Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 60

Mobbing and Rioting

JUNE 1984

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

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 1 November 1984. All correspondence should be addressed to -

Mrs A Cowan
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

(Telephone: 031-668 2131)

CONTENTS

CONTENTS (cont'd)

SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO.60

MOBBING AND RIOTING

PART I - INTRODUCTION

1.1 In August 1975 the Crown Agent made a proposal to the Commission "that the law relating to conspiracy (including the law relating to mobbing and rioting) should be reviewed". Due to pressure on resources committed to other projects, it was not possible to undertake any work in respect of this proposal for some years. Although we still have no immediate plans to undertake work on the subject of conspiracy, we have recently found it possible to carry out a preliminary review of the law of mobbing and rioting. This Consultative Memorandum is the result of that review.

1.2 Although, as will be seen, the substantive law of mobbing and rioting appears to have been expressed in broadly similar terms since at least the eighteenth century, our examination of the subject has led us to conclude that the principles on which that law is based are not in fact entirely clear and may on occasions lead to misunderstanding and confusion. Moreover, it may be open to question whether the concepts of common purpose and guilt by association, as they arise in the crime of mobbing and rioting, are in all, or indeed any, cases a defensible basis for in effect finding a person guilty of other grave crimes such as serious assault, or even murder.

1.3 Some, though not all, of these difficulties emerged in the recent case of Hancock and Others v. H.M.A.;[1] and other cases in the past fifteen years or so appear to have highlighted some of the other difficulties that are inherent in the charge. In the circumstances the time now seems opportune to seek the views of consultees on the issues and questions discussed in this Memorandum. As will be seen we are in no way committed to recommending any reform of the law on this subject. Consultees may take the view that there is nothing wrong with the present law and that no changes should be made to it. Even if it were seen as being defective in certain respects, it may be thought that even then no changes should be made or that, at most, any changes should be confined to matters of practice. Only if none of these courses was seen as satisfactory would it be necessary to consider reform of the substantive law. The questions at the end of this Memorandum (to which consultees are invited to respond) follow the above pattern. It would, however, be most helpful if any consultees who consider that no change should be made in present law and practice would also give us their views on the possible options for reform so that those views can be taken into account should any such reform ultimately appear to us to be desirable.

[1] 1981 S.C.C.R. 32.

PART II - THE PRESENT LAW

2.1 Although Hume[1] declines to give a general definition of the crime, preferring to deal separately with the various particulars that go to make it up, it would seem that such general definitions as have from time to time been attempted have at first sight differed very little for more than 150 years. Thus Alison[2] states:

> "The general term Mobbing and Rioting includes all those convocations of the lieges for violent and unlawful purposes, which are attended with injury to the persons or property of the lieges, or terror and alarm to the neighbourhood in which it takes place."

He goes on to observe that:

> "the two phrases are usually placed together; but nevertheless they have distinct meanings, and are sometimes used separately in legal language; the word Mobbing being particularly applicable to the unlawful assemblage and violence of a number of persons, and that of Rioting to the outrageous behaviour of a single individual."

It seems clear that practice has strengthened the tendency to use the two terms together and although examples have been found where either one or the other term is used alone, for a great many years now the crime

---

[1] Commentaries on the Law of Scotland Respecting Crimes (1840) Vol.i.416.

[2] Principles of the Criminal Law (1832) i.509.

has been referred to judicially and elsewhere as mobbing and rioting.[1]

2.2 Subsequent definitions of the crime have elaborated on, but have been to much the same effect as the above definition by Alison. In Myles Martin and Others,[2] Lord Mure in charging the jury[3] said:

> "As to mobbing and rioting the law is this: If there is an assembly of people acting together for a common illegal purpose, and effecting, or endeavouring to effect that purpose by violence or any other kind of intimidation, then there is a mob in the legal sense of the term. They must be to all appearance in communication with each other, and be assembled for a common illegal purpose; and if when so assembled they act violently, or behave in a noisy, violent and disorderly manner, to the disturbance of the peace, the crime of mobbing and rioting is completed."

2.3 In Sloan v. Macmillan,[4] Lord Salvesen said:[5]

---

[1] It is worth noting that, by virtue of s.44 of the Criminal Procedure (Scotland) Act 1975, it is not necessary in any indictment to specify by any nomen juris the crime which is charged, but it is sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime. A similar provision for summary procedure is contained in s.312(b) of the 1975 Act.

[2] (1886) 1 White, 297.

[3] At p.303.

[4] 1922 J.C. 1.

[5] At p.7.

> "It is not necessary that any actual violence shall be used in order that a mob may be deemed riotous; it is sufficient if the mob assembles for the purpose of intimidating people in the lawful performance of their duties. If no resistance is made to the intimidation, perhaps violence will never be used. But the very object of intimidation, if it is to be effective, is to induce the belief in the minds of those intimidated that, unless they submit, worse things will happen and the thing will be done forcibly."

2.4 In 1948 the editors of the 5th edition of Macdonald's Criminal Law of Scotland proferred[1] the following brief definition:

> "Mobbing is the assembly of a number of people acting together for a common purpose which is illegal, or which is to be achieved in an illegal manner, to the alarm of the lieges."

A similar definition is to be found in the current (2nd) edition of Sheriff Gordon's work on Criminal Law where he states:[2]

> "A mob is a group of persons acting together for a common illegal purpose, which they effect or attempt to effect by violence, intimidation, or a demonstration of force, and in breach of the peace and to the alarm of the lieges, and it is a crime to form part of a mob."

---

[1] At p.131.

[2] At p.797.

2.5 Most recently a general definition of the crime has been given by the Lord Justice General (Emslie) in the case of Hancock and Others v. H.M.A.[1] In that case the Lord Justice General said:

> "A mob is essentially a combination of persons, sharing a common criminal purpose, which proceeds to carry out that purpose by violence, or by intimidation by sheer force of numbers. A mob has, therefore, a will and purpose of its own, and all members of the mob contribute by their presence to the achievement of the mob's purpose, and to the terror of its victims, even where only a few directly engage in the commission of the specific unlawful acts which it is the mob's common purpose to commit."

2.6 The foregoing is by no means an exhaustive list of the general definitions of mobbing which have been given over the years, but the list is of sufficient length, and those whose definitions are quoted are of such authority, as to confirm what was said earlier: namely that the crime of mobbing and rioting has been described in broadly similar terms for well over a century. It seems to us, however, that these general statements of the law tend to beg the more difficult questions of principle to which we adverted in the Introduction. We shall return to them later. In the meantime we examine in rather more detail the various constituent elements of the crime.

---

[1] 1981 S.C.C.R. 32, at 46-47.

Numbers

2.7 As to the number which may be necessary to constitute a mob Hume[1] said:

> "The most obvious circumstance is, that a great host or multitude of people must be assembled. For herein it is, in the appearance of power, as well as disposition to execute their unlawful purposes of their own will and authority - that the alarm and danger of such assemblies be."

While he went on to say, as to the lowest number that might suffice:

> "This is truly a matter ... which is better left open to be decided on the whole circumstances of each case",

it seems to be reasonably clear that he had in contemplation what might in general terms be referred to as a reasonably large number. He does, however, make the point[2] that, the higher the excesses to which the mob proceeds, the lower the number that may be required to constitute the mob.

2.8 Alison[3] largely echoes what is said by Hume as to the effect of numbers but states that "it is indispensable that a considerable host or number of persons shall have been assembled", and, by referring to the provisions of the Riot Act 1714, seems to suggest

---

[1] i.416.

[2] i.416.

[3] i.510.

that 12 or more are required. Macdonald[1] says no more than that:

> "No fixed number is necessary to constitute a mob. Whether an assemblage is a mob or not depends upon its conduct."

In Sloan v. Macmillan,[2] a case which did not involve any violence but only intimidation, it was held that 17 people were enough to constitute a mob, but it was suggested that 5 would be too few. In the case of H.M.A. v. McAndrew and Others,[3] the jury were directed that as few as 7 persons would constitute a mob and in the case of Hancock and Others,[4] the 8 accused persons alone were alleged to have constituted the mob, and no point was taken by the defence that this was too few.

Purpose

2.9 An important distinction between mobbing and other crimes of disorder such as breach of the peace is that the former requires a common purpose. All of the authorities are clear as to this requirement. As will be seen, however, the precise nature and effect of this requirement are often far from clear. The general proposition was stated by Hume who said:[5]

> "The convocation must not only have a tendency towards violence and mischief, but it must consist of persons who are combined for some

---

[1] p.132.

[2] Supra.

[3] Edinburgh High Court, May 1980 (unreported).

[4] Supra.

[5] i.418.

> purpose of that kind. It is the union and resolution of a multitude, who are in league to defy authority, and execute their pleasure by means of force ... that is the aggravating quality of the crime of mobbing."

2.10 It is implicit in the foregoing passage that the mob's purpose must be an illegal one, but it is to be noted that this refers to the mob's immediate rather than ulterior purpose. The mob's object may apparently be a lawful one such as the removal of an illegal toll or barrier;[1] or the object may be conceived by the mob as being lawful, such as the removal of a minister upon whose appointment they, as parishioners, had not been consulted.[2] Again, the mob may have been gathered upon some lawful authority, such as to assist a sheriff or other official in the execution of his duty: if they carry out this task in a violent and tumultuous manner an illegal purpose will, it seems, be inferred.[3]

2.11 According to both Hume[4] and Alison[5] the common purpose of a mob must be some local or private matter, and not the attainment of any general or national object. The point made by both these writers is that, in the latter case, the crime would become one of treason. They acknowledge that in some cases the

---

[1] Macphie and Others, 1823, Alison, i.512.
[2] Macdonald and Others, 1823, Alison, i.512.
[3] Hume, i.417.
[4] i.418.
[5] i.513.

distinction may be a narrow one, and both give as an example of this the case of the Porteous Mob where, apprehending that a Royal Pardon was about to be granted to a condemned man, the mob took the law into its own hands and summarily executed the person concerned. The culprits in that case were prosecuted for mobbing and not for treason.[1]

2.12 It has been said that the common purpose of a mob need not be planned or preconceived: it may arise or develop spontaneously once the mob is assembled.[2] Moreover, it has also been held that the purpose need not be articulate or clearly present in the minds of the members of the mob.[3] We have some difficulty in understanding how this can be said to be a common purpose at all, and we return to this point later.[4]

2.13 In some older indictments, and particularly in those prepared prior to the passing of the Criminal Procedure (Scotland) Act 1887, an alleged specific purpose was libelled with the alternative of an unknown purpose. Thus, for example, in the case of Myles Martin and Others[5] the major proposition of the indictment libelled that a mob had assembled:

---

[1] William Maclauchlan, (1737) Maclaurin's Criminal Cases 633.

[2] Hume, i.418; Alison, i.513; Macdonald, 132; Francis Docherty and Others, (1841) 2 Swin. 635.

[3] Michael Hart and Others, (1854) 1 Irv. 574.

[4] See para.2.19 below.

[5] (1886) 1 White 297.

> "for the unlawful purpose of overawing, intimidating, and obstructing the said D.G. by threats, force, and violence, and preventing, or endeavouring to prevent, him from fulfilling his duty of executing or serving the said charges of payment ... or for some other unlawful purpose to the prosecutor unknown."

Section 2 of the 1887 Act provides that any indictment used may be in accordance with the simplified forms in Schedule A to that Act, or as nearly conform thereto as the circumstances permit. The form provided for mobbing and rioting does not require that the common purpose be specified. Whether as a result of this or for other reasons it seems to have been the practice in the twentieth century not to libel any specific purpose in an indictment and simply to use the phrase "acting of a common purpose". Some of the difficulty in relation to charges of mobbing and rioting in recent times appears to have involved the question whether this undefined "common purpose" was to any extent preconceived or was merely spontaneous and, if the latter, whether it could be discovered merely by looking at the actings of those concerned. That was part of the Crown's argument in Hancock,[1] and, although the Crown was unsuccessful in that case, the opinion of at least one of the judges seems to lend some support to that particular argument. We shall return to this point later.[2] It had been our understanding that, following on the case of Hancock, it was to become Crown Office policy that mobbing and

---

[1] Supra.

[2] See para.6.6 below.

rioting should not be charged unless the common purpose of the mob could be clearly specified in the indictment. A very recent case[1] has, however, come to our attention which indicates that our understanding must have been mistaken. Even if the understood policy were to be followed, there would, we think, be other problems to which we also return later.[2]

The degree of violence required

2.14 Although mobbing is normally thought of as involving an actual and tumultuous disturbance of the public peace (and this has been alleged in all of the more modern cases) such disturbance is not an essential element in the crime. It has been held to be mobbing merely to bar the entry to a church "by dense numbers, and by refusing to move, though there were no noise nor other acts".[3] So too, in Sloan v. Macmillan[4] 17 men went to a coal mine during a strike in order to stop some volunteers who were working there. Five of the 17 went down the pit and falsely represented to the volunteers that the pit was surrounded by hundreds of desperate men whom they were having difficulty in controlling. No violence was used, nor indeed any

[1] H.M.A. v. Kingsman and Others, Glasgow Sheriff Court, November 1983, reproduced in Appendix 3.

[2] See para.6.7 below.

[3] John Gordon Robertson (1842) 1 Broun 152, at 192.

[4] Supra.

tumultuous behaviour, but the volunteers were over-awed and the strikers were able to draw the fires and prevent further work. This was held to be mobbing despite the absence of any violence.

2.15 In much the same way it appears not to be necessary for the crime of mobbing that the mob should actually carry out its purpose of tumult, or violence, or intimidation. It is enough that the mob should have assembled in order to carry out its illegal purpose, or at least should have set out to the place where the purpose is to be effected. In the case of John Fraser[1] a mob set out with the purpose of attacking the house of the Sheriff of Edinburgh but retired without doing any damage on finding that a force was stationed there to repel them: this was held to be enough for a relevant charge of mobbing.

