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Examining the Doctrine of Art and Part in Early Modern Scotland

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Introduction

In 1586, James Findlay, his son John, wife Janet, and sister Elspeth, along with Tibble Smart, were accused of the art and part cruel slaughter, or killing, of Peter, David, and William Reid and their mother Christina Maher by using witchcraft and enchantment.[1] The case of *James Findlay and others* (1586) was a typical example of the way in which art and part liability operated: to demonstrate that all those within the dwelling house, by implication, were equally culpable of the resulting death. The defence of James, John, Janet, and Elspeth was that Tibble was the principal accused and the death was a direct result of his actions. These four accused were continued to another day, and Tibble proceeded to a trial. He was subsequently acquitted by an assize (jury). This construction of art and part in the early modern period is a significant departure from its modern form.

Art and part is a term of art used in Scots law to denote a form of derivative liability, namely, persons who collectively participated in some way (regardless of the role they played) in an offence and shared a common criminal purpose with the primary actor(s). This doctrine operates to extend criminal liability to a person who did not have the *actus reus* of the offence in question and may not have, in some circumstances, had the *mens rea*. In the modern context, art and part has been the subject of criticism and controversy, particularly in respect to homicide offences.[2] This is because an accused who neither inflicted nor anticipated the deceased's death could be convicted of murder.[3]

[1] National Records of Scotland (NRS) MSS JC2 vol. 2 High Court Book of Adjournal (1 December 1584–20 October 1591) f46v (88).
[2] F. Leverick, 'The (Art and) Parting of the Ways: Joint Criminal Liability for Homicide', *Scots Law Times (SLT)*, 37 (2012), 227.
[3] Ibid., 227.

There is currently no academic literature which considers the development of art and part liability. There have been modern cases heard by the High Court of Justiciary (Scotland's highest criminal court) which have considered the nuances involved in applying the doctrine to primary and co-accused individuals,[4] and Fiona Leverick has considered various issues associated with applying the principles of art and part.[5] The scholarship on criminal liability has tended to focus on the doctrinal developments associated with attributing responsibility.[6] Whilst some of it has considered the intersection of history, law, and criminal responsibility,[7] its primary focus has been on modern issues and developments. However, Nicola Lacey's study of criminal responsibility demonstrated that legal concepts connected to responsibility were intrinsically linked to the legal and cultural environments which influenced their development,[8] and Michele Pifferi has shown that the early modern period was significant because of the development in theoretical definitions and concepts.[9] This chapter builds on these insights to consider how the legal environment of the early modern period influenced the development of art and part liability before the justiciary court.

The sixteenth and seventeenth centuries witnessed important developments in the legal and political institutions in Scotland.[10] The complexities associated with applying the doctrine of art and part in the early

[4] *Docherty v. HM Advocate* 2003 SLT 1337; *Socratous v. HM Advocate* 1987 SLT 244; *McKinnon v. HM Advocate* 2003 JC 29; *Brown (Lilian Hazel Carr) v. HM Advocate* 1993 SCCR 382; *Robert Kidd, John Tiffoney v. HM Advocate* [2010] HCJAC 98, 2010 WL 3975644; *Ann Gorman v. HM Advocate* [2010] HCJAC 9, 2011 WL 398152; *John Crawford v. HM Advocate* [2012] HCJAC 40, 2012 WL 1015834.

[5] Leverick, 'The (Art and) Parting', 227.

[6] N. Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford, 2016), 10–11; H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford, 2008); J. Horder, *Excusing Crime* (Oxford, 2007); V. Tadros, *Criminal Responsibility* (Oxford, 2007).

[7] L. Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law* (Cambridge, 1996); A. Norrie, *Crime, Reason and History*, 3rd ed. (Cambridge, 2014); R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo and V. Tadros (eds.), *The Boundaries of Criminal Law* (Oxford, 2010).

[8] Lacey, *Criminal Responsibility*, 176–179.

[9] M. Pifferi, 'Criminal Responsibility and Its Histories: New Perspectives for Comparative Legal History', *Critical Analysis of Law: An International and Interdisciplinary Law Review* 4 (2017), 222, 225.

[10] W. C. Dickinson, 'The High Court of Justiciary', in *An Introduction to Scottish Legal History* (20 Stair Society, Edinburgh, 1958), 410–411; A. M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (Leiden, 2009); J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007); J. Goodare, *State and*

modern period have important implications for our understanding of its modern form. The aim of this chapter is to consider the historical development of the concept of art and part, seeking to trace the rule through selected early sources of Scots law and, for comparison, early sources of English law. It will explore the extent to which the concept was reformed by legislative provision in the sixteenth century, and will assess, through the examination of selected homicide prosecutions from 1580 to 1650, how far initiatives for enhancing the administration of justice impacted on the prosecution of art and part. The conclusions drawn about the law in practice will go beyond the law as recorded in the parliamentary legislation and key legal books to consider how concepts such as culpability, intention, and knowledge contributed to wider understandings of criminal liability.

