PARTIES TO CRIME
ROLLIN M. PERKINS †

I. TERMINOLOGY

In the field of felony the common law divided guilty parties into principals and accessories. According to the ancient analysis only the actual perpetrator of the felonious deed was a principal. Other guilty parties were called "accessories", and to distinguish among these with reference to time and place they were divided into three classes: (1) accessories before the fact, (2) accessories at the fact, and (3) accessories after the fact. At a relatively early time the party who was originally considered an accessory at the fact, ceased to be classed in the accessorial group and was labeled a principal. To distinguish him from the actual perpetrator of the crime he was called a principal in the second degree. Thereafter, in felony cases there were two kinds of principals, first degree and second degree, and two kinds of accessories, before the fact and after the fact. As applied to homicide cases, the common law of parties was summarized in this form by the Supreme Court of North Carolina:

"The parties to a homicide are: (1) principals in the first degree, being those whose unlawful acts or omissions cause the death of the victim, without the intervention of any responsible agent; (2) principals in the second degree, being those who are actually or constructively present at the scene of the crime, aiding and abetting therein, but not directly causing the death; (3) accessories before the fact, being those who have conspired with the actual perpetrator to commit the homicide, or some other unlawful act that would naturally result in a homicide, or who have procured, instigated, encouraged, or advised him to commit it, but who were neither actually nor constructively present when it was committed; and (4) accessories after the fact, being those who,

† A.B., 1910, University of Kansas; J.D., 1912, Stanford University; S.J.D., 1916, Harvard University; Professor of Law, State University of Iowa; author, Iowa Criminal Justice (1932), Cases on Criminal Procedure (3d ed. 1929); member, Iowa and California State Bars, The American Bar Association, The American Law Institute; contributor to various legal periodicals.

1. "Etymologically the noun, or substantive, is primarily accessory and the adjective accessory; but present usage favors accessory for both." WEBSTER'S NEW INT. DICTIONARY (1934).

2. 1 Hale P. C. *437; 2 Stephen, History of the Criminal Law of England (1883) 239; Matters of the Crown Happening at Salop, 1 Flo. 97, 99 n., 75 Eng. Rep. R. 152, 157 (1553); United States v. Hartwell, 26 Fed. Cas. 196, No. 15,318 (C. C. Mass. 1869); State v. Scott, 80 Conn. 317, 323, 68 Atl. 258 (1907). Sometimes by statute, the phrase "accessory during the fact" is used to include the accessory before the fact and the ancient accessory at the fact, with the provision that he shall be tried and punished as a principal. See 2 Colo. Ann. Stat. (Courtright's Mills, 1930) § 1749.

3. Ibid.
after the commission of the homicide, knowingly aid the escape of a party thereto.”

Since accessories are recognized only in felony cases, one who occupies a certain relation to a crime may be either an accessory or a principal depending upon whether the offense is a felony or not. In fact, as will be pointed out presently, one may occupy such a position that he is (1) a principal if the offense is treason, (2) an accessory after the fact if the offense is a felony, or (3) neither if the offense is a misdemeanor. To describe parties occupying various positions in relation to the crime, there should be appropriate words which would be the same no matter what the crime may be. Both “principal” and “accessory” are unavailable for this purpose and hence other terms must be employed.

The starting point in a classification of parties in the field of criminal law is the distinction between innocent and culpable parties. One who has caused, or has aided in causing, a socially harmful occurrence, or has interfered with the course of justice after such occurrence may, under certain circumstances, be excused by the law, for the part he has played. The most common excuse recognized by the law is the innocent mistake of fact, a mistake of fact based upon reasonable grounds, of such a nature that what was done would not have been socially harmful (or if so would have been privileged) had the facts been as they were bona fide believed to be. The classic example is the fatal act of a daughter in placing in her father’s beverage a powder she believed to be a beneficial medicine, but which was in fact a deadly poison. Excuses are also recognized where the socially harmful occurrence is caused by one too young or too insane to have criminal capacity. Other excuses might be mentioned, such as acts done under necessity or compulsion, although the latter have rather limited application.

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5. The word “culpable” is used here rather than “guilty,” because, although the two are nearly synonymous, it is believed the person who assists a misdemeanant to avoid arrest or conviction, may be classed as a “culpable” party, although such conduct does not render him guilty of the misdemeanor.
8. Necessity, as an excuse in the homicide cases, finds its chief recognition in the law of self-defense, and one cannot be convicted of aiding and abetting a homicide if the perpetrator was excused or justified in the killing. Harper v. State, 83 Minn. 402, 35 So. 572 (1903); Patton v. State, 62 Tex. Cr. R. 71, 136 S. W. 459 (1911). See also Hurd v. Commonwealth, 257 Ky. 315, 78 S. W. (2d) 9 (1935).
9. The common law does not recognize any compulsion as sufficient to excuse the intentional killing of an innocent person. Brewer v. State, 72 Ark. 145, 78 S. W. 773 (1904). But one who is compelled under threat of death to go with wrongdoers, and who did not himself cause the loss of life, may have an excuse for a homicide caused by one of the group. Rizzolo v. Commonwealth, 126 Pa. 54, 17 Atl. 520 (1889).
rence is an innocent party, or if there are several parties all within this group, no crime has been committed. On the other hand, if a culpable party makes use of an innocent agent in the perpetration of his criminal plan, it is the same, in the words of East, as if he had used "merely an instrument." 10

Culpable parties are of four different kinds, who may be called respectively: (1) perpetrators, (2) abettors, (3) inciters, and (4) criminal protectors. A "perpetrator", as here used, is one who, with

10. I East P. C. *228. Where a crime is accomplished through the instrumentalities of an innocent agent, the one who induced the act is a principal even though not present when the act was committed. Aldrich v. People, 224 Ill. 622, 79 N. E. 964 (1907).

11. That is, one who has acted with malice aforethought or with criminal negligence in a homicide case, with animus furandi in a larceny case, with intent to commit a felony in a burglary case or, in other words, with whatever kind of mind at fault is required in order that the particular socially harmful occurrence may be classified as a crime.

12. 4 Bl. Comm. *34. See also Smith v. State, 37 Ark. 274, 276 (1881); In re Vann, 136 Fla. 113, 118, 186 So. 424, 426 (1939); People v. Whitmer, 369 Ill. 317, 320, 16 N. E. (2d) 757, 759 (1938); State v. Wilson, 39 N. M. 284, 289, 46 P. (2d) 57, 60 (1935); Commonwealth v. Bitler, 133 Pa. Super. 268, 281, 2 A. (2d) 493, 498 (1938); Moore v. Lowe, 116 W. Va. 165, 180 S. E. 1 (1935); Krudwig v. Koepke, 223 Wis. 244, 249, 270 N. W. 79, 81 (1936). One court has spoken of an offender who commits his offense by the aid of an innocent agent as "not the actual perpetrator." People v. Whitmer, 369 Ill. 317, 320, 16 N. E. (2d) 757, 759 (1938). But if emphasis is placed on the crime rather than the mere physical occurrence it seems proper to say that one who has contrived to bring about the prohibited result by the employment of innocent hands, has perpetrated his offense in this manner.

13. "... the word 'abet' includes the elements of knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the illegal act." Anderson v. Board of Medical Examiners, 117 Cal. App. 113, 114, 3 P. (2d) 344 (1931); cf. State v. Ankrom, 86 W. Va. 570, 574, 103 S. E. 925 (1920).


15. "An abettor is one who is actually or constructively present at the commission of the deed and contributes to it by moral or physical force." Webster's New Int. Dictionary (1934). See also 4 Bl. Comm. *24-26; Shelton v. Commonwealth, 267 Ky. 18, 24, 86 S. W. (2d) 1054 (1935); State v. Edes, 213 N. C. 709, 713, 197 S. E. 580 (1938); Creasy v. Commonwealth, 166 Va. 721, 725, 186 S. E. 63 (1936); Krudwig v. Koepke, 223 Wis. 244, 249, 270 N. W. 79 (1936).
sionally been employed to apply to a guilty party who was not present. Rather than labor the point let it merely be said that this meaning is arbitrarily assigned to the word for the purpose of the present discussion. The term "aider and abettor" is more common and has been said to be necessary to express the idea, although the very court making this suggestion has at other times used the word "abettor" alone. The phrases "aid and abet" and "aider and abettor" seem unnecessarily verbose. To "aid" is to render assistance and hence one might innocently aid a perpetrator, without knowledge of his wrongful purpose. The word "abet" includes either the element of aid, or that of commanding, counseling or encouraging the crime without actual assistance plus, in either case, the additional element of mens rea. For this reason an instruction to convict the defendant if he aided or abetted any other person to commit the crime has been held reversible error. In other words, one who is present (actually or constructively) may aid without abetting, where he acts innocently, or abet without aiding, as by merely encouraging the perpetrator. Furthermore, any aid given with mens rea is abetment; hence to add the word "aid" to the word "abet" is not necessary and is sometimes misleading.

An "inciter", as the word is here used, is one who, with mens rea, counsels, commands, procures or encourages another to commit a crime, the one not being present either actually or constructively at the moment of perpetration. The word has been so used at times by the courts. If deemed necessary some such phrase as "absent inciter" might be employed. The need is for a term to express the position of a culpable party, not present either actually or constructively at the time of perpetration, whose guilt relates to the commission of the crime itself rather than to assistance rendered the offender afterwards. "Inciter" or even "absent inciter" will be more convenient than to refer to a misdemeanant as a "principal who would be an accessory before the fact if the crime had been a felony", or to refer to a felon under some of our statutes as a "principal who would have been an accessory before the fact at common law".

16. Robertson v. State, 23 Ala. App. 267, 125 So. 60 (1929); State v. Powell, 168 N. C. 134, 141, 83 S. E. 310 (1914). Statutes have sometimes resorted to this usage. See, e. g., OKLA. PEN. CODE (1931) § 1808.
20. Ibid.
21. People v. Dole, 122 Cal. 486, 55 Pac. 581 (1898); State v. Corcoran, 7 Idaho 220, 61 Pac. 1034 (1900); State v. Allen, 34 Mont. 403, 87 Pac. 177 (1906).
22. See, e. g., Griffith v. State, 90 Ala. 583, 588, 8 So. 812 (1891).
23. "Instructions as to when accessories are principals reviewed, and held correct" (Syllabus). State v. Slycord, 210 Iowa 1209, 323 N. W. 636 (1930).
There is also need of a term to designate a person who was in no way tainted with guilt of a crime when perpetrated but who, with full knowledge of the facts, thereafter conceals the offender or gives him some other assistance to save him from detection, arrest, trial or punishment. Under some of the statutes abolishing the distinction between the accessory before the fact and the principal, the word "accessory" has been employed for this purpose. This may be the ultimate solution, but any general attempt to use the word in this sense at the present time will cause confusion. The same is true of the phrase "accessory after the fact", since the common law limited this to the felony cases. Since no other term seems to have been employed for this purpose, "criminal protector" is arbitrarily adopted for the present discussion.

Using the terms "perpetrator", "abettor", "inciter" and "criminal protector" with the meanings thus arbitrarily assigned, the common law classification of principals and accessories may be expressed in this form:

1. In treason, perpetrators, abettors, inciters and criminal protectors are all principals "because of the heinousness of the crime", and different degrees of principals are seldom even mentioned.

2. In felony:
   a. Perpetrators are principals in the first degree;
   b. Abettors are principals in the second degree;
   c. Inciters are accessories before the fact;
   d. Criminal protectors are accessories after the fact.


25. 4 Bl. Comm. *35. "It is to be known, that a fact which would make one accessory in felony, in treason . . . makes him a principal. . . . In treason all are principals; . . ." Regina v. Tracy, 6 Mod. 31, 32, 87 Eng. Rep. R. 379 (1703).


27. "A principal in the first degree is he that is the actor or absolute perpetrator of the crime; . . ." 4 Bl. Comm. *34.


29. 1 Hale P. C. *615; 4 Bl. Comm. *37; Griffith v. State, 90 Ala. 583, 8 So. 812 (1891); Neumann v. State, 116 Fla. 98, 156 So. 237 (1934); Shelton v. Commonwealth, 261 Ky. 18, 86 S. W. (2d) 1054 (1935).

