SCOTTISH LAW COMMISSION

ART AND PART GUILT OF STATUTORY OFFENCES

CONSULTATION PAPER

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

Comments should be sent, by 21 December 1984, to:

The Secretary
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

(Telephone: 031-668 2131)

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CONTENTS

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Introduction

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

2. Section 88 of the Road Traffic Regulation Act 1967 provides:

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

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

3. In the course of considering that question for the purposes of the Road Traffic Regulation Act consolidation some doubts were expressed as to whether

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

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

3 Criminal Procedure (Scotland) Act 1975, ss.216 and 428; and see para.14 below.

the general statutory provisions in the Criminal Procedure (Scotland) Act are in fact sufficiently wide to cover art and part guilt in the whole range of offences embraced in the road traffic legislation. The time-scale of the consolidation exercise did not permit a thorough examination of the problem, and consequently the Report recommended the re-enactment of section 88 of the 1967 Act subject to certain modifications.[1] It was thought, however, that it might be useful to examine this whole question at an early date, and the Commission has now received a reference on behalf of the Secretary of State for Scotland in the following terms:

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

Art and part guilt

4. The concept of art and part guilt has probably always been a part of the common law of Scotland, and it, or something like it, no doubt forms a part of most, if not all, systems of criminal law. At its simplest it involves an application of the principle that, where two or more people engage together in the commission of a crime, each is equally guilty of the whole crime regardless of the part played by each individual. Thus, in the example that is often used to explain art and part guilt to juries, the man who stands at the door of a bank keeping watch during a robbery is as guilty of the robbery as the man who actually removes the money from the safe. However, the degree of involvement that may render a person liable art and part can vary greatly from, at the one extreme, mere instigation or counsel to, at the other extreme, full participation

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1 Report, para.12.

in every part of the actus reus of the crime.[1] While the law recognises anything within these extremes as constituting art and part guilt, it may be thought that such a wide concept does not draw an appropriate distinction between, on the one hand, minor involvement by way of prior assistance without any active participation in the actual crime itself and, on the other hand, full participation as a principal at the time when the crime is committed. Indeed, at the latter extreme full, joint participation in a criminal act is often not seen as an example of art and part guilt at all but simply as joint wrongdoing with all concerned being equally involved as principals. So, for example, in a case where two or more people were charged with breaking into a house and stealing its contents, we think it unlikely that a judge would find it necessary to charge a jury on the principles of art and part guilt. That art and part guilt is often seen as involving something short of full participation in a crime is, we think, reflected in the words of the general statutory provision referred to in paragraph 2 above which speaks of being "guilty art and part only". On the other hand, as has been pointed out, the authorities seem clear that the concept of art and part is equally appropriate for cases of full joint participation, and this view has on occasions been echoed by some judges.[2]

5. At the other extreme the concept of art and part guilt is, as has been mentioned, apt for cases involving no more than relatively minor assistance in the commission of a crime, even where that assistance involves no participation at all at the time of commission of the crime. Thus, for example, a person who supplied the housebreakers mentioned in the previous paragraph with a ladder in order to facilitate their entry to the house in question, and with knowledge of their plan, might well be found guilty art and part in the housebreaking even although he was nowhere near the house at the time.[3] This sort of extreme example seems to arise only rarely in relation to common law crimes and, when it does, appears not to give rise to great problems. On the other hand it may be thought that in such cases the truly accessory nature of the criminal activity concerned might better be reflected by a separate charge

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

2 See, for example, Stoddart and Others v. Stevenson (1880) 4 Couper 334, referred to in para.9 below.

3 Compare, for example, H.M.A. v. Semple, 1937 J.C. 41, a case involving the supply of abortifacients to a woman.

of aiding and abetting the commission of the principal crime. Such a course is available in England under section 8 of the Accessories and Abettors Act 1861, but, although there seems to be no reason why the Scots common law should not recognise such a charge, we are unaware of such a course ever having been followed and, so far as we can tell, the principle of art and part has always been relied on in cases of complicity by accession in common law crimes.