Earlier Sources of Scots Law: *Regiam Majestatem* and *Quoniam Attachiamenta*

To investigate the historical development and textual analysis of art and part, a wide construction of the concept and terminological usage(s) was required when examining the earlier sources of law. These sections, and indeed the chapter more broadly, will not speak to the learned authority or discuss the authoritative sources of legal learning.

The medieval law book known as *Regiam Majestatem* is one of the earliest sources of Scots law. Several manuscript editions exist of this treatise.[11] There were two printed texts available in the seventeenth century and these were published in 1609 by Sir John Skene of Curriehill. These editions have been preferred here because of the date of publication and Skene's role as a jurist in the sixteenth century.[12]

Society in Early Modern Scotland (Oxford, 1999); J. Goodare, *The Government of Scotland: 1550–1625* (Oxford, 2004).

[11] A modern critical edition of *Regiam* and an in-depth study of the text can be found in J. R. Davies (ed.) with A. Taylor, *Regiam Maiestatem – The Earliest Known Version* (68 Stair Society, Edinburgh, 2022).

[12] The printed editions of this sources have been preferred, as the use of manuscript sources is problematic given their moveability in the period under review and the scope of this chapter. See: A. L. M. Wilson, 'The Transmission and Use of the Legal Decisions of Sir Richard Maitland of Lethington in Sixteenth- and Seventeenth-Century Scotland', *The Library* 19 (2018), 325, 328; A. L. M. Wilson, 'The Textual Tradition of Stair's Institutions, with Reference to the Title "of Liberty and Servitude"', in H. L. MacQueen (ed.), *Miscellany VII* (62 Stair Society, Edinburgh, 2014), 2–4; J. W. Cairns, 'The Moveable Text of Mackenzie: Bibliographical Problems for the Scottish Concept of

Skene translated and edited two versions of the text, one of which was printed in Latin and the other in Scots.[13] The Latin version of *Regiam* was then transcribed (into modern English) and edited by Lord Cooper for the Stair Society[14] in 1947.[15] The text, *Regiam*, is divided into four books, with corresponding chapters within each.[16]

An initial appraisal of the Stair Society's edition of *Regiam* demonstrates that art and part was in operation, or at least that the terminology was in use.[17] The rule can be found in book IV, chapter twenty-six, titled 'actor and art and part'.[18] The body of the text reads '*de ordine cognitionis in criminus*', which has been translated by Cooper as 'the order in which crimes should be prosecuted'.[19] It notes that if two are accused (one of theft and the other of instigating it) then the person who is accused of theft should be tried first and the other thereafter. The same, it is argued, would apply to theft and reset (handling of stolen goods). Procedurally, this is a rule regarding the prosecuting of actors for two different, if linked, crimes.

If the principal (in this case the person who stole the goods) is acquitted then it follows that the person who instigated it, or who handled stolen goods, would also be acquitted. There appears to be no difference between the actor who carries out the offence and someone who acts on behalf of another. The rule articulated in *Regiam* is in fact a rule that uses one crime (theft) to establish or corroborate the other (reset or instigating the crime). Presumably, the individual accused of theft would be tried, convicted, and punished first, so that this could be used to establish that the goods were stolen and thus the crime of reset had occurred. This, in its very basic form, is an evidential principle. This rule is very different to imposing liability for an offence on actors, regardless of their individual actions.

The other medieval source contained in the Stair Society volume prepared by Cooper from Skene's 1609 version is the text known as

Institutional Writing', in J. W. Cairns (ed.), *Law, Lawyers and Humanism* (Edinburgh, 2015), 500–505.

[13] J. Skene (ed.), *Regiam Majestatem: The Auld Lawes and Constitutions of Scotland* (1609).

[14] 'The Stair Society: Scotland's Leading Society' (Stair Society, 2023), www.stairsociety.org.

[15] Lord Cooper (ed.), *Regiam Majestatem and Quoniam Attachiamenta Based on the Text of Sir John Skene* (11 Stair Society, Edinburgh, 1947).

[16] Ibid., 20.

[17] Ibid., 247, 270–271; Davies with Taylor, *Regiam*, 437.

[18] Cooper, *Regiam*, 247.

[19] Ibid., 270.

Quoniam Attachiamentia.[20] *Quoniam* was the name given to the work of Scots law which dealt with the procedure of the baronial courts and has been attributed to the fourteenth century.[21] *Quoniam* is similarly split into chapters, each on a different matter concerning procedure. Chapter 83 discusses how those who have been accused of reset should only be punished after the thief has been convicted.[22] This concerns the same principle articulated above about summoning of individuals in the appropriate order to essentially corroborate another offence. *Quoniam* develops this further by arguing that 'when this has been done the rule should be applied that actor and art and part should be punished alike'.[23] This is a development to the rule as formulated in *Regiam* and demonstrates that both those who participated in the theft and those who are in possession of the stolen goods are equally liable for the purposes of punishment, regardless of their respective parts.