In misdemeanors:

(a) Perpetrators, abettors and inciters are all principals, because the law "does not descend to distinguish the different shades of guilt in petty misdemeanors." 32

(b) Criminal protectors are not punishable as such. 33

Stated in terms of the common law itself, those who would be accessories, either before or after the fact, in a felony case, are principals if the offense is treason; whereas if the offense is only a misdemeanor, those who would be accessories before the fact, in a felony case, are principals, while those who would be accessories after the fact are not regarded as parties to the misdemeanor, in any capacity. 36

There is some authority for using the word "accomplice" to include all principals and all accessories, but the preferred usage is to include all principals and accessories before the fact, but to exclude accessories after the fact. 38 If this limitation is adopted, the word "accomplice" will embrace all perpetrators, abettors and inciters. It will also include criminal protectors if the offense is treason but will not do so if it is a felony or a misdemeanor.

II. THE COMMON LAW THEORY OF PARTIES

Appreciation of the common law theory of parties to crime requires full acceptance of the concept of one crime with guilt attaching to several. Thus if a felony had been committed and four were guilty thereof, they might be respectively (1) principal in the first degree, (2)
PARTIES TO CRIME

principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact; or two or more of them might jointly occupy any one of these positions. Two factors tended to obscure the true common law position. One was the requirement that the accessory be tried where his act of accessoryship occurred and not where the felony was perpetrated, if the two were in different counties; a rule which was due to an early statute and not to the common law theory of parties. The other was the possibility, recognized from the first as far as principals were concerned, of convicting one person of murder and another of manslaughter, based upon the same killing. This also was the result of legislation. In the English common law there was but one crime of felonious homicide (if petit treason is ignored). The division of this into murder and manslaughter resulted from early statutes intended to exclude the more heinous types of homicide from benefit of clergy. In its origin this was merely a difference in penalty dependent upon the presence or absence of aggravating circumstances, and no doubt it would have been worded in terms of “degrees” of the crime if that concept had been in use at the time. For most purposes murder and manslaughter have come to be regarded as distinct offenses, but the common law never entirely lost sight of the notion that the crime is felonious homicide, of which murder and manslaughter are but different grades. This is clearly the view taken with reference to the common law of parties to homicide.

Under some of the modern statutes it may be necessary to speak of the accessory as guilty of a separate substantive offense, but this is an undesirable fiction as far as the accessory before the fact is concerned, because his offense is separate and “substantive” only to the extent that certain of the procedural difficulties of the common law are abrogated, a result equally attainable by more direct legislative lan-

39. 1 HALE P. C. *623. As to the reason behind this statute, compare a similar enactment in case of a wound inflicted in one county resulting in death in another. 1 HALE P. C. *426. 40. 1 HALE P. C. *438; 1 EAST P. C. *359. Several persons may be guilty of different degrees of the same homicide. Red v. State, 39 Tex. Cr. R. 667, 47 S. W. 1003 (1898). One may abet in the heat of passion what another perpetrates from malice aforethought. State v. Phillips, 118 Iowa 660, 92 N. W. 876 (1902); Mickey v. Commonwealth, 9 Bush 593 (Ky. 1873). On the other hand one may with malice aforethought encourage another to kill which the other does in the sudden heat of passion. Parker v. Commonwealth, 180 Ky. 102, 201 S. W. 475 (1918).

41. 12 HEN. VII, c. 7 (1496); 4 HEN. VIII, c. 2 (1512); 23 HEN. VIII, c. 1, §§ 3, 4 (1531); 1 EDW. VI, c. 12, § 10 (1547).

42. “Upon an indictment of murder, tho the party upon his trial be acquit of the murder, and convict of manslaughter, he shall receive judgment, as if the indictment had been of manslaughter, for the offense in substance is the same.” 1 HALE P. C. *438.


44. Karakutza v. State, 163 Wis. 293, 298, 156 N. W. 965 (1916).
guage. A different emphasis is observable even in the statement of the position. Hale would speak of "an accessory to murder before the fact", whereas at the present time the statement may be in some such form as "an accessory before the fact to the crime of murder". The common law theory was well expressed by the Supreme Court of Tennessee in a murder case:

"The offense is compounded of the connivance of the accessory and the actual killing by the principal felon, and the crime of the accessory, though inchoate in the act of counseling, hiring, or commanding, is not consummate until the deed is actually done. The law in such case, holds the accessory before the fact to be guilty of the murder itself, not as principal, it is true, but as accessory before the fact, for it is the doing of the deed, and not the counseling, hiring, or commanding that makes his crime complete; and it is for the murder that he is indicted, and not for the counseling and procuring." 48

This is to be contrasted with the crime of solicitation or incitement, which was present according to the common law whenever one solicited another to commit a felony or a grave misdemeanor. The essence of this offense is the incitement and the crime is complete without the perpetration of the offense solicited, even if the other party promptly refuses the improper request. In fact, if the solicited offense is committed as a result of the solicitation, the incitement is merged in the other crime and the common law required the inciter to be indicted as a party to that offense rather than for the solicitation. Some

45. Compare MASS. ANN. LAWS (Michie, 1933), c. 274, § 3, with IOWA CODE (1939) § 12895, which reads: "The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense must hereafter be indicted, tried and punished as principals."
48. State v. Ayers, 67 Tenn. 96, 100 (1874).

... it is the known and familiar principle of criminal jurisprudence, that he who commands, or procurers a crime to be done, if it is done, is guilty of the crime, and the act is his act." Per Mr. Justice Story in U. S. v. Gooding, 12 Wheat. 469, 49 (1827).

51. Regina v. Gregory, 10 Cox C. C. 459 (1867).
53. Rex v. Higgins, 2 East 5, 19, 102 Eng. Rep. R. 269, 275 (1801). In this case Mr. Justice Grose suggests that this is true where the solicited offense is a felony, on the ground that a misdemeanor merges in a resulting felony. This result, however, seems not properly controlled by the disputed point as to whether a misdemeanor is merged in a resulting felony. See as to such merger, Regina v. Button, 3 Cox C. C. 229 (1848), and Note (1925) 37 A. L. R. 778. It is rather comparable to the general
of the modern statutes have greatly limited the scope of solicitation as a separate offense.\textsuperscript{54}

By the common law theory the accessory after the fact was also guilty of the original felony. His assistance to the known felon related back to the crime itself and tainted him with guilt of that very offense,\textsuperscript{55} and subjected him to the same penalty except as the rigor of this rule was modified by statute.\textsuperscript{56} But while the common law viewed guilt as accessory before the fact and guilt as principal as "in substance the same",\textsuperscript{57} it recognized that the accessory after the fact was really tainted with "a different species of guilt".\textsuperscript{58}

Reference to this theory of subsequent culpable conduct relating back to the original offense, and uniting with it, requires mention of certain types of misconduct after a crime which are punishable on an entirely different basis, such as misprision of felony and compounding a felony. A "misprisor" is one who knows of the commission of a crime and does not disclose it to the proper authorities. A misprisor was never regarded as a party to the original crime\textsuperscript{59} but misprision of felony was punished as a misdemeanor at common law.\textsuperscript{60} There seems to be a tendency for misprision of felony to be ignored at the present time,\textsuperscript{61} but misprision of treason is frequently found in the statutes.\textsuperscript{62}

\textsuperscript{54} For example, very little of the common law offense of solicitation will be found in the \textit{Iowa Code} (1939), and nothing omitted from the statutes is punishable in Iowa merely because it was recognized as a common law crime. Estes v. Carter, 10 Iowa 400 (1866). In some states, on the other hand, much of the law of solicitation is retained. State v. Hampton, 210 N. C. 283, 186 S. E. 251 (1936).

\textsuperscript{55} Note Blackstone’s use of the phrase "\textit{ex post facto}.” 4 BL. Comm. *37. Not merely after the fact but "by an after fact."

\textsuperscript{56} Id. at 39.

\textsuperscript{57} I HALE P. C. *626. “Incitement and execution are touched with equal guilt.” Per Mr. Justice Cardozo in \textit{People} v. Emieleta, 238 N. Y. 158, 163, 144 N. E. 487, 489 (1924).

\textsuperscript{58} 4 BL. Comm. *40. See also I HALE P. C. *626.

\textsuperscript{59} "If A. knows that B. hath committed a felony, but doth not discover it, this doth not make A. an accessory after, but it is misprision of felony, for which A. may be indicted, and upon his conviction fined and imprisoned.” I HALE P. C. *618.

\textsuperscript{60} \textit{Ibid. “Misprision of felony is also the concealment of a felony which a man knows but never assented to; for if he assented, this makes him either principal or accessory.”} 4 BL. Comm. *121.

\textsuperscript{61} The common law offense of misprision of felony, being wholly unsuited to American criminal law and procedure, was never a substantive crime in this state. \textit{People} v. Leftovitz, 294 Mich. 263, 293 N. W. 642 (1940); cf. \textit{State} v. Graham, 190 La. 669, 182 So. 711 (1938). Misprision of felony is found in the federal statutes. 18 U. S. C. A. § 251. But the words "whoever ... conceals" have been held to require something more than a negative failure to report the felony, some affirmative act of concealment. \textit{Neal} v. United States, 102 F. (2d) 643 (C. C. A. 8th, 1939); \textit{Bratton} v. United States, 73 F. (2d) 795 (C. C. A. 10th, 1934).

\textsuperscript{62} E. g.: "Misprision of treason shall consist in the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. Any person found guilty thereof shall be imprisoned in the penitentiary for a term of not less than one year and not more than two years." \textit{ILL. REV. STAT.} (Smith-Hurd, 1935) § 38-557.
A "compounder" is one who knows of the crime and agrees, for some reward, received or promised, not to prosecute. The compounder of a felony seems anciently to have been regarded as a party to the felony, but in the later common law his guilt was not that of the original felony but of a misdemeanor known as "compounding a felony". Compounding certain misdemeanors is now frequently authorized by statute. Compounding a felony is generally a crime, either felony or misdemeanor, and by some enactments the compounding of any offense is punishable unless a compromise is expressly allowed by law.

In the absence of some unusual statutory extension, one must be more than a misprisor or a compounder to be constituted a "criminal protector" as the term is here used. It is not enough that he merely keep silent and fail to prosecute, either with or without a reward. To be a "criminal protector" he must, with guilty knowledge of the offense, "receive, relieve, comfort or assist" the offender, in order to hinder his "detection, apprehension, trial or punishment".

Emphasis upon the theory of one offense with guilt attaching to several is quite appropriate because it is still part of the groundwork of our legal philosophy, as far as perpetrators, abettors and inciters are concerned, in spite of the fact that some of the statutes require lip-service to the notion of a separate substantive offense, in the effort to avoid certain procedural difficulties. It explains how one may be guilty of a crime he could not perpetrate, by having caused or procured it as a result of his abetment or incitement. Thus while a woman cannot herself perpetrate rape she may be guilty of a rape resulting

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63. 4 Bl. Comm. *133.
66. E. g., Iowa Code (1939) c. 659.
67. E. g., Iowa Code (1939) c. 589.
69. E. g., Howard v. People, 97 Colo. 550, 51 P. (2d) 594 (1933).
72. This is true even under a statute which punishes all persons who know of the commission of felony and "conceal it from the magistrate" because "conceal" means more than mere non-disclosure. People v. Garnett, 129 Cal. 364, 61 Pac. 1114 (1900). Skelly v. United States, 76 F. (2d) 483, 488 (C. C. A. 10th, 1935), cert. denied, 295 U. S. 757 (1935).
73. "Every one is a party to an offense who either actually commits the offense or does some act which forms part of the offense, or assists in the actual commission of the offense, or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or do any act forming a part thereof." State v. Scott, 80 Conn. 317, 323, 68 Atl. 258 (1907). As to statutes speaking of the accessory before the fact as guilty of an "substantive" offense, see Fla. Comp. Gen. Laws (1927) § 7111; Mass. Ann. Laws (Michie, 1933) c. 274, § 3.
PARTIES TO CRIME

from her incitement or her abetment; a man may be guilty of the rape of his own wife although he cannot himself perpetrate such rape. On the same ground a woman may be guilty of assault to commit rape, a single person may be guilty of bigamy, one not related to any other party to the crime may be guilty of incest, one who has given no mortgage may be guilty of unlawful disposal of mortgaged property, and one who holds no federal office may be guilty of false return by a postmaster. The possibility of guilt by one not in a position to do the prohibited deed has been recognized in connection with numerous other offenses, such as embezzlement by a fiduciary, embezzlement by a public officer, fraudulent withholding of funds by a tax collector, misapplication of bank funds, mother's concealment of the birth of a bastard child, unlawful sale of its own securities by a corporation, violation of election law, and violation of traffic law by the driver of a vehicle. It is hardly necessary to add that two acting together may perpetrate a crime to which each contributes an essential part. Where, for example, one beats a victim with a stick while a confederate holds a gun on him to prevent resistance, both offenders may be convicted under a statute providing a special penalty for beating a person while possessing a deadly weapon to prevent him from defending himself.