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

Art and part in statutory offences

7. At a time when, admittedly, statutory offences as we know them today were still largely in their infancy, Hume expressed the view[1] that "the charge of art and part is suitable alike to accusations of every sort; to an indictment on a British statute, which creates some new offence, as to one laid at common law or on any of our old Scottish Acts." Although that statement of principle seems perfectly clear, judicial decisions later in the nineteenth century began to put the matter in doubt, although it seems that in none of these subsequent cases was any reference made to the above quoted passage in Hume.

8. In the case of Isabella Murray and Helen Carmichael or Bremner[2] a woman was held to be not guilty art and part under a statute which forbade the possession of base coin on the ground that the statute struck only at the person actually in possession. Subsequently, in the case of Colquhoun v. Liddell,[3] where three men were prosecuted under a statute prohibiting trespass in pursuit of game, two of the men who ran up and down a public road adjoining the field in question with the purpose of preventing the escape of a hare being chased by the third man inside the field were, by a majority, held not to be guilty art and part along with that third man. The ground of the majority decision was that,

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1 Commentary on the Law of Scotland respecting Crimes, ii.239.

2 (1841) 2 Swin. 559.

3 (1876) 3 Couper 342.

where a statute renders criminal an activity which would not otherwise be so regarded, then the statutory offence is only committed by acts having the necessary qualities or incidents; if, however, a statute merely regulates the procedures or penalties for that which is itself criminal, guilt by accession may arise in the ordinary way.[1]

9. Within a very short time the decision in Colquhoun v. Liddell was again considered by the court. In Stoddart and Others v. Stevenson[2] several men were charged under the same statute as had been in issue in Colquhoun's case. The facts were, however, slightly different. In this case all the men sat on a fence surrounding a field and, from that position, directed the activities of dogs which were searching for game in the field. Convictions were sustained in respect of all the men and, for reasons which are not perhaps wholly convincing, Colquhoun was distinguished in that, in the present case, the men, by directing their dogs, were for all practical purposes inside the field and thereby committing the offence. The Report records that all were guilty "art and part" and, while that is strictly accurate, modern practice would, as suggested in paragraph 4 above, probably regard each accused simply as a joint principal participant.

10. Ten years later alleged offences under the same Act again came to the attention of the High Court in the case of Wood v. Collins.[3] On this occasion the facts were virtually identical to those in the case of Colquhoun, but this time the court decided to follow the decision in Stoddart and Others. All the men were convicted and considerable doubt was cast on the decision in Colquhoun.

11. Despite the apparent demise of Colquhoun as an authority, it seems that uncertainty about art and part guilt in statutory offences continued for many years. In part, this was probably because of the effect of another decision

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1 See Opinion of Lord Justice Clerk Hope at 351.

2 (1880) 4 Couper 334.

3 (1890) 2 White 497.

which was given in the years between Stoddart and Wood.[1] In part, rather surprisingly, the uncertainty may have been because the qualifications of, and doubts about, the Colquhoun decision as expressed in Stoddart and Wood seem to have escaped general notice. Certainly, as recently as 1948, the editors of the 5th edition of Macdonald[2] quote at length[3] the Opinion of the Lord Justice Clerk in Colquhoun as authority for the proposition that guilt by accession is not permitted in the case of every statutory offence: they make no reference at all in that passage to the decisions in either Stoddart or Wood.[4]

Offences committed by persons in special capacity

12. As has just been mentioned the case of Robertsons v. Caird was also decided in the 1880's, and it introduced a new area of uncertainty into the matter of art and part guilt in statutory offences. That case involved the prosecution of a debtor and another person under section 13 of the Debtors (Scotland) Act 1880 which provides that a "debtor in a process of sequestration ... shall be deemed guilty of a crime" if he does certain things such as concealing his assets. The facts in that case clearly showed that the debtor and the other person had been jointly involved in the concealment of certain of the debtor's assets but the court held that only the debtor could be convicted since the statute rendered criminal only acts done by a "debtor in a process of sequestration" and, of the two accused, only the debtor satisfied that particular requirement of capacity. In other words the statutory description of the crime was not appropriate for the second accused in a material respect; for that reason he could not be guilty of the crime as a principal; and consequently he could not be guilty art and part. Whatever the legal justification for this approach, it may be thought to be objectionable on the basis that concealment of a debtor's property in order to defeat the claims of his creditors is a fraud at common law as well as under the statute, and in the former case guilt by accession is clearly possible.[5] The common law seems never to have concluded

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1 Robertsons v. Caird (1885) 5 Couper 664, discussed further in the following paragraph.