Additionally, it is not clear if the rule contained in *Quoniam* relates *only* to the punishment of thieves and resetters, or *more generally* to those accused art and part of other offences. Based on the above reading, if the rule were to be applied to all offences, then there would be no assessment of the actor's culpability. Likewise, mitigating factors which could excuse (or qualify) degrees of wrongdoing would not be considered. Both *Regiam* and *Quoniam* are silent on how varying levels of liability might be dealt with, for example, aiding, abetting, and accomplice. Indeed, given the above reading, it is submitted that these various forms of liability would be treated as equally liable. The construction of art and part liability in these two earlier sources demonstrates a strict application with respect to the punishment of participants involved, without regard to the degrees of responsibility. It is not clear how knowledge, intention, and capacity would have interacted with art and part liability, which could bring about unfair applications before the court.

A final note should be made regarding a discrepancy found between the text of *Quoniam* that Cooper translated for the Stair Society and the edition prepared by T. D. Fergus in 1996 for the Stair Society.[24] The

[20] See Skene, *Regiam*; Cooper, *Regiam*.
[21] See the introductory comments by Cooper, *Regiam*, 1–55.
[22] Ibid., 371.
[23] Ibid..
[24] T. D. Fergus (ed. and trans.), *Quoniam Attachiamenta* (44 Stair Society, Edinburgh, 1996).

version Fergus prepared does not contain the chapter discussed above regarding reset.[25] It is thus plausible that the section which appeared in Skene's edition of *Quoniam* (and prepared by Cooper) was a fragment from the chapter which appears in *Regiam* with additional material from other sources of law. If indeed this is the case, this would indicate that *Quoniam*, which is regarded as belonging to the fourteenth century and as exclusively Scottish, did not contain provisions which could be regarded as art and part.

Conversely, the aim of the compilers differed between the two texts. The text which Skene prepared was used by Scottish lawyers for centuries, as a text for legal practice. This is different from an edition which is produced as a surviving textual edition for evidence of its history.[26] Additionally, *Regiam* was a text which sought to cover both civil and criminal law, more consistent with the approach found before the royal courts,[27] whereas *Quoniam* was a manual concerned with procedure before the baronial courts.[28] This could explain why the chapter concerning art and part liability is not included in Fergus's edition. Indeed, a closer examination of the textual history of both *Regiam* and *Quoniam* may reveal whether the change in scope of this provision was made by its original compiler or at a later point in its transmission.

Reference to English Legal Authority: *Glanvill* and *Bracton*

Scholars have drawn comparisons between the text of *Regiam* and that of the English medieval law book that became known as *Glanvill*.[29] Traditionally, these considerations have looked at the composition of the two treatises.[30] The following textual analysis will, for the first time,

[25] Ibid., 387–388.
[26] Ibid., 8.
[27] Cooper, *Regiam*, 48.
[28] See ibid., 48.
[29] G. D. G. Hall (ed. and trans.), *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur: The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson with Seldon Society, London, 1965).
[30] H. MacQueen, '*Regiam Majestatem, Scots Law, and National Identity*', *Scottish Historical Review* LXXIV (1995), 1; A. A. M. Duncan, '*Regiam Majestatem*: A Re-consideration', *Juridical Review* 6 (1961), 199; A. Harding, '*Regiam Majestatem* amongst Medieval Law Books', *Juridical Review* 29 (1984), 97; H. L. MacQueen, 'Glanvill Resarcinate: Sir John Skene and Regiam Majestatem', in A. A. MacDonald, M. Lynch and I. B. Cowan (eds.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (Leiden, 1994), 385–403; A. Taylor, 'What Does *Regiam Maiestatem*

consider how the legal text construed art and part and how this informs discussions on criminal liability.

Glanvill book XIV deals explicitly with criminal pleas. This book is short, separated into various sections concerning the different crimes of homicide, arson, robbery, rape, and falsifying. It briefly excludes theft and other offences, as those crimes were not heard before the King's Court.[31] Within the section on homicide, the text refers to the two common types of homicide.[32] The first type is murder, which is done 'secretly, out of sight and knowledge of all but the killer and his accomplices'.[33] This hints at a principal killer with accomplices, but no clear conclusions can be drawn regarding liability.

The Stair Society volume of *Regiam* and *Quoniam* prepared by Lord Cooper notes that the sections discussed above were similar to the rules formulated in Henry de Bracton, *De legibus et consuetudinibus Angliae* (hereafter, *Bracton*).[34] The rule contained in *Bracton* reiterates that the principal accused should be prosecuted first and the accessories thereafter. Further sections articulate a more thorough understanding of criminal liability. The text makes it clear that if the principal is convicted it may also be presumed that those listed as accused and instigators are also guilty, and they are to appear that same day.[35] This would have created a presumption against the remaining accused. The text also outlines that the accessory must come before the instigator, as 'giving assistance in whatever way involves an act which instigating does not'.[36] This reinforces an awareness and focus on criminal acts which directly result in an outcome.