75. Regina v. Ram, 17 Cox C. C. 609 (1803); State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1900); see People v. Trumbley, 252 Ill. 29, 96 N. E. 573 (1911); State v. Williams, 32 La. Ann. 335 (1880); Campbell v. State, 63 Tex. Cr. R. 595, 141 S. W. 232 (1911).
78. Boggus v. State, 34 Ga. 275 (1866); State v. Warady, 78 N. J. L. 687, 75 Atl. 977 (1909). On this basis it has been held that an unmarried man who marries a married woman, knowing her to be married, may be convicted of bigamy even if there is no statute expressly covering such a case. Regina v. Brawn, 1 Car. & K. 144, 174 Eng. Rep. R. 751 (M. P. 1843).
86. State v. Sprague, 4 R. I. 257 (1886).
87. State v. Fraser, 105 Ore. 589, 209 Pac. 467 (1922).
89. People v. Hoaglin, 262 Mich. 247 N. W. 141 (1933). One charged with unlawful possession of three or more pieces of counterfeit coin (a felony) may be convicted on proof that such coins were in the possession of another with whom he was acting in guilty concert. Regina v. Rogers, 2 Mood. 85, 169 Eng. Rep. R. 34 (1839).
90. Hardy v. State, 180 Miss. 333, 177 So. 911 (1938).
Three exceptions have been made to the general rule recognizing guilt by incitement or abetment where perpetration itself is impossible: (1) where the very purpose of the crime is to protect one of the parties to the prohibited transaction, (2) where the purpose is other than this but the legislative body must have contemplated two parties and yet provided a penalty for only one, and (3) where a statute creating an offense limited in its application to persons who qualify in some particular manner, has its own incitement and abetment clause which is also limited in its scope.

(1) If the very purpose of the crime is to protect a type of persons thought to be in need of special protection, one within this group is not guilty by reason of having incited or abetted the perpetration by another. Hence a girl under the age of consent cannot be convicted of "statutory rape", even upon proof that she enticed or procured a man to have carnal intercourse with her, because it "cannot be said that an Act . . . the whole object of which is to protect women against men, is to be construed so as to render a girl against whom an offence is committed equally liable with the man by whom the offence is committed." 91 (2) If a statutory offense involves a transaction between two persons or groups of persons, and provides a penalty only for those engaging in one side of the transaction, those on the other side cannot be convicted as inciters or abettors since their omission from the penal provision evinces a legislative purpose to leave their participation unpunished. 92 Hence a purchaser of intoxicating liquor is not punishable under a statute which merely provides a penalty for the sale thereof. 93 (3) A statute providing a penalty for certain misconduct by persons who qualify in some particular manner may limit guilt by incitement or abetment to those having the same qualifications by having a special incitement and abetment clause of its own limited in this manner. 94

92. Holding that an unmarried person is not guilty of adultery by having sexual intercourse with a married person, even on the theory of aiding and abetting the other, because the manifested intent of the legislature was to apply the penalty only to the married person to such intercourse, the court adds: "Of course, an unmarried person might be guilty as a principal of this offense, under section 31 of the Penal Code, by aiding and assisting in its commission in some other way than by living in a state of illicit intercourse with a married person; . . ." Ex parte Cooper, 162 Cal. 81, 85, 121 Pac. 318, 320 (1912).
93. United States v. Farrar, 281 U. S. 624 (1930); Wilson v. State, 130 Ark. 204, 196 S. W. 621 (1917); State v. Teahan, 59 Conn. 92 (1882); Wakeman v. Chambers, 69 Iowa 169, 28 N. W. 498 (1886); State v. Cullins, 53 Kan. 100, 36 Pac. 56 (1894). A contrary view was expressed in an early Tennessee case. State v. Bonner, 39 Tenn. 135 (1858). But this case was distinguished later in a case recognizing the exception. Harney v. State, 76 Tenn. 113 (1881).
94. State v. Furth, 82 Wash. 665, 144 Pac. 907 (1914). This is not a well-considered opinion and it is doubtful if this statute has an aider and abettor clause intended to exclude other aiders and abettors; but there is no doubt of the legislative power to include such a restriction by the use of a clause clearly manifesting such an intent.
PARTIES TO CRIME

III. PRINCIPALS AND ACCESSORIES

Mention has been made of certain advantages to be derived from the use of terms other than "principal" and "accessory" to express the relation of a culpable party to the crime. Additional advantages are to be found as a result of the modern practice of dividing offenses into degrees. It is much less confusing, for example, to speak of a perpetrator of second degree murder, or an abettor of first degree murder, than it is to refer to a principal in the first degree to murder in the second degree, or a principal in the second degree to murder in the first degree. With all of this, however, the suggested terms are merely offered as possible aids to a general consideration of the field and with no thought that the traditional terms can be abruptly abandoned. As will be mentioned presently, modern statutes have not completely removed from all jurisdictions the handicaps developed by the common law distinction between principals and accessories, and these terms must be retained because of this fact alone. Even if the last trace of such handicaps had entirely disappeared it would still be necessary to speak of "principals" and "accessories" to explain how the present law differs from the old.

It is important to repeat that the common law distinction between principals and accessories has no application to treason or to misdemeanors, and that this is just as true of offenses created by statute as of those originally recognized by the common law. Nor are the parties to such offenses distinguished as principals in the first degree or in the second degree. It is true that guilt of such crimes may be incurred by incitement or abetment as well as by perpetration, but this has always been merely a matter of evidence and has never been permitted to develop stumbling blocks in the path of the enforcement of justice. In these fields the position of the criminal protector has been equally free from procedural complications. He who aids a known traitor in the effort to save him from the legal consequences of his

101. Collier v. State, 54 Ga. App. 346, 187 S. E. 843 (1936); State v. Cook, 149 Kan. 487, 87 P. (2d) 648 (1939). It is proper to charge one with aiding and abetting in the commission of a misdemeanor. People v. Hoaglin, 262 Mich. 162, 474 N. W. 141 (1933). But this is not necessary. Under an indictment charging the defendant with the commission of a misdemeanor his guilt may be established by showing that the offense was committed by his command or inducement. United States v. Gooding, 12 Wheat. 460 (U. S. 1827); State v. Warady, 78 N. J. L. 687, 75 Atl. 977 (1910).
crime is guilty of treason as a principal; while he who renders such aid to a misdemeanant does not by so doing become tainted with the guilt of that misdemeanor, and hence is not a party thereto.

All of this was quite different in trials on charges of felony, including felonies created by statute as well as others. The results of the common law distinction between principals and accessories were of tremendous importance in the realm of procedure; but before speaking of these results it is necessary to consider the distinction itself. Confusion of terms must be carefully avoided. If one employs another to represent him in a legal transaction, the one is a principal and the other is his agent, but if one employs another to commit a felony for him, and the other carries out the unlawful commission with full knowledge of the facts, and in the absence of the first party, the employee (assuming criminal capacity on his part) is the principal and the employer is an accessory before the fact.

A. Principal in the First Degree

"The distinction between principals in the first and second degrees is a distinction without a difference" except in those rare instances in which some unusual statute has provided a different penalty for one of these than for the other. "A principal in the first degree is the immediate perpetrator of the crime while a principal in the second degree is one who did not commit the crime with his own hands but was present aiding and abetting the principal." It may be added, in the words of Mr. Justice Miller, that one may perpetrate a crime, not only with his own hands, but "through the agency of mechanical or chemical means, as by instruments, poison or powder, or by an animal, child, or other innocent agent" acting under his direction.

There may be joint principals in the first degree, as where two or more cause the death of another by beating, stabbing, shooting or other means, in which both, or all, participate. If, however, one holds a victim while a second inflicts a fatal injury with a knife, only the stabber is a principal in the first degree, because the stabbing caused the death and the holding was merely aiding, thus rendering the holder guilty as

102. "... knowing receivers and comforters of traitors, are all principals." Hale P. C. *613.
103. Ibid.
104. Ibid.: State v. Woodworth, 121 N. J. L. 78, 82-3, 1 A. (2d) 254, 258 (1938).
105. If "the person employed is guilty, he is the principal, and his employer but an accessory." Wixson v. State, 5 Park. Cr. R. 119, 129 (N. Y. 1861).
a principal in the second degree. It might be suggested that the principal in the second degree be limited to one whose abetment was in the form of counsel, command or encouragement, and that any principal giving physical aid be said to be of the first degree; but this is unacceptable because it would place in the latter category one who was unable to perpetrate the crime. It would be an obvious confusion of terms to speak of a woman as guilty of rape as a principal in the first degree, although she may be guilty of this crime as a principal in the second degree.

If the crime is the result of two or more essential acts, all guilty parties who perform any of these acts are joint principals in the first degree, as where one conspirator prints the blank forms to be used in forgery and another fills in the false signatures. This is true, moreover, even if neither is present when the other is performing his part of the criminal plan.

While speaking of presence it may be well to add that the actual perpetrator of a felony is always a principal in the first degree whether he was present at the moment of the culmination of his felonious scheme or not. Perhaps it would be more in keeping with our mode of expression in other situations to say that the actual perpetrator is always present, either actually or constructively, at the moment of perpetration. Whether we speak in terms of constructive presence in this connection or not, there is no question with reference to the guilt of the perpetrator, the one who, with mens rea, has caused the socially harmful occurrence without the assistance of any guilty agent.

Typical instances of one who is guilty as a principal in the first degree, although he was not actually present in person at the moment of perpetration, include the perpetrator who left poison so that it was inadvertently taken by the victim while the former was not present; the perpetrator who accomplished the same end by laying a bomb, trap or

110. "And anciently, he that struck the stroke, whereof the party died was only the principal, and those, that were present, aiding, and assisting, were but in the nature of accessaries. . . ." Hale P. C. *437. These assisters were the ancient accessories at the fact who later became principals in the second degree.


114. Hale P. C. *435; 4 BL COMM. *35.

115. For example, in determining the issue of jurisdiction, a perpetrator is said to be constructively present at the point of perpetration. State v. Hall. 114 N. C. 909, 19 S. E. 602 (1894).


118. 4 BL COMM. *35. The use of the bomb for this purpose has developed since the time of Blackstone and hence it is not mentioned by him.
pitfall, by setting a wild beast upon the other, by shooting from a distance, or by procuring a child of tender years, or a madman, to commit the harmful deed. On the other hand, one who employs a guilty agent to commit a felony is not a principal in any degree, but is an accessory before the fact, if the crime is committed during his absence. Thus one who procures a boy to steal for him while he is not around is a principal in the first degree if the boy carries away the property as an innocent agent, but is an accessory before the fact if the boy does this act as a guilty party.