Concert

2.16 The law of concert, as it is applied in cases of mobbing and rioting, is closely linked to the requirement of a common purpose, and it is probably the aspect of mobbing which in recent times has caused the greatest difficulty to both judges and juries. It seems to be clear that the general rule is that an allegation of mobbing enables the law of concert to be taken significantly further than in the case of most other crimes, so that a member of a mob will be held

[1] 1784, Hume, i.420.

responsible for all that the mob does and regardless of whether or not he personally participates in all or any such acts provided that the acts in question are done in pursuance of the mob's common purpose. What precisely is meant by "held responsible for" is in our opinion, however, far from clear. On one view it simply means that an accused can be found guilty of being a member of a mob the activities of which included particular acts of violence. Upon another view it means that an accused can be found guilty of being a member of a mob and can also be found guilty of the particular acts of violence. The tendency in the reported cases (though this is not always entirely clear) seems to be to favour the second view, though we for our part would regard the first as being more acceptable and appropriate. Quite apart from the question whether it is appropriate that a person should ever be found guilty of possibly very serious acts of violence simply on the basis of membership of a mob, a rule to that effect can give rise to considerable problems in cases where there is difficulty in determining with any precision just what the mob's purpose was. Even where such a purpose can be discerned, there may be difficulties in determining whether particular acts, carried out by only some individuals from the mob, were carried out in pursuance of that common purpose or not. These and other difficulties arising from the peculiarities of art and part guilt in cases of mobbing and rioting will be examined in more detail later. In the meantime it may be helpful to examine more closely how the matter of concert has been approached in the courts and elsewhere.

2.17 In general it appears to be the law that where a person has been shown to have participated in some of the specific acts perpetrated by a mob he will be guilty art and part of any other acts which are of a broadly similar kind; and even if the acts in which he did not take part are of a much more grave character, he will probably still be guilty art and part if these acts were of a kind which followed from the common purpose to which he had allied himself. This proposition was expressed by Lord Mure in his charge to the jury in the case of Myles Martin and Others[1] when he said:

> "If you are satisfied that the prisoners formed part of a mob, whose object was to intercept, and even attack the officers of the law in the discharge of their duty, and were aware of that object, you will be entitled in law to find they were art and part guilty of the acts of the mob, whether by mobbing and rioting, or of assault, although they may not be proved to your satisfaction to have been actual participators in the assault. If, on the other hand, you should have doubts whether the accused or any of them, though among the mob and engaged with them generally in their illegal rioting, were aware of the intention of the mob to assault the Sheriff, and are of opinion they were not actual participators in that assault, you may, while finding them guilty of mobbing and rioting as charged, consider yourselves justified in finding them not guilty of the assault."

It is to be noted that, in this passage, Lord Mure actually used the word "guilty" in relation to the particular assault specified in the indictment. The jury in that case found all the accused guilty of

---

[1] Supra.

mobbing and rioting but, in respect of the assault, returned verdicts of not guilty and not proven.

2.18 A somewhat different approach was taken much more recently by Lord Stott when charging a jury in the unreported case of Lawtie and Others,[1] where, it is to be noted, he used the rather less precise phrase "responsible in law for" in relation to particular acts of violence.[2] He said:

> "... anyone who knowingly forms part of the rioting mob is held responsible in law for everything the mob does as a mob while he is a member of it. Once it is proved against you that you formed part of a riotous mob, you will be responsible in law, not only for what you do yourself, but also for any assault on persons or property which is committed at the time you are part of the mob by any others in the mob as members of the rioting mob."

It may be questioned whether Lord Stott went quite far enough in making it clear to the jury that art and part responsibility for assaults and other specific acts will arise only where such acts fall within the general, common purpose of the mob.

2.19 In fact, and subject probably to the same qualification, mere presence may alone be enough to implicate a person art and part in guilt of the actings

---

[1] Aberdeen High Court, February 1975.

[2] Compare the passage from a charge by Lord Murray, quoted at para.6.18 below, where he uses the phrase "criminally liable for".

of a mob. As Hume[1] put it: where "his presence is characterized in such a way as fixes him for an associate in the enterprise", this "is a just ground for convicting him as art and part". Of course, if a person is merely caught up in a mob by accident that will not impute any guilt to him; but if his presence is such as to lend what has been referred to as "countenance and approval" to what goes on, then he may be found guilty of mobbing and rioting, with consequent guilt for all the actings of the mob, even though he takes no active part in any specific acts of violence. Again, according to Hume, the rationale for this approach is that:

> "The presence of any one who joins the multitude in such a fashion is truly a substantial assistance; since it adds to their confidence, and apparent force, and to the terror and alarm, which are the engines for the execution of their lawless project."[2]

Indeed, Hume goes rather further and suggests that a person who joins a mob after it has already committed some outrageous act, and in the knowledge that it has done so, may be guilty retrospectively in relation to that earlier act as well as in relation to anything that occurs after his joining.[3] While it may be doubted whether effect would be given today to such a view, the passage in Hume is worth referring to since it tends to cast some doubt on a passage in Gordon[4] where the learned author says that although "it must be shown that the accused was present as part of the mob, it is not

---

[1] i.422.

[2] i.423.

[3] i.424.

[4] At p.984.

necessary to show that he approved or knew of the mob's purpose, or of any particular acts committed by them." Gordon may not have had in mind the special problem of retrospective guilt when he wrote that, but the passage in Hume does suggest that there may be cases where it is necessary to show that an accused had some knowledge of particular acts. In any event it may be thought that some knowledge of the mob's purpose would be necessary before a person could be said to be "acting of a common purpose". Having said that, the fact that the writer of a current textbook on the criminal law is prepared to exclude knowledge of the common purpose as a pre-requisite for art and part guilt is at least an indication of some uncertainty as to the precise state of the law and, at worst, an indication of a law that many people might regard as unjust and unprincipled.[1]

2.20 It is accepted by Gordon[2] that the responsibility of a person present in a mob is limited to things done "in the course and for the purposes of" the mob. Thus, a member of a mob will not be responsible for any acts which are done in settlement of a private grudge, or generally in circumstances which are remote from the purposes of the mob.[3] In such cases, however, problems may arise, where the specific acts have only been libelled as having been committed by all the members of the mob, in determining whether and how those who are

---

[1] cf. para.2.12 above.

[2] Ibid.

[3] Hume, i.425; Alison, i.522; Macdonald, 134, 135.

proved to have committed these acts may be convicted of the substantive crimes. In the case of Wilson, Latta and Rooney,[1] which was a case of alleged conspiracy, it was successfully argued by the Crown that convictions of the specific crimes embraced in the conspiracy would be competent even if there was no conviction of the conspiracy itself. In presenting this argument the Crown relied on what is now section 61(2) of the Criminal Procedure (Scotland) Act 1975 which provides:

> "Any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such a crime."

Although he sustained the Crown argument the Lord Justice Clerk (Grant) queried why the indictment did not include as alternative, substantive, charges the various sub-heads of the conspiracy charge. On the analogy of the foregoing decision Gordon suggests[2] that it is competent in cases of mobbing to convict a person of assault alone even where that is libelled as one of the manifestations of the mobbing. It is our understanding that effect has been given to this view in mobbing and rioting cases, but it may be questioned whether those responsible for the statutory provision really had in mind that it would be used as a means of sustaining a conviction for, in effect, a different crime from that originally libelled. If, however, one accepts Sheriff Gordon's view, then other equally undesirable consequences are also possible as in the recent case of Hancock and Others[3] where a jury

---

[1] Unreported, Glasgow High Court, February 1968.

[2] p.982, n.31.

[3] Supra.

returned an unsupportable verdict of guilty in relation to the mobbing charge rather than verdicts on the possible alternative charges of assault, though it would appear from the opinions in that case that, had such verdicts been returned, at least some of them might well have been sustained on appeal. In such cases, of course, a jury is obliged to make up its mind whether it will find persons guilty of mobbing and rioting, including particular acts of violence, or whether it will acquit of mobbing and rioting but return verdicts of guilty in respect of some or all of the particular acts of violence: it cannot, in other words, return alternative verdicts simultaneously in the hope that one will survive even if the other is subsequently rejected on appeal. Equally, since allegations of particular assaults within a charge of mobbing and rioting are seen as, to some extent, substantive crimes in their own right, it would not be possible to charge them cumulatively along with the mobbing and rioting charge since an accused would then be facing multiple charges in respect of the same incident. Alternative charges may, of course, arise for a jury's consideration in cases other than mobbing and rioting but it is probably fair to say that it is only in mobbing and rioting and conspiracy cases that the form of charge combines a general charge with specific criminal acts which may or may not have to be disentangled, in whole or in part, depending on the view taken of the evidence. This, we think, may present very difficult problems for juries and judges alike.

2.21 This is not a new problem: in the case of Walter Johnston and Others[1] the jury found that "there were mobs at the times and places libelled", and that those accused whom they convicted were "guilty, art and part, of the crimes libelled". It was submitted to the court that there was no finding as to what particular crimes had been committed and indeed that it had not been proved that all the crimes libelled had been committed, and so accordingly, the accused could not be found guilty of all the crimes alleged in the libel. Although the court thought that "the verdict was not so distinct and accurate as it might and ought to have been", nevertheless they felt that sentence should be pronounced on the accused. The problems appear, however, to have become more acute in recent times. Partly this may be because, as will be seen, mobbing and rioting charges seem increasingly to have been used for cases of more or less random street and gang violence where it is often difficult to discern the nature, or indeed the existence, of any common purpose at all. Partly it may be because the extended concept of guilt by association which is a feature of the law of mobbing has on occasions been seen as less than appropriate or just. These and other problems will be examined in more detail in Part VI of this Memorandum.

[1](1771) Maclaurin's Criminal Cases 541, a case in which Maclaurin himself appeared for the accused Johnston.

PART III - HISTORICAL ANALYSIS

3.1 As has been seen, the crime of mobbing and rioting is one of considerable antiquity in Scots law. The crime exists at common law although there have also been Acts of the Scottish Parliament which have prohibited the raising or assembling of conventions of the people within burghs without special licence from the Sovereign or authority from the magistrates, especially if such people carried arms, displayed banners, beat drums or sounded trumpets, or made use of other warlike instruments. The death penalty was imposed for offending against these statutes. An example of the crime being prosecuted under the Scots statutes is the case of David Mowbray[1] in 1686. That was a case where a mob had gathered in Edinburgh and attacked members of a Roman Catholic church congregation as they were leaving their place of worship and thereafter went on a general riot through the town. One of the rioters was arrested and sentenced to be "whipped through the city by the hangman". In order to spare him from his punishment, the accused Mowbray and his associates collected another mob and rescued him from the town officers and hangman. Mowbray was arrested and charged with being in this tumult, convicted, and sentenced to death.

3.2 For the purposes of this Memorandum, a search has been made of the records of the Lord Advocate's Department from 1801-1828, of the High Court and Circuit indictments for the periods 1829-44 and 1888 to date,

---

[1] Arnot's Criminal Trials (1812) p.269 Fountainhall's Decisions i.401 at 407.

and of the records of the Justiciary Office from 1844 to 1888. In many cases it has been possible to examine the original precognitions as well as indictments.

3.3 These records provide a vivid illustration of the social, religious and political history of Scotland and a keen sense of the political climate of the times. Those cases in the period up to about 1920 fall into fairly distinct categories of socially or politically motivated conduct which have seldom since then been prosecuted in the courts as mobbing and rioting. It cannot, however, be asserted with confidence that there will never again be a need to prosecute comparable behaviour in this way.

3.4 The only precognitions which survive from before 1800 are those concerning the Atholl and Strathtay Riots of 1797. They relate to three separate cases reported against 17 persons, and they disclose that the general populace of the area were incensed by the provisions of a Militia Act and rose up against the Duke of Atholl, demanding that he should not continue to support it.

3.5 Many of the records are indexed under names which clearly point to the existence of significant local tumult or ill-feeling against something which was seen as important in the daily life of the times. The "Fraserburgh Riots" of 1813 and the "Dundee Riots" of 1816 both involved riots over the price of food. In the Fraserburgh case, there were local protests about the price of grain and alleged shortages. The riots followed when one businessman in the town tried to ship stocks of grain out of the harbour. In the Dundee case the price

of meal was raised by two pennies, causing a significant section of the townspeople to rise in protest and rampage through the town, burning effigies and smashing shops. Possibly the best known example of this type of case is to be found in the Shawfield Riots of 1725,[1] which were a protest against the malt tax.

3.6 Just as cases of that type are common, so are cases where the accused were all members of a trade, such as weavers, colliers or cotton-spinners. The various weavers' riots are well documented historically and occurred in areas where there was protest about unemployment and where there were efforts to organise the workforce.

3.7 The third general category might be described as consisting of attempts to interfere with the administration of justice and of attempts to overcome the will of the authorities, civil or religious. In the first of these sub-categories are cases like the riots in Greenock in 1820 when the mob forced open the prison and set free prisoners, although no proceedings were taken against any individuals in that case; or the case in 1821 in Sutherland where mobbing was charged against tenants who resisted sheriff officers in an attempt to carry out a court eviction order. The best known case of this type is probably the Porteous Mob of 1736.[2] The second sub-category mentioned has included attempts by

---

[1] Alison op. cit. i.514.

[2] Alison op. cit. i.514; and see para.2.11 supra.

parishioners in Croy, in Ross and Sutherland, to prevent the minister appointed to the parish from preaching at the church.[1]

3.8 Cases such as that just mentioned make it clear that mobbing is a relevant charge even where those charged believed they had a right to make the objection they did, although not necessarily in the form that it took. Another example of that is the Glasgow Green Riot,[2] where a houseowner had built walls over a footpath alleged to be a right of way. In due course, those who rioted against the building of the walls were charged and the charge was found relevant, the court stating firmly that the civil courts were the place for making their claims. A civil action having subsequently been raised, the walls were ordered to be removed.

3.9 The records of the Lord Advocate's Department from 1801-1829, which contain some precognitions not all of which resulted in indictments, show that there were some 50 cases of mobbing and rioting in that period. A further 22 cases were prosecuted on circuit in the High Court from 1829 to 1844 and an examination of them shows once again that most can be clearly related to significant social events or conditions of the time. Thus there were riots relating to the Reform Bill,[3] several cases relating to interference with the electoral

---

[1] Hugh MacDonald & Ors. (1823); Alison, op. cit. i.512.