2 The Criminal Law of Scotland

3 p.236.

4 Though these cases are mentioned elsewhere: see p.7.

5 See Sangster and Others v. H.M.A. (1896) 2 Adam 182.

that a person cannot be guilty of a crime art and part simply because for one reason or another he does not possess the capacity actually to commit the principal act. Thus a woman can be guilty art and part of the crime of rape on another woman, where she assists a man to perform the act, although obviously incapable of performing it herself.[1] This sort of approach did not commend itself to the court in Robertsons v. Caird.

13. During the early part of the twentieth century further grounds for distinguishing certain types of statutory offence continued to appear though the cases involved were rather more concerned with establishing liability as principals under particular statutes than expressly with problems of art and part guilt. This may be an illustration of the tendency, previously remarked upon, to regard art and part guilt as something less than full participation as a principal. Thus in Phyn v. Kenyon,[2] a prosecution under the Salmon Fishery Act 1861, two fishermen were acquitted of using a fixed engine for the purpose of fishing on the ground that the statutory provision was expressly directed at "the owner of any engine" and it had been shown that the two fishermen were not the owners of the engine in question. In very different circumstances, in Lawson v. Macgregor,[3] where a bye-law prescribed the maximum number of people to be carried on an omnibus, convictions in respect of exceeding that maximum were sustained against the owner of the omnibus, its driver and its conductress, it being said by Lord Justice General Clyde[4] that "when there is a general prohibition against a particular act, it seems to me to be indisputable that anybody who is concerned in a contravention of the general rule is liable to the penalty attached to the general rule". By contrast to that case the later case of Graham v. Strathern[5] was at first sight similar since it also involved an

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

2 (1905) 4 Adam 528.

3 1924 J.C. 112.

4 At 116.

5 1927 J.C. 29.

allegation of overcrowding on a public service vehicle. Here, however, it was a regulation which was in issue; the regulation was expressly directed to the tramway authority; and the penalty provided for in the regulation was exigible only against the authority concerned. Consequently an appeal against conviction by the tram conductor was allowed.

A general statutory provision

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

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

That provision (though without the opening 10 words) now appears in sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975.[1] As has already been suggested[2] it appears from the use of the word "only" in the foregoing provision that Parliament saw art and part guilt as appropriate for cases of subsidiary rather than principal participation in a criminal act.

15. The Parliamentary debates for 1949 relating to the passage of the Criminal Justice (Scotland) Bill do not reveal any discussion of this provision,[3] but it may be presumed, particularly in view of the opening words, that it was enacted in an attempt to resolve the doubts and uncertainties which, as has been seen, had been accumulating during the previous hundred years or so. It would seem, however, that the intended resolution of doubt was not quite as successful as might have been hoped. There are perhaps several reasons for this.

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

2 Para.4 above.

3 Apart from an unanswered query from an English Peer about the meaning of "art and part".

Doubts not removed

16. The first reason concerns the problem which was identified in the case of Robertsons v. Caird[1] where a statute prohibits certain conduct on the part of a person having a particular position or capacity. The first case which might have dealt with that problem after the passing of the 1949 Act did not in fact do so. In McIntyre v. Gallacher[2] a foreman was charged under section 188 of the Burgh Police (Scotland) Act 1892 with failing adequately to light a hole that had been made in a street. On appeal it was held that the statute imposed the duty of adequate lighting on the responsible contractors and not on their workmen, with the consequence that the foreman's appeal against conviction was allowed. It was not argued that the foreman might have been guilty art and part and accordingly that possiblity was not considered by the court.