B. Principal in the Second Degree

Even as a matter of common law the distinction between principals in the first degree and those in the second degree is one of fact rather than of legal consequence. Their guilt is exactly the same unless in a particular case some factor of mitigation or aggravation applies to one and not the other, and if this is true either principal may be guilty of a higher grade of the crime than the other. A principal in the second degree is one who is guilty of felony by reason of having aided, counseled, commanded or encouraged the commission thereof in his presence, either actual or constructive. He differs from the principal in the first degree in that he does not do the deed himself or with the aid of an innocent agent, but aids, commands, counsels or encourages a culpable party to perpetrate the felony, and he differs from the accessory before the fact only in the requirement of presence. The principal in the second degree must be present at the perpetration of

120. State v. Hall, 114 N. C. 909, 19 S. E. 662 (1894).
122. Regina v. Manley, 1 Cox C. C. 104 (1844).
126. Regina v. Manley, 1 Cox C. C. 104 (1844). See also Workman v. State, 23 N. E. (2d) 419 (Ind. 1939).
129. 1 HALE P. C. *438; 4 Bl. Comm. *34; State ex rel. Dooley v. Coleman, 126 Fla. 203, 170 So. 722 (1936); Hardy v. State, 90 Miss. 336, 177 So. 911 (1938); Kinder v. Commonwealth, 262 Ky. 849, 91 S. W. (2d) 68 (1936); Walrath v. State, 8 Neb. 80 (1878); State v. Ray, 212 N. C. 725, 194 S. E. 482 (1938); Methvin v. State, 60 Okla. Cr. R. 1, 60 P. (2d) 1052 (1936).
the felony, either actually or constructively, whereas the accessory before the fact must be absent. In other words, although neither presence nor absence is of itself a determinant of guilt, yet if the mens rea is found to exist, the same command, counsel, procurement or encouragement which will make a principal in the second degree of one who is present (actually or constructively) at the time a felony is committed, will make him an accessory before the fact if he is absent. One who is present, let it be added, may become a principal in the second degree, by guiltily rendering actual and immediate assistance to the perpetrator which the accessory before the fact would be unable to contribute because of his absence.

Counsel, command or encouragement may be in the form of words or gestures. Such a purpose "may be manifested by acts, words, signs, motions, or any contact which unmistakably evinces a design to encourage, incite, or approve of the crime". Promises or threats are very effective for this purpose, but much less will meet the legal requirement, as where a bystander merely emboldened the perpetrator to kill the deceased. A very illuminating case involved two drivers of different vehicles engaged in a race on a public highway, each thereby stimulating the other to drive at a crim-
inally negligent pace, as a result of which a pedestrian was struck and killed by one of the vehicles. The driver of that vehicle was held guilty of manslaughter as a principal in the first degree and the other driver was held guilty of the same offense as a principal in the second degree. One may also encourage a crime by merely standing by for the purpose of giving aid to the perpetrator if necessary, provided the latter is aware of this purpose. Guilt or innocence of the abettor, let it be added, is not determined by the quantum of his advice or encouragement. If it is rendered to induce another to commit the crime and actually has this effect, no more is required.

Actual aid may be rendered in many ways, typical examples being where a bystander, for the purpose of supplying the perpetrator with a deadly weapon for instant use, tosses him a bludgeon or hands him a revolver with which the victim is killed. He whose act contributes one of the elements of the crime itself is a principal in the first degree, and hence the aid needed for guilt in the second degree is less than this. On the other hand, an act may have aided the actual result without involving guilt in any degree if it was an unwitting contribution. If felonious homicide is committed with a borrowed weapon the lender will not be guilty of either murder or manslaughter, although the killing follows very promptly after the lending, if he did not know or have reason to expect that any unlawful use was contemplated by the borrower. And the fact that one strikes a person unlawfully with his fist, after which another unexpectedly stabs the same victim fatally with a knife, will not constitute the first offender a guilty party to the murder if he had no knowledge of such an intent in the mind of the other and the two had no common purpose in the sense of a like criminal intent. In the words of Blackstone, often quoted by the courts, "presence need not always be an actual and immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps

140. Hicks v. United States, 150 U. S. 442 (1893); State v. Tally, 102 Ala. 25, 15 So. 722 (1893).
144. Hardy v. State, 180 Miss. 336, 177 So. 911 (1938).
146. State v Porter, 276 Mo. 387, 207 S. W. 774 (1918); accord, Turner v. Commonwealth, 268 Ky. 311, 104 S. W. (2d) 1085 (1937).
147. 4 BL. COMM. *34; cf. I HALE P. C. *439; Neumann v. State, 116 Fla. 98, 156 So. 237 (1934); Collins v. State, 88 Ga. 347, 14 S. E. 474 (1891); Walrath v. State, 8 Neb. 80 (1878); State v. Wilson, 39 N. M. 284, 46 P. (2d) 57 (1935).
watch or guard at some convenient distance.” A person is regarded as constructively present, within the rules relating to parties in criminal cases, whenever he is cooperating with the perpetrator and “is so situated as to be able to aid him, with a view known to the other, to insure success in the accomplishment of the common purpose”. The typical example of constructive presence is that of the “sentinel” stationed outside to watch, while his associates enter a building for the purpose of robbery or burglary. Another illustration is found in the case of a “helper” who took his stand 150 yards away from the scene of the actual shooting, armed with a rifle which would be fatal at that distance, with intent to make use of it if the occasion should require. The posting of a guard to give warning so that illicit liquor might be disposed of before the arrival of officers has been a rather common device. The most extreme application of the doctrine of “constructive presence” involved the hold-up of a stagecoach. One of the conspirators stationed himself on a mountain top, thirty or forty miles from the intended ambush, and signaled the approach of the vehicle by means of a controlled fire. Because he was so situated as to be of assistance at the moment, he was held to be a principal in the second degree.

Presence, although indispensable to the position of the principal in the second degree, is not the only requirement. In fact, presence at the scene of an offense is not of itself sufficient to constitute any sort of criminal guilt. Obviously a terrified onlooker is not to be punished for his mere misfortune in having been present at the commission of a felony. The next point is not so obvious since the law might require a bystander to interfere in the effort to prevent a felony from being perpetrated in his presence, if he could do so without unreasonable danger to himself. However, this is not required under the present law unless the bystander owes some special duty of protection to the

151. State v. Chastain, 104 N. C. 900, 10 S. E. 519 (1889).
155. Under the early common law one who was present at the commission of a felony was guilty of a misdemeanor if he did not “use means to apprehend the felon.” Hale P. C. *439. See id. at pp. *448-9, *593. But even this was presence plus the omission to take steps to apprehend a known felon, and it did not make him a party to the crime.
157. People v. Woodward, 45 Cal. 293 (1873); Levering v. Commonwealth, 132 Ky. 666, 117 S. W. 243 (1909); State v. Hildreth, 31 N. C. 440 (1849); Burrell v. State, 1 Wis. 159 (1853); Connaught v. State, 1 Wis. 159 (1853).
intended victim.\textsuperscript{158} In the words of the Supreme Court of North Carolina:

"Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor."\textsuperscript{159}

Even the secret acquiescence or approval of the bystander is not sufficient to taint him with guilt of the crime.\textsuperscript{160}

One may be guilty, as a principal in the second degree, of a felony committed by another in his presence although there has been no pre-arrangement or previous understanding between the two;\textsuperscript{161} but unless he contributes actual aid it is necessary that his approval should be "manifested by some word or act, in such a way that it operated on the mind of" the perpetrator.\textsuperscript{162} This is entirely logical. The bystander's approval of the felonious deed, or even his intent to offer physical assistance if necessary, can not encourage the perpetrator in any manner if it is unknown to him, and hence it makes no contribution to the actual crime itself.\textsuperscript{163} It is quite otherwise if the bystander contributes actual physical aid to the accomplishment of the prohibited result. This will render him guilty (assuming \textit{mens rea} on his part) even if the perpetrator is quite unaware of the assistance at the time.\textsuperscript{164}

Aid or encouragement to another who is actually perpetrating a felony will not make the aider or encourager guilty of the crime if it is rendered without \textit{mens rea}. It is without \textit{mens rea} if the giver does not know or have reason to know of the criminal intention of the other;\textsuperscript{165} or if it is used as a mere pretension, for the purpose of having evidence sufficient to convict the real offender,\textsuperscript{166} assuming this can be accomplished without irreparable harm. For guilt as principal in


\textsuperscript{159} State v. Powell, 168 N. C. 134, 140, 83 S. E. 310 (1914).


\textsuperscript{161} Harris v. State, 177 Ala. 17, 59 So. 205 (1913); State v. Lord, 42 N. M. 638, 84 P. (2d) 86 (1938); Espy v. State, 54 Wyo. 291, 92 P. (2d) 549 (1939).

\textsuperscript{162} Harper v. State, 83 Miss. 402, 410, 35 So. 572 (1903).

\textsuperscript{163} Hicks v. United States, 150 U. S. 442 (1893).

\textsuperscript{164} Way v. State, 155 Ala. 52, 46 So. 273 (1908); Commonwealth v. Kern, 1 Brewst. 350 (Pa. 1867).


\textsuperscript{166} Price v. People, 109 Ill. 169 (1884); People v. Noelke, 29 Hun 461 (N. Y. 1883); Wright v. State, 7 Tex. App. 574 (1880).
PARTIES TO CRIME

the second degree it is necessary that the acts or words of encouragement be employed with that intent, unless the offense is one for which no more than criminal negligence is required. In general it is the abettor's state of mind rather than the state of mind of the perpetrator which determines the abettor's guilt or innocence, except that he is chargeable even with a specific intent if he gives his aid or encouragement knowing the other is acting with such an intent. If the charge is first degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent, and the same may be said of assault with intent to kill. A person who hands a loaded firearm to one of two engaged in a violent quarrel is guilty of assault with intent to murder if such an assault results from this abetment. In this connection, it is to be borne in mind that "intention" includes not only the purpose in mind but also such results as are known to be substantially certain to follow.

Counsel, command or encouragement to commit a crime may be countermanded by the inciter or abettor so as to relieve him from criminal responsibility for subsequent acts of the perpetrator if the countermand is duly communicated to the latter in time to enable him to govern his action thereby. On the other hand, if the act of incitement or abetment has gone beyond mere words or gestures, an effective undoing of what has been done may be prerequisite to exculpation. For example, a man stepped up to a woman who was "cussing and fussing" with others, handed her his gun, and told her to "go ahead and kill them all." The man was held guilty as a principal in the second degree because of a homicide then and there committed by the woman, although he changed his mind after giving her the weapon and made an ineffective effort to disarm her.

167. Hicks v. United States, 150 U. S. 442 (1893); Fudge v. State, 148 Ga. 149, 95 S. E. 980 (1918).
168. Where the charge was manslaughter based upon death resulting from an unlawful race on the highway it seems the incitement of the one and the fatal act of the other were both criminally negligent rather than intentional. Regina v. Swindall and Osborne, 2 Car. & K. 230, 175 Eng. Rep. R. 95 (1846).
174. Restatement, Torts (1934) § 13, comment d.
C. Accessory Before the Fact

An accessory before the fact is one who is guilty of felony by reason of having aided, counseled, commanded or encouraged the commission thereof, without having been present either actually or constructively at the moment of perpetration.\(^\text{178}\) He is one who meets every requirement of a principal in the second degree except that of presence at the time. This makes it possible to include here by reference everything said above relative to such matters as (1) constructive presence, (2) what constitutes counsel, command or encouragement, as well as the need of communication to the perpetrator and the modes of such communication, (3) the requirement of \textit{mens rea}, and (4) the possibility and limitations of countermand. Attention here may at once be directed to other matters.

The accessory before the fact is unable to render aid at the actual moment of perpetration, because anyone in such a position is held to be constructively present and therefore a principal. But he may render aid in advance, as by procuring for the perpetrator the weapon or other means by which the felony is to be committed.\(^\text{179}\) The element of time requires special mention here, but this is only to emphasize the want of any legally established time limit within which the accessory’s incitement may be recognized. It is no ground of immunity to him, for example, that his counsel and advice were given more than a year prior to the perpetration of the crime.\(^\text{180}\) It is also possible for encouragement or persuasion to be recognized even where negotiations are conducted through an agent or representative.\(^\text{181}\) And one may be guilty as accessory where the crime resulted from his incitement to engage in certain kinds of criminal activity although his instructions were general rather than special. Thus one who headed a conspiracy to commit robberies, equipped confederates with supplies and weapons, suggested prospective victims and shared in the spoils, is guilty of a robbery perpetrated by his associates even though he had not given them the name of this particular victim.\(^\text{182}\)

One who incites the commission of a crime is guilty even if the perpetrator varies the method of perpetration, as where the counsel or command was to poison the victim and the perpetrator resorted to


\(^{179}\) 2 Coke Inst. 182; I Hale P. C. *616.

\(^{180}\) Workman v. State, 21 N. E. (2d) 712 (Ind. 1939).

\(^{181}\) People v. Wright, 26 Cal. App. (2d) 197, 79 P. (2d) 102 (1938).