[2] Alexander Macphie & Ors. (1823); Alison, op. cit. i.512; and see also Alexander Gollan (1883) 5 Couper 317 where the protest was against railway traffic on the Sabbath.

[3] Alison op. cit. i.514-515.

processes,[1] cases concerning attempted interference with the course of justice[2] (often combined with an element of deforcement of court officers), violent protests against suspected grave-robbers,[3] the so-called "cholera riots",[4] in which the mob in Paisley rioted against the efforts of the medical authorities to deal with the cholera epidemic, protests against immigrant workers,[5] and a riot involving the holding of a procession, accompanied by great violence and disorder, when permission to hold it had previously been refused by the magistrates.[6]

3.10 An examination of the Circuit Court indictments of that period, 1829-44, (the earliest period for which indictments are generally available) shows also that whereas most of them refer to the crime as mobbing and rioting, some charge only mobbing[7] and some only rioting.[8]

---

[1] E.g. Alexander Fawns & Ors., Perth 1830; James Alexander & Ors., Ayr 1834, Donald Stewart & Ors., Inverness 1837; John Hosie, Stirling 1837.

[2] E.g. William Dalgliesh & Ors., Dumfries 1830 Thomas Stewart & Ors., Jedburgh 1831, (both cases involving violent attempts to resist arrest in furtherance of court orders) Jacob Tait & Ors., Jedburgh 1829 (attacking toll-house).

[3] George Ferguson & Ors., Perth 1829.

[4] Joseph Green & Ors., Glasgow 1832.

[5] John Adamson & Ors., Perth 1830.

[6] Samuel Waugh & Ors., Ayr 1831.

[7] E.g. Andrew Hill & Ors., Glasgow 1829, John Gibb and Andrew Forbes, Aberdeen 1829, David Buchanan & Ors., Glasgow 1830.

[8] E.g. Jacob Tait & Ors., Jedburgh 1829, James Cunningham & Ors., Glasgow 1840 (which indictment combined rioting with breach of the peace but not mobbing).

Furthermore, not all of them specify the common purpose alleged to have been shared by the accused; and although that can sometimes be inferred from the narrative of the events which took place,[1] nevertheless cases where it is specifically mentioned are few, and even these are divided into cases where the alleged purpose is contained in the major proposition of the indictment[2] and those where it

[1] E.g. George Ferguson & Ors., Perth 1829 where the purpose was presumably to register public outrage against alleged grave-robbers, although that is not stated; Alexander Fawns & Ors., Perth 1830, where rival factions in an election fought with each other, in an attempt, presumably to disrupt each other's attempts at canvassing.

[2] E.g. Thomas Stewart & Ors., Jedburgh 1831 ("especially when committed for the purpose of preventing the sentence or warrant of a judge from being carried into execution"); John Hosie, Stirling 1837 ("especially when the said crimes, or any of them, are committed with the intent of preventing, or deterring, or obstructing by force and violence, a voter from exercising his franchise in the election of a member to serve in the Commons House of Parliament"). In this case, the specified purpose is repeated in the body of the indictment.

appears in the narrative of the events.[1] Finally, there are numerous cases where no specific purpose is alleged and none can be inferred from the indictment itself, except perhaps that of creating general mayhem or disorder.[2]

---

[1] E.g. John Adamson & Ors., Perth 1830 ("with the wicked and felonious intent of attacking the persons and destroying the houses and property of all Irishmen, and driving them out of Dundee"); Samuel Waugh & Ors., Ayr 1831 ("the magistrates - having forbidden the said procession - and the said mob - having notwithstanding wickedly and feloniously and with an utter recklessness of the consequences to the public peace and the safety of the lieges, determined to carry their [resolution to process] into effect, and to maintain and support the same, and to put down and overpower, by force and violence, all opposition thereto."); Joseph Green & Ors., Glasgow 1832 ("for the purpose of inflaming the minds of others, and inciting them to join in the outrageous proceedings which they meditated against the medical men and others who had been devoting themselves, in the most exemplary and charitable manner, to the care of persons afflicted with the disease called cholera"); James Alexander & Ors., Ayr 1834 ("and this they did with the illegal purpose of thereby interfering, by prior intimidation or subsequent outrage, with the free exercise of the elective franchise at the foresaid election"); Robert Allan & Ors., Dumfries 1842 ("[did] concert or devise measures to attack and demolish or injure various shops and houses in Dumfries and Maxwelltown aforesaid, and to concuss and maltreat or intimidate sundry individuals in said towns").

[2] E.g. Robert Sutherland & Ors., Inverness 1829 (an indictment signed, as Advocate-Depute, by Archibald Alison, whose "Principles of the Criminal Law" are cited here extensively); John Gibb and Andrew Forbes, Aberdeen 1829; John McCabe & Ors., Glasgow 1837; James Cunningham & Ors., Glasgow 1840.

3.11 The period 1844-88 shows a marked decline in the number of cases of mobbing and rioting. The Justiciary records for the High Court at Edinburgh for that period show only some 29 cases and again those tend to fall into the same categories as before. Thus, there are cases involving rescuing of prisoners,[1] cases involving deforcement of officers of law,[2] and another case involving obstruction of a presbytery.[3]

3.12 In the years 1886-88, there were serious riots concerning crofting reforms and four indictments[4] have been traced concerning behaviour associated with these. These cases clearly fall into the established pattern of social conditions or major social or political events of the time producing unlawful responses from those affected.

---

[1] John Urquhart & Ors., May 1844; Matthew Clark & Ors., June 1846.

[2] Alexander Gollan (1883) 5 Couper 317; John Nicholson & Ors., (1887) 1 White 307 (where the accused were known collectively as the Garralapin Crofters); Alexander McLean & Ors., (1886) 1 White 232 (the Tiree Crofters); John McDonald & Ors., (1887) 1 White 315 (the Herbusta Crofters).

[3] Andrew Holm & Ors., (1844).

[4] Donald McRae & Ors., (1888) 1 White 543; John McLeod, December 1887; Alexander McLeod & Ors., (1888) 1 White 554; Malcolm Smith & Ors., January 1888; many of the accused in other indictments of this period, as in footnote 2 above, were described as being crofters from a particular village or parish.

3.13 All High and Circuit Court indictments have been examined for the period 1888 to 1980 when the number of such cases continued to drop dramatically at least until 1966. Between 1887 and 1966, only 19 High Court cases of mobbing and rioting were traced. This trend reversed equally dramatically from 1967 onwards, for in the years 1967-69 there were 13 such cases, and in the years 1970-80, there were 31.

3.14 The year 1887 is a convenient point from which to group the more modern cases of mobbing and rioting for, as has already been mentioned,[1] the provisions of the Criminal Procedure (Scotland) Act of that year led to much simpler and more compact forms of indictment, and may possibly be regarded as statutory authority for the non-necessity of stating the alleged common purpose on the face of the indictment.

3.15 It is interesting to note that the type of conduct which was charged as mobbing and rioting changed during the period at the beginning of this century. In the few cases where the alleged purpose of the rioters was actually specified, most involved charges which arose from civil or industrial unrest and it appears to have been common to charge workers in such cases, before the advent of any significant trade union legislation, with mobbing where their conduct was thought to merit it.

3.16 There was political unrest towards the end of the First World War which resulted in civil disturbance, such

---

[1] Para.2.13.

as the case of Emmanuel Shinwell and Others in January 1919, and there were riots involving the Irish question. As has been mentioned, there were a number of cases concerned with industrial disputes where the conduct alleged amounted usually to attempts to stop working in pits or factories.[1] Perhaps the best known example of this type of case which has been prosecuted as mobbing and rioting, and the only one which is reported,[2] is the case of Sloan v. McMillan. This case has not been included in the total of cases referred to since it was not a High Court case, but was prosecuted by way of summary complaint. This again involved the common purpose of compelling men working at a colliery to cease working and to draw the fires, they having been threatened that there was an uncontrollable mob of about 400 men marching on the colliery, when in fact there was no such mob, and no actual physical violence took place. This was held to be a relevant case of mobbing.

---

[1] E.g. John McKenzie & Ors., May 1910; Charles Hendren & Ors., January 1919; and John Evers & Ors., 4 April 1921 and William Easton & Ors., 5 April 1921, both of which specified that the common purpose was to compel the men who were in charge of the pumping machinery at a pit to abstain from working and stop the pumping machinery, thus permitting water to flood the workings and damage and destroy them. (Much more recently use has been made of s.7 of the Conspiracy and Protection of Property Act 1875 in cases where attempts have been made to stop others from working in the course of an industrial dispute: see Elsey v. Smith, 1982 S.C.C.R. 218; Galt v. Philp & Ors., 1984 S.L.T. 28.).

[2] 1922 J.C. 1.

3.17 From about this time, however, the emphasis can be clearly seen to change from those cases in the 19th century where the common purpose was usually linked to important social considerations affecting a significant proportion of the population, through the "industrial dispute" cases of the early 20th century, to a situation where the charge has been almost exclusively used to deal with gang fights between rival factions, not generally related to any significant historical event of the time, and involving usually (as participants) only those few people who have allegiances to one or other faction.[1] It is of course true that cases of mobbing involving this sort of conduct have been traced in the 19th century,[2] but the last 50 years of this century have seen the crime being charged more and more exclusively in relation to such conduct. Although the case of Sloan v. McMillan[3] is authority for the proposition that there need not be actual violence, no subsequent cases have been found which did not allege the use of some, and usually considerable, violence.

3.18 Of the 19 cases mentioned in the period 1887 to 1966, four[4] were concerned with riots over crofting reforms, four[5] were so-called "industrial dispute" cases,

---

[1] This is not to be taken as implying that the victims of such conduct are equally supporters of such gangs; many completely innocent and uninvolved people have been caught up in such violence and have suffered grievously and sometimes fatally, as a result.

[2] E.g. Alexander Fawns & Ors., Perth 1830, and John McCabe & Ors., Glasgow 1837.

[3] 1922 J.C. 1.

[4] See footnote 4, p.29.

[5] See footnote 1, p.31.

one[1] was the Glasgow Riot of 1919 which arose from political unrest at the end of the First World War, two could be loosely described as cases of mobs "looting" property in the course of a rampage, and the remaining eight are cases involving allegations of gangs engaged in general disorder.

3.19 In the years 1967 to 1969, there were no fewer than 13 High Court cases of mobbing, all of which, with only one exception,[2] involved allegations of persons engaged, usually as members of gangs, in general lawless, violent behaviour against either individuals or property.

3.20 The first case where specific gang violence was mentioned was in 1928.[3] That case alleged a fight between two named Glasgow gangs and also included an allegation of murder within the substantive charge of mobbing. Another two such cases appear in 1934,[4] reflecting the fact that this was a period when gang violence was rife in parts of that city. There is no other High Court mobbing case between 1934 and 1960 and it is not until one reaches the period from 1967 to 1980 that cases of mobbing and rioting arising out of "gang warfare" occur in great numbers.

---

[1] Emmanuel Shinwell & Ors., January 1919.

[2] Laurence Winters & Ors., May 1968, an alleged riot by inmates in Peterhead Prison.

[3] James McCluskey & Ors., May 1928.

[4] John Traquair, March 1934 and William McPhee & Ors., March 1934.

3.21 The trend of using the charge to deal with the conduct of gangs which became marked after 1966, became even more pronounced in the period 1970-80. In these ten years, there were no fewer than 31 cases prosecuted in the High Court at Edinburgh and on circuit in which mobbing and rioting was charged. Of these 31 cases, 29 of them dealt with allegations of groups or gangs engaged in lawless rampage, either by fighting on the streets, or attacking rival gangs, or invading houses and assaulting the occupants. As has been pointed out before[1] many of the victims of this conduct were innocent of involvement with the gangs. Only two of the cases were in any significant respects different from the rest; these were the cases of Vernon Jones and Others[2] which involved a riot by U.S. sailors stationed in Dunoon following ill-feeling between them and local youths, and of Ian Hancock and Others[3] where the accused travelled in a van from place to place with violent incidents taking place at a number of different locations.

3.22 None of the indictments in these 31 cases mentioned contains any specification of what the alleged common purpose was. It is, however, fairly clear from reading the precognitions that in many of them the common purpose in fact was to set out in reprisal for previous

---

[1] Para.3.17, footnote 1.

[2] 18 March 1974 High Court (unreported).

[3] 1981 S.C.C.R. 32.

conduct of an opposing gang or gangs in order to inflict injury on members of that opposing group. Such a purpose was not, however, stated in the indictments.

3.23 The style of indictments since 1887 has varied.[1] Some contain all the allegations of what the mob did within the one charge of mobbing and rioting, while others have put the specific allegations into separate charges or sub-heads of the mobbing charge. Some again make it clear what the individual accused are alleged to have done and others charge the specific allegations against the mob generally.

3.24 A brief analysis of the results of the 31 cases between 1970 and 1980 shows that in only six[2] cases were all the accused convicted of mobbing and rioting and all the various specific allegations either contained in the mobbing charge or libelled as sub-heads of the mobbing charge. This is a very low figure since, as has been seen, in theory at least, where the acts libelled are proved to have been part of a common purpose, then all the accused participating in that common purpose should be guilty of all the acts of the mob, whether they can be individually linked to a specific incident or not. Of course, there may be many reasons for this relatively

---

[1] Examples of the various styles listed in this paragraph are given in Appendix 1 attached to this Memorandum.

[2] This figure does not include the case of Hancock & Ors. where, although all of the accused were actually convicted of mobbing and of all the allegations of criminal conduct which took place while they were present, all the convictions were quashed on appeal. This case is the only successful appeal against conviction in the sample of cases examined.

high failure rate: for example, it may transpire in the course of the evidence in a given case that particular crimes alleged were not in fact in common contemplation; or again, some accused may not be identified as having been involved at all; or again, the evidence actually given at the trial may fall short of what had been expected to prove the charges on the indictment. Often, for want of any other evidence, it may have proved necessary for the Crown to use as witnesses persons who may have been involved on the periphery of the violence; and the evidence of such witnesses may be regarded by the jury as evidence of socii crimini, and therefore suspect or tainted. Yet another possibility - and one which we are inclined to think may apply in a good many cases - is that the jury has simply not been able to understand the directions that have been given on guilt by association or, if such directions have been understood, the jury has been unwilling to apply them because they appeared to lead to an unjust and unacceptable result.