17. There having been no further relevant case before the court prior to 1978, Sheriff Gordon, in the second edition of his work on criminal law published that year, while disapproving of the decision in Robertsons v. Caird, appears to indicate that there is still some lingering doubt in "special capacity" cases.[3] In the very next year, however, the issue came before the court in the case of Vaughan v. H.M.A.[4]

18. In that case an accused, who was not related to the mother and son concerned, was charged with, and convicted of, causing the son to have incestuous intercourse with the mother, contrary to the Incest Act 1567. On appeal it was argued that he could not be guilty of incest as actor since he was not within the forbidden degrees; that the Act of 1567 itself made no provision except for persons within these prohibited degrees; and that section 216 of the Criminal Procedure (Scotland) Act, while being a general provision covering art and part guilt, could not derogate from the restrictive terms of a particular statute. In refusing the appeal the court, in its Opinion, stated:[5]

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1 See para.12 above.

2 1962 J.C. 20.

3 Para.5.-09 et seq.

4 1979 S.L.T. 49.

5 At p.51.

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

19. While the Opinion of the court in Vaughan v. H.M.A. appears at first sight to put the problem of special capacity cases beyond doubt, it is worth noting that elsewhere in their Opinion the court said:[1]

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

The court did not suggest that this was a mistaken concession nor did they suggest that Robertsons v. Caird would have been differently decided if section 216 of the Criminal Procedure (Scotland) Act 1975 had been in force at the time. This accordingly suggests that there may still be some classes of statutory offence where the approach taken in Vaughan would not be followed.

20. Another point that may be worth making is that, although the case of Vaughan was concerned with a statutory crime, the statute in question is one of such antiquity that the crime of incest might well have developed as a common law crime in Scotland, as has happened with many other common law crimes which originally had a statutory foundation. On that basis it is difficult to distinguish as matter of principle guilty participation in the crime of incest by one who is not within the forbidden degrees and such participation in the crime of rape by one who is not a man, a contrast which was adverted to by the court in Vaughan.[2] All of this may be the more readily distinguishable from

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1 At p.50.

2 At p.50; and see para.12 above.

the host of modern statutes which, subject to penal sanctions, impose duties and prohibitions on particular classes of person such as, for example, licencees, traders, shop-keepers, company directors, users of motor vehicles and so on.

21. The possible consequences of any lingering doubts that remain after the decision in Vaughan will be examined later.[1] For the present, however, we turn to a second reason which may have contributed to the continuing uncertainty that appears to have survived the passing of section 31 of the Criminal Justice (Scotland) Act 1949. That concerns the practice, in particular statutes, of inserting an express provision relating to aiding and abetting.

22. Although examples can be found of particular aiding and abetting provisions which apply not only in Scotland,[2] in the main the aiding and abetting of statutory offences committed in England and Wales appears to be covered by the English counterpart of section 216 of the Criminal Procedure (Scotland) Act 1975, though the English provision is quite differently expressed being in terms of aiding and abetting, counselling or procuring.[3] There are, however, several instances of express aiding and abetting provisions applicable to Scotland appearing in United Kingdom statutes. It was indeed the consolidation of one of these which gave rise to the present enquiry.[4] One example of this sort of provision - and possibly the one that is most commonly used in practice - is section 176 of the Road Traffic Act 1972. It is in the following terms:

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

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1 Para.32 et seq below.

2 See, e.g., Explosive Substances Act 1883, s.5; Official Secrets Act 1920, s.7; Representation of the People Act 1949, s.47.

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

4 It is possible that such aiding and abetting provisions are to be found only in road traffic legislation: see further in para.42 below

23. It is not at all clear why it should have been thought necessary to make such provision. It seems to have been introduced for the first time in the Road Traffic Act 1930,[1] but a desire to give Scotland the benefit of a separate offence of aiding and abetting the commission of road traffic offences does not appear to have inspired the provision in question. It was introduced into the then Road Traffic Bill only at its Report stage in the House of Lords and was described as a "drafting amendment" made necessary because what ultimately became section 10(5) of the Act was not appropriate to Scotland. Section 10 of the 1930 Act, which was otherwise applicable to Scotland, provides for certain penalties for the offence of speeding, but subsection (5) provides that if, under the relevant statute applicable in England, a person is convicted of aiding, abetting, counselling or procuring any person who is employed by him to drive a motor vehicle to commit an offence under the section, then he is to be liable to greater penalties than the principal offender. In light of this the subsection added for Scotland was in two parts. The first was substantially in the terms which now appear in section 176 of the 1972 Act[2] and the second was a proviso to the same effect as section 10(5).

