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Distinctions Between Accessory Before the Fact and Principal

upholds an agreement to lease land which, on its face, has the possibility of not vesting during the prescribed time should be made only after careful consideration.

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DISTINCTIONS BETWEEN ACCESSORY BEFORE THE FACT AND PRINCIPAL

"The ancient doctrine that 'no accessory can be convicted or suffer any punishment where the principal is not attainted or hath the benefit of his clergy' led to the escape of many offenders. On the other hand it served in certain cases to mitigate the ferocity of the ancient law in the punishment of felons."[1] Whereas the common law denied a merger of the crimes of accessory before the fact and principal, modern statutes have removed this distinction from the criminal law.

Justice was often thwarted by the older rule and a desire for reform brought about statutory modification in England. Two English statutes, in 1826 and 1848 were designed to change this outmoded rule.[2] The 1848 statute was reenacted with unimportant changes in 1861 and this statute remains in effect today.[3] The statute of 1826 authorized conviction of a separate substantive offense,[4] but it was interpreted to mean "not to make those triable who before could never have been tried."[5] The real reform came in 1848 when the statute allowed an accessory to be indicted, tried and convicted as a principal felon.[6] The modern practice is to make the accessory before the fact triable independently of the principal[7] and to "provide that the prior conviction of the principal is not a pre-condition of the prosecution of an accessory before the fact."[8]

The New York court in *People v. Bliven*[9] speaking of the common law immunity of the accessory when the principal was not tried or

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[1]Russell, Crime 164-5 (11th ed. 1958).

[2]Criminal Justice Act, 1826, 7 Geo. 4, c. 64; Criminal Justice Act, 1848, 11 & 12 Vict., c. 46.

[3]Accessories and Abbettors Act, 1861, 24 & 25 Vict., c. 94. A check of this statute to 1961 shows it to be still in effect.

[4]7 Geo. 4, c. 64.

[5]Rex v. Russell, 1 Moody 356, 368, 168 Eng. Rep. 1302, 1306 (Cr. Cas. Res. 1832).

[6]24 & 25 Vict., c. 94.

[7]See, e.g., Ind. Ann. Stat. § 9-102 (1956); Kan. Gen. Stat. Ann. § 21-105 (1949); Mo. Rev. Stat. § 556.170 (1959); N. M. Stat. Ann. § 41-6-34 (1953); Vt. Stat. tit. 41, ch. 375 (1947).

[8]Model Penal Code, appendix 41 (Tent. Draft, No. 1 1953).

[9]112 N.Y. 79, 19 N.E. 638 (1889).

not amenable to prosecution asserted: "The general policy throughout this country and England runs in favor of more liberal views at the present time in regard to the treatment of those technicalities which formerly existed as obstructions in the path of the enforcement of the criminal law."[10]

Modern statutes relating to accessories before the fact are based on two theoretical grounds. Some allow conviction of a separate substantive offense,[11] while others allow conviction as principal upon evidence showing the defendant to be an accessory.[12] Some jurisdictions do not permit conviction of the accessory when the principal has been acquitted;[13] others allow this procedure on the theory that the second jury, not being bound by the decision of the first, has been convinced of the guilt of the principal offender.[14]

The problem of the accessory-principal relationship was raised in the recent North Carolina decision of *State v. Jones*[15] in which Jones was convicted of murder in the first degree on the evidence of three accomplices. There was evidence that the defendant was an accessory before the fact, but the trial court refused to instruct the jury on this point. The supreme court in the opinion of Chief Justice Winborne, with three judges dissenting, held that the crime of accessory before the fact is a lesser included offense, reversed the conviction for the failure to so instruct the jury, and ordered a new trial.

Two of the dissenting justices felt that the evidence failed to show that the defendant could have been an accessory before the fact and would have affirmed the judgment; they further disagreed with the majority that an accessory before the fact is a lesser included offense.[16]

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[10]19 N.E. at 644.

[11]Del. Code Ann. tit. 11 § 102 (1953); Mass. Ann. Laws ch. 274, § 3 (1956); Wis. Stat. Ann. § 939.05 (1959). For an excellent discussion of accessory before the fact as a separate substantive offense see Schwartz v. State, 37 Del. 484, 185 Atl. 233 (1936);

[12]Fla. Stat. Ann. § 776.011 (Supp. 1960); Pa. Stat. Ann. tit. 18, § 5105 (1945); Tex. Pen. Code Ann. art. 80-82 (1948). For a discussion of this principle see Burnett v. People, 204 Ill. 208, 68 N.E. 505, 510 (1903).

[13]Murphy v. State, 184 Ind. 15, 110 N.E. 198 (1915); State v. Jones, 101 N.C. 719, 8 S.E. 147, 148 (1888); Maybush v. Commonwealth, 70 Va. (29 Gratt.) 857 (1878).