3.25 On the other hand, it should be pointed out that out of the 31 cases mentioned, only nine resulted in the situation that all the accused were acquitted of mobbing and in six of these, some convictions were returned in respect of some of the substantive charges contained in the sub-heads. In every case in which there was a conviction for mobbing, there was a conviction also for some at least of the substantive charges included in the sub-heads.

PART IV - OTHER JURISDICTIONS

4.1 It seems likely that all jurisdictions embody some kind of sanction to deal with offences against public order and it may therefore be helpful to examine a few of these in order to see how they deal with the kind of behaviour that might, in Scotland, be the subject of a charge of mobbing and rioting. Most Commonwealth and common law jurisdictions use the model provided by English law as the base for their own legal systems. We accordingly propose to look first at the offences provided by the English common law together with the proposals for reform of that law which have very recently been recommended by the Law Commission for England and Wales.[1]

4.2 It must be borne in mind that the recent review of the law by the Law Commission for England and Wales was made in furtherance of its programme of codification of the criminal law of England and Wales. On one view, there appears not to be any particularly pressing need for reform in England and Wales, for, as was pointed out in the Working Paper of the Law Commission on Offences against Public Order,[2]

> "Our present impression is that while the common law exhibits some uncertainties, none of them is of major significance. Furthermore, we are at present unaware of any

---

[1] Offences Relating to Public Order, (1983, Law Com. No.123).

[2] Working Paper No.82 (March 1982) at p.53.

substantial criticism of the broad content of the common law offences."

The Law Commission has, however, now made proposals for new statutory offences relating to public disorder. We begin by looking at the English common law.

4.3 The English common law recognises four relevant offences, namely affray, riot, rout and unlawful assembly. Affray is defined by Smith and Hogan[1] as

(1) unlawful fighting or unlawful violence used by one or more persons against another or others; or an unlawful display of force by one or more persons without actual violence;

(2) in a public place, or, if on private premises, in the presence of at least one innocent person who was terrified; and

(3) in such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified.

Although there are some aspects of this definition which can be comprehended within mobbing and rioting in Scotland, generally speaking affray appears to be used to deal with conduct on a rather less serious scale.

[1] Criminal Law (5th ed.) 1983 p.738.

4.4 The classic definition of riot appears to be that of Hawkins:[1]

> "a tumultuous disturbance of the peace by three persons or more who assemble together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually execute the enterprise in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."

This definition is nearer to the Scots crime of mobbing, though, as has been pointed out[2] it is not necessary in Scotland for the mob to have carried out their purpose of tumult or intimidation.

4.5 The gap in English law which is provided in Scotland by the availability of the crime of mobbing and rioting, as pointed out in the preceding paragraph, is filled in England by the offence of rout, which crime is complete without the execution of the intended enterprise.

4.6 There appears to be dispute[3] as to an accepted definition in English law of the offence of unlawful assembly, but it would seem to involve an assembly of three or more persons whose common purpose is to commit a crime (probably of violence or tumult) or some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace.

---

[1] Pleas of the Crown vol.1 c.65 ss.1-5.

[2] Para.2.15 above.

[3] Cf. R. v. Chief Constable of Devon and Cornwall, ex parte C.E.G.B. [1981] 3 W.L.R. 967.

4.7 The Law Commission has now recommended the abolition of these four common law offences and their replacement by four new statutory offences. The existing offence of rout will, according to these recommendations, be abolished without replacement, as will certain other old statutory enactments dealing with public order.

4.8 It is to be recommended that there be a new statutory offence of affray to apply where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, in public or private, and that conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

4.9 Two statutory offences are to be recommended to replace the offence of unlawful assembly at common law. The first, dealing with group violence, and to be known as "violent disorder", will provide that where three or more persons are present together using or threatening unlawful violence to persons or property, in public or private, and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, then each person using such violence commits the offence. The second offence relates to conduct intended or likely to cause fear or provoke violence, and is to provide that where three or more persons present together, in public or private, use threatening, abusive or insulting words or behaviour which is intended or is likely either to cause another person to fear immediate unlawful violence

to persons or property or to provoke the immediate use of such violence by another person, then each is guilty of an offence.

4.10 A new statutory offence of riot will deal with situations where twelve or more persons present together, in public or private, use or threaten unlawful violence for some common purpose (which may be inferred from their conduct) and that conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. Each person who uses such violence for the common purpose would commit the offence.

4.11 The United States of America. The Model Penal Code of the American Law Institute (1962) contains only two offences to deal with the type of conduct under discussion. These are riot and disorderly conduct. The latter of those tends to relate to much less serious conduct than that with which we are concerned, and would normally be conduct, which if prosecuted at all, would be charged in Scotland as breach of the peace. Section 250.1 provides:

> "§ 250.1 Riot; Failure to Disperse
>
> (1) Riot. A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:
>
> (a) with purpose to commit or facilitate the commission of a felony or misdemeanor;
>
> (b) with purpose to prevent or coerce official action; or

(c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) Failure of Disorderly Persons to Disperse Upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor."

4.12 The commentary on this section[1] argues that in fact no separate offence of riot is needed in the Model Code since they say that the crimes of conspiracy and attempt cover all phases of preliminary collaboration to commit criminal offences, and the crime of disorderly conduct reaches the violent, tumultuous, noisy and dangerous aspects of either group or individual activity. The only purposes for its separate existence are rationalised as being the provision of aggravated penalties for disorderly conduct where the number of rioters makes the behaviour especially alarming or dangerous, and the provision of a means for dealing with those who disobey lawful police orders directing a disorderly crowd to disperse. The Model Code eliminates the separate crime of rout and unlawful assembly, and while all the revised codes based on it follow suit as regards rout, many retain unlawful assembly.[2] The number required to constitute a riotous crowd varies in the State codes from 2 to 10.

---

[1] 1980 edition p.316.

[2] op. cit. p.317.

4.13 Reference to the Model Penal Code should not be taken as implying that all the states follow the actual wording of the Code in drafting their own statutes. For example, the Illinois statute[1] describes the offence as "mob action", and describes it as follows:

> "S.25-1 Mob action (a) Mob action consists of any of the following:
>
> (1) the use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law; or
>
> (2) the assembly of 2 or more persons to do an unlawful act; or
>
> (3) the assembly of 2 or more persons without authority of law, or the purpose of doing violence to the person or property of anyone supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional powers or regulative powers over any person by violence."

Significantly, this crime is designated a "Class C" misdemeanour (maximum one year imprisonment or $500 fine) unless injury is inflicted to the person or property of another, in which case it is a "Class 4" felony (not less than one and not more than three years' imprisonment or a fine of $10,000). Failing to withdraw from mob action on being commanded to do so by a peace officer is also made an offence.

4.14 Those countries whose legal system is in the civilian tradition also have offences dealing with

---

[1](1980) Chapter 38, section 25-1.

serious public disorder, and, as the Law Commission points out,[1] these tend to be drafted in broad terms. Thus, for example, in South Africa, the crime of "public violence" is defined[2] as consisting of "the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others".

4.15 Germany. The German Penal Code provided[3] that anyone who used or took part in violent force against people or property, or threatened people with violent force which would be used by a group of people with combined forces in a way which endangered public safety, or who encouraged a group of people to be prepared to perpetrate such action would be liable under the Article to a maximum of three years' imprisonment. The penalty can be increased to a maximum of ten years' imprisonment in particularly serious cases, i.e. where the perpetrator has a gun with him, or carries another weapon in order to use it for the action, or when due to the use of force a third person is in danger of death or serious injuries, or where the perpetrator is looting or damaging substantially other people's property. The West German Cabinet approved, on 13 July 1983 an amendment to Article 125 in order to make it criminal for demonstrators not to withdraw from a demonstration when told to do so by police because of acts of violence, even though the

---

[1] Working Paper p.191, Report p.135.

[2] Hunt, South African Criminal Law and Procedure (1970) vol.11 pp.74-75.

[3] Article 125.

individuals told to leave may not themselves have joined in the violence, unless they are proved to have held back from the acts and threats of violence. It is understood[1] that this amendment has been sent to committee stage and is to be introduced as soon as possible.

4.16 Scandinavia. By section 135 of the Norwegian Penal Code of 1902, anybody who endangers the general peace by publicly insulting or provoking hatred of the Constitution or any public authority, or publicly inflaming one group of the population against another, or is accessory thereto shall be punished by fine or imprisonment up to one year. To bring about the occurrence of a riot with the intent to use violence against person or property, or to threaten therewith, or to be an accessory to bringing about such a riot, or to act as a leader during a riot where such intent has been revealed is a more serious offence[2] punishable by imprisonment up to three years. Finally, it is also an offence, punishable with up to three months' imprisonment, to stay after an order to disperse has been given.

4.17 The Swedish Penal Code of 1965 also contains different provisions to deal with conduct of varying degrees of seriousness. Thus, if a crowd of people disturbs public order by demonstrating an intent to use group violence in opposition to a public authority, or otherwise to compel or obstruct a given measure, and does not disperse when ordered to do so by the authority, Chapter 16, Section 1, provides that instigators and

---

[1] The Times, 14 July 1983.

[2] Section 136.

leaders shall be sentenced to imprisonment for a maximum of four years and other participants for a maximum of two years, or to a fine, for the offence of riot. This section also provides that if the crowd disperses on the order of the authority, instigators and leaders shall still be liable for the offence of riot, but with a reduced sentence, i.e. a fine or a maximum of two years' imprisonment. The more serious offence of violent riot is committed under section 2 where a crowd, with the intent referred to in section 1, has proceeded to use group violence on a person or property, whether a public authority was present or not. In this case, instigators and leaders are liable to a maximum of ten years' imprisonment, and other participants to four years or a fine. Finally, section 3 provides a more minor offence aimed at a member of a crowd disturbing public order who neglects to obey a command aimed at maintaining public order, or who intrudes on a protected area or one closed off against intrusion. If no riot is occurring, such a person commits the offence of disobeying police order with a maximum sentence of six months' imprisonment or a fine.

PART V - LEGISLATION DEALING WITH PUBLIC ORDER OFFENCES IN THE UNITED KINGDOM

5.1 As has previously been mentioned, there were originally Acts of the Scots Parliament which related generally to public order, over and above the powers which existed at common law. Hume[1] explains that these statutes were introduced to deal with such conduct within towns or burghs due to the greater need to preserve order within towns, and the greater number of residents, and consequently property, capable of being damaged. Thus the statute of James II[2] provided:

> "That within the burrows throughout the realme, na leagues nor bandes be maid, nor zit na commotion nor rising of commounes in hindering of the common law, but at the commandement of their head officiar. And gif ony dois in the contrarie, and knowledge and taint may be gotten thereof, their gudes that ar foundin guiltie therein, to be confiscat to the King, and their lives at the Kingis will."

5.2 This was followed by an Act of 1491 c.34[3] and one in 1606 c.17[4] which approved "all and whatsoever acts made heretofore for staying of all tumults, and unlawful meetings and commotions within burgh". Hume[5] states that

---

[1] i.430.

[2] 1475 c.77; repealed by the Statute Law Repeals (Scotland) Act 1906.

[3] Repealed by the Statute Law Repeals (Scotland) Act 1906.

[4] Repealed by the Statute Law Repeals (Scotland) Act 1964.

[5] i.430.

this legislation was held to apply to obstructing the apprehension, imprisonment or execution of criminals, breaking open jails and freeing prisoners, interfering with courts while in session, and resisting the raising of the militia or levying of a supply. It was under these statutes that David Mowbray was tried.[1]

5.3 A further Act in 1563[2] forbade the lieges from convening or assembling within the burgh, arming themselves or raising clamour or banners without special licence. Gradually, the use of all of these older statutes declined.

5.4 By far the most important statute dealing with such conduct was the Riot Act 1714.[3] The first prohibition of this Act was against tearing down any church or religious building and the prohibition extended to dwelling-houses, barns, stables and the like. The Act however, also contained a most important provision making it an offence for a group of persons, at least 12 in number, having assembled together riotously for any purpose and to the dusturbance of the public peace, and having had a form of proclamation made to them to disperse, to remain together for an hour or more after proclamation. The Act prescribed who was empowered to make this proclamation, and it was not necessary that those at the meeting had actually attacked anyone or anything. Mere riotous assembly was sufficient. All who

---

[1] Arnot's Criminal Trials p.269 - cf. para.2.1 above.

[2] c.83; repealed by the Statute Law Repeals (Scotland) Act 1906.

[3] Repealed by the Statute Law Repeals Act 1973.

were present when the proclamation was made were presumed to hear it,[1] but if someone joined the mob after the proclamation had been made, he did not suffer the full penalty of the Act unless it could be proved that he had been made aware of it. Obstruction of the magistrate or other officer reading the proclamation was itself a crime. It will be noted that provisions similar to this still exist in some civil law systems.[2]

5.5 Recently, there have been repeated calls for the re-introduction of the Riot Act, or something like it. In the report by Lord Scarman on the Brixton Disorders of 10-12 April 1981,[3] he rejected these calls for a statutory offence penalising failure to disperse after a public warning, with a defence of reasonable excuse for a person's presence. He considered that there would be problems in establishing the offence due to the practical difficulties of making the warning heard or of proving that a particular person had been apprised of it on arriving after it had been given, and that "reasonable excuse" would give rise to further difficulties.

5.6 The Conspiracy and Protection of Property Act 1875 and the Trade Union and Labour Relations Act 1974 deal with certain aspects of industrial disputes which may be relevant in the context of public order. While section 15 of the 1974 Act makes "peaceful picketing" lawful, and section 13 of that Act confers civil immunity

---

[1] Hume op. cit. i.436, Alison op. cit. i.533, Macdonald op. cit. 136.

[2] See Part IV above.