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

25. The next major piece of road traffic legislation after 1930 was the Road Traffic Act 1960 which was a consolidation enactment. That Act repealed[3] the proviso to section 119(8) of the 1930 Act while leaving the first part of that subsection intact. It also, however, made new provision[4] which was substantially to the same effect as the whole of section 119(8) of the 1930 Act, including

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1 s.119(8).

2 See para.22 above.

3 s.267(1) and Sch.18.

4 s.240(1).

the proviso. The first part of section 119(8) was then left (and still remains) as a provision authorising for Scotland the separate offence of aiding, abetting, counselling or procuring the commission of an offence under what remains of the 1930 Act.

26. The next stage in relation to aiding and abetting provisions for Scotland came in the Road Traffic Act 1962. That Act repealed[1] section 240 of the 1960 Act and replaced it with a new section in precisely the terms which were subsequently reproduced in section 176 of the Road Traffic Act 1972. What had been the proviso to the original section 240 in the 1960 Act was not replaced. Likewise, the comparable English provision[2] was repealed without replacement by the 1962 Act.[3]

27. The Parliamentary debates on the Acts of 1960 and 1962 do not disclose any consideration having been given to the question whether it was necessary or desirable to retain, in relation to Scotland, express provision for an offence of aiding and abetting once the possible justification for such a provision had been removed. Nor does any consideration appear to have been given to the relationship between such provision and section 31 of the Criminal Justice (Scotland) Act 1949.[4] It seems, however, to have been the general practice of prosecutors for many years now to use the aiding and abetting provisions in the Road Traffic Acts in preference to the art and part provisions in the 1949 Act, and now sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975. Interestingly, it seems to be the practice, where a vehicle has been taken without consent or other lawful authority and several people are involved in the taking, to charge them all as principals under section 175(1)(a) of the Road Traffic Act 1972 rather than relying on the provisions of section 176. This may simply be because the evidence given at a trial may ultimately disclose that all

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1 s.40 and Sch.3.

2 1960 Act, s.4(4).

3 s.8 and Sch.1.

4 See para.14 above.

concerned in fact drove the vehicle at some stage in the escapade, though it is arguable that only one driver can be involved in the actual "taking" of a vehicle and any subsequent driving by others is no more than an item of evidence from which their art and part involvement in that "taking" can be inferred. Strictly speaking, of course, any form of joint delinquency, even where all are equally involved as principals, is a form of art and part guilt;[1] but we doubt whether prosecutors see such cases in that way, and in particular we doubt whether they would regard themselves as deriving authority from section 216 when they prosecute several accused jointly for taking a vehicle without consent.

28. In normal practice section 176 of the Road Traffic Act is relied on in relation to other provisions of the Road Traffic Acts, such as using a motor vehicle without insurance. It does not appear that section 216 of the Criminal Procedure (Scotland) Act is ever relied on in such cases. There may be several reasons for this. One reason may simply be that it is more convenient, when a prosecutor is proceeding against both a principal actor and one who has assisted in a subsidiary way, to charge both accused under the same statute. Another reason (although this has never been commented on in any of the cases) is that section 176 of the Road Traffic Act expressly provides that the aider and abettor is to be liable on conviction to the same punishment as might be imposed on conviction of the principal offence. In the context of road traffic offences that, of course, includes, where appropriate, disqualification from driving and the endorsement of penalty points on a licence. There is no provision as to penalties in section 216 of the Criminal Procedure (Scotland) Act and it may be open to doubt whether, if that section were used in the case of a person who aided or abetted the commission of a road traffic offence, the penalties at least of disqualification and endorsement would be available to the court since, upon one possible view, these special penalties are appropriate only for those who commit the relevant offences as principals.

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1 See para.4 above.

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

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

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

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

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

31. Gordon suggests[4] that "where a statute expressly provides for an offence of aiding and abetting, counselling, procuring or inciting, this will normally be construed as meaning the same as art and part guilt", and he goes on to say that "it is difficult to see why [section 176 of the Road Traffic Act 1972] is necessary in view of the general provisions of the 1975 Act". The preceding paragraphs of this paper have suggested some reasons in relation to penalties which may make the express provisions of section 176 necessary although that may have been an unintended consequence of the course originally initiated by Parliament in 1930.[5] There is, however, a further consideration which may be thought to make section 176, or something like it, desirable even if not strictly necessary.