The text of *Bracton* questions why it should be that the principal, accomplices, and instigators are to be joined in such a way.[37] The text states that all parties involved (principal, accomplices, and instigators) are linked because they are considered equally liable; regardless of the

actually Say (and What Does It Mean)?', in W. Eves, J. Hudson, I. Ivarsen and S. B. White (eds.), *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries* (Cambridge, 2021), 47–85.

[31] *Glanvill*, 177.

[32] Ibid., 174.

[33] Ibid.

[34] G. E. Woodbine (ed.) and S. E. Thorne (trans.), *Bracton on the Laws and Customs of England*, 4 vols. (Cambridge, MA, 1968–77), vol. 2, 389.

[35] *De legibus* vol. 2, 392.

[36] Ibid.

[37] Ibid.

individual actions, each single action is regarded as a collective forming a single deed or joint perpetration. These discussions are far more developed than those in *Regiam* and *Quoniam*. The discussions contained in *Bracton* are, conversely, more closely aligned with the doctrine of art and part: that the natural and probable consequences of shared perpetration is to be treated as jointly liable, regardless of individual actions. The above four legal treatises differ on how those, once found guilty, should be punished. The changes in the formulation of art and part require a closer examination of the law in practice, to consider how courts dealt with more complex cases which involved taking into account principles of culpability in fairly attributing responsibility.

Legal Treatises: *Balfour's Practicks* and *Hope's Major Practicks*

Balfour's Practicks, compiled in the sixteenth century, treats the matter of liability in a comment within a section titled 'summonding of partakaris and complices'.[38] The treatise argues that the parties who are accused of a crime must appear before the summoning justice, and this applies to any persons who are named as accomplices or suspected as art and part of the alleged offence.[39] Balfour does not elaborate further, nor is it clear from the treatise how art and part liability is constituted. The only citation attributed to this section is a single case dated from 1535.

Hope's *Major Practicks* develops this further. In his title on criminal causes, he notes that all crimes must be charged in the criminal indictment as art and part.[40] This tract cites an Act of 1592, which stipulates that exemptions may not be raised in respect to whether art and part is relevant.[41] Hope further develops this by citing another Act of 1600, which concerns the 'guiltiness of crimes'.[42] He notes, with respect to the guiltiness of crime, that it is not only those who are the actual committers, but also those who were involved as 'actitors, causers and movers of the samen to be committed', as they all should be held as art and part of the said act.[43] This is a similar rule to that which is set out in *Bracton* and

[38] *Balfour's Practicks*, vol. 2, 307.
[39] Ibid.
[40] *Hope's Major Practicks*, vol. 2, 285.
[41] Ibid., 287–288.
[42] Ibid., 288 (para. 36). The corresponding citation is listed as 1600 c. 25. *Records of the Parliaments of Scotland to 1707* (*RPS*) and the record edition of *The Acts of the Parliaments of Scotland* (*APS*) produce no corresponding match.
[43] *Hope's Major Practicks*, vol. 2, 288.

confirms the rule as contained in *Quoniam* applying to all crimes: that is, regardless of the level of involvement (committing the act or causing it to come about), each are art and part of the crime and equally guilty of the resulting act. This raises a key issue: if early modern Scotland was treating actors in a crime equally, regardless of individual participation or contribution, this could result in unfair practices. If a defendant had contributed in a minor way to the offence, could it be said that they were as culpable as those who undertook the substantive act? There was very little discussion of intentionality or knowledge in Hope's *Major Practicks*, which would become significant in regulating art and part liability.[44]

These two sources demonstrate that by the sixteenth century art and part had retained its usage as a mechanism which regulated the procedural order of summoning individuals involved in the offence. However, a more developed understanding was articulated in Hope's *Major Practicks.* These developments were attributed to Parliament through legislative initiative. A closer consideration of the legislative sources is therefore necessary as these changes to art and part indicate a substantial change in practice.

The Scottish Parliament and Legislation

The Records of the Parliaments of Scotland provide further insight into the nature of art and part liability. Two fifteenth-century Acts demonstrate that liability need not be a physical act or deed in which the actor(s) participated; if someone counsels, fortifies, supplies, or offers assistance they could be held art and part of the crime.[45] Similarly, the doctrine is applied to a wide range of criminal activity from treason, homicide, theft, to the taking of salmon in 'time forbidden'.[46] Liability for art and part was not therefore confined to any one form of criminal activity and there was little difference between the ways in which this doctrine was applied to these different offences.

The phrase art and part was in use from at least the late fifteenth century.[47] The wording contained in the various Acts indicated that art and part involved extending liability to any person who participated in

[44] See section below on 'The Use of Art and Part in Practice before the Justiciary Court'.
[45] *RPS*, 1484/2/7 and 1484/2/10.
[46] Ibid.
[47] *RPS*, 1450/1/2; 1484/2/6; 1484/2/7; 1484/2/10; 1505/1/24; 1506/2/6; 1526/6/18; 1526/6/19; 1535/52; 1546/7/9; 1568/4/33; 1579/10/66.

the offence, in any way, and if this were alleged, they were treated as the principal.[48] This suggests that there would *not* be a differentiation between the principal and the secondary actors, at least where punishment might be considered. This is, again, a much wider understanding of the doctrine than was postulated in *Regiam* and *Glanvill*, which demonstrates that there was a substantive change over time to the development of extending liability.