[3] (1981) Cmnd.8427 paras.7.31 et seq.

on the perpetrators of certain acts done in furtherance of a trade dispute, it is now[1] clear that that immunity does not extend to acts which are in themselves criminal or to wrongful acts, not in themselves criminal, which form part of the ingredients of a criminal offence. If such acts contravene the terms of section 7 of the 1875 Act, which in general terms makes certain specified conduct criminal if done wrongfully and without legal authority "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing", or indeed amount to mobbing and rioting, then there is no immunity from prosecution.

5.7 Section 5 of the Public Order Act 1936, which applies to Scotland, provides that:

> "any person who in any public place or public meeting
>
> (a) uses threatening, abusive or insulting words or behaviour, or
>
> (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned,"

commits an offence. This statute is presently being reviewed jointly by the Home Office and the Scottish Office.

---

[1] Galt v. Philp & Ors. 1984 S.L.T. 28. See also Elsey v. Smith 1982 S.C.C.R. 218.

PART VI - OUR COMMENT ON THE PRESENT LAW

6.1 Although judicial and other statements as to the law of mobbing and rioting have, as we have observed, been on the face of it quite similar for some two hundred years or so, our consideration of that law and of the cases that have been prosecuted under it has led us to the conclusion that in fact the law is far from clear and that, in so far as it is understood and applied, it may have undesirable features and consequences. Although many of the difficulties that have emerged in recent years seem to have taken a practical form (in relation, for example, to the framing of indictments and the charging of juries) our concern is with the substance of the law as well as with its practice. Although in what follows we attempt to analyse the problems one by one, in fact many of them are inter-related and, in a sense, flow from each other.

Common purpose

6.2 Earlier in this paper we drew attention to the reforms introduced by the Criminal Procedure (Scotland) Act 1887 and suggested that they could be taken as sanctioning the practice of not libelling any common purpose in an indictment. Certainly that has been the practice in the great majority of cases, particularly in recent years. This, however, is not merely a matter of procedure since, whether any common purpose is alleged in an indictment or not, the crime of mobbing and rioting can only be established where it is proved that those involved were acting of a common purpose. But what exactly does this mean, and what in particular is its significance for particular acts of violence said to

have been committed by members of the mob? We begin by looking at the procedural aspects of the problem, though it is not always possible to separate them entirely from the substantive problems.

6.3 As long ago as 1841 Lord Justice Clerk Hope said:[1]

> "Mobbing is not simply a breach of the peace by a number of persons; to constitute that crime, it is absolutely necessary that there should be a common object. It is not necessary that this object should have been preconcerted. It may have been taken up after the rioting began, but there must have existed a lawless and violent purpose, and in a combined form. And it is absolutely necessary, in order to make a relevant charge of mobbing, that the indictment should set forth on the face of it, what this common object was. Acts of assault may be relevantly charged as mobbing, if they are done in furtherance of the common object. But, unless that object is set forth, it is impossible to judge whether such acts are relevantly laid."

As can be seen the Lord Justice Clerk dealt with the need to libel a common purpose as something affecting the relevancy of an indictment; and that, in our opinion, must be a sound approach. The phrase "common purpose" means little by itself, and fair notice of the charge, coupled with a satisfactory yardstick by which to test the evidence, can only be provided if the nature of any alleged common purpose is adequately specified in an indictment.

---

[1] Francis Docherty & Ors. (1841) 2 Swin. 635 at 638.

6.4 As we have seen, however, the Lord Justice Clerk's strictures appear to have gone virtually unnoticed for more than one hundred years. The case of Hancock drew attention to the need to establish a clear common purpose before guilt by accession can follow, but the opinions delivered in that case were not in fact so much directed at the need to specify a common purpose in an indictment as at the need to prove one in the course of a trial. It had, however, been our understanding that it was now to be Crown Office policy to charge mobbing and rioting only where a common purpose could be so specified in the indictment. If such a course were to be regularly followed in future, that would go some way to meeting some of the problems that have arisen in the past not only by giving reasonable notice to an accused person of the case which he has to meet but also by providing the yardstick by which evidence at the trial could be measured. As noted earlier,[1] however, it seems that our understanding of Crown Office practice following on the case of Hancock has been mistaken.

6.5 On the assumption that it is in fact to be Crown Office policy in future to follow the practice of the past and not to specify a common purpose in an indictment, it may be worth drawing attention to the fact that this can give rise to several other problems in addition to those which emerged in Hancock. If no particular purpose is specified, and a jury is merely directed that it must be satisfied that the accused were acting "of a common purpose", it is theoretically possible that each of the jurors might find a different

[1] See para.2.13 above.

purpose proved, and yet the verdict would be a unanimous one of guilty. This might not matter too much if one were merely concerned with the question whether particular accused had formed part of a mob, but it could lead to absurd and unacceptable results if the jury also had to consider the question of responsibility for particular acts of violence said to have been committed in pursuance of that common purpose.

6.6 This sort of problem would, in our view, be likely to be exacerbated in a case where there was no preconceived purpose on the part of the mob, and any purpose was simply said to have arisen spontaneously in the course of the mob's actings. This would be particularly so in the kind of case, apparently contemplated by Lord Cameron in Hancock,[1] where a common purpose is to be inferred from a series of incidents "indicative of a recognisable pattern of deliberate conduct". It seems likely that, in the passage referred to, Lord Cameron was addressing himself to the question of what may suffice for the purpose of proving a common purpose rather than to the nature of that purpose itself. He does, however, use the phrase "common criminal purpose" in a way which could, it seems to us, be taken as indicative of no more than a rather generalised assent to unruly behaviour rather than a combination of wills towards the achievement of a particular objective.

---

[1] At p.45.

6.7 This leads us to our next comment which is that, even if in future a common purpose were to be specified in indictments, there must be some uncertainty in many cases as to what is "a common criminal purpose". It is clear from the authorities to which we have referred in Part II that it is not necessary for mobbing and rioting that the purpose must itself be criminal: it may be enough if an otherwise lawful purpose is to be achieved by unlawful means. While this may in a sense be no more than a verbal point, it does suggest that there may often be considerable difficulty in determining the degree of specification required in relation to a common purpose, particularly when one bears in mind that it is only the existence of a common purpose which gives rise to the extended application of the law of concert that is to be found in mobbing and rioting.

6.8 At one extreme it may be suggested that the common purpose ought to be sufficiently specified as to justify a charge relating to particular acts of violence being levelled against each accused as an individual. Thus it might be thought that a person who is a member of a mob which assaults a number of named individuals could only be charged with mobbing and rioting, and consequently guilt by association under the mobbing and rioting principle, if the common purpose which he must be proved to have shared was the particular purpose of committing each of these specified assaults on these named individuals. It is possible to contemplate such cases arising and, if the charging of mobbing and rioting was so restricted, the extended kind of guilt by association might not be objectionable. Indeed, it

might not be significantly different from ordinary art and part guilt. However, it may be doubted whether the court in Hancock contemplated such a degree of restriction, and the authorities to which reference has been made certainly appear to suggest that mobbing and rioting may be an appropriate charge in cases where the purpose is not so restricted. Even on the authority of Hancock it seems clear that the particular crimes for which a person can be convicted are not necessarily restricted to those crimes the commission of which fall within a mob's common purpose. In any event a restriction of the sort suggested might well be inappropriate and unworkable in the sort of case, already referred to, where the purpose itself is lawful and it is only the means of achieving it which is unlawful.

6.9 A restriction of the kind mentioned would make it very difficult for the Crown to bring an appropriately serious charge in a good many cases since, in the absence of a charge of mobbing and rioting (and assuming that the accused could not be charged with assault under the normal law of art and part guilt) the only alternative might be a charge of breach of the peace. However, if such a restriction is not to apply, there is in our view considerable difficulty in determining just what is meant by a common purpose, and in deciding how that is to be specified in an indictment and proved in court. Is it, for example, enough that an accused shared a common criminal purpose, however expressed, to make him guilty of any act done by the mob, whether that act is specified as part of the common purpose or not; or is it necessary that there should have to be some kind of connection

between the particular act and the common purpose stated in the indictment, for example that it is the kind of act that might be expected to be done in pursuance of the common purpose?

6.10 Some sort of concept of foreseeability was hinted at in one of the early cases[1] where Lord Justice Clerk Hope directed the jury as follows:[2]

> "Presence in a mob, if such presence is in order to countenance what is done, will be a fact sufficient to establish a party's guilt of all that is done by the mob, of all which arises, as might be anticipated, out of the acts and excesses of a mob, once set in motion, and acting in order to accomplish a particular end."

It seems to us, however, that foreseeability in this sense is a very vague and unsatisfactory concept in cases where questions of guilt or innocence of possibly very grave assaults may turn upon it. We are not clear what such a concept means. Does it mean that, for guilt by association to arise, the particular act must have been foreseeable (whether reasonably or otherwise) in the circumstances of the particular case by those who formed the mob, or does it simply mean that the act must have been of a kind which would normally be expected whenever a mob engaged in disorderly behaviour? This is a very uncertain area, and to talk simply of "an act committed in pursuance of a common purpose" seems to us to beg more questions than it answers.

---

[1] H.M.A. v. Robertson & Ors. (1842) 1 Broun 152.
[2] At p.194.

6.11 This problem may be seen at its most acute if the act in question is a murder. There may not be too much of a problem in a case where the common purpose of the mob is in fact to commit that murder, but the situation is in our view far from clear where the murder is merely one of several acts of more or less random violence of the kind that seems to have featured in several of the mobbing and rioting cases in recent years. Assuming that it were possible in such cases to say that the mob's purpose was to attack members of another group or gang, can it really be said that a murder was committed in pursuance of such a common purpose? If, as is quite likely, any such murder is not committed intentionally in the strict sense of that word but is categorised as murder because of the wicked recklessness displayed in its commission, it is then we think difficult, if not impossible, to say that it was committed in pursuance of any purpose far less a purpose that was common to all those who were members of the mob.[1]

6.12 As can be seen our concern in relation to this aspect of mobbing and rioting is not merely with the concept of common purpose on its own but with the consequences which that has for guilt by association of what would otherwise be separate crimes provable only by the ordinary rules of art and part guilt. We turn now to consider the matter of guilt by association in rather more detail.

---

[1] Cases involving an allegation of murder may also give rise to sentencing problems. These are dealt with in paras.6.21 to 6.24 below.

Guilt by association

6.13 It may be as well at this stage to state clearly what we understand to be the difference between the law of concert in the normal case and as it is operated in cases of mobbing and rioting. In the former case, the law recognises that, to be guilty of a crime, a person need not have actively participated in every act necessary to constitute that crime. Thus, to take an example that is often given to juries, a man who stands guard at the door of a bank will be as guilty of a bank robbery as the man who puts his hand in the till. There are, however, certain restrictions to this principle. Most importantly, for ordinary art and part guilt the person concerned must not only have been aware of what the others were doing but also, and in that knowledge, must have himself participated to some extent in the acts involved. In mobbing and rioting cases, on the other hand, guilt by association can arise even where a person takes no part at all in particular acts of violence, and even perhaps where these acts take place without his knowledge, provided only that the acts in question were committed in pursuance of the mob's common purpose and that the person concerned can be taken from his other actings to have "countenanced" them, or at least to have "countenanced" the common purpose.

6.14 This extension of the normal principles of art and part guilt could possibly be regarded as acceptable if it was clear that, in cases of mobbing and rioting, an accused was merely being found guilty of that crime, with any particular assaults or other acts of violence

being no more than descriptive of the behaviour of the mob taken as a whole. However, the fact is that, apart from some observations that appear to go slightly in this direction, or at least to beg the question, the approach to the crime of mobbing and rioting has been to regard a conviction of that crime as also involving a finding of guilt in respect of all the particular acts of violence specified in the charge. Thus, juries and judges will be required to consider the question: Is this accused to be found guilty of the murder, or the assault, or whatever, by reason of his membership of the mob? Upon this basis, in his charge to the jury in the case of Myles Martin and Others[1] Lord Mure said:

> "... you may, while finding them guilty of mobbing and rioting as charged, consider yourselves justified in finding them not guilty of the assault."

By contrast a rather different approach to the matter of individual responsibility for particular assaults is to be found in the case of Lawtie and Others[2] where Lord Stott said:

> "Once it is proved against you that you formed part of a riotous mob, you will be responsible in law not only for what you do yourself, but also for any assault on persons or property which is committed at the time you are part of the mob."[3]

Statements such as these, together with the sentencing problems that can arise in mobbing and rioting cases,[4]

---

[1](1886) 1 White 297.

[2]Aberdeen High Court, February 1975.

[3]For a fuller quotation and discussion of these passages see paras.2.17 and 2.18 above.

[4]See paras.6.21 et seq.

suggest to us that this is an area of some confusion where it is not always easy to be sure whether a person is being found guilty of mobbing and rioting or of the substantive crimes libelled within the mobbing charge or both.

6.15 The foregoing statements of the law may each in its own way be reasonably accurate (and certainly they were not the subject of appeal) but they seem to us to confuse, on the one hand, the matter of guilt of mobbing and rioting (with or without any libelled aggravations) and, on the other hand, guilt of the substantive crimes contained in these aggravations. This sort of confusion may often, we think, be made worse by the fact that in many instances judges require to charge juries to the effect that what we have referred to as aggravations may, depending on the view taken of the evidence in a particular case, be regarded as separate crimes on their own, distinct from any charge of mobbing and rioting:[1] but in that event, of course, the directions given to the jury must make it clear that the ordinary rules of art and part are to be applied before any particular accused can be found guilty of such a charge.

6.16 The distinction which we are trying to draw is, we believe, a valid one, but we have not found it easy

[1] This will arise in cases where it is thought that s.61(2) of the Criminal Procedure (Scotland) Act 1975 authorises the returning of verdicts in respect of particular assaults even where a jury returns a verdict of not guilty on the mobbing and rioting charge. We have already expressed some doubt about whether that section is in fact authority for such a practice: see para.2.20 supra.

to express it with clarity - a difficulty which seems to have been shared by judges in the past. In essence the distinction is between guilt of membership of a riotous mob which performs specific acts of violence and guilt of membership of such a mob coupled with individual guilt in relation to these same acts of violence. The principle of extended guilt by association might be justified if it gave rise to guilt only in the first of these ways, but many of the decided cases, and much of what has been written on the subject, indicates that individual guilt of particular acts of violence will be the consequence where a person is found guilty of mobbing and rioting. Herein, we think, lies a major difficulty.