32. As has been seen the doctrine of art and part guilt in Scots law is very flexible and extends to those whose degree of participation in a criminal act

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1 Coogans v. MacDonald, 1954 J.C. 98.

2 Under s.311(5) of the Criminal Procedure (Scotland) Act 1975.

3 e.g. Tudhope v. Eadie, 1983 S.C.C.R. 464.

4 Para.5-12.

5 See paras.23-27 above.

may be quite minor or subordinate. Indeed, it appears to be the case that the concept is sufficiently wide to cover counselling and instigation without any direct physical participation in the actual act concerned.[1] Where the art and part principle is relied on, however, the accessory participant will always be charged as though he were a principal and, if found guilty, will be found guilty of the principal crime or offence with the subsidiary nature of his participation being taken into account, if at all, only at the stage of sentencing. That having been said, it is probably the case that in the great majority of instances the concept of art and part is relied on where the person concerned has to some extent actively taken part in the commission of the crime or offence in question. Accordingly there is normally no great conceptual difficulty in regarding the person who is guilty art and part as in fact being guilty of the principal crime or offence. On the other hand, where any participation is much more remote, as in cases of counselling or inciting not involving any direct participation in the crime or offence, it may, although art and part guilt may be technically possible, be seen as rather more acceptable to find such a person guilty of a separate offence of counselling or inciting as the case might be. This "separate offence" approach may also, it seems to us, be of advantge in "special capacity" cases of the kind referred to earlier in this paper,[2] particularly if, as was hinted at in Vaughan v. H.M.A., some such cases may still not be susceptible to the art and part approach.[3] For example it might, we think, be easier to hold that a person was guilty of a separate offence of aiding and abetting a "debtor in a process of sequestration" to commit an offence under the Debtors (Scotland) Act than it was to find such a person guilty art and part in the commission of the principal offence.[4] It should perhaps also be added that what we have called the "separate offence" approach may also have the merit of making clear at the outset that a person is merely being charged as an accessory, something which is often not apparent when he is simply charged with having committed the principal offence.

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1 See para.4 above.

2 Para.12 above.

3 Paras.19-21 above.

4 cf. Robertsons v. Caird, para.12 above.

33. In the context of road traffic offences the distinctions which we have just been making may be seen most clearly in those offences which relate to a particular manner of driving a motor vehicle, such as, for example, driving without due care and attention (1972 Act, section 3), or driving, having consumed more than the permitted amount of alcohol (1972 Act, section 6(1)). Disregarding for the moment the fact that the latter offence is one of strict liability,[1] what should be the position of, say, a person who, knowing that another has consumed too much alcohol, prevails upon him to drive his motor car in contravention of section 6? Some might find it rather difficult to say that such a person was guilty art and part in the commission of the driving offence, particularly if he never actually travelled in the car himself; but that conceptual difficulty may be thought to disappear if one considers that part of section 176 which refers to "counsels, procures or incites".[2]

34. The points that have just been made may be seen fairly clearly in the case of R. v. Robert Millar (Contractors) Ltd. and Robert Millar.[3] A lorry driver, employed by a Scottish company, was sent on a journey to England in a lorry which (to his knowledge and also that of the managing director of the company) had a dangerously defective tyre. In the course of the journey the tyre burst and the lorry collided with a motor car all the occupants of which were killed. The driver was convicted of causing these deaths by dangerous driving and the appellant company and its managing director were charged with "counselling and procuring" the commission of these offences. On appeal it was held that the company and managing director had been properly convicted. Much of the

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1 This is considered later: see para.35 below.

2 Cf. Carter v. Richardson [1974] R.T.R. 314.

3 [1970] 1 All E.R. 577.

appeal was concerned with the question whether counselling and procuring was a continuing activity and whether, if it was not, the appellants in this case could be convicted standing the fact that they were in Scotland whereas the deaths had occurred in England. For present purposes, however, and ignoring the cross-border problems in that particular case, the point is that there would at best have been a certain artificiality in saying that the company or the managing director were guilty art and part in the offence of causing death by dangerous driving whereas the words "counselling and procuring" do not necessarily present the same difficulty.