The Act of 1592

In 1592, the Scottish Parliament enacted a piece of legislation titled *Concerning the Relevancy of Libels in Causes Criminal*.[49] The use of libel in this context refers to the formal statement of the complaints or grounds of the charge(s) in a criminal prosecution, similar to an indictment.[50] This Act stipulated:

> seeing that diverse exceptions and objections rise [raised] upon criminal libels and parties frustrated of justice, that in time coming all criminal libels shall contain that the persons complained [of are] art and part of the crime libelled, which shall be relevant to accuse them thereof so that no exception or objection takes away that part of the libel in time coming.[51]

There are three particularly noteworthy elements in this Act. The first element is that no exceptions (or defence) can be established on the basis that either party was *not* art and part of the crime. This appears to be a legislative initiative to change the confines of art and part liability as well as augmenting procedure. It would have significantly increased the number of prosecutions for those who were deemed to be art and part. The second notable feature of this piece of legislation was its implementation following concerns regarding the administration of justice. This indicates that Parliament is responding with legislation to combat a perceived issue. The third and final notable feature is that art and part was a doctrine that extended to all criminal actions, as this legislative initiative was not confined to a specific criminal activity. Here the language of the statute becomes important for our understanding of

[48] See e.g. *RPS*, 1450/1/2.
[49] *RPS*, 1592/4/95.
[50] Scottish Language Dictionaries, *Dictionary of the Scots Language*, www.dsl.ac.uk/. Hereafter referred to as *DSL*. For more on the context of this word see https://dsl.ac.uk/entry/snd/libel.
[51] *RPS*, 1592/4/95.

parliamentary reform in this area – was this strictly procedural or administrative in nature, or did it make substantive changes to the law?

Procedural or Administrative Reform?

The 1592 Act specifically called attention to the dissatisfaction and frustration of justice in respect to this aspect of the criminal process. In this context, the 1592 Act appears to be a legislative mechanism to ensure expediency in the execution of criminal justice and thereby avoid high costs and lengthy delays. It is difficult to state empirically that Scotland experienced an increase in criminal actions prosecuted before the Royal Courts. Scholars have drawn attention to the greater number of cases that were handled by the English courts during this period, which in turn increased business, put greater pressure on the courts, and created longer delays.[52] In the present state of scholarship, any suggestions as to whether these trends also occurred in Scotland can only be tentative.

The 1592 Act does not indicate an administrative change when compared to similar statutes which regulated the Scottish civil court, the Court of Session. Administrative changes before the Court of Session generally concerned 'regulating the number required for a quorum, the order for hearing actions (i.e., "tabling"), other matters associated with tabling, calling and continuations, the roles of procurators, clerks and macers, and the fees they might charge'.[53] The changes enacted by the 1592 Act do not alter the administrative processes of the court. The Act does however alter the use of exceptions (defences) relating to art and part.

Exceptions were regulated under the Romano-canonical procedure according to type. Mark Godfrey has noted that Scotland was a 'notable instance of embedding the procedural law of the *ius commune* within a distinctive native tradition'.[54] The procedural tradition of the *ius commune* was not static and there was variation among the courts – the so-called *stylus curiea*.[55] There were however 'procedural items characteristic of a Romano-canonical approach . . . in which certain types

[52] B. J. Shapiro, *Law Reform in Early Modern England 1500–1740: Crown, Parliament and the Press* (Oxford, 2019), 43; S. Hindle, *The State and Social Change in Early Modern England 1550–1640* (Basingstoke, 2000); M. Braddock, *State Formation in Early Modern England 1550–1700* (Cambridge, 2000).

[53] Godfrey, *Civil Justice in Renaissance Scotland*, 170.

[54] Ibid., 170.

[55] R. H. Helmholz, *The Oxford History of the Laws of England Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004), 313.

of defences to claims would be categorised in terms of the Romano-canonical taxonomy of "exceptions"'.[56] There were three main categories of exceptions recognised in the *ius commune*. These were dilatory, peremptory, and those which were difficult to classify and have been referred to as 'mixed'.[57] The various types of exceptions had to be raised at certain *stages* of the proceedings, as they either prevented further process of the action or excluded the plaintiff's actions altogether. If the defendant failed to raise the exception(s) at the appropriate stage, they lost their right to do so.

The order in which the exceptions were listed was prescribed by law, to ensure a procedural framework in which all parties and the court operated.[58] This phenomenon was also used in common law jurisdictions.[59] Before the justiciary court, the so-called *stages* of the trial were somewhat different, generally all evidence and/or arguments that related to any matter had to be raised prior to the case being put to the assize (the jury).[60]

The 1592 Act therefore explicitly regulates exceptions which relate to the part of the criminal indictment that accused *the parties as art and part of the crime*. There does not appear to be a temporal limit, and therefore it can be concluded that exceptions raised at any point in the trial which related to whether the defendant(s) were art and part would not be heard. This would not have barred the defendant from raising *other* defences. Critically, the changes enacted by the 1592 Act were not only a change to the procedure before the justiciary court but also to the substantive operation of this device.

