Criminal Law - Accessories - Conviction After Principal Has Been Acquitted

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—the defendant was charged with being an accessory before the fact to the crime of embezzlement, a principal in the same offense, and an accessory before the fact to a charge of malfeasance in office. The charge against the principal was dismissed. The court sustained the defendant's plea in abatement on that ground. Upon the State's appeal, the question involved was whether an accessory can be informed against and tried after the acquittal of the principal.

Held, order reversed and record remanded with order to overrule the plea. The court stated that it was the intention of the legislature to abolish some of the technicalities of the common law when it passed Sec. 353.06 Wis. Stats.: "Every person who shall counsel, hire or otherwise procure any offense to be committed which shall be a felony may be indicted or informed against and convicted as an accessory before the fact either with the principal felon or after conviction of the principal felon, or he may be indicted and informed against and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted or shall or shall not be amenable to justice, and in the last mentioned case may be punished in the same manner as if convicted of being an accessory before the fact." The result of the operation of the statute is that an accused accessory is not automatically acquitted because of the acquittal of the principal, by either the court or a jury, in an entirely different action. Granting that in the separate trial of the accessory in order to obtain a conviction the State must prove the guilt of the principal, nevertheless, the prosecution is not bound by the verdict of another jury in the prosecution of the principal for a distinct and separate offense. State v. Hess (Wis. 1939) 288 N.W. 275.

Under the common law, an accessory before the fact could not be convicted before the conviction of the principal, or the outlawing of the principal, which was the equivalent of a conviction. The accessory, however, could be joined with the principal in the same indictment and tried at the same time. Apparently, the only exception to this rule was where the accessory consented to be tried before the principal. The result was that an accessory could not be tried if the person charged as principal was acquitted. Karakutza v. State, 163 Wis. 293, 156 N.W. 965 (1916); People v. Beintner, 168 N.Y. Supp. 945 (1918); People v. Ah Gee, 37 Cal. App. 1, 174 Pac. 371 (1918); State v. Gargano, 99 Conn. 103, 121 Atl. 657 (1923).

Modern statutes on this subject tend toward an elimination of the distinction between principals and accessories—at least that has been stated as being the purpose of the legislation. Conservatism and a technical interpretation of the statute have thwarted this intention in many cases. Perhaps one of the sources of the lack of uniformity can be traced to the two classes of statutes now in effect. One class, which is more numerous, abolishes all distinction between principals and accessories and provides that an accessory may be convicted and punished as a principal. The other class, which is modeled after the English statute, removes the necessity of prosecution and conviction of the principal, making it sufficient to prove the guilt of the principal felon. Wisconsin is in the latter classification. Karakutza v. State, supra.

It appears that under almost all statutory interpretations convictions of the accessory, before the principal has been tried or convicted, have been allowed. Although one might expect substantially the same agreement among states as
to conviction of the accessory after the acquittal of a principal, the rule is not so uniformly announced.

Where a separate designation of the two crimes has been established by statute, the courts have stated that the offense of being an accessory is punishable without regard to the conviction or acquittal of the principal. *People v. Beintner, supra; Cummings v. Commonwealth*, 221 Ky. 301, 298 S.W. 943 (1927); *State v. Reid*, 178 N.C. 745, 101 S.E. 104 (1919); *Powers v. State*, 172 Ga. 1, 157 S.E. 195 (1931); *Roberts v. People*, 103 Col. 251, 87 P. (2d) 251 (1938). Certain states, under similar statutes, tenaciously retain some semblance of the common law distinction between principals and accessories. Though they refuse it for some purposes, there is a reluctance to disregard the common law entirely. In Illinois, the court has declared: "The rule of the common law concerning the effect of the acquittal of the principal is not changed by a statute authorizing the trial of the accessory before that of the principal. A statute providing that an accessory before the fact may be indicted and convicted of a substantive felony whether the principal has or has not been convicted, or is or is not amenable to justice, removes the common law requirement of a prior or simultaneous conviction and sentence of the principal, but has no application to a case in which the principal has been tried and acquitted." *People v. Wyherk*, 347 Ill. 28, 178 N.E. 890 (1931). See also: *McCarty v. State*, 44 Ind. 214, 15 Am. Rep. 232 (1873). And, that a conviction of the defendant was illogical after the principal, whom he was to have aided, was acquitted. *State v. St. Philip*, 169 La. 468, 125 So. 451 (1929). Where the defendant was charged as principal, the court stated that the evidence was only sufficient to hold him as an accessory and, since the principal was acquitted, the conviction could not be sustained. *Pierce v. State*, 130 Tenn. 24, 168 S.W. 851 (1914).