\(^{182}\) Breaz v. State, 214 Ind. 31, 13 N. E. (2d) 952 (1938).
stabbing or shooting. He is also guilty of all incidental consequences which might reasonably be expected to result from the intended wrong as where robbery, or attempted robbery results in the death of the victim. But he is not guilty of a crime committed by the perpetrator which is entirely other than the one incited and not an incidental result thereof, as where the incitement was to commit arson and the perpetrator committed robbery.

A special problem, dealt with here because factually the resulting crime is usually not in the presence of the one under consideration, arises when one conducting an ordinarily lawful business in the usual manner surmises that the other intends an unlawful use of the property or service being offered. Must such a one forego the profit of this transaction at the risk of being held a party to the crime if the surmise proves correct? The consideration will not be limited to accessories in the technical sense because the possibilities include treason and misdemeanor as well as felony.

The solution of this problem is found, not in logical abstractions, but in the effort to make a proper adjustment between conflicting social interests. To whatever extent an affirmative answer is given, there will be some restraint on lawful business, because, at times, an illegal use will be erroneously expected. Furthermore, if an affirmative answer should be given without limitation a merchant might find it necessary to probe rather deeply into his customer's intentions to safeguard himself against the possibility of conviction resulting from the jury's mistake. On the other side, of course, is the social interest in the prevention of crime. Hence the tendency has been to dispose of these cases as follows: the gravity of the social harm resulting from the unlawful conduct is used to determine whether mere knowledge of the intended use will be sufficient to carry the taint of illegality. A seller who completes the sale of goods after correctly divining that the purchaser is buying them as an agent of an armed combination attempting to overthrow the government, thereby "voluntarily aids the treason". Furthermore, "no man ought to furnish another .with the means of

185. 2 Hawk. P. C. c. 29, § 18.
187. Many of the cases are civil suits for the price of the thing sold or the service rendered, but as correctly stated obiter in an Indiana case, "where the act of selling is under such circumstances as would make the seller an accessory before the crime, he cannot recover from the buyer the purchase money of the thing so sold." Bickel v. Sheets, 24 Ind. 1, 6 (1865).
188. Steele v. Curle, 34 Ky. 381, 387 (1836).
transgressing the law" to the extent of committing murder or other heinous crime. But the mere knowledge of one party to a transaction that the other intends later to make an unlawful use of the property or service involved, will not of itself be sufficient to taint that one with the offense subsequently committed if it is of a relatively minor nature. This has been applied in such cases as the following, in which knowledge of the intent was held insufficient for guilt: sale of liquor by an authorized dealer to a buyer who intended an unlawful resale; sale of innocent ingredients to one who intended to use them in the unlawful manufacture of liquor; sale of property purchased to be used for the purpose of gaming; sale of a dress to a prostitute to be used in her "profession"; the washing of clothes for a prostitute for a similar use; work and labor done and materials furnished for a house to be used for gambling purposes; transmittal of telegraph messages, innocent in themselves, to be used in maintaining a gaming house. It is otherwise, even as to such an offense, if the one charged as an inciter has not only had knowledge of the intended offense but has gone out of his way to promote it, as by packing the goods sold in an unusual manner to conceal their identity.

Even offenders are not always accessories to separate offenses by other wrongdoers with whom they have dealt with knowledge of the unlawful intent.

202. A defendant who sold counterfeit bills to a second party, who sold the same bills to a third person who was arrested while trying to pass them, all three having knowledge of the counterfeit nature of the bills, was not an accessory to the third person's possession, since the defendant's connection with the bills ended when he received his money from the second party, who might dispose of them as he chose. United States v. Peoni, 100 F. (2d) 401 (C. C. A. 2d, 1938).
D. Accessory After the Fact

The accessory after the fact is one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment. There are four requisites:

1. A felony must have been committed by another, and it must have been completed prior to the act of accessoryship, although it is not necessary that a formal charge shall have been filed against the principal felon before this time;

2. The accessory must not himself be guilty of that felony as a principal;

3. He must do some act to assist the felon personally in his effort to avoid the consequences of his crime; and

4. This assistance must be rendered with guilty knowledge of the felony.

The ancient phrase used to describe the act of accessoryship after the fact is: "where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon," but it was recognized even in the very early law that comfort or assistance which had no tendency to frustrate the due course of justice was not included. The more accurate statement, in the absence of legislative enlargement of the field, is:

"An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon in order to hinder the felon's apprehension, trial, or punishment." One does not become an accessory after the fact merely by failing to arrest a

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203. I HALE P. C. *618; 4 BL. COMM. *37; Whorley v. State, 45 Fla. 123, 33 So. 849 (1903) ; State v. Wells, 197 So. 419 (La. 1940).
204. 4 BL. COMM. *38; State v. Tollett, 173 Tenn. 447, 121 S. W. (2d) 525 (1938).
206. Crosby v. State, 179 Miss. 149, 175 So. 180 (1937) ; People v. Chadwick, 7 Utah 134, 25 Pac. 737 (1891).
207. 4 BL. COMM. *37-8; Wren v. Commonwealth, 28 Grat. 952, 956 (Va. 1875).
209. 1 HALE P. C. *618. See also 4 BL. COMM. *37; Wren v. Commonwealth, 26 Grat. 952, 956 (Va. 1875).
211. As an example of such extension, see Howard v. People, 97 Colo. 550, 51 P. (2d) 594 (1935).
known felon \textsuperscript{213} or to disclose a known felony.\textsuperscript{214} Even compounding a felony, although punishable as such,\textsuperscript{215} does not render the compounder guilty of that felony as accessory after the fact,\textsuperscript{216} although the very ancient rule was otherwise.\textsuperscript{217}

"As to the receiving, relieving or assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man an accessory after the fact; as that he concealed him in the house, or shut the door against the pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact." \textsuperscript{218}

One may be guilty as accessory after the fact by throwing suspicion away from the principal by swearing falsely at the coroner's inquest,\textsuperscript{219} or by concealing the evidence in a homicide case by secreting the corpse.\textsuperscript{220} One who performs a surgical operation upon a fugitive from justice for the purpose of obliterating his finger prints and altering his facial expression to enable him to evade arrest has been held guilty of conspiring to conceal him in violation of the federal statute\textsuperscript{221} and would seem to be an accessory after the fact in the absence of any special enactment.

One who is an accessory before the fact may also become an accessory to the same offense after the fact,\textsuperscript{222} but this is not true of one

\textsuperscript{213} Hale P. C. *618.
\textsuperscript{214} Levering v. Commonwealth, 132 Ky. 666, 117 S. W. 253 (1909).
\textsuperscript{215} Some statutes provide that anyone who, after knowledge that a felony has been committed, conceals it from a magistrate, or harbors and protects the person who committed it, is an accessory after the fact. State v. Bowman, 92 Utah 540, 70 P. (2d) 458 (1937).
\textsuperscript{216} But we are of opinion that the word 'conceal', as here used in our statute, implies some act or refusal to act by which it is intended to prevent or hinder the discovery of the crime; that a mere failure to give information is not enough.” Davis v. State, 96 Neb. 7, 13 (1910). See also United States v. Shapiro, 113 F. (2d) 891 (C. C. A. 2d, 1940).
\textsuperscript{218} ibid.
\textsuperscript{219} ibid. See also 1 HAWK. P. C. c. 59, § 6.
\textsuperscript{220} Wren v. Commonwealth, 26 Grat. 952, 956-7 (Va. 1875). Surreptitiously restoring to its original position the weapon used to commit the felony, or burning overalls used by the felon are facts admissible in evidence on such an issue. Crosby v. State, 179 Miss. 149, 175 So. 180 (1937).
\textsuperscript{221} Blackey v. State, 24 Tex. Cr. R. 616, 7 S. W. 233 (1888).
\textsuperscript{222} People v. Farmer, 196 N. Y. 65, 89 N. E. 462 (1909).
\textsuperscript{223} Piquett v. United States, 81 F. (2d) 75 (C. C. A. 7th, 1936), cert. denied, 298 U. S. 664 (1936).
who is guilty as a principal felon. On the other hand, absence at the
time of perpetration is not essential in the case of an accessory after
the fact. For example, one who was present at the time a murder was
committed, without abetting the felony in any way, but who thereafter,
with guilty knowledge, assisted in concealing the evidence of the crime
in order to protect the principal from prosecution, was guilty as an
accessory after the fact.

Under the common law rule a wife cannot be accessory after the
fact by reason of having concealed her husband or given him other
assistance, knowing him to be a felon, but this does not apply to the
husband who renders such assistance to his wife, nor to others such
as parents or children. The exception has been extended somewhat
liberally by some of the modern statutes.

IV. PROCEDURAL PROBLEMS

A. Under the Common Law

The limitation of the principal-accessory distinction to felony
cases offers a clue to its origin. There was no dissatisfaction with the
common law penalty for either treason or misdemeanor. The death
penalty was thought to be quite appropriate for treason, and much
milder penalties were provided for misdemeanor cases. On the other
hand, there came to be great dissatisfaction with the rule applying the
death penalty in all felony cases, particularly after the little group of
felonies had been greatly enlarged by statutory additions. This dis-
satisfaction led to the invention of various devices for the purpose of
avoiding an excessive number of executions in felony cases, as, for
example, benefit of clergy and the doctrine of coercion. Without
doubt, the principal-accessory distinction was one of these devices, and
because of this it is not surprising to find the development along lines
which tended to prevent conviction in spite of clear evidence of guilt.

The technicalities tending to this result made their appearance in four
different connections and may be grouped under the heads of (1) jur-
sisdiction, (2) pleading, (3) trial and (4) degree of guilt.

A consideration of these problems of the principal-accessory dis-
tinction may well be prefaced by brief mention of felony cases which

223. "One who is a principal cannot be an accessory after the fact." People v. Chadwick, 7 Utah 134, 138, 25 Pac. 737, 738 (1891).
224. White v. People, 81 Ill. 333 (1876).
228. 2 Lewin C. C. 232 n.
229. "... distinctions between accessories and principals rest solely in authority,
being without foundation either in natural reason or the ordinary doctrine of law; for
the general rule of law is that what one does through another's agency is to be regarded
concern several guilty parties who are all principals. The difficulties held to be so insurmountable in cases involving accessories do not arise at all if the guilty parties are all principals, even if they are principals of different degrees. The problem of jurisdiction cannot arise in a form similar to that of the accessory cases. The common law theory of criminal jurisdiction is that the place of trial depends upon the situs of the offense, and since the principal in the second degree is always present, constructively if not actually, his abetment is in legal theory at the same place as the perpetrator by the principal in the first degree. Hence, the court having jurisdiction over one principal will also have jurisdiction over the other. It is not necessary for the pleading to disclose whether the defendant is a principal in one degree or the other. A principal in the second degree may be charged in the indictment either as having committed the felony or as having been present aiding and abetting another in the commission thereof, and if the indictment specifically charges one as the perpetrator and the other as the abettor, both may be convicted although the proof establishes that the one charged as abettor was in fact the perpetrator, while the other was present aiding and abetting him. With reference to trial, the principal in the second degree may be tried and convicted prior to the trial of the principal in the first degree, or even after the latter has been tried and acquitted. Furthermore, a principal in the second degree may be convicted of a higher degree of guilt than the principal.

