 should refer to obligatory or only to discretionary disqualification.

Possible distinctions between art and part and aiding and abetting etc.

34. Gordon suggests[4] that:

> "where a statute expressly provides for an offence of aiding and abetting, counselling, procuring or inciting, this will normally be construed as meaning the same as art and part guilt . . . it is difficult to see why [section 176 of the Road Traffic Act 1972] is necessary in view of the general provisions of the 1975 Act".

The preceding paragraphs of this report have suggested some reasons in relation to penalties which may make the express provisions of section 176 necessary although that may have been an unintended consequence of the course originally initiated by Parliament in 1930.[5] There is, however, a further consideration which may make section 176, or something like it, desirable even if not strictly necessary.

35. As has been seen the doctrine of art and part guilt in Scots law is very flexible and extends to those whose degree of participation in a criminal act may be quite minor or subordinate. Indeed, it appears to be the case that the concept is sufficiently wide to cover counselling and instigation without any direct physical participation in the actual act concerned.[6] Where the art and part principle is relied on, however, the accessory participant will always be charged as though he were a principal and, if found guilty, will be found guilty of the principal crime or offence with the subsidiary nature of his participation being taken into account, if at all, only at the stage of sentencing. That having been said, it is probably the case that in the great majority of instances the concept of art and part is relied on where the person concerned has to some extent actively taken part in the commission of the crime or offence in question. Accordingly, there is normally no great conceptual difficulty in regarding the person who is guilty art and part as in fact being guilty of the principal crime or offence. On the other hand, where any participation is

[1] *Coogans* v. *MacDonald*, 1954 J.C. 98.
[2] Under S. 311(5) of the Criminal Procedure (Scotland) Act 1975.
[3] e.g. *Tudhope* v. *Eadie*, 1983 S.C.C.R. 464.
[4] Para. 5–12.
[5] See paras. 26–30 above.
[6] See para. 6 above.

much more remote, as in cases of counselling or inciting not involving any direct participation in the crime or offence, although art and part guilt may be technically possible, it may be thought more acceptable to find such a person guilty of a separate offence of counselling or inciting as the case might be. This separate offence approach may also, it seems to us, be of advantage in special capacity cases of the kind referred to earlier in this Report,[1] particularly if, as may have been hinted at in *Vaughan* v *H.M.A.*, some such cases may still not be susceptible to the art and part approach.[2] For example it might, we think, be easier to hold that a person was guilty of a separate offence of aiding and abetting a "debtor in a process of sequestration" to commit an offence under the Debtors (Scotland) Act 1880 than it was to find such a person guilty art and part in the commission of the principal offence.[3] It should perhaps also be added that what we have called the separate offence approach may also have the merit of making clear at the outset that a person is merely being charged as an accessory, something which is often not apparent when he is simply charged with having committed the principal offence.

36. In the context of road traffic offences the distinctions which we have just been making may be seen most clearly in those offences which relate to a particular manner of driving a motor vehicle, such as, for example, driving without due care and attention (1972 Act, section 3), or driving, having consumed more than the permitted amount of alcohol (1972 Act, section 6(1)). Disregarding for the moment the fact that the latter offence is one of strict liability,[4] what should be the position of, say, a person who, knowing that another has consumed too much alcohol, prevails upon him to drive his motor car in contravention of section 6? Some might find it rather difficult to say that such a person was guilty art and part in the commission of the driving offence, particularly if he never actually travelled in the car himself; but that conceptual difficulty may be thought to disappear if one considers that part of section 176 which refers to counselling, procuring or inciting.[5]