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

35. Offences of strict liability, and offences specifying a particular mental element (such as knowledge) that has to be proved before guilt is established, are by no means uncommon in statutes. In such cases the mental element, if any, that would have to be established before a person could be found guilty of aiding and abetting the commission of such offences is something to which the Scottish courts have not so far had to address their attention, though some attention has been given to it in England.[1] Likewise it does not appear that the Scottish courts have had to consider the position of a person charged on an art and part basis with the commission of either an offence of strict liability or an offence requiring a particular mental element. In the absence of any existing Scottish decisions on these matters it is not really possible to say how they might be resolved. So far as can be judged, however, it does not seem that, should such matters ever require resolution in Scotland, they would be more easily resolved under the doctrine of art and part than would be the case under an express aiding and betting provision since, in the former case, there might be some artificiality in attributing to a subsidiary wrongdoer a state of mind appropriate to a principal wrongdoer whereas, in the latter case, it might be possible to take proper note of the subsidiary character of the aider and abettor in determining the mental element required of him.

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

Conclusions

36. While some of the considerations which have been ventilated in this paper are to some extent speculative, they all, with varying degrees of force, lead us to conclude that what we are dealing with here is not merely a rather technical problem of determining whether for the future specific aiding and abetting provisions can be omitted from offence-creating statutes with reliance being placed instead on the general provisions of section 216 of the 1975 Act. Our examination of this matter has persuaded us that there may be differences of emphasis and of substance between the two approaches and that in certain circumstances an aiding and abetting provision may have certain advantages which are not to be found in the art and part provisions of the 1975 Act.

37. As we see it the possible advantages of an aiding and abetting provision over a general art and part provision may be summarised as follows -

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

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

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

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1 See paras.12 and 19 above.

2 See paras.5, 32 to 35 above.

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

(d) a general aiding and abetting provision could, on the analogy of section 176 of the Road Traffic Act, make express provision that on conviction a person should be liable to the same penalties as might be imposed for the principal offence: in special capacity cases such as those involving the driver of a motor vehicle this might avoid any problems in relation to special penalties such as disqualification;[1]

(e) provision on the lines mentioned in (d) above would leave it open to Parliament, as it saw fit, to modify or restrict the applicability of certain penalties in the case of aiders and abettors, as is done in section 93(6) of the Road Traffic Act;[2]

(f) in the case of offences of strict liability or involving a particular mental element, problems which might arise if subsidiary behaviour were charged on an art and part basis might not be so great if a separate offence of aiding and abetting were available.[3]

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1 See para.28 above.

2 See para.29 above.

3 See para.35 above.

38. If it were agreed that the foregoing advantages might accrue in certain cases (and might accrue more frequently if there were a general aiding and abetting provision applicable to all statutory offences) there might be a case for proposing that the existing provisions in sections 216 and 428 of the Criminal Procedure (Scotland) Act 1975 should simply be replaced by a general aiding and abetting provision. At one stage we were attracted to this course upon the view that the concept of aiding and abetting etc. would encompass all that is presently understood under the art and part principle while at the same time dealing more readily with problems of the kind referred to in the previous paragraph. Further reflection, however, has persuaded us that it might be unwise to remove the concept of art and part guilt altogether in the case of statutory offences. For one thing, as has been seen,[1] the concept of art and part is, upon one view, appropriate for all cases of full joint participation by a number of wrongdoers and, if it were to be removed in respect of statutory offences, there might be a question as to the basis on which several accused could be jointly charged with committing the same offence. For another thing, there may well be cases where accessory behaviour falls short of full participation as a principal but is nonetheless so bound up with the principal offence that the accessory ought properly to be convicted of that principal offence: only the principle of art and part guilt would, we think, enable that result to be achieved.

39. With all of the foregoing considerations in mind a possible option is that the art and part provisions in sections 216 and 428 of the 1975 Act should be retained but that they should be supplemented, possibly on a "without prejudice" basis, by a general aiding and abetting provision relating to all statutory

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1 See para.4 above.

offences. Such a provision would make clear that the aiding, abetting etc. was to constitute a separate offence distinct from the principal offence, and would also make clear that upon conviction the penalties appropriate to the principal offence would follow (subject, of course, to any modification provided for in a particular statute). If all of this were to be done it would then be open to a prosecutor to decide in any particular case whether to proceed on an art and part basis or on the basis of the separate offence of aiding and abetting.