Substantive Law Reform?

The Act of 1592 expressly stated that *all criminal libels* should include that the persons complained of *are art and part of the crime*.[61] A moderate reading of this indicates a substantive change to the confines

[56] Godfrey, *Civil Justice in Renaissance Scotland*, 170.
[57] Helmholz, *Oxford History*, 323; Godfrey, *Civil Justice in Renaissance Scotland*, 171.
[58] C. H. Van Rhee, 'The Role of Exceptions in Continental Civil Procedure', in P. Brand, K. Costello and W. N. Osborough (eds.), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference, Dublin, 2003* (Dublin, 2005).
[59] Ibid.
[60] S. Dropuljic, 'The Justiciary Court and Criminal Law in Early Modern Scotland from 1580 to 1650, with Special Reference to Actions for Homicide' (unpublished PhD thesis, University of Aberdeen, 2023), 55–57, 68–75, ch. 5.
[61] RPS, 1592/4/95.

of art and part liability. It was no longer a device used to regulate the procedural summoning of parties, nor was it a form of derivative criminal liability. Art and part was no longer a doctrine that *extended* criminal liability. Rather, it was a doctrine to *inculpate* (incriminate) those who were complained of as art and part of the crime. This would have created an irrefutable presumption against any person who acted with others in joint preparation of an offence (especially as the Act expressly prohibited any defence to that point of the charge). Therefore, presumably, proof (or evidence) would not be required to establish that the parties acted in joint preparation of the offence as there was an express requirement to charge all persons complained of in any criminal cause as art and part. This would be a substantive change to the raising and prosecuting of offences before the court, in respect to the confines of criminal liability and in core requirements of proof. In addition, the Act is silent regarding how those who were found guilty would be treated (or punished) by the law. It can only be presumed that regardless of the role each actor played in the activity, they were equally liable for the resulting act. Importantly, all these changes would have altered the substantive operation of the device, as the nature of criminal liability was widened, and core requirements of proof would have been removed (so far as they related to this specific aspect of the criminal libel).

Did the 1592 Act Reform the Administration of Justice?

Early modern law reform in Scotland typically involved revisiting or codifying the existing law rather than superseding or revising it.[62] In the sixteenth century, commissioners were tasked with making the existing law more accessible.[63] For example, the terms of reform for the 1575 and 1592 commission were to consider and draw together the law from the various law books, Acts of Parliament, and the decisions before the Court of Session.[64] The 1575 commission resulted in *Balfour's Practicks* and the 1592 commission resulted in the volume titled *The Lawes and Actes of Parliament*, Skene's *De Verborum Significatioune* (an account of the difficult and technical words found in the old laws), as well

[62] Goodare, *Government of Scotland*, 74.
[63] Ibid., 76–77.
[64] RPS, 1592/4/67; J. W. Cairns, 'Historical Introduction', in K. Reid and Zimmermann (eds.), *A History of Private Law in Scotland*, 2 vols. (Oxford, 2000), 96–97.

as Skene's edition of *Regiam Majestatem*.[65] These publications meant that a considerable amount of legislative material was available in print for the first time, with regular printing of Acts of Parliament thereafter.[66]

Likewise, the decades following the 1580s and 1590s witnessed the Scottish Parliament becoming a legislature which reformed the law rather than merely debating it.[67] Successive parliaments would go on to pass more new legislation than previous parliaments.[68] Goodare notes that the legislation of two parliaments 'in particular – those of 1584 and 1587 – can be seen as an absolutist manifesto [of James VI and I]'.[69] Following on from 1587, a significant amount of new legislation as well as reforming legislation was enacted.[70]

It is within this reform environment that the 1592 Act needs to be considered. On the one hand, commissioners were undertaking a consolidation exercise to examine existing laws and make them more accessible. On the other, there appears to be a legislative initiative to reform, specifically ensuring the efficient administration of criminal justice. The evidence from this examination indicates that the 1592 Act would have, whether purposely or incidentally, increased the remit of art and part liability and the criminal law.