37. The points that have just been made may be seen fairly clearly in the case of *R.* v. *Robert Millar (Contractors) Ltd. and Robert Millar.*[6] A lorry driver employed by a Scottish company, was sent on a journey to England in a lorry which (to his knowledge and also that of the managing director of the company) had a dangerously defective tyre. In the course of the journey the tyre burst and the lorry collided with a motor car all the occupants of which were killed. The driver was convicted of causing these deaths by dangerous driving and the appellant company and its managing director were charged with counselling and procuring the commission of these offences. On appeal it was held that the company and managing director had been properly convicted. Much of the appeal was concerned with the question whether counselling and procuring was a continuing activity and whether, if it was not, the appellants in this case could be convicted standing the fact that they were in Scotland whereas the deaths had occurred in England. For present purposes, however, and ignoring the cross-border problems in that particular case, the

[1]Para. 15 above.
[2]Paras. 22–24 above.
[3]Cf. *Robertsons* v. *Caird*, para. 15 above.
[4]This is considered later: see para. 39 below.
[5]Cf. *Carter* v. *Richardson* [1974] R.T.R. 314; *Valentine* v. *Mackie*, 1980 S.L.T. (Sh. Ct.) 122.
[6][1970] 1 All E.R. 577.

point is that there would at best have been a certain artificiality in saying that the company or the managing director were guilty art and part in the offence of causing death by dangerous driving whereas counselling and procuring does not necessarily present the same difficulty.

38. Some of the consultees who commented on our Consultation Paper did not share the conceptual difficulty which we have suggested in the preceding paragraphs. One, with reference to the *Millar* case, posed the question: 'What was subsidiary about the accession of the managing director?' Our answer is that, when we have used the word subsidiary, we have done so not necessarily in terms of culpability alone but also in terms of the actual degree of participation in the particular acts constituting the crime in question. Whatever one's view may be about the culpability of the managing director in *Millar,* it is in our view difficult to think of him as having been involved, in the fullest sense, in the causing of deaths by dangerous driving since, at the moment when the deaths occurred, he was several hundred miles distant from the lorry and from the person who was actually driving it. The actual charge against him of counselling and procuring the commission of the offence appropriately reflected that state of affairs; but we remain of the view that art and part may, for a case like that, be less than a wholly appropriate concept.

Offences of strict liability, and offences requiring a particular mental element

39. Offences of strict liability, and offences specifying a particular mental element (such as knowledge) that has to be proved before guilt is established, are by no means uncommon in statutes. In such cases the mental element, if any, that would have to be established before a person could be found guilty of aiding and abetting the commission of such offences is something to which, with one exception,[1] the Scottish courts have not so far had to address their attention, though some attention has been given to it in England.[2] Likewise it does not appear that the Scottish courts have had to consider the position of a person charged on an art and part basis with the commission of either an offence of strict liability or an offence requiring a particular mental element. In the absence of any existing Scottish decisions on these matters it is not really possible to say how they might be resolved. In the Consultation Paper we expressed the view that it might be easier to determine the appropriate mental element where a person was charged with aiding and abetting an offence than it would be where he was charged as art and part. This view was doubted by some of our consultees and, on further reflection, we are disposed to agree that this probably cannot be advanced, at least in general terms, as a positive advantage of an aiding and abetting provision. Much will no doubt depend on the nature of any given offence and on the circumstances in which it is alleged that the offence was committed.

Possible advantages of a general aiding and abetting provision

40. In the Consultation Paper we suggested that the possible advantages of a general aiding and abetting provision could be summarised as follows:

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[1] *Valentine* v. *Mackie, supra.*

[2] *Johnson* v. *Youden* [1950] 1 K.B. 544; *Ackroyds Ltd.* v. *D.P.P.* [1950] 1 All E.R. 933; *Ferguson* v. *Weaving* (1951] 1 K.B. 814; *John Henshall (Quarries) Ltd.* v. *Harvey* [1965] 2 Q.B. 233.