6.17 It seems to us that to some extent this problem has arisen because, no doubt in the interests of justice, it has been considered necessary that there should be some connection beyond mere membership of a mob and a sharing of a common purpose before responsibility in some form or another for particular acts of violence can be laid at the door of an accused person. It is not clear to us, however, what this connection has to be. As we see it there are really two points which seem to become confused in the authorities. First, what must be the relationship of the individual assault or assaults to the common purpose; and, second, what must the relationship of the accused to each of these individual assaults? The word "countenance" has frequently been used to

describe some sort of relationship[1] but, as we read the authorities, it has mostly been used as a test of whether or not an accused shared a mob's common purpose rather than as a link between a particular accused and a particular act of violence. On the other hand, the word "consent" also appears in some of the cases, though it seems to have been used on some occasions in the context of the relationship between a particular accused and particular incidents, and on other occasions in the context of the relationship between particular incidents and the common purpose.

6.18 Thus, in the case of Hancock, Lord Wylie, in his charge to the jury said, in a passage quoted by Lord Cameron:[2]

> "It may well be that you would come to the view that in some instances at least certain individual accused were not members of this group in the full and proper sense of the term as being consenting participants responsible for what the group do knowingly present in the knowledge of what is going on, but if a person knowingly associates himself with this kind of lawless gathering, he renders himself responsible in law for what is done by the mob as a mob while he is a member of it."

Later in his charge the trial judge also said:

---

[1] See e.g. H.M.A. v. Robertson & Ors. (1842) 1 Broun 152; H.M.A. v. Urquhart (1844) 2 Broun 13; and, most recently, H.M.A. v. Hancock & Ors. 1981 S.C.C.R. 32, per Lord Cameron at 44, and the Lord Justice General at 47.

[2] At p.41.

> "... you will have to consider whether, in the circumstances, their continued presence in the mob constituted consent on their part to what was going on."

A somewhat different approach, based on consistency with the common purpose, was adopted by Lord Murray in the recent unreported case of MacAndrew and Others[1] when, in his charge to the jury, he said:

> "If you consider that the assaults were consistent with a common criminal purpose of the mob and that they were perpetrated by members of the mob, then each participant who is proved to have adhered to the mob would be criminally liable for the assaults even if it is not established that he individually attacked anyone with or without a weapon."

6.19 We accept, of course, that any observations made in the course of a charge to a jury must be treated with some caution since it is no part of the judge's function to give a comprehensive analysis of all the relevant law: his charge must be tailored to the circumstances of the particular case. That said, however, it seems to us that there must be some confusion and uncertainty as to the manner in which guilt by association will arise in cases of mobbing and rioting when the test can be expressed in so many different ways.

6.20 The confusion in this branch of the law may be made worse, we think, by the manner in which these crimes are indicted. It is not made clear whether an individual is being charged with guilt of a particular crime on the

[1] High Court, Edinburgh, 8 May 1980.

ground of extended guilt by association or on the ordinary ground of guilt "actor or art and part" or both. Examples of mobbing and rioting indictments appear in the appendices to this Memorandum, but the indictment in the case of Hancock may be taken as fairly typical. The indictment in that case alleges that the various accused "did form part of a mob ... which did conduct itself in a violent, tumultuous and riotous manner" etc. The indictment then goes on "and did" followed by a long list of individual acts. As a simple matter of English, this is ambiguous. It could mean that the accused did form part of a riotous mob which conducted itself in a general tumultuous manner, and in addition that the accused did the individual specified acts; or it could mean that the accused formed part of a mob which conducted itself in a generally tumultuous manner and which also did certain individual acts. In other words, it is not clear whether the second "did" refers back to what the accused did or to what the mob did. We understand that the accepted Crown Office view is that the second "did" refers to the actings of the mob and not those of the individual accused, but we think that this style of framing the charge may well be confusing to juries, particularly in cases where they may be directed that it is open to them to treat the separate assaults as separate charges in respect of particular accused persons.

6.21 The difficulties to which we have been referring may also produce problems when it comes to sentencing, especially, though not only, if one of the particular acts said to have been committed is a murder. Assuming that one or more accused is found guilty as libelled the

question is whether the judge is bound to impose a mandatory sentence of life imprisonment or whether he has a discretion to impose some other determinate sentence upon the basis that he is truly imposing a sentence for the crime of mobbing and rioting and not for the crime of murder. In the case of Alexander Morrice and Others[1] the indictment libelled an overall charge of mobbing and rioting with two sub-heads, one alleging murder and the other assault to severe injury. Five of the six accused were convicted of mobbing and of the sub-head containing the murder charge and all were sentenced to life imprisonment.[2] The remaining accused was convicted of mobbing only and sentenced to five years detention. It is not clear whether the trial judge in this case saw himself as imposing mandatory life sentences for the crime of murder or a discretionary life sentence for the crime of mobbing and rioting. In Hynds and Others[3] that problem was removed by the verdict being one of guilty of culpable homicide but, in that case, separate verdicts were returned and recorded in respect of both the mobbing charge and the sub-heads. As a result it is not clear whether the allegation of murder was treated by the jury as a separate crime or whether they returned, in effect, a verdict of guilty as libelled but the verdicts were merely recorded in this way. This case is another

---

[1] High Court, Glasgow, December 1971 (unreported); for examples of indictments including an allegation of murder see Appendix 2

[2] Or its equivalent in respect of persons under the age of 21.

[3] High Court, Glasgow, December 1979 (unreported).

example of the confusion which seems to exist between guilt of mobbing and rioting as aggravated by particular acts of violence and guilt in respect of these acts of violence themselves. In this case the confusion was manifest in the manner in which the verdicts were given and recorded.

6.22 The sentencing problem would appear more acutely if capital punishment were ever again to be the penalty for murder, but in our view the problem does exist at present where the mandatory sentence is one of life imprisonment. Indeed, the problem is one which has been recognised in the past. Macdonald stated, at a time when capital punishment still existed, that a "capital sentence does not follow on a charge of mobbing at common law, even where death has been caused".[1] This is consistent with the views of Hume[2] and Alison,[3] but Alison goes further and says that, for a conviction of the capital crime, the proof must bring home the perpetration of that offence individually to the accused, by the ordinary principles of art and part guilt.[4]

6.23 On one view this approach is tenable if one accepts that, in a case of mobbing and rioting, an accused is being found guilty not of particular assaults or other acts of violence but of membership of a mob which perpetrated these particular acts. As has been

---

[1] p.135.
[2] i.426, 427.
[3] i.525.
[4] i.526.

seen, however, this way of looking at guilt by association has generally not been followed in the courts and elsewhere. On that basis the effect of the views expressed by Alison is unclear. The evidence in a particular case may tend to show that particular accused were directly involved in committing the murder. If, however, a jury's verdict is simply expressed as "guilty of mobbing and rioting as libelled", how is a judge to know whether particular accused have been found, in a sense, guilty of the murder by ordinary art and part rules, or on a more general basis of having, for example, "countenanced" the murder?

6.24 The case of murder presents a particularly acute problem for a sentencing judge, but the problem is, we think, a general one which may also arise in less serious cases as well. Normally, as we understand it, a judge will consider it appropriate to impose a more severe sentence (other things being equal) on an accused who commits a serious assault than on one who commits a minor assault. Assaults of varying degrees of gravity may appear in an indictment for mobbing and rioting but again, if a jury's verdict is merely "guilty as libelled", the judge will have no means of knowing what degree of personal participation in particular assaults the jury has found proved. Is he then entitled to discriminate in the matter of sentence upon his own view of the evidence? We think that the answer to that must be in the negative but, if that is right, the consequence may be that some accused will be dealt with less severely than they should or, perhaps worse, that some will be

dealt with more severely than their individual conduct actually warrants.

6.25 We suspect that juries in recent times have tended to solve this problem in some cases by returning verdicts which suggest that they are applying the normal rules of art and part to particular assaults so that only some of the sub-heads in a mobbing indictment are held as proved against particular accused. This may be a sensible approach but it seems to us, from our examination of some of the cases, to be difficult to support in logic where the jury has apparently accepted that the accused were guilty of mobbing and rioting: in that event, it seems to us, the doctrine of guilt by association should have led to findings of guilt in respect of all the sub-heads as well. Perhaps juries are simply uneasy about applying, in its fullest form, a law which may, on one view, find people guilty of serious crimes in which they have not personally participated to any extent. If that is right, it suggests that that law, and the circumstances in which juries are asked to consider it, may merit some re-consideration.

PART VII - OPTIONS FOR REFORM

7.1 In Part VI of this Memorandum we have expressed some comments on the law of mobbing and rioting as it has been described and operated over the years. As will have been seen, we have considerable reservations about that law taking, as we do, the view that in several important respects it is far from clear and that it may, in some instances, result in people being convicted of, and punished for, serious crimes of violence in which they themselves took no part, and in circumstances where, arguably, they ought not to be subject to such conviction and punishment. The complexity of the law of mobbing itself, coupled with the many options that may be open to a jury when considering a particular case, can cause considerable difficulties for judges and may on occasions, we suspect, lead to confusion in the minds of juries. To some extent these problems may be heightened by the modern practice of charging mobbing and rioting in cases of more or less random street violence where quite often the focus of attention tends, we think, to be on the particular acts of violence specified in the indictment rather than on the mobbing and rioting itself. This may be particularly so in those cases where no common purpose is stated in the indictment and none is easily discernible from the evidence. That said, it must be added that many of the problems which we have identified will still be present even in cases where a clear common purpose <u>is</u> specified and proved so long as the indictment goes beyond generalised violent behaviour and specifies, for example, particular assaults.

7.2 From a prosecutor's point of view there may be attractions in using a charge of mobbing and rioting in preference to individual charges of assault, not least in cases where it is clear that particular assaults were committed by persons who were engaged in a general tumult but where it is impossible to prove, on the basis of the normal rules of corroboration and art and part guilt, which particular individuals took part in which assaults. However, our examination of past cases suggests that, in at least some cases, it may be open to question whether the incidents concerned were truly ones of mobbing and rioting with associated assaults occurring in pursuance of a common objective or, rather, were simply incidents consisting of separate assaults committed by varying members of a group all of whom also happened to be behaving in a rowdy and violent manner.

7.3 Incidents of group violence can, of course, take many forms, and the nature of any difficulties will to some extent depend on the precise nature of any given case. To take one extreme, if it can be shown that a group of people gathered together for the express purpose of assaulting A, B and C, and A, B and C were in fact assaulted by members of that group, it is arguable, as a matter of policy, that all the members of that group should be guilty of mobbing and rioting consisting both of general violence and of these three assaults: moreover, this guilt should extend to all the members of the group irrespective of whether particular individuals personally took part in all or any of the specified assaults. This, as we understand it, would be the effect of the present law of mobbing and rioting: and in this

case the extended guilt by association in relation to non-participants in the assaults may be thought to be justifiable on the basis that, since the very existence of an obviously violent mob deters opposition and resistance, those who join such a mob, knowing and approving of its purpose, are in effect helping to bring about that purpose even if they do not themselves participate in the assaults which are the ultimate objective of the mob's activity. This sort of case, of course, comes very close to, and may indeed be indistinguishable from, cases involving ordinary art and part guilt.

7.4 In a rather different kind of case, however, the general nature of the incident, and the particular assaults, may all be outwardly the same as in the previous example, but the purpose of the group, in so far as it can be discerned at all, may simply be a rather vague and ill-defined one of showing off by behaving in an aggressive and generally violent manner. It may be impossible in such a case to fix individual guilt of the assaults by ordinary art and part principles, yet this is precisely the sort of case where it may be questioned whether it is just and principled that all the members of the group should bear responsibility for assaults perpetrated by only some of their number. Having said that, however, most people would probably agree that behaviour of this kind (even without responsibility for particular assaults) is a serious form of disorder which should be dealt with in an appropriate fashion by the law and by the courts.

7.5 It would, of course, be possible in cases such as the last one mentioned - and so long as some kind of common purpose can be discerned - to charge mobbing and rioting but without any specification of particular assaults; but in that event, of course, it is likely that no evidence could be led about any assaults that took place on the basis of the rule which prohibits evidence about a crime which is not libelled in an indictment. If, however, it was impossible to spell out any common purpose at all, then, as we understand the present law, the only available charge would be one of breach of the peace. Now, of course, breach of the peace is a charge which is capable of embracing very grave and serious conduct and it could, in theory, attract a punishment of life imprisonment. It must be said, however, that the charge is one which is more often associated with very minor rowdiness and, as such, might not be seen as appropriate for the kind of behaviour which, if only there were a common purpose, would be mobbing and rioting. It is, of course, impossible to detail in advance all the possible forms that violent group behaviour involving particular assaults might take in the future. It may, however, not be unreasonable to suggest that in the most general terms such behaviour may fall broadly into one of four possible categories. These are:

(i) Where a group has deliberately gathered together with the clear common purpose of assaulting, perhaps seriously, certain known and named individuals, and proceeds to carry out such assaults;

(2) where a group has deliberately gathered together with the clear common purpose of assaulting, perhaps seriously, members of another group or gang, whose individual identities may, however, be unknown or uncertain, and proceeds to carry out such assaults, perhaps regardless of whether or not those assaulted are in fact members of that other group or gang;

(3) where a group has come together more or less by chance with the purpose, in so far as any can be discerned at all, of acting in a generally violent and aggressive manner and of assaulting anyone who chances to cross its path or to incur its disfavour, and proceeds to behave in such a fashion; and

(4) where a group has come together more or less by chance, and without any common purpose, but which, for no discernible reason, proceeds to behave in a violent manner and where, in the course of doing so, one or more persons is assaulted by one or more members of the group.