[14]Commonwealth v. DiStasio, 297 Mass. 347, 8 N.E.2d 923, 929 (1937); Fleming v. State, 142 Miss. 872, 108 So. 143, 145 (1926); Thomas v. State, 40 Okla. 204, 267 Pac. 1040, 1043 (1928).

The California statute says: "An accessory to the commission of a felony may be prosecuted tried and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted." Cal. Pen. Code § 972.

[15]254 N.C. 450, 119 S.E.2d 213 (1961).

[16]State v. Simons, 179 N.C. 700, 103 S.E. 5 (1920). Precedent in North Carolina that accessory before the fact is a lesser included offense is based on the case of State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). The decision in Bryson appears to

Another dissenting justice felt the problem of accessory in any degree did not arise.

State v. Jones raises the basic problem once again, *i.e.*, whether an indictment for the principal crime gives notice to the defendant that he may be convicted as an accessory. Specifically, is the right to be informed of the charge violated by indictment as a principal and conviction as an accessory? The corollary and less disputable problem of whether an accessory may be indicted, tried and convicted before the principal has been practically legislated out of existence.[17]

The common law did not authorize conviction as accessory before the fact when the indictment was as a principal in the commission of the crime.[18] *State v. Buzzell*[19] from New Hampshire clearly states this doctrine: "In murder, the felony of an accessory is not the act of a principal; and the felony of a principal is not the act of an accessory. In fact they are different acts, done at different times and different places: in law, they are different crimes."[20] Here, summarized, is the traditional view holding the two crimes, accessory before the fact and principal, separate and distinct and by implication requiring separate indictments.

This traditional position of the common law has been modified today for the most part.[21] "The general rule now is that one who at common law would be an accessory before the fact may be charged directly in the indictment with the commission of the offense, or he may be charged as principal by setting out facts which at common law would constitute him such accessory."[22]

The question of a right to be informed of the nature of the crime

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have been reached more on expediency than reason, and it would have been better if the court had reconsidered this problem in the present case.

[17]"In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted, and punished in all respects as if a principal in the first degree...." Va. Code Ann. § 18.1-11 (Repl. Vol. 1960). See also, S.C. Code § 16-2 (1952); Tenn. Code Ann. § 39-109 (1955); W. Va. Code § 6119 (1955).

[18]"At common law an accessory before the fact could not, in felonies, be tried and convicted as such upon an indictment charging as principal...." State v. Levine, 117 Vt. 320, 91 A.2d 678, 680 (1952).

"At common law an accessory before the fact to a felony was deemed to have committed a crime separate and distinct from that committed by the principal, and could not be convicted of the latter or main offense merely because of his connection therewith as accessory....Accordingly, one who was a mere accessory could be convicted only upon an indictment charging him as such...." Chambers v. State, 194 Ga. 773, 22 S.E.2d 487, 489 (1942).

[19]58 N.H. 257 (1878).

[20]Id. at 258.

[21]See notes 26 and 27 infra.

[22]4 Wharton, Criminal Law and Procedure § 1791 (12th ed. 1957).

charged in relation to the accessory-principal problem is shown in two of the leading cases on the point, *State v. Whitman*[23] from Minnesota and *People v. Bliven*[24] from New York. Both these cases were decided under statutes which allow conviction as a principal when the evidence shows the defendant to be an accessory before the fact.[25] The statutes abolish the distinction between principal and accessory recognized by the common law. There is also a constitutional question, whether under such statutes the defendant is sufficiently informed of the charge against him. Speaking directly on the constitutional problem involved, the Minnesota court said:

> "[O]ne who at common law would be an accessory before the fact may be charged directly by the indictment with the commission of the felony as principal, and on his trial evidence may be received to show that he procured the crime to be committed, and further that the reception of such evidence is neither a variance nor a violation of section 6, art. 1 of our Constitution providing that in criminal cases the accused shall be informed of the nature and cause of the accusation against him."[26]

The view adopted in Minnesota is a major reformation in the accessory-principal relationship, recognizing that sufficient notice to satisfy the constitution is given to the accessory when he is indicted as a principal and convicted on evidence that he was an accessory before the fact.

Statutory revision and judicial interpretation have changed the common law theory which separated principal and accessory before the fact. Modern criminal law exhibits a strong tendency to merge the two crimes. In *People v. Bliven*, the court said of this traditional distinction:

> "The only objection that could be urged against an indictment in this form is the possibility of misleading the defendant as to the nature or character of the act of which he is accused. . . . [U]pon reflection we think the objection is more fanciful than real, and if it be understood that upon an indictment of this nature a man may be convicted upon proof, not only of his doing the act with his own hand, but upon proof that he advised and procured another to do it, and thus did it himself,

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[23]103 Minn. 92, 114 N.W. 363 (1908).

[24]112 N.Y. 79, 19 N.E. 638 (1889).