The Use of Art and Part in Practice before the Justiciary Court

The analysis of the catalogue of homicide hearings from 1580 to 1650 revealed that 82 per cent of such hearings brought before the court were charged as art and part.[71] From a purely numerical perspective, this indicates that the 1592 Act was being respected. There was, however, a fluctuation in the use of art and part throughout the period under review. During the first decade (1580–1590), 86 per cent were indicted as art and part. Thereafter the use of art and part remained significantly high, with 92 per cent indicted from 1600 to 1609; and 90 per cent from 1610 to 1619. There was a drop in its use from 1640 to 1650, with 66 per cent

[65] Cairns, 'Historical Introduction', 96–97.
[66] Ibid., 97.
[67] A. R. C. Simpson and A. L. M. Wilson, *Scottish Legal History: 1000–1707* (Edinburgh, 2017), vol. 1, 224.
[68] Goodare, *Government of Scotland*, 72–73.
[69] Goodare, *State and Society*, 73.
[70] Simpson and Wilson, *Scottish Legal History*, vol. 1, 225.
[71] The methodology of that study can be found at Dropuljic, 'The Justiciary Court and Criminal Law', 60–74.

indicted as art and part. This could be attributed to the overall decrease in actions before the court because of the political and religious turbulence of the wider historical environment.[72] Conversely, it could be attributed to a change in practice. This section will examine the complexities encountered in practice by practitioners when advancing their clients' defences, and how key legal concepts evolved through adaptation in the court.

The Law in Practice: Prosecuting Art and Part

The case of *James Findlay and others* (1586), discussed in the introduction, illustrates art and part in operation. The five individuals were accused as art and part because they were all within the dwelling house and therefore equally culpable of the resulting deaths which occurred therein.[73] However, the advocate for the first four accused (Mr Thomas Craig) argued that they should not be put to a trial because the death was the direct result of Tibble Smart's actions, and he was the principal accused. Craig contended that the principal accused should be tried first. The trial of the principal accused would, once found guilty, corroborate the trial of the remaining co-accused. The justice agreed and the first four accused were continued to a later date and Smart was then put before the assize and acquitted of the slaughter. It is not clear what happened to the other accused persons, but it is presumed that no trial took place following the acquittal of Smart. The procedural regulation of the principal accused and the remaining actors demonstrates the rules as evidenced above in practice before the court. Importantly, this demonstrates that the law regarded at least one person as the principal accused, which became an important development and distinction before the court.

As a matter of course, the focus during the prosecution of homicide was on the common activity which the accused persons undertook and/or were involved in.[74] Art and part were not the only words invoked during the prosecution. For example, the phrasing 'art, part, redd and

[72] D. Stevenson, 'The Covenanters and the Court of Session, 1637–1650', *Juridical Review* (1972), 227; A. MacDonald, *The Jacobean Kirk, 1567–1625: Sovereignty, Polity and Liturgy* (London, 1998), ch. 4; Ford, *Law and Opinion*, ch. 2.

[73] NRS MSS JC2/2, f46v.

[74] NRS MSS JC2 vol. 3 High Court of Adjournal (15 May 1596–26 June 1604) f1063r (1063)–f1065r (1065); JC2 vol. 4 High Court of Adjournal (25 July 1604–19 July 1611) 807.

counsel' of the crime was included in the indictment.[75] The counsel aspect retained its mundane meaning of giving guidance – specifically when certain individuals were evidenced to have 'communed' in the perpetration of the offence.[76] The 'redd' aspect is ambiguous. Given the context in which it was used, it appears to have invoked a similar meaning to guidance, a form of advising as to a certain course of action.[77] Individuals therefore invoked liability, not only from participating in the physical acts of the offence, but also in the counselling and preparatory stages of the offence. This, importantly, did not substantially change the liability that was imposed. Therefore, in attributing criminal liability, the law did not regard those who planned the crime (perhaps a more active role) and those who were incidentally involved (perhaps a more passive role) as any different. This reiterates the rules as discussed above, that all those who participated in the joint perpetration of an offence were equally liable.

In summary, the activity involved in art and part liability included physical acts as well as counselling, aiding, or advising as to a certain course of action. Art and part had a wide remit in the early modern period and conveyed derivative liability from different forms of participation. Practitioners before the court encountered issues in practice when advancing defences for their clients. Advocates before the court had to raise defences against establishing core requirements of the liability, predominantly this involved an argument that evidence of intentionality and knowledge were lacking.

The Use of Exceptions (Defences) in Practice

The case of *William Jameson and another* (1632) demonstrates the practical developments of art and part liability.[78] This case accused two persons, William and Walter Jameson, as art and part of the killing of Harry Hamilton. It was alleged that they were on the public highway between Leith and Edinburgh and committed a deadly strike, under the silence of night, upon the victim who died two days later.[79]

[75] NRS MSS JC2/2, f139r (273); JC2/3, f1005r (1005)–f1005v (1007).
[76] NRS MSS JC2/2, f139r (273).
[77] DSL, https://dsl.ac.uk/entry/dost/rede_n_1.
[78] NRS MSS JC2 vol. 7 High Court Book of Adjournal (26 March 1631–15 November 1637) f052r; Stair A. Gillon, *Selected Justiciary Cases 1624–1650,* vol. 1 (16 Stair Society, Edinburgh, 1953), 201–204.
[79] NRS MSS JC2/7, f052r.

The principal dispute before the court was whether William Jameson, who was the son of Walter, *could be held to be art and part for the killing by being in the company of his father whilst the deadly strike was given*.[80] The emphasis has been added to demonstrate that, although expressly prohibited by the 1592 Act, this action involved the use of a defence which pertained to the part of the libel that charged both defendants as art and part. Therefore, whilst the 1592 Act was an effort to introduce reform, there were exceptions in practice to the implementation by the courts.