230. Connor v. State, 29 Fla. 455, 10 So. 891 (1892); Sweat v. State, 90 Ga. 315, 17 S. E. 273 (1892). Other systems may give primary importance to personal jurisdiction, see the French CODE D'INSTRUCTION CRIMINELLE, Art. 5. Statutes may provide criminal jurisdiction on this basis, see U. S. CR. CODE, § 1.
233. Regina v. Crisham, C. & M. 188, 174 Eng. Rep. R. 466 (1841); Screws v. State, 189 Ga. 678, 4 S. E. (2d) 601 (1939); McKinney v. Commonwealth, 143 S. W. (2d) 745 (Ky. 1940). It has been said this would not apply in the rare situation in which a different penalty was provided for the two types of principal. State v. Woodworth, 121 N. J. L. 78, 83, 1 A. (2d) 254 (1938). But the common law rule is otherwise even in such a case. East P. C. (1803) 348; Rex v. Stearne, 1 Leach 473, 168 Eng. Rep. R. 338 (1787).
234. 1 HALE P. C. *437-8; Mackalley's Case, 9 Coke 65b, 67b, 77 Eng. Rep. R. 828 (1611); Neumann v. State, 116 Fla. 98, 105, 156 So. 237 (1934); Reed v. Commonwealth, 125 Ky. 126, 100 S. W. 856 (1907).
in the first degree.\textsuperscript{237} The former may be convicted of first degree murder, for example, although the latter has been convicted of second degree murder.\textsuperscript{238} Similarly, the former may be convicted of murder although the latter has been convicted of manslaughter,\textsuperscript{239} since an abettor may counsel with malice aforethought what the other perpetrates in the sudden heat of passion.\textsuperscript{240} An abettor may be convicted of felony even though the perpetrator has been convicted of misdemeanor only.\textsuperscript{241} Needless to say, the abettor may be convicted of a lower degree of crime than the perpetrator.\textsuperscript{242} None of these problems can be answered so simply if an accessory is involved. However, let us repeat that the involvement of an accessory requires a felony case because “in misdemeanors and in treason, all who take part in the crime are principals.”\textsuperscript{243}

\section*{I. Jurisdiction}

As previously mentioned the common law adopted the territorial theory of criminal jurisdiction, by which the power to hear and determine a criminal case is dependent upon the situs of the offense. Thus if one standing in North Carolina shoots across the boundary line into the state of Tennessee and inflicts a fatal injury upon a person there, the common law does not authorize a conviction of this murder in North Carolina because, according to its view, the homicide is committed in Tennessee.\textsuperscript{244} It is the same if a wrongdoer perpetrates a felony at a distance through the act of an innocent agent,\textsuperscript{245} or if he incites a guilty party to commit treason or a misdemeanor in another jurisdiction.\textsuperscript{246} In all such cases the offense may be tried and punished where the harm itself is done. But one who incites a guilty party to perpetrate a felony in another jurisdiction is not punishable there, but

\begin{footnotesize}
\begin{enumerate}
\item Davis v. State, 152 Ind. 145, 52 N. E. 754 (1899); State v. Lee, 91 Ind. 499, 60 N. W. 119 (1894).
\item Hale P. C. *438; Bruce v. State, 99 Ga. 50, 25 S. E. 760 (1896); Goins v. State, 46 Ohio St. 457, 21 N. E. 476 (1889).
\item East P. C. *350.
\item Christie v. Commonwealth, 193 Ky. 799, 237 S. W. 660 (1922).
\item State v. Hall, 114 N. C. 909, 19 S. E. 602 (1894). The court suggested in this case that this want of jurisdiction to try such an offense in the state in which the offender stood at the time could be corrected by legislation. This is done in some jurisdictions by a statute authorizing the punishment of one who commits a crime “in whole or in part” within the state. See State v. Botkin, 132 Cal. 231, 64 Pac. 286 (1901).
\item Lindsey v. State, 38 Ohio St. 507 (1882).
\item Town of Barkhamsted v. Parsons, 3 Conn. 1 (1819); Wharton, Criminal Law (12th ed. 1932) § 333.
\end{enumerate}
\end{footnotesize}
only where his act of accessoryship occurred.\textsuperscript{247} The same is true of an accessory after the fact who guiltily renders aid to the felon in another jurisdiction.\textsuperscript{248}

2. Pleading

The case may be lost in advance either by carelessness in the pleading or by a mistaken notion as to whether the particular defendant was or was not present at the time the crime was committed. One charged with felony as a principal cannot be convicted if the evidence establishes accessorial guilt,\textsuperscript{249} and one charged as an accessory cannot be convicted if the evidence shows him to have been a principal.\textsuperscript{250} One may be charged as a principal and as an accessory in separate counts of the same indictment,\textsuperscript{251} but the prosecution can be required to elect upon which count it will rely before the case is finally submitted to the jury.\textsuperscript{252} How nicely this operates in favor of the accused is disclosed by the fact that while an acquittal of one charged as an accessory does not bar a subsequent trial upon an indictment charging him as principal,\textsuperscript{253} he may be acquitted by both juries because of a doubt as to whether he was or was not present at the time.\textsuperscript{254}

3. Trial

Where no change has been interposed by statute, an accessory, unless he waives his right in this regard,\textsuperscript{255} cannot be tried before the principal.\textsuperscript{256} The two may be joined in the same indictment and tried

\textsuperscript{247} I HALE P. C. *623; State v. Chapin, 17 Ark. 561 (1856); People v. Hodges, 27 Cal. 340 (1865); State v. Wyckoff, 31 N. J. L. 65 (1864). It is sufficient if any act of incitement was within the jurisdiction although the inciter left the state before the felony was perpetrated. In re Malicord, 211 N. C. 684, 191 S. E. 730 (1937). The result stated in the text was reached by an English statute, I HALE P. C. *623, early enough to be common law in this country; but it has been rejected in at least one state. State v. Ayers, 67 Tenn. 96 (1874).

\textsuperscript{248} I HALE P. C. *623; Tully v. Commonwealth, 13 Bush 142 (Ky. 1877).


\textsuperscript{250} Regina v. Brown, 14 Cox C. C. 144 (1878). One charged as accessory after the fact might be convicted although he was shown to be present at the time of the felony if he was not tainted with guilt until after the crime was complete. White v. People, 81 Ill. 333 (1876).


\textsuperscript{252} Regina v. Brannon, 14 Cox C. C. 394 (1880).

\textsuperscript{253} I HALE P. C. 625; 4 BL. COMM. *40. Hale states that acquittal as principal does bar a subsequent prosecution as accessory before the fact, I HALE P. C. *625-6, but it has been held not a bar. Commonwealth v. DiStasio, 297 Mass. 347, 11 N. E. (2d) 799 (1937).

\textsuperscript{254} To warrant a conviction the prosecution must prove its case “beyond a reasonable doubt.” 9 Wigmore, EVIDENCE (3d ed. 1940) § 2407.

\textsuperscript{255} If the accessory waives his right in this regard he may be tried before the principal, but if he is convicted it is necessary to respite judgment until the trial of the principal because the subsequent acquittal of the latter would annul this conviction. I HALE P. C. *623.

\textsuperscript{256} Ibid.; State v. Graham, 190 La. 669, 182 So. 711 (1938); see People v. Smith, 271 Mich. 553, 551, 260 N. W. 911 (1935).
PARTIES TO CRIME

jointly, unless the accessory is entitled to a severance, but if they are tried together the jury must be instructed to inquire first into the guilt of the principal, and if they find him not guilty to acquit the accessory forthwith; but if they find the principal guilty then to consider whether or not the accessory is also guilty. Needless to add, an acquittal of the principal bars a subsequent trial of the accessory.

The results of this aspect of the principal-accessory concept are quite absurd. Anything which prevents conviction of the principal makes impossible the conviction of the accessory. Hence, if the principal is never apprehended, or if before the moment of conviction he should die or be pardoned, the accessory must go free although his guilt may be well known and easy to prove. Furthermore, if both are convicted in due course, but the conviction of the principal is thereafter reversed, the conviction of the accessory cannot stand.

A far-fetched corollary was that there could be no accessory to manslaughter before the fact. The notion was that manslaughter is unlawful homicide in the heat of sudden passion and hence could not

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258. Many statutes authorize any joint defendant in a felony indictment to require separate trials. See, for example, Code of Iowa (1939) § 13,842. Needless to say, under such authorization either the accessory or the principal could require a severance.
259. 1 HALE P. C. *624.
261. Hale says that pardon of the principal after he "be only convict" and before attainder is a bar to the trial of the accessory. 1 HALE P. C. *625. Attainer resulted from the sentence of death which was included in the judgment of conviction of felony. In other words, it was not the establishment of guilt of the principal by plea or verdict which was the magical event in this regard, but the judgment of conviction which was entered thereon. It is in this sense, the correct one it is submitted, that the word "conviction" is used in the text.

Under the ancient law outlawry in treason and felony amounted to attainder. 2 HALE P. C. *205. Hence the original statements were to the effect that "the accessory can not be brought to trial until the principal has been convicted or outlawed." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 509.
262. "... for if anything obstruct judgment... the accessory is to be discharged." 1 HALE P. C. *625.
263. Anciendy the fugitive felon could be reached by outlawry. See note 261 supra.
265. 1 HALE P. C. *625; Rex v. Burrige, 3 P. Williams 439, 24 Eng. Rep. R. 1135 (1735); State v. Duncan, 28 N. C. 98 (1845). "See in a writ of error in the Common Bench, that it was held by Thirning that in every case of felony, where a man is indicted as a principal and afterwards has a charter of pardon, or else he abjures the realm, the accessory, in that case, shall not be arraigned; for when the life of the principal is pardoned by the law in whatever manner it may be, that felony is extinct in his person, and consequently he is acquitted and for the same reason the accessory is acquitted, etc. Query, if the principal resort to his clergy." Anonymous, STRATHEM'S ABB. (Klingelsmith's translation) 420, pl. 33. In some of our jurisdictions the power to pardon is restricted to "after conviction." See, e. g., Mo. Const., Art. V, § 8. If there can be no pardon before conviction this point will not arise.
266. Ray v. State, 13 Neb. 55, 13 N. W. 2 (1882). The party in this case was accessory after the fact.
have been incited by one not present. If guilt of manslaughter is predicted upon some other basis, such as criminal negligence, this reasoning does not apply. But even in the case of voluntary manslaughter the premise is not supported by fact. Under the rules of provocation and the cooling time it would easily be possible for one of two who have received great provocation from a third, to follow and kill the third, at the command or suggestion of the second, before the passion had had time to cool, although the fatal act was at such a distance from the inciter that it could not be said to be in his presence. The modern trend seems to be in the direction of recognizing an accessory before the fact even in the case of voluntary manslaughter.

More logical was the rule in cases of suicide. Malicious self-destruction was recognized by the common law as "a peculiar species of felony." By the ancient law punishment was provided in the form of ignominious burial and forfeiture of goods and chattels, upon a determination of guilt by the coroner's jury. Hence, one who had incited the self-destruction of another could be convicted as an accessory before the fact. Later, when a change of the punitive system left no punishment available for the suicide, one who had counseled, commanded or otherwise encouraged such an act of self-destruction on the part of another, was held not subject to conviction if he was not present at the time, because he was accessory before the fact and the principal had not been convicted. If such a one was present at the time he is convictable as a principal. For example, where two, who have agreed to commit suicide, take poison for this purpose, each in the presence of the other, but only one dies, the survivor is guilty of murder. Because suicide is not punishable under modern penal systems it is held, in some jurisdictions, not to be a crime at all. There is some authority for holding the abettor of suicide dispensable where this view prevails, although the better

271. Id. at 190; 3 Stephen, op. cit. supra note 227 at 105.
272. 1 Hale P. C. *415. If the body could not be seen the inquisition was by the justices. Id. at 414-5.
273. Id. at 416; 4 Bl. Comm. *189.
rule is otherwise. Under some of the modern statutes abolishing the distinction between principals and accessories even the absent inciter of suicide has been held punishable.

4. Degree of Guilt

Under the original rule, "principals and accessories were felons, and were, as such, punishable with death." However, this was modified at an early time to the extent of entitling accessories after the fact to benefit of clergy even in cases in which principals and accessories before the fact were excluded therefrom. Ignoring this modification, the authorities tended toward such generalizations as "that accessories shall suffer the same punishment as their principals." The law in this regard might easily have taken a different turn, because it was clearly recognized even in the time of Lord Hale that two who jointly kill a third may have different degrees of guilt, because one may act with malice aforethought and the other without. And as previously mentioned an abettor may be convicted of either a higher or a lower degree of guilt than the perpetrator. With reference to the inciter, however, the rule came to be that "an accessory cannot be guilty of a higher crime than his principal." The result of this rule combined with the manslaughter rule previously mentioned, was, at one time, that if either the principal or the accessory before the fact was found guilty of manslaughter, no judgment of conviction could be entered against the accessory. This is largely a matter of history because the present trend is to recognize that one may be accessory to manslaughter before the fact.