(*a*) a separate offence of aiding and abetting, etc. the commission of a statutory offence may avoid the difficulties which have arisen in the past where the principal offence can only be committed by a person having a special capacity;[1]

(*b*) where the accessory behaviour is of a more remote kind, involving perhaps counselling or the supplying of materials, it may be conceptually easier to think in terms of a separate offence of aiding and abetting rather than in terms of art and part participation in the commission of the principal offence;[2]

(*c*) implicit in the foregoing, aiding and abetting, etc. can be seen as a separate offence, distinct from the main or principal offence:[3] in appropriate cases this may more accurately reflect the subsidiary nature of the accessory's participation than would be the case if he were charged with, and convicted of, the principal offence;

(*d*) a general aiding and abetting provision could, on the analogy of section 176 of the Road Traffic Act 1972, make express provision that on conviction a person should be liable to the same penalties as might be imposed for the principal offence: in special capacity cases such as those involving the driver of a motor vehicle this might avoid any problems in relation to special penalties such as disqualification;[4]

(*e*) provision on the lines mentioned in (*d*) above would leave it open to Parliament, as it saw fit, to modify or restrict the applicability of certain penalties in the case of aiders and abettors, as is done in section 93(6) of the 1972 Act;[5]

(*f*) in the case of offences of strict liability or involving a particular mental element, problems which might arise if subsidiary behaviour were charged on an art and part basis might not be so great if a separate offence of aiding and abetting were available.[6]

As mentioned in paragraph 39 above, we would not now advance the last of these as a general advantage for an aiding and abetting provision. We remain of the view, however, that the remainder of the foregoing can be stated to offer certain advantages.

Consultation

41. Having set out the foregoing possible advantages which seem to us to flow from an aiding and abetting provision, the Consultation Paper went on to consider possible options. These were:

(*a*) to leave things as they are;

(*b*) to repeal any existing aiding and abetting provisions applicable only to Scotland and to rely instead on the general art and part provisions in the Criminal Procedure (Scotland) Act 1975;

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[1]See paras. 15 and 22 above.

[2]See paras. 7 and 35–38 above.

[3]This is the effect of, for example, s. 176 of the Road Traffic Act 1972.

[4]See para. 31 above. It would not, of course, necessarily follow that a person convicted of aiding and abetting an offence would actually receive the same penalty as if he had committed the principal offence: he would merely be liable to the same penalty.

[5]See para. 32 above.

[6]See para. 39 above.

(*c*) to repeal the art and part provisions in the 1975 Act and to replace them by a general aiding and abetting provision applicable to all statutory offences; and

(*d*) to make a general aiding and abetting provision applicable to all statutory offences but at the same time to retain the art and part provisions in the 1975 Act.

42. While, with only one exception, none of those who commented on our Consultation Paper expressed any liking for options (*b*) or (*c*), there was a considerable difference of view in relation to options (*a*) and (*d*). Before examining that difference of view it should be mentioned that some consultees suggested that any general aiding and abetting provision, if such were to be introduced, should not be restricted to statutory offences but should extend to common law offences as well. We can understand why this suggestion was made, but we have not examined this possibility since it is beyond the terms of our reference.

43. Putting the matter shortly, it is, we think, fair to say that those consultees who favoured option (*a*) did so because, in whole or in part, they did not share our view as to the possible advantages which a general aiding and abetting provision would have over a general art and part provision, and because they did not consider that the present state of the law on these matters is causing any problems in practice. By contrast those who favoured option (*d*) seemed to accept the views expressed in the Consultation Paper, and considered that the introduction of a general aiding and abetting provision would permit much greater flexibility in the prosecution of statutory offences.

44. The difference of opinion between consultees in relation to options (*a*) and (*d*) has caused us some difficulty. Not only are the numbers of consultees favouring each option about the same, but also each group contains consultees whose views always carry great weight. We are conscious, therefore, that, although the option we ourselves favour has the support of several such consultees, it equally does not have the support of others.