7.6 As a matter of policy it is arguable that the present law of mobbing and rioting, with its implications for guilt by association, would be appropriate for the first of these examples provided that the common purpose could be clearly spelled out and proved. Indeed, in such a case it might well be possible to charge all of the

accused with the particular assaults, and to prove those charges on the normal principles of art and part guilt. Similarly, it may be thought that the present law of mobbing and rioting would be appropriate for the second example, though in that case there might be difficulties, of the kind we described in Part VI of this Memorandum, in determining with certainty the appropriate connection between individual members of the mob and, on the one hand, the common purpose and, on the other hand, any particular assaults committed by members of the mob. The third and fourth examples are, however, in a rather different position. Both clearly involve the commission of serious crimes but it may be difficult, if not impossible, to find any clear or principled connection between the general violence of the mob and particular assaults committed by members of the mob, far less may it be easy to find such a connection between individual members of the mob and any or all of such assaults.

7.7 If the view were to be accepted that the present law of mobbing and rioting is in a number of respects far from clear, and that it may in some cases be inappropriate, it is then necessary to consider the possible options which may be open. Before doing so, however, we think it right to make one general observation. The focus of our attention throughout this Memorandum has been on those cases where groups of persons have threatened and, as often as not, used actual physical violence to persons or property. There are, however, some old cases[1] where a charge of mobbing and

[1] See para.2.14 above.

rioting has been regarded as appropriate in respect of essentially non-violent behaviour. While it might be thought unlikely that, in modern times, a crowd would seek, for example, to bar entry to a church, there are many contemporary instances of broadly comparable behaviour associated with, for example, industrial disputes or attempts to influence defence policy. These are extremely sensitive matters, and whether or not such behaviour should ever be prosecuted, let alone whether it should be prosecuted as mobbing and rioting, raises policy considerations which are not, we think, for us, and which we have not attempted to deal with in this Memorandum. It is in any event possible, we suppose, that some of these matters may be dealt with in the course of the current review of the Public Order Act to which we referred in Part V. In the result the options which are canvassed below are seen as being primarily relevant to cases of group behaviour involving the threat or, more commonly, the use of violence.

7.8 One possible option, of course, is to leave the present law and practice unchanged. Despite our criticisms of, and reservations about, the present law this must, we think, be a serious option. We are not aware that the present law has provoked any allegations of actual injustice and, if that is so, there may be something to be said for simply leaving things as they are.

7.9 On the assumption that some reform may be thought to be desirable, it seems to us that the options fall broadly into two categories: those involving no

more than a change in current practice, particularly in the way in which indictments are framed, and those involving a more radical change in the substantive law. Although, in what follows, we detail all of these options separately, they are not necessarily mutually exclusive and some could be combined together. For example, if a new statutory crime relating to violent disorder were to be introduced, it need not necessarily replace the crime of mobbing and rioting: the latter crime, albeit perhaps with modifications, could be retained in order to deal with certain forms of group violence not falling within the definition of the statutory crime.

Possible changes in practice

7.10 Under this head the possible options appear to include:

(a) For the Crown always to state clearly in an indictment what was the alleged common purpose of the mob. This would simply involve compliance with what in any event was stated to be the law nearly 150 years ago by Lord Justice Clerk Hope[1] though, as has been seen, his opinion on this matter has gone largely unnoticed and appears still to be disregarded today. If this course were now to be followed it might meet a few of the problems that have been identified in this Memorandum but, for the reasons given in Part VI, we doubt whether it would solve what we see

[1] See para.6.3 above.

as the major problems in the law of mobbing and rioting.

(b) In addition to (a) the Crown could alter the style of words used in an indictment so as to make it entirely clear and unambiguous that any particular acts of violence are being libelled as having been committed by the mob rather than by the individual accused.[1] This would tend to remove the confusion which may, we think, be caused to juries by the present style of indictment; but once again it would not solve any of the major problems.

(c) Where the Crown wishes to seek alternative convictions in respect of particular acts of violence libelled as sub-heads in a mobbing and rioting charge, it could adopt the practice of libelling these acts as separate charges against the individuals concerned, and should not then seek to rely on section 61(2) of the Criminal Procedure (Scotland) Act 1975. It will be recalled that the Lord Justice Clerk queried why this course had not been followed in the conspiracy case of Wilson, Latta and Rooney,[2] and such a course would meet the doubts which we in any

---

[1] See para.6.20 above.

[2] See para.2.20 above.

event entertain about the effect of the statutory provision in cases of conspiracy and mobbing and rioting. A practice such as this might make it easier for juries to deal with cases where possible alternative verdicts are being put to them for consideration, but it would of course make indictments lengthy, and it would only go a small way to remove the problems and uncertainties which surround the concept of guilt by association.

(d) The Crown could restrict the libelling of particular acts of violence within a mobbing and rioting charge to those cases where such acts fall clearly within the stated purpose of the mob. That purpose, and the acts said to have been committed in pursuance of it, would, of course, require to be stated clearly in the charge itself. This would not wholly remove the difficulties which we have identified, but it would mean that the charge would be used only in those cases where the difficulties are least apparent. That would be so because in such cases there would be a clear connection between the purpose of the mob and the particular act or acts of violence, and because any distinctions between guilt by association and ordinary art and part guilt would be very slight, or even non-existent. A limitation such as this would, however,

make it difficult in many cases for the Crown to prosecute serious disorder by means of an appropriately serious charge.

(e) In cases where no common purpose could be discerned other, perhaps, than to behave in a generally rowdy and violent manner, the Crown could state that general purpose in a charge of mobbing and rioting but would not add any particular acts of violence as sub-heads to that charge. Such acts could, of course, appear in the indictment as separate charges of assault or whatever in the ordinary way if there was sufficient evidence to support such charges. A course such as this might enable some instances of violent behaviour to be dealt with by an appropriately serious charge without raising problems relating to guilt by association, but it would still be necessary under the existing law to establish some kind of common purpose. In many cases this might be impossible. Furthermore, if particular acts of violence had been committed by members of the mob, but there was insufficient evidence to bring separate charges in respect of them, the leading of evidence might be extremely difficult since witnesses would presumably be anxious to introduce evidence about these acts of violence but would have to be stopped

from doing so either on the ground that such evidence was irrelevant or on the ground that it indicated the commission by one or more of the accused of a crime not libelled against them.

7.11 Although all of the foregoing options could be introduced simply by changes in practice and without any statutory provision, the main objection to them is that they either do little to remove the obscurities and problems of the present law or they simply avoid these obscurities and problems altogether while at the same time making it difficult to deal adequately with certain kinds of violent behaviour. More radical options for reform would involve changing the substantive law, and this would, of course, require legislation.

Possible changes in substantive law

7.12 Under this head the possible options appear to include:

(a) The crime of mobbing and rioting could be retained as it is at present but subject to an express provision that a conviction of that crime would not carry with it guilt by association of any particular acts of violence specified in sub-heads of the charge. In other words, the conviction would be in respect of membership of a mob the activities of which had included these particular acts of violence. This would clarify a great deal of the confusion which presently surrounds the subject of

guilt by association but it would make the crime inappropriate for the kind of case mentioned in paragraph 7.10(d) above where it can be proved that the mob's purpose was in fact to commit these particular acts of violence. Moreover, this option would not deal with the case where considerable group violence occurs without the group having any common purpose at all.

(b) If it were thought desirable to make some provision for cases where a mob's purpose was in fact to commit particular, and specified, acts of violence, while following in general the option suggested in (a) above, this could no doubt be done by way of express exception to the general rule, but to admit guilt by association in some cases and not in others might lead to confusion.

(c) If option (a) above were to be adopted, it might be thought desirable to provide expressly that, in determining sentence after conviction, the court should be entitled to take account of evidence as to particular acts of violence in so far as that indicated the degree of gravity to be attached to the mob's activities. Possibly this is no more than a court would be entitled to do in any event, but an express removal of

the concept of guilt by association might be thought to raise doubts on this score. It would probably not be possible to go further than this and to provide that the court, for purposes of sentence, could take account of evidence as to a particular individual's involvement in specified acts of violence. This would, in a sense, be to resurrect the concept of guilt by association under another guise, and would in any event make sentence depend entirely on the judge's view of the evidence albeit that, on a particular matter, the jury might in fact have reached a different conclusion.

(d) The crime of mobbing and rioting could be retained, but the need to libel and prove a common purpose could be removed. This might go some way to meeting some of the difficulties that have been identified in this Memorandum; but the concept of extended guilt by association would still remain, and to do no more than remove the requirement of a common purpose might well simply increase the difficulties surrounding that concept.

(e) Legislation could create a totally new crime to deal with violent disorder. If it were thought that the present crime of mobbing and rioting is so defective that it ought to be abolished, the creation of such a new crime would be essential unless,

of course, it were also thought that the crime of breach of the peace could and should fill the gap. Even if the crime of mobbing and rioting were to be retained, there might still be a case for the creation of a new crime. This could be so if mobbing and rioting were in future to be restricted, either in substance or in practice, along any of the lines suggested above. Depending on the nature of any such restriction, a new statutory crime might be needed to deal with cases which could no longer be charged as mobbing and rioting. Equally, even if the present law and practice relating to mobbing and rioting were to be retained without change, there might, we think, still be something to be said for creating a new crime to deal with those incidents of violent behaviour where either there is no common purpose or there is none that can be discerned. Since many of the problems which we have identified stem in large measure from the concept of common purpose, a crime which penalised violent disorder without the necessity of there being such a purpose, and which in any event could be seen as a more serious crime than breach of the peace, might be thought to be a useful addition to our criminal law. Clearly the details of

any new crime would have to be carefully considered and the following questions in particular suggest themselves. Should any minimum number of persons be required? How is the prohibited behaviour to be described? In particular, should it be described only in general terms or should it be described in such a way as to permit reference in an indictment to particular acts of violence? What should be the maximum penalty for any such offence? These are matters of detail which would require careful consideration in the event of this option, in any of its forms, being taken further. What we are clear about, however, is that any new statutory crime should <u>not</u> contain as an essential ingredient a requirement as to common purpose. If such a crime were to be introduced it would, of course, remain possible to libel additional charges of assault or whatever against individual members of the group where evidence to justify such charges was available. So far as this option is concerned, it should perhaps be added that, if a new statutory crime were to be introduced, and if mobbing and rioting were to be retained, it might be desirable to deal with mobbing and rioting in statutory form as well since otherwise there might be uncertainty as to the scope of the residual common law

crime. That is, however, more a matter of technique than of substance.

(f) A final option which should be mentioned is the possible resurrection of something like the Riot Act involving an order to disperse, with failure to comply with such an order amounting to a crime. We doubt whether this is a serious option. Some of the reasons against it were given by Lord Scarman.[1] Moreover, our experience suggests that many of the cases that cause problems in Scotland are of a kind which involve a sudden flare up of violence with most of the violence and damage occurring well before it would ever be practicable to have any proclamation read out.

[1] See para.5.5 above.

PART VIII - QUESTIONS ON WHICH THE VIEWS OF CONSULTEES ARE SOUGHT

In this Part of the Memorandum we set out the questions on which we seek the views of consultees. As will be seen, some of the questions are fairly specific while others are rather more general in their terms. The reason for this is that, as was stated in Part I, we are not committed to recommending any reform in this area of the law. We are anxious that consultees should be free to comment on any matters relating to the law of mobbing and rioting that appear relevant, and to draw to our attention any considerations or suggestions that have not so far occurred to us. It is hoped that the more generally framed questions will provide an opportunity for this to be done.

1. Is the present law of mobbing and rioting satisfactory?

2. If not, what are seen as its major defects?

3. Even if the present law is thought to be less than satisfactory in certain respects, should any change or reform in law or practice be contemplated, or should the present law and practice be left unchanged? (Para.7.8)

4. If any changes are thought to be necessary, should these be confined to changes in practice? (Para.7.10)

5. What are seen as the advantages and disadvantages of the following possible changes in practice? -

(a) The Crown should always state clearly in an indictment what was the alleged common purpose of the mob. (Para.7.10(a))

(b) The Crown should alter the style of words used in an indictment so as to make it entirely clear and unambiguous that any particular acts of violence are being libelled as having been committed by the mob rather than by the individual accused. (Para.7.10(b))

(c) Where the Crown wishes to seek alternative convictions in respect of particular acts of violence libelled as sub-heads in a mobbing and rioting charge, it should adopt the practice of libelling these acts as separate charges against the individuals concerned, and should not seek to rely on section 61(2) of the Criminal Procedure (Scotland) Act 1975. (Para.7.10(c))

(d) The Crown should restrict the libelling of particular acts of violence within a mobbing and rioting charge to those cases where such acts fall clearly within the stated purpose of the mob. (Para.7.10(d))

(e) In cases where no common purpose can be discerned other, perhaps, than to behave in a generally rowdy and violent manner, the Crown should state that general purpose in a charge of mobbing and rioting but should not add any particular acts of violence as sub-heads to that charge. (Para.7.10(e))

6. Are there any other changes in practice which could and should be made?

7. What are seen as the advantages and disadvantages of the following possible changes in substantive law? -

   (a) It should be expressly provided that a conviction for mobbing and rioting does not carry with it guilt by association of any particular acts of violence specified in sub-heads of the charge. (Para.7.12(a))

   (b) There should be an exception to the above rule for cases where a mob's purpose was in fact to commit particular, and specified, acts of violence. (Para.7.12(b))

   (c) If option (a) above were to be adopted, it should be expressly provided that, in determining sentence after conviction, the court should be entitled to take account of evidence as to particular acts of violence in so far as that indicated the degree of gravity to be attached to the mob's activities. (Para.7.12(c))

   (d) The crime of mobbing and rioting should be retained but the need to libel and prove a common purpose should be removed. (Para.7.12(d))

   (e) (i) The crime of mobbing and rioting should be abolished and replaced

by a new statutory crime of violent disorder.

(ii) The crime of breach of the peace should be used to deal with a wider range of violent behaviour, and in particular should be used either as a substitute for mobbing and rioting or at least for those cases where mobbing and rioting may be thought to be inappropriate.