The rule that an accessory should not be convicted of a higher crime than his principal was based on the notion that the former should never suffer more punishment than the latter. This has been carried to such an extent that if the principal is a corporation the penalty to be

280. McMahan v. State, 168 Ala. 70, 53 So. 89 (1910); Commonwealth v. Hicks, 118 Ky. 637, 82 S. W. 255 (1904).
281. 2 STEPHEN, op. cit. supra note 227 at 231.
282. Id. at 232; 4 BL. COMM. *39.
283. 4 BL. COMM. *39; People v. McArdle, 295 Ill. 149, 14 N. E. (2d) 683 (1938).
284. 1 HALE P. C. *438.
285. 4 BL. COMM. *36; Bingham v. Commonwealth, 183 Ky. 688, 210 S. W. 459 (1919). The abettor was guilty of murder and the perpetrator of manslaughter.
287. 4 BL. COMM. *36.
289. State v. Robinson, 12 Wash. 349, 41 Pac. 51 (1895).
inflicted upon the accessory must be limited to a fine, since the corpora-
tion cannot be punished by imprisonment.\textsuperscript{291}

Since the common law distinction was between principals on the
one hand and accessories on the other, the technical embarrassments to
the prosecution which have just been mentioned apply to the accessory
after the fact,\textsuperscript{292} as well as to the accessory before, except that the pos-
sibility of an accessory to manslaughter after the fact seems to have
been recognized from the first.\textsuperscript{293} An additional difficulty, however, is
involved in the prosecution of an accessory of the latter type. The
origin of this technicality is the rule that one cannot be an accessory
after the fact if his guilty conduct did not occur after the commission
of the felony itself.\textsuperscript{294} In ordinary circumstances, this rule works
well enough, because one whose guilty aid was rendered before the
completion of the felony is usually a principal in the second degree or
an accessory before the fact, depending upon whether he was present
or absent at the time. But the rule has been given an extreme applica-
tion in certain situations such as the homicide cases. In these cases, one
who, with full knowledge of the facts, aided in the concealment or
escape of a murderer after the mortal blow was struck but before the
death of the victim, was held not to be an accessory to murder.\textsuperscript{295}

On the other hand, no indictment or other formal charge against the
principal, at the time aid is given him, is required to constitute the
aider an accessory after the fact. This result has been reached even
under statutes which refer to the principal as the person "charged with
or found guilty of the crime".\textsuperscript{296} There is, however, authority for the
opposite conclusion on this point.\textsuperscript{297}

\textsuperscript{291} People v. Duncan, 363 Ill. 495, 2 N. E. (2d) 705 (1936); People v. McArdle,
295 Ill. App. 149, 14 N. E. (2d) 683 (1938).
\textsuperscript{292} Hale, for example, deals first with what constitutes accessoryship before the
fact, then what constitutes accessoryship after the fact, and lastly the procedural prob-
lems involved. \textit{i Hale P. C.} \textsuperscript{*612-626}. The accessory after the fact is triable where
his act of accessoryship took place rather than where the felony was committed. \textit{Id.}
at 623. One charged as a principal cannot be convicted as accessory after the fact.
Reynolds v. People, 83 Ill. 479 (1876). But the acquittal of one charged as a principal
is not a bar to a subsequent indictment against him as an accessory after the fact, and
\textit{vice versa}. \textit{Ibid.} Such an accessory, unless he waives his rights in this regard cannot
be tried until the principal is convicted. \textit{Id.} at 623. And a conviction based upon such
a waiver is annulled if the principal is subsequently acquitted. \textit{Ibid.}
\textsuperscript{293} \textit{i Hale P. C.} \textsuperscript{*616}; State v. Burbage, 51 S. C. 284, 28 S. E. 937 (1897).
\textsuperscript{294} Hightower v. State, 78 Tex. Cr. R. 605, 182 S. W. 492 (1916); Gonzales v.
State, 74 Tex. Cr. R. 435, 171 S. W. 1146 (1914); see Roberts v. People, 103 Colo.
250, 87 P. (3d) 251 (1928).
\textsuperscript{295} Harrell v. State, 39 Miss. 702 (1861). Assault with intent to kill was a
felony by statute and hence the aider was held to be accessory to that felony after the
fact. But at common law he would not have been punishable at all because the assault,
as such, even with this intent, was only a misdemeanor. Hence a verdict of not guilty
was directed in the case of a defendant who helped a murderer to escape after the
mortal blow but before the death of the victim. \textit{Commonwealth v. Costa}, 2 D. & C. 612
(Pa. 1922).
\textsuperscript{296} State v. Jones, 91 Ark. 5, 120 S. W. 154 (1909).
\textsuperscript{297} People v. Garnett, 129 Cal. 364, 61 Pac. 1114 (1900).
B. Statutory Changes

Since the reason for the principal-accessory distinction ceased to exist when most of the felonies were removed from the category of capital crimes, the distinction itself should be abrogated, and the legislative trend has long been in this direction. Probably no jurisdiction retains the common law of accessories untouched by legislative change. However, statutes have been variously worded and have received different types of interpretation. It is grave error to assume that this common law distinction with all of its consequences has completely disappeared from the country as a whole. For example, under variously worded statutes intended to improve the administration of justice by changes in this field we find in certain jurisdictions such conclusions as these: Under a statute expressly authorizing an accessory before the fact to be tried either in the county in which his act of accessoryship occurred or in the county in which the felony was perpetrated, the accessory is entitled to a directed verdict of acquittal if it is shown that all of his acts of accessoryship were performed beyond the boundaries of the state. A statute authorizing trial of the accessory "although the principal offender may not have been arrested and tried" does not permit the trial of the accessory before that of the principal if the principal is in custody and his case ready for trial. A statute directing the accessory before the fact to be indicted and tried as a principal does not permit the trial of the accessory if the principal has been acquitted. A statute authorizing trial of the accessory whether the principal has been convicted or not does not authorize the trial of the accessory if the principal has been tried and acquitted. And a statute authorizing an accessory before the fact to be considered a principal and punished accordingly does not permit the inciter to be punished more severely than the perpetrator. Again, where certain of the common law technicalities have been removed by statute it is still impossible to convict one indicted as having committed the crime.

298. See, e. g., Griffith v. State, 90 Ala. 583, 8 So. 812 (1890); State v. Burns, 82 Conn. 213, 218, 72 Atl. 1085 (1909); State v. Bogue, 52 Kan. 79, 34 Pac. 410 (1893); Fleming v. State, 142 Miss. 872, 108 So. 143 (1926); In re Resler, 115 Neb. 335, 341, 212 N. W. 765, 768 (1927); People v. Beintner, 168 N. Y. S. 945 (1918). One statute has extended it to include cases of misdemeanor. State v. Shapiro, 29 R. I. 133, 69 Atl. 340 (1908).


302. People v. Wyherk, 347 Ill. 28, 178 N. E. 890 (1931); McCarty v. State, 44 Ind. 214 (1873); Pierce v. State, 130 Tenn. 24, 164 S. W. 851 (1914).

and proved to have incited it as an accessory before the fact; or to convict one charged as a principal in the second degree and proved to be accessory before the fact; or charged as accessory before the fact and proved to be a principal in the second degree.

The statements in the preceding paragraph, let it be emphasized, represent merely the conclusions of a few courts under particular statutes. Some of them are quite unsound even as a matter of statutory construction, but no attempt will be made here to apportion the blame between the legislatures and the courts.

By some of the statutes "the distinction between an accessory before the fact and a principal is abrogated," and in such a jurisdiction it has been said: "No man can now be an accessory to a felony committed here, 'he is a principal or nothing.' " Some of the other enactments are worded quite differently. It is proper to say that almost everywhere the unavailability of the principal has ceased to be a bar to the conviction of the accessory before the fact. Beyond this, generalizations are hazardous. A comparative study of the various enactments and the different interpretations of each type is quite beyond the scope of the present effort, but brief mention may be made of results achieved by well worded statutes liberally interpreted.

It has been held, under legislative authority deemed sufficient for such changes, that the accessory may be tried and punished in the jurisdiction in which the felony was perpetrated, although he himself remained beyond its borders until afterwards; that the indictment need not state whether the defendant was an accessory or a principal; that the accessory may be prosecuted although the principal has

307. IOWA CODE (1939) § 12895; OKLA. STAT. (1931) § 2902.
309. See, e. g., LA. CODE OF CR. PRO. (1932) art. 238; MASS. ANN. LAWS (1933) v. 9, c. 274, §§ 2, 3; WIS. STAT. (1935) §§ 333.05, 333.06.
310. The word "almost" is required by the inference in State v. Graham, 190 La. 669, 182 So. 711 (1938), although the accessory there was after the fact.
311. In Florida the accessory after the fact cannot be convicted prior to the conviction of the principal. Hysler v. State, 136 Fla. 563, 187 So. 261 (1939).

The "antiquated rule" that one who, while out of the state, commits a felony within the state by the aid of a guilty agent, cannot be prosecuted for the crime where it was committed is no part of Kansas jurisprudence... State v. Wolkow, 110 Kan. 722, 202 Pac. 639 (1922).
313. In re Rowe, 77 Fed. 161 (C. C. A. 8th, 1896); Hunter v. State, 47 Ariz. 244, 55 P. (2d) 310 (1936); Burns v. State, 197 Ark. 918, 125 S. W. (2d) 403 (1939); Miller v. People, 59 Colo. 249, 155 P. (2d) 320 (1936); Workman v. State, 23 N. E. (2d) 419 (Ind. 1939); State v. Patterson, 52 Kan. 335, 34 Pac. 784 (1893); State v. Whitman, 103 Minn. 93, 114 N. W. 363 (1908); Alexander v. State, 66 Okla. Cr. R. 5, 89 P. (2d) 332 (1939).
not been convicted, or even after the principal has been acquitted; and that the accessory may be convicted of either a higher or a lower grade of crime than the principal.

A consideration of the principles underlying the results sought by legislation in this field is entitled to special attention. "The reason of this rule is very plain," it was said at one time in support of the common law position. "If there is no principal, there can be no accessory; and the law presumes no one guilty until conviction." But, however "plain" this explanation may be, it lends no support to the conclusions reached. Had such support not been entirely wanting, the accessory concept would not have been excluded in cases of treason and misdemeanor.

Let a simple factual situation be assumed. Suppose there is abundant evidence to prove that A procured poison and handed it to B with instructions to B to administer it to C, that B did so with fatal results, and that A was prompted by a malicious purpose to cause the death of C. Let it further be supposed that there is substantial doubt whether B knew he was administering poison or had been led to believe it was a beneficial drug. Unless this doubt can be clarified it will be impossible to convict B of murder, but why should this doubt acquit the originator of this murderous scheme, as to whom there is no doubt? "There can be no accessory without a guilty principal" it is true, but if B is a guilty party A is an accessory, and if B is an innocent party A is a principal in the first degree. Since the punishment is the same in either case, it is not indispensable, as a matter of criminal justice, that we should know which label is appropriate in this case.


319. In explanation of the origin of the rule it has been said: "The modes by which guilt and innocence were proved were, or had lately been, sacral and supernatural processes which could not be allowed a chance of producing self-contradictory results. What should we think of the God who suffered the principal to come clean from the ordeal after the accessory had blistered his hand?" 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 509.


It has been said that even under modern statutes it is imperative for the state to prove the guilt of the principal as well as the instigation by the accessory. With proper limitations this position may be accepted. If an innocent citizen is the subject of a murderous assault under such circumstances that he is privileged by law to defend himself by the use of deadly force, a bystander, who could not himself prevent the harm by milder measures, would incur no guilt by encouraging the one assailed to shoot in self-defense, whereas one who counseled him to take this extreme measure might be found to have made no mistake but to have spoken with the deliberate and malicious purpose of causing the death of one known to him to be acting in the capacity of a "practical" joker. If so, the instigator should be convicted of murder, as a principal in the first degree if the common law label must be retained.