The advocate for the defendant (Mr Robert Craig) advanced an argument before the court that William had no previous knowledge of a plan to undertake the killing, he had no weapon upon his person, and what had occurred between his father and the victim was on the spur of the moment, proceeded upon randomly.[81] This indicates that lack of knowledge meant that he could not have intended to participate in the joint perpetration of the offence. The focus on lack of intention and knowledge of a common purpose demonstrates that this was a key component of art and part liability. This also highlights concerns that can arise when transposing knowledge of the offence from one accused to the other.

If considered purely on the facts, William (regardless of his involvement in the physical act) was present when a lethal act took place. A strict reading is that he was art and part liable for the offence, regardless of the role he played. This is how most instances before the court were tried. The allegation that William had no prior knowledge and was merely an innocent bystander contributes to our understanding of the doctrine in practice. If a person, by their act, was closely associated with or involved in the activity, they could be charged art and part. Therefore, an evidential presumption of art and part liability was created by the collective involvement in the circumstances accompanying the fatal act. Additionally, it was the accused who would have to disprove the allegations brought forward and demonstrate that they were not privy to the planning, nor had they willingly entered into a joint venture – as evident from the argument by the advocate. Although no evidence was supplied to support the claim that William was not involved the argument put forward seems to have been persuasive, as William was acquitted by the assize.

[80] Ibid.
[81] Ibid.

Interestingly, the courts would hear arguments about the respective roles of the defendants to differentiate their punishments.[82] This is despite the Act of 1450 which stipulated that those alleged art and part were to be punished equally to the principal doer. For example, in the case of *Patrick McGregor and others* (1636), several persons were charged with multiple offences including slaughter. The verdict was culpable and convict; however, the court differentiated the accused based on culpability. Two of the accused (Allister and Callum Forbes) would be referred to the Privy Council for their punishment to be considered in light of their judicial confession, indicating their marginal contribution to the crimes.[83] This is a significant development. It demonstrates that a practice developed before the court to refer marginal cases to the Privy Council so that punishment could be reflective of their individual contribution and therefore their respective culpability in the offence.

Conclusions and Reflections

This chapter has begun the task of re-examining a key criminal law doctrine, art and part liability, to understand its development. In the earlier sources (*Regiam* and *Quoniam*), art and part liability had retained a narrow application, as it was a procedural mechanism to regulate the summoning of individuals for offences. There was some indication that this device regulated derivative liability, but the extent and scope was obscured in the law books and practicks.

An examination of the legislative sources revealed a much wider understanding of art and part liability. The Acts of Parliament demonstrated the extent to which this device applied to all offences and included physical acts as well as deeds such as counselling, fortifying, supplying, or offering assistance. The 1592 Act made significant changes to this device and reformed the raising of exceptions. The wider legal environment demonstrated that royal justice was under scrutiny, by both Parliament and the King. The 1592 Act changed the substantive operation of the device, as the nature of criminal liability was widened and core requirements of proof relating to establishing liability were removed.

The law in practice before the court challenged the rules expressed in the earlier written sources, practicks, and legislation. The practice before the court confirmed elements of art and part liability as a summoning

[82] *RPS*, 1450/1/2.
[83] NRS MSS JC2/7, f333v.

device to prosecute those involved in committing an offence. There were, conversely, actions which challenged the scope and impact of the legislation. Practice developed not only to challenge aspects of the libel (indictment) which alleged art and part liability, but also to differentiate art and part actors as to their involvement in carrying out the offence. The latter allowed the court (and privy council) to mitigate punishments according to the respective actor's level of culpability.

The developments before the court demonstrate two points. The first concerns legal reform in the early modern period. A numerical analysis showed an appreciable change to the use of this mechanism. Combined with the legislative initiatives and reformulating of the law, this indicated that the 1592 Act was a successful attempt to regulate criminal procedure. That said, the wider practice of the court was not reflective of this legislative turning point for art and part liability. There was a continued use of exceptions to differentiate involvement of actors, to ensure broader principles and core constituent elements of the offence (such as knowledge and intention) were satisfied.

The second point relates to refinement of sentencing procedures before the court. The doctrine of art and part treated those who participated in the offence, regardless of their role, equally before the law. However, the practice of referring punishments to the Privy Council demonstrates that the court was circumventing this approach by considering an individual's degree of involvement. These wider practices demonstrate the contentious use of the doctrine and the unfair outcomes which could result from an expansion in the scope of criminal liability. This is significant because this differs substantially to the modern form.

These changes in the legal landscape illustrate that the early modern period is an important historical period, understandings of which can contribute to discussions on criminal lability and how notions of culpability manifested over time. Importantly, the law of art and part liability required the raising of exceptions to ensure against any injustices. This is significant as it forms part of a wider picture in the historical foundation of art and part liability. Returning to the early modern period and the various sources of law therefore contributes to an important but underresearched area of Scottish criminal law.