[25]Minn. Stat Ann. § 610.12 (1947); N.Y. Pen. Laws § 1934 (1940).

[26]State v. Whitman, 103 Minn. 92, 114 N.W. 363, 364 (1908); accord, Hunter v. State, 47 Ariz. 244, 55 P.2d 310, 311 (1936); State v. Olson, 40 Wash. 2d 621, 314 P.2d 465, 468 (1957); Berry v. State, 51 Wyo. 249, 65 P.2d 1097, 1100 (1937).

we think no man will suffer any real inconvenience or any injustice from such a rule."[27]

This decision and the view it takes of the New York statute[28] serve to clarify the problem in that state. A defendant is put on notice that an indictment for murder includes not only the principal crime, but the crime of accessory before the fact as well. This informs the offender that on an indictment for murder he may be convitced as an accessory before the fact and establishes a sound precedent in New York.

The basis of this logic seems to rest in the tort concept of principal and agent. As the Arizona court commented in *Hunter v. State*:[29] "[W]hat one does acting through another he himself does, and that the principal in the crime is the active agent of those advising, aiding or encouraging him to do the act. An allegation in a pleading that a person did a certain thing is sustained by proof that his agent did it."[30] This presents a more logical result than allowing an accessory before the fact to escape when in fact his may be the main responsibility for the crime. This reasoning appears to have been the basis for the ruling in *People v. Bliven*, and the rule there as well as in *State v. Whitman* is submitted as the preferable treatment of the problem.

The modern trend in statutory criminal law is toward merger of all degrees in crime, including the crime of accessory before the fact. The North Carolina statute makes the crime of accessory before the fact a separate substantive offense.[31] North Carolina is peculiar in this field in that the punishment for an accessory before the fact may only be life imprisonment,[32] while other states allow the maximum penalty, as the accessory is punished in the same manner as the principal.[33] In *State v. Jones* the premise is established that North Carolina will not convict as a principal on evidence which shows the defendant is an accessory before the fact. Upon indictment for the principal offense a conviction of accessory before the fact may be had, but not a conviction as a principal when the evidence shows accessory before the fact. This distinction seems to demonstrate that North Carolina does not follow the theory of merger of accessory before the fact

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[27]People v. Bliven, 112 N.Y. 79, 19 N.E. 638, 644 (1889). See also, Von Patzoll v. United States, 163 F.2d 216, 219 (10th Cir. 1947); Scott v. State, 49 Del. 251, 113 A.2d 880, 882 (1955); Chambers v. State, 194 Ga. 773, 22 S.E.2d 487, 489 (1942).

[28]N.Y. Code Crim. Proc. §§ 275 and 284.

[29]47 Ariz. 244, 55 P.2d 310 (1936). For a general discussion on this point see 1 Bishop, Criminal Law § 673.2 (9th ed. 1923).

[30]55 P.2d at 310.

[31]N.C. Gen. Stat. § 14-5 (1951).

[32]N.C. Gen. Stat. § 14-6 (1951).

[33]Va. Code Ann. § 18.1-11 (Rep'l. Vol. 1960). This is a typical statute on punishment.

and principal, other than the statutory innovation providing for indictment, trial and conviction of an accessory before that of the principal. The North Carolina rule also denies conviction of the accessory after acquittal of the principal[34] in contrast with the practice in some jurisdictions.[35]

The harshness of the common law in dealing with all of the parties to a crime was mitigated by distinguishing between accessory before the fact and principal. This distinction is almost defunct today, made so primarily by statute. There is still disagreement in the interpretation of various statutes and the following provisions embodied in a statute would remove remaining areas of doubt:

> 1. An accessory before the fact may be indicted, tried, convicted, and punished as a principal whether or not the principal has been apprehended or is amenable to justice.
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> 2. Prior acquittal of the principal will not prevent indictment, trial, conviction, and punishment of the accessory before the fact if his guilt can be established beyond a reasonable doubt. Upon the trial of the accessory before the fact it must be shown that the crime was committed by a specific principal, though he need not be named, and that the defendant either counseled, advised, or procured the principal to do the act.
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> 3. All parties to a felony are principals, for the crime which one commits through the agency of another he is deemed to have himself committed. A party is the person who actually does the act; or anyone present, aiding, and abetting in the commission of the offense; or one not present who has advised, counseled, or procured the commission of the crime.
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> 4. Any person indicted as a principal has notice that the indictment includes the charge of accessory before the fact, under which indictment the defendant may be convicted as a principal.

The last provision would satisfy the requirements of notice to the defendant and serve to remove an archaic technical distinction from modern law. Justice is best served when the guilty are punished and outmoded obstructions are removed to allow conviction of the accessory before the fact when his guilt can be established.

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[34]State v. Jones, 101 N.C. 719, 8 S.E. 147, 148 (1888).
[35]State v. Hess, 233 Wis. 4, 288 N.W. 275, 277 (1939).