Under a Florida statute providing for punishment of accessories as principals, it has been held that the effect of the section did not do away with the distinction between principals in the second degree and accessories before the fact. It was further explained that "where an accessory before the fact is not indicted or informed against for a substantive offense, but is indicted or informed against in the common law mode, which is permissible under our statutes, the common law rule controls." *Neumann v. State*, 116 Fla. 98, 156 So. 237 (1934). But, when the accessory is indicted for a substantive offense, he may be tried at the time of or independently of the principal felon. *Lake v. State*, 100 Fla. 373, 129 So. 827 (1930). In Massachusetts a statute also provides for the punishment of accessories as principals. Although an accessory may be tried before the principal, "obviously in such case the accessory may defend on ground that the Commonwealth has failed to prove the commission by the principal of the felony charged." *Commonwealth v. Di Stasio* (Mass. 1937) 11 N.E. (2d) 799; *Commonwealth v. Kaplan*, 238 Mass. 250, 130 N.E. 485 (1921).

Those jurisdictions wherein accessories are, by statute, called principals, permit conviction of the accessory after the principal's acquittal. In some cases, it was contended that, since the principal was acquitted at a separate trial, the law should operate to acquit the defendants. But the court said that "one who has heretofore been termed an accessory may be prosecuted, tried and punished, though the principal felon be neither prosecuted nor tried, or if tried, has been acquitted." *Thomas v. State*, 40 Okla. 204, 267 Pac. 1040 (1928). Under a similar statute, it was stated that the effect of the statute was "to permit the prosecution of one who aids or abets without regard to the conviction or acquittal of one who, under the common law, would have been called the principal."
People v. Smith, 271 Mich. 553, 260 N.W. 911 (1935). See also: State v. Smith, 100 Iowa 1, 69 N.W. 269 (1896); State v. Nikolich, 137 Wash. 62, 241 Pac. 664 (1925); Hornsby v. State, 29 Ohio App. 495, 163 N.E. 923 (1928); Scharman v. State, 115 Neb. 109, 211 N.W. 613 (1926). In Arkansas the statutes provide that an accessory be treated as a principal and that he "may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged." But it has been held that a lower court abused its discretion in trying the accessory before the principal. Feaster v. State, 175 Ark. 165, 299 S.W. 737 (1927). It was suggested in State v. Bogue, 52 Kans. 79, 34 Pac. 410 (1893) that the subsequent acquittal of a principal does not carry with it the conviction against the accessory. For a discussion of the Federal rules see: Rooney v. United States, 203 Fed. 928 (C.C.A. 9th, 1913); United States v. Pyle (S.D. Calif. 1921) 279 Fed. 290; Dunn v. United States, 284 U.S. 390, 52 Sup. Ct. 189, 76 L.Ed. 356 (1932).

LEROY J. GONRING.

Fixtures—Must Chattel Be Annexed to Constitute a Fixture.—Louis Shapiro mortgaged his apartment building, which was equipped with gas ranges, mechanical refrigerators, and rollaway beds, to the Welfare Building and Loan Association. Although the ranges and refrigerators were physically connected to the building, the rollaway beds were not. Shapiro later gave a bill of sale to the gas ranges, refrigerators, and rollaway beds to one Leisle; but before Leisle removed them the building and loan association foreclosed the mortgage. Leisle brought action against the Association alleging conversion. Held: the ranges and refrigerators and beds were part of the realty and passed with the realty to the Welfare Building and Loan Association. Leisle v. Welfare Building and Loan Association (Wis. 1939) 287 N.W. 739.

In determining the question as to when personal property becomes a fixture the majority of the courts today apply three tests. These three tests are: (1) actual physical annexation, (2) adaptation to the use of the realty, and (3) the intention of the parties. Standard Oil Co. v. La Crosse Super Auto Service, 217 Wis. 237, 258 N.W. 791 (1935). But by a survey of the decisions of the courts which apply these tests it is readily found that the first two criteria are used only in arriving at an understanding as to what the intention of the parties really was at the time of the annexation; and then this intention is used as the true basis for deciding the case. Ottumwa Woolen Mill v. Hawley, 44 Iowa 57, 24 Am. Rep. 719 (1876).

In the Standard Oil Case there was physical annexation—underground gasoline tanks and gasoline pumps—and they were adapted to the use of the realty—a gasoline station—and yet the court held that these tanks and pumps were not part of the realty but were still personalty because it was the intention of the parties that they were to be considered as such. The intention in this case was indicated by the terms of a lease which gave the Standard Oil Company the right to remove equipment following the termination of the lease.

Also, as shown in the principal case, if there is no annexation and yet it is the obvious intention of the parties that the property is to be considered as part of the realty, then the courts will hold that it is realty in deference to the original wishes of the parties. So today the major question to be decided has been narrowed down to the intention of the person making the annexation to make the chattel a permanent addition to the real estate; and it is only in deter-