Recommendations

45. Despite the views of those who favour option (*a*), that is to leave things as they are, we are of the opinion that option (*d*) is the one which ought to be followed. We think that the enacting of a general provision, broadly comparable to section 176 of the Road Traffic Act 1972 but applicable to all statutory offences, would bring most, if not all, of the advantages set out in paragraph 40 of this Report. Moreover, as was pointed out by some of our consultees, such a course would bring a greater, and we think desirable, flexibility to the prosecution of statutory offences in Scotland.

46. We have considered whether there would be any advantage in trying to find any other, and possibly more modern, words to replace 'aids, abets, counsels, procures or incites' as presently used in, for example, section 176 of the Road Traffic Act 1972. Arguably some of these words have a rather archaic ring to them, and might be better replaced by words such as 'assists', or 'encourages'. On reflection, however, we have come to the conclusion that such a change would be unwise, at least for so long as the words used in section 176 remain in that section, and in other statutes. These words have

been subject to interpretation by the courts over the years and are now, we think, well understood. To introduce any new words would create a risk that they might be taken as having been intended to have a different meaning from the words used in the Road Traffic Acts, and in statutes such as those mentioned in the footnote to paragraph 25 above. That would be an unfortunate, and unintended, result.

47. We accordingly recommend:

(1) It should be an offence for a person to aid, abet, counsel, procure or incite any other person to commit an offence under the provisions of any statute or regulations made thereunder.

(2) On conviction such a person should, unless otherwise provided, be liable to the same punishment as might be imposed on conviction of the principal offence.

48. If effect were to be given to the foregoing recommendation, it would plainly be undesirable that the new provision should be retrospective. **We accordingly also recommend:**

(3) The foregoing recommendations should not apply in respect of any actings which occurred prior to these recommendations coming into effect.

49. We are conscious that, if effect were to be given to the foregoing recommendations, there would then by a measure of duplication between them and provisions like section 176 of the Road Traffic Act 1972. We do not think, however, that this will give rise to problems in practice, and we would expect existing provisions, like section 176, to be reconsidered one by one in the course of future consolidations or statute law revision exercises.

50. A draft Bill giving effect to the foregoing recommendations is annexed to this Report.

APPENDIX A

AIDING OR ABETTING OFFENCES (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

Make provision for Scotland with regard to aiding, abetting, counselling, procuring or inciting any person to commit an offence against the provisions of any enactment.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Aiding or abetting, etc. commission of offence.

1.—(1) Any person who, after the commencement of this Act, aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of any enactment shall be guilty of an offence and shall be liable on conviction, unless the enactment otherwise requires, to the same punishment as might be imposed on conviction of the first-mentioned offence.

(2) In this section "enactment" includes any order, regulation, rule or other instrument having effect by virtue of any Act.

Short title, commencement and extent.

2.—(1) This Act may be cited as the Aiding or Abetting Offences (Scotland) Act 1985.

(2) This Act shall come into force at the end of the period of 2 months beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

Clause 1

Subsection (1) implements the recommendations in this report that it should be an offence for a person to aid, abet, counsel, procure or incite any other person to commit an offence under any statute, and that, on conviction, such a person should, unless otherwise provided, be liable to the same punishment as might be imposed on conviction of the principal offence. The subsection also implements the recommendation that the new provision should not apply in respect of actings which occurred prior to the new provision coming into effect.

Subsection (2) extends the effect of the above provision to any order, regulation, rule or other instrument having effect by virtue of any Act.

APPENDIX B

List of those who submitted comments on the Consultation Paper

Association of Chief Police Officers (Scotland)
Association of Scottish Police Superintendents
Michael Christie, Esq., University of Aberdeen
Committee of Senators of the College of Justice
Crown Agent
Faculty of Advocates
Sheriff G. H. Gordon, Q.C.
Law Society of Scotland
N. McFadyen, Esq.
The Hon. Lord Murray
Procurators Fiscal Society
Sheriff Principal Sir Frederick O'Brien, Q.C.
Scottish Law Agents' Society
Scottish Police Federation
Sheriffs' Association

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