If there is no evidence of defendant's guilt except on the theory that he caused a crime to be committed by another (whether by incitement or abetment), it will obviously be necessary for the prosecution to prove the crime was actually committed by another, and this must be established with the same certainty as if the perpetrator himself were on trial. Aside from outworn technicality, however, it is not necessary to have a judgment of conviction against the perpetrator to establish his actual guilt. In fact if such a judgment is available and is introduced in evidence against the accessory it is not conclusive in his case but is only prima facie evidence of the other's guilt. The

322. Ogden v. State, 12 Wis. 532 (1866); accord, Miller v. People, 98 Colo. 249, 55 P. (2d) 320 (1936); Thomas v. State, 73 Fla. 115, 74 So. 1 (1917).
325. Pinder v. State, 27 Fla. 370, 8 So. 837 (1891); State v. Reed, 53 Kan. 767, 37 Pac. 174 (1894); State v. Gray, 43 Ore. 445, 74 Pac. 927 (1904).
328. Terry v. State, 149 Ark. 462, 233 S. W. 673 (1921); McCall v. State, 120 Fla. 707, 163 So. 38 (1935); Anderson v. State, 63 Ga. 675 (1878). A statute providing that a judgment of conviction of the thief "shall be conclusive evidence against said receiver, that the property of the United States thereon described had been embezzled, stolen or purloined," was held unconstitutional. Kirby v. United States, 174 U. S. 47 (1899).
accessory may contest this and introduce evidence to show the perpetrator really innocent in spite of his conviction.\textsuperscript{329}

If criminal courts operated on a purely sporting theory of justice, and if there were added to this the assumption that the perpetrator always has greater moral guilt than the inciter, it might seem improper to convict the latter of a higher grade of crime than the former, or to punish the inciter after the perpetrator has been acquitted. But any such assumption is fallacious. While it is true, to take a test from the homicide cases, that one may incite in the heat of passion what another carries out in cold blood,\textsuperscript{330} it is also true that one, acting with malicious premeditation, may instigate that which is perpetrated by another at once and in the heat of passion.\textsuperscript{331} Furthermore, “different juries may reach different conclusions as to the guilt of the principal”,\textsuperscript{332} and through “failure of proof or caprice of the jury the principal may have been convicted of an offense of lower grade or even acquitted, but this alone does not determine the question of the guilt or innocence of the accessory of the crime charged. The actual guilt or innocence of the principal is the controlling fact, and, having determined that the principal is actually guilty of the crime charged, the accessory may be convicted and punished as a principal upon proof that he aided, abetted, and encouraged the commission of the crime.” \textsuperscript{333}

Suppose, for example, the trial of the actual slayer resulted in an acquittal because the jury was not satisfied with the evidence then available, but in following up leads from the evidence introduced in that trial the state has now the most convincing evidence that another man planned that homicide and hired the one first tried to do the deed. Certainly the interests of social discipline do not require that the “man higher up” should go free merely because his “tool” happened to be acquitted.\textsuperscript{334}

\textsuperscript{329} Commonwealth v. DiStasio, 208 Mass. 562, 11 N. E. (2d) 799 (1937); State v. Burbage, 51 S. C. 284, 28 S. E. 937 (1897); Aston v. State, 136 Tex. Cr. R. 12, 122 S. W. (2d) 1073 (1939). A confession by the principal does not prove his guilt in a prosecution against the accessory because it is only hearsay as to him. Ogden v. State, 12 Wis. 532 (1860). The husband of the victim was convicted of rape as principal in the second degree after the alleged principal in the first degree had been acquitted. The judgment was reversed and the husband discharged. State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899).

\textsuperscript{330} State v. Smith, 100 Iowa 1, 69 N. W. 269 (1896); Moore v. Lowe, 116 W. Va. 165, 180 S. E. 1 (1935).

\textsuperscript{331} Bingham v. Commonwealth, 183 Ky. 688, 210 S. W. 459 (1919). The defendant was an abettor (present) in this case rather than an inciter, but the basic problem is the same.

\textsuperscript{332} Cummings v. Commonwealth, 221 Ky. 301, 313, 298 S. W. 943, 948 (1927); cf. Seiden v. United States, 16 F. (2d) 107 (C. C. A. 2d, 1926); see, Roberts v. People, 103 Colo. 250, 87 P. (2d) 251 (1938); Woody v. State, 10 Okla. Cr. R. 322, 136 Pac. 430 (1913).

\textsuperscript{333} Fleming v. State, 142 Miss. 872, 880-1, 108 So. 143, 145 (1926).

\textsuperscript{334} “We think a guilty accessory may be punished, even though the principal escape.” State v. Bogue, 52 Kan. 79, 87, 34 Pac. 410, 412 (1893).
The only sound basis for procedure in such cases is that the guilt of an inciter "must be determined upon the facts which show the part he had" in the offense, and not upon the result of the trial of some other person. Needless to say, substantial rights, as distinguished from technicalities of purely historical significance, should be safeguarded. But every effort should be made to avoid such positions as that miscarriage of justice in the trial of the perpetrator must of necessity cause justice to miscarry when the inciter is tried, or that a defendant must be acquitted if there is doubt as to which of two theories of the crime is the true one, if he would be equally guilty of the same offense under either, just as we avoid any notion that the state is estopped to try and convict the real murderer merely because it has erroneously convicted the wrong man in a previous trial.

One of the greatest social menaces of the present day is the man who would be termed an accessory before the fact by the common law but in lay language is referred to as the "brains" of a crime ring. He tends to put crime on a "business basis", he recruits members of the "profession", he provides the means by which crimes are perpetrated on an elaborate scale, and weapons so that death will result from any interference with his plans. The guilt of his terrified underlings, who carry out his commands because they dare not disobey, is certainly no greater than his. And it will not promote the general scheme of social discipline to handicap the prosecution of such an offender by unreasonable obstacles.

The position of the accessory after the fact has also been modified by statute in most of the jurisdictions. These enactments also are variously worded in the different states. The distinction between the principal and the accessory after the fact has been quite generally preserved, but there has been a very definite trend in the direction of removing procedural technicalities from this branch of the law. Certain other important changes are to be found. The present state of the statutory law, however, requires these changes, and the details of the trend mentioned, to be spoken of as accomplishments in some states, rather than in more general terms.

Some of these enactments, for example, provide that the accessory after the fact may be tried in any court which shall have jurisdiction of

335. State v. Smith, 100 Iowa 1, 4, 69 N. W. 269 (1896).
337. The accused was properly convicted although it cannot be determined whether he fired the fatal shot himself or aided and abetted another in doing so. Gambrel v. Commonwealth, 283 Ky. 816, 143 S. W. (2d) 514 (1940).
339. "These several distinctions have been abolished by statute in this Territory, except as to accessories after the fact." Drury v. State, 9 Okla. 398, 403, 60 Pac. 101, 105 (1900). Italics added. See also the statutes cited in the following footnotes.
the principal felon even if the act of accessoryship was committed outside of the state, adding, sometimes, that if both events occur within the state, but in different counties, the accessory may be tried in either one. Some authorize the trial, conviction and punishment of such an accessory even if the principal “cannot be taken so as to be prosecuted and punished,” or “whether his principal has or has not been convicted,” or has been pardoned, or is dead, or has been acquitted. On the other hand, the common law requirement that the accessory after the fact must be charged as such in the indictment has commonly been retained. Hence, one cannot be convicted as such accessory under an indictment charging him as principal, nor be convicted as principal if he is charged as an accessory after the fact. This seems to be more than a mere technicality, as far as an accessory of this type is concerned.

The social problem presented by the accessory after the fact is substantially different from that which arises in connection with the accessory before. The accessory after the fact has had no part in causing the felony itself, but has merely interfered with the due course of justice. This culpable interference is in itself a socially harmful occurrence, and hence may properly be dealt with rather severely in the general scheme of social discipline. But the ancient notion that the accessory after the fact has become tainted with the principal felony and has subjected himself to the same punishment as is provided for the felon he aided, seems out of line with the general view of the present day. In fact, as previously mentioned, the movement to moderate the penalty provided for such misconduct began at an early time in the form

344. See, e. g., Ala. Gen. Acts 1928, § 3197. This would be included under the more general provisions of a principal who “cannot be taken” or “is not amenable to justice.” See note 91 supra.
345. This is sometimes expressly provided in the statute. See, e. g., Mont. Rev. Code (1935) § 11885; Okla. Stat. (1931) § 2903. It is sometimes held to be implied in other phrase, such as, “though the principals be not taken or tried.” Commonwealth v. Long, 246 Ky. 809, 56 S. W. (2d) 524 (1933).
346. This is sometimes expressly provided. See, e. g., Ind. Stat. Ann. (Baldwin, 1934) § 2245. More commonly it results from the fact that the statutes preserve the distinction between the principal and the accessory after the fact and do not include any change in this part of the rule, while making modifications in other respects. See the statutes cited in the other footnotes to this paragraph.
of according benefit of clergy to the accessory after the fact even in cases in which this privilege was denied to the principal or the accessory before. When benefit of clergy became obsolete, the accessory after the fact was once more subject to the same punishment as the principal except where a different penalty has been provided by legislation. Modern statutes vary widely in this respect. Under some, the accessory after the fact receives the same punishment as the principal, either by express provision or by the failure to provide any other penalty. Under others, quite a different penalty is provided, such as "imprisonment for not more than five years, or . . . a fine of not more than five hundred dollars, or by both." There may be an even milder provision than this, as, for example, that one convicted as accessory after the fact "must be fined not more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months."

Some statutes, furthermore, have made a more realistic approach than did the ancient law, to the part of this problem affected by intimate relationship between the felon and one who conceals or otherwise aids him to protect him from the consequences of his crime. The common law was "so strict . . . that the nearest relations are not suffered to aid or receive one another" in the effort to save a felon from trial and punishment; and were punishable as accessories after the fact if they did so. The only exception to this, made nominally at least on purely technical grounds, was that a wife could not become an accessory after the fact by receiving and concealing or otherwise aiding her husband. No such protection was accorded the husband who knowingly tried to save his wife from the consequences of her felony, nor was it recognized in favor of the parent, child or brother of the principal felon. In view of the moral timbre of our time, however, even if it be viewed as weakness, it is asking too much of a jury to expect a conviction of one who has merely opened his door or given

348. It was abolished in England in 1827. 1 Stephen, History of Criminal Law of England (1883) 472. In one manner or another it has been eliminated in this country. See 1 Stat. 114, § 30 (1790), 18 U. S. C. A. § 551 (1927), which excludes it as far as federal offenses are concerned. "In this country, although in some states recognized as a part of the common law, it has now universally been abolished either by express enactment or by implication." 3 Wharton Criminal Procedure (10th ed., Kerr, 1918) § 1892.


350. See, e. g., Iowa Code (1935) § 12896.


354. "... for she is presumed to act under his coercion. . . ." Id. at *39.


356. 1 Hale P. C. *629.

357. 4 Bl. Comm. *38.
PARTIES TO CRIME

some similar aid to a parent, child or other intimate relation.\textsuperscript{358} Hence, a number of the statutes exclude from the field of accessoryship after the fact, any person "standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity" to the principal felon,\textsuperscript{359} with a qualification sometimes added, such as, "unless in doing so he shall forcibly break a prison in which such felon was at the time confined, or take him by force from an officer or guard."\textsuperscript{360}

The ends of social discipline will be best served by abrogating entirely the distinction between the accessory before the fact and the principal, by removing procedural technicalities from the prosecution and conviction of the accessory after the fact, by providing milder penalties for such a party, and by excluding from this type of accessoryship those who are intimately related to the principal.

\textsuperscript{358} Even the court may be influenced by too harsh a rule. In one case a conviction of the felon's brother as accessory was reversed, although the guilt seems to have been clearly proved. Neal v. United States, 102 F. (2d) 643 (C. C. A. 8th, 1939).

\textsuperscript{359} 4 FLA. COMP. GEN. LAWS ANN. (Skillman, 1928) § 7112; IND. STAT. ANN. (Baldwin, 1934) § 2245; KY. STAT. (Carroll, 1936) § 1129; MO. REV. STAT. (1929) § 4447; VA. CODE (1930) § 4765; WASH. REV. STAT. (Remington, 1932) § 2261. Some statutes have a similar provision without including the grandparent-grandchild relation. ILL. REV. STAT. (Cahill & Moore, 1935) c. 38, § 584; TENN. CODE (1932) § 10766.

\textsuperscript{360} See, e. g., KY. STAT. (Carroll, 1936) § 1129; "... except for resisting, by force or menaces, officers or others in the legal discharge of their duty, ..." TENN. CODE (1932) § 10766.