40. If the foregoing recommendation were to be followed there would then, of course, be a considerable overlap between the new provision and provisions such as that contained in section 176 of the Road Traffic Act. Such provisions could, however, gradually be eliminated in the course of future consolidations and, of course, any new offence-creating legislation would probably not require any comparable provision.

41. There remain two further options. The first is to repeal, either gradually in future consolidations or all at once (if they could all be identified with certainty), all of the purely Scottish aiding and abetting provisions which presently appear in statutes like the Road Traffic Acts, and to leave all forms

of accessory behaviour to be dealt with under the art and part provisions of the Criminal Procedure (Scotland) Act 1975. This was the course that was contemplated at the time when the recent consolidation of the Road Traffic Regulation Acts was being prepared.[1] While this would have the effect, at least in relation to road traffic legislation, of removing provisions which may possibly have been introduced originally more or less by accident,[2] we tend to see this as the least satisfactory of the possible options since it would do nothing to deal with the actual and potential problems identified in this paper regarding the applicability of the art and part principle to statutory offences. Moreover, such a course would still leave standing those instances of statutory aiding and abetting provisions which do not apply exclusively to Scotland.[3] Some of these provisions perform an additional function as well as making aiding and abetting an offence,[4] and could not readily be repealed without a close examination of all the policy considerations involved in the statutes in question. It would be somewhat anomalous to retain the concept of aiding and abetting for Scotland in such cases while removing it in others.

42. The second remaining option is to do nothing at all. This would mean that in those cases where there presently are specific aiding and abetting provisions it would continue to be possible to use them where, for one reason or another, that seemed to be more appropriate than relying on the art and part provisions of the Criminal Procedure Act. At the same time these latter provisions would continue to have general effect and could be relied on where necessary. We do not discount this option and consider that it is one which must be looked at seriously. It is possible that express aiding and abetting provisions applicable to Scotland are to be found only in road traffic legislation. We have not ourselves been able to find any other examples in United Kingdom legislation though it

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1 See para.2 above.

2 See paras.23 to 27 above.

3 For examples see footnote 2 to para.22 above.

4 For example, s.5 of the Explosive Substances Act 1883 makes aiding and abetting an offence "within or without Her Majesty's dominions". While that phrase may no longer be appropriate, it may still be policy to give extraterritorial effect to legislation relating to explosives.

must be stated that we have not engaged in the enormously time-consuming task of examining every single statute in force.[1] The possibility, however, that aiding and abetting provisions applicable to Scotland were originally introduced into the Road Traffic Act 1930 in order to enable a special provision relating to speeding offences to be made[2] lends some support to the view that such provisions may not have been considered in other classes of legislation.

43. Whether that is so or not, there may be a case for taking no further action on the basis that, since road traffic offences are by far the most common statutory offences prosecuted in Scottish courts, the possible advantages of an aiding and abetting provision are already available in relation to a wide range of the more common offences. Against that it may be questioned why the possible advantages of an aiding and abetting provision (assuming that we have correctly identified them) should not be available in relation to other statutory offences, even if they are not prosecuted with the same frequency.

44. To sum up, it appears to us that there are four possible options for consideration. These are:

(a) to leave things as they are;

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

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

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

As presently advised we are provisionally of the view that the second of the above options is the least attractive since it would remove, certainly so far as road traffic offences are concerned, those advantages which we see as inherent

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1 Unfortunately none of the existing computer retrieval systems has been programmed to enable Scottish provisions in U.K. statutes to be identified.

2 See paras.23 to 27 above.

in an aiding and abetting provision. For the moment, however, we have reached no conclusions about the relative merits of the other options. Consultees are therefore invited to advise us:

(1) whether they agree that an aiding and abetting provision has, or may have, the advantages which we have summarised in paragraph 37 above;

(2) whether they agree that the possible options are those set out in the present paragraphs; and

(3) which of these options (or any other) they prefer.

Scottish Law Commission
September 1984