(iii) Even if the law of mobbing were to be retained, either in its present form or with modifications, there should be a new statutory crime of violent disorder, with no requirement of common purpose, to deal with those cases where mobbing and rioting in its present form is thought to be defective or inappropriate, or would be inappropriate after any such modification. (Para.7.12(e))

(f) There should be a modern replacement for the Riot Act. (Para.7.12(e))

8. If a new statutory crime as suggested in 7(e) above were to be introduced, what should be its ingredients? In particular, should any minimum number of persons be required; how should the prohibited behaviour be described; what should be the maximum penalty for any such crime? (Para.7.12(e))

9. If there were to be a new statutory crime as suggested in 7(e) above, should the crime of mobbing and rioting also be retained? If so, should any modifications be made to it either in relation to practice or in relation to substance?

10. Are there any other changes in the substantive law which could and should be made?

APPENDIX 1
(See page 35)

Example A - All the allegations of the actings of the mob contained within the one, overall charge.

Example B - Allegations of specific crimes committed charged as separate sub-heads and also charged against the mob itself, rather than against alleged individual members.

Example C - Allegations of specific crimes taken out of the overall charge of mobbing and charged against specified individuals.

APPENDIX 1

Example A

MALCOLM SMITH (John's Son), MALCOLM SAUNDERS (Robert's son), both of Lower Borve, Barvas, Ross-shire, and MALCOLM MACIVER (Malcolm's Son), and JOHN NICOLSON (Alexander's Son), both of Five-penny Brove there, you are Indicted at the instance of The Right Honourable JOHN HAY ATHOL MACDONALD, Her Majesty's Advocate, and the charge against you is, that on 17th January 1888, near the house of Robert Ross, shepherd, Galson Farm, Barvas aforesaid, you formed part of a riotous mob, which, armed with sticks, bludgeons, spades, scythes, pitchforks, and other weapons, and acting of common purpose, pulled down a quantity of the boundary fence of the said farm, and assaulted with the weapons foresaid a body of police, who endeavoured to prevent said mob from continuing to pull down said fence, and to arrest some of the members of said mob, whereby Norman Smith, constable, Habost, Ross-shire, Donald Fraser, constable, Ardgay, Ross-shire, James Paul, constable, Portmahomack, Ross-shire, John Findlay, constable, Pitcaple, Aberdeenshire, and others, were injured in their persons.

JOHN RANKINE, A.D.

Example B

JAMES BLACK and THOMAS DONAGHY, prisoners in the Prison of Barlinnie, Glasgow, you are Indicted at the instance of The Right Honourable IAN HAMILTON SHEARER, Her Majesty's Advocate, and the charges against you are that you did, on 29 May 1964, (1) in the showground on waste ground off Viewfield Road in the Burgh of Bishopbriggs, form part of a riotous mob of evil-disposed persons, which, acting of common purpose, did conduct itself in a violent, riotous and tumultuous manner, to the terror and alarm of the lieges and in breach of the public peace, and (a) did assault Daniel McArthur, 9 Barnes Road,

Glasgow, attempt to stab him with a knife or other similar instrument, kick him and knock him to the ground, (b) did assault James Reston, 45 Barnes Road, Glasgow, punch him, kick him, butt him and attempt to stab him with a knife or other similar instrument, and (c) did assault Peter Paterson Bryan, 56 Borderway, Kirkintilloch, and fight with him; and (2) in Liddesdale Road, Glasgow, at a part near Ensay Street, form part of a riotous mob of evil-disposed persons, which, acting of common purpose, did conduct itself in a violent, riotous and tumultuous manner, to the great terror and alarm of the lieges and in breach of the public peace, brandish knives, sticks and bottles and throw bottles at and fight with persons to the Prosecutor unknown, and (a) did assault said Peter Paterson Bryan and cut or stab him on the body with a knife or similar instrument, (b) did assault Charles McCormick, 191 Bardowie Street, Glasgow, and cut or stab him on the body with a knife or other similar instrument, and (c) did assault Thomas Muir, Junior, aged 16 years, 755 Bilsland Drive, Glasgow, and cut or stab him repeatedly on the body with a broken bottle and a knife or other similar instruments, whereby he was so severely injured that he died in Stobhill General Hospital, Glasgow, on 30th May 1964, and did murder him.

W. LORN K. COWIE, A.D.

Example C

LAURENCE COSTIGANE WINTERS, DAVID McCRACKEN, ROBERT DUNCAN, and JAMES YOUNGSON, all prisoners in the Prison of Peterhead, Aberdeenshire, you are Indicted at the instance of The Right Honourable HENRY STEPHEN WILSON, Her Majesty's Advocate, and the charges against you are that on 27th May 1968, in the Prison of Peterhead, Aberdeenshire, (1) you, Laurence Costigane Winters, David McCracken, Robert Duncan, and James Youngson, did form part of a riotous mob of evil disposed persons, which acting of a common purpose did conduct itself in a violent, riotous and tumultuous manner, and did shout, curse and swear, brandish weapons and threaten to assault prison officers; (2) you, Laurence Costigane Winters, did assault Norman Ritchie, an officer at said Prison,

and did strike him on the face with a pair of scissors and stab him on the back with a pair of scissors to his severe injury and the danger of his life and you did attempt to murder him; (3) you, Laurence Costigane Winters, did assault Robert Wallace, an officer at said Prison, and did stab him repeatedly with a pair of scissors to his severe injury and you did attempt to murder him; (4) you, Laurence Costigane Winters, did assault Mitchell Coull, an officer at said Prison, and did repeatedly attempt to cut him with a pair of scissors; (5) you, Robert Duncan, did assault said Robert Wallace and did strike him on the head with a wooden object to his injury; (6) you, Laurence Costigane Winters, did assault Thomas Taylor, who is employed as a Tailor at said Prison, and did strike him on the head with a pair of scissors to his injury; (7) you, Laurence Costigane Winters, did assault Robert James Pirie, an officer at said Prison, and did strike him on the head with a pair of scissors and kick him repeatedly, all to his injury; and (8) you, David McCracken, and you, James Youngson, did assault said Robert James Pirie and did grab him, struggle with him, knock him down and strike him on the head with an object to the prosecutor unknown, all to his injury.

DONALD MACAULAY, A.D.

APPENDIX 2
(See page 66)

Examples A, B, C - Cases where the charge of murder has been included as part of the allegation of mobbing (and see Appendix 1, Example B).

APPENDIX 2

Example A

JOHN GIBB and ANDREW FORBES, present prisoners in the tolbooth of Aberdeen, you are Indicted and Accused at the instance of SIR WILLIAM RAE of St Catharines, Baronet, his Majesty's Advocate, for his Majesty's interest: THAT ALBEIT, by the laws of this and of every other well governed realm, MOBBING; as also MURDER; as also ASSAULT, especially when committed to the effusion of blood, are crimes of an heinous nature and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said John Gibb and Andrew Forbes are, both and each, or one or other of you, guilty of the said crimes first and second above libelled, and of the said crime of assault third above libelled, aggravated as aforesaid, or of one or more of the said crimes, actors or actor, or art and part: IN SO FAR AS, on Friday the 22d day of May 1829, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, a mob, or great number of disorderly, riotous, and evil disposed persons, armed with sticks and other weapons, did riotously and tumultuously assemble upon King street road, at or near Aberdeen, in the shire of Aberdeen, and at or near that part of the said road where it crosses the Aberdeenshire Canal, and did, then and there, conduct themselves in the most riotous and outrageous manner, by wickedly and feloniously throwing a number of stones at Charles Bean, ...; at John Scorgie, ...; and at Adam Rae, ...; and at a number of other peaceably disposed persons who were passing along the said King street road, and by threatening violence, and causing great alarm to the said Charles Bean and others foresaid; and did wickedly and feloniously pursue the said Charles Bean, and his said companions, northward along the said King street road, still threatening violence, and throwing a number of stones at them, until they had come to that part, or near to that part, of the said King street road, where it crosses Powis burn; and did, time aforesaid, upon or near that part of the said King street road, which is one hundred yards or thereby to the southward of the said Powis burn, and in the parish of Old Machar aforesaid, wickedly and feloniously continue to throw stones at the said Charles Bean,

John Scorgie, and Adam Rae, and other peaceably disposed persons, and to threaten them with violence, and to act in the foresaid riotous and tumultuous manner, to their great alarm and danger; and you the said John Gibb and Andrew Forbes were, both and each, or one or other of you, present at, and actively engaged in said mob, by taking an active part therein, and by exciting, encouraging, assisting, aiding, and abetting the said mob, or number of disorderly and evil disposed persons, in their said unlawful, riotous, and tumultuous proceedings; and you the said John Gibb and Andrew Forbes did, both and each, or one or other of you, time above libelled, and upon or near to the foresaid part of the said King street road, which is one hundred yards, or thereby, to the southward of the foresaid Powis Burn, wickedly and feloniously attack and assault the said Charles Bean, and did, with stones, or other hard substances, strike the said Charles Bean several severe blows on the head, and body, and limbs, both when he was standing at the place last above libelled, and when lying on the ground there, to which he had been brought by one or more of the said blows, and did thereby, or by the force of his falling on the ground, occasioned as aforesaid, wound him severely on the head, to the great effusion of his blood, and did also bruise him on the right elbow, and on the right side, and on other parts of his person; and in consequence of the said wounds and injuries so inflicted as aforesaid, the said Charles Bean was severely and mortally wounded, and lingered until the morning of Sunday the 24th day of the said month of May, when he died in consequence thereof, and was thus murdered by you the said John Gibb and Andrew Forbes, or one or other of you: ... ALL WHICH, or part thereof, being found proven by the verdict of an Assize, or admitted by the respective judicial confessions of you the said John Gibb and Andrew Forbes, before the Lord Justice-General, Lord Justice Clerk, and Lords Commissioners of Justiciary, in a circuit court of Justiciary to be holden by them, or by any one or more of their number, within the burgh of Aberdeen, in the month of September, in this present year 1829, you the said John Gibb and Andrew Forbes OUGHT to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

A. WOOD, A.D.

Example B

JAMES McCLUSKEY, Abraham Zemmil, Alexander McCaughey, Archibald Gaughan, James Walker, and George Stokes, prisoners in the prison of Glasgow, you are indicted at the instance of The Right Honourable WILLIAM WATSON, His Majesty's Advocate, and the charge against you is that, on 6th May 1928, at or near Albert Bridge, Glasgow, you, being members of a gang known as the "South Side Stickers", or by some other name to the prosecutor unknown, did form part of a riotous mob of evil-disposed persons, which, acting of common purpose, did conduct itself in a violent, riotous and tumultuous manner, to the great terror and alarm of the lieges, and in breach of the public peace, and did attack and fight with members of another gang known as the "Calton Entry" gang, or by some other name to the prosecutor unknown, and did throw stones, bottles and other missiles, and did brandish swords, knives and other lethal instruments, to the danger of the lieges, and did assault James Tait, 30A Charlotte Street, Glasgow, and did stab him on the back with a knife or other sharp instrument, whereby he was so severely injured that he died on 8th May 1928 in the Royal Infirmary, Glasgow, and did murder him, and you, Abraham Zemmil and George Stokes, have each been previously convicted of breach of the peace.

ROBERT H. MACONOCHIE, A.D.

Example C

Alexander George Morrice, [and 5 others], all prisoners in the Prison of Barlinnie, Glasgow, you are Indicted at the instance of The Right Honourable NORMAN RUSSELL WYLIE, Her Majesty's Advocate, and the charge against you is that you did on 3rd September 1971 in Auchinairn Road, Northgate Road, Wallacewell Road, Croy Road and Rye Road, Auchinairn, all in Bishopbriggs, Glasgow, and on waste ground at the junction of Rye Road, aforesaid, and Wallacewell Place, form part of a riotous mob of evil disposed persons which acting of a common purpose did conduct itself in a violent, riotous and tumultuous manner to the great terror and alarm of the lieges and in breach

of the public peace, and did brandish weapons, shout gang slogans, swear, throw missiles, threaten violence to the lieges and did (a) in Rye Road, aforesaid, near Wallacewell Place, aforesaid, assault Christopher Eaglesham, 27 Rye Crescent, Glasgow, and did strike him repeatedly on the head and body with a piece of wood, knock him to the ground, strike him on the head and body with bottles and pieces of wood, punch and kick him, stamp on him and did murder him; and (b) in Rye Road, aforesaid, and on said waste ground at the junction of Rye Road, aforesaid, and Wallacewell Place, aforesaid, assault James Mackin, 10 Ryefield Road, Glasgow, and did throw bottles at him, strike him on the head and body with bottles and pieces of wood, knock him to the ground and kick him all to his severe injury.

J.G. MILLIGAN, A.D.

APPENDIX 3
(See page 12)

Recent indictment where no common purpose has been specified.

APPENDIX 3

ALEXANDER KINGSMAN, [and 18 others], you are Indicted at the instance of The Right Honourable THE LORD MACKAY OF CLASHFERN, Her Majesty's Advocate, and the charges against you are that on 1 January 1983 ...; (2) you ALEXANDER KINGSMAN, [and 18 others], did, in the house occupied by Kingsman at 317 Wallacewell Road, Glasgow form part of a mob of evilly disposed persons which acting of a common purpose did conduct itself in a violent, riotous and tumultuous manner to the great terror and alarm of the lieges and in breach of the public peace, brandish bottles, knives, hammers, forks, tin openers or similar instruments, shout gang slogans and did (a) assault Jardine Smith, Constable, Strathclyde Police, then in uniform and in the execution of his duty, and strike him on the head with a pram or similar instrument to his injury; (b) assault David Canning Reynolds, Constable, Strathclyde Police then in uniform and in the execution of his duty and strike him on the back to his injury; (c) assault Steven Elliot, Constable, Strathclyde Police then in uniform and in the execution of his duty and strike him on the chest with a knife or similar instrument to his injury; and (d) assault Kenneth Dundas, Officer of Strathclyde Police, then in uniform and in the execution of his duty and strike him on the hand and leg with a pair of step-ladders and beer can or similar instruments to his injury.

By authority of Her Majesty's Advocate

J.M. TUDHOPE
Procurator Fiscal