



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 41 | Number 1

Article 14

---

12-1-1962

# Criminal Law -- Procedure -- Indictments -- Principal Includes Accessory Before the Fact as Lesser Offense

William R. Hoke

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

William R. Hoke, *Criminal Law -- Procedure -- Indictments -- Principal Includes Accessory Before the Fact as Lesser Offense*, 41 N.C. L. REV. 118 (1962).

Available at: <http://scholarship.law.unc.edu/nclr/vol41/iss1/14>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

The court in the principal case found the printed clauses in the acknowledgment to be the controlling expression of defendant's intent. By doing so, however, it ignores comment two of section 2-207 which prohibits such a finding when there is an agreement in existence between the parties at the time the acknowledgment is dispatched, unless the acknowledgment states that its expression of acceptance will not be effective until assent is given to the additional or different terms.<sup>27</sup>

At the end of 1960, the Uniform Commercial Code had been adopted in only six states;<sup>28</sup> since then, it has been enacted in twelve more.<sup>29</sup> Consequently, litigation concerning the interpretation of the Code is bound to increase. However, until considerable litigation has ensued, the only mutually applicable authority courts will have in interpreting it will be the comments which the drafters have appended to the various sections. Unless courts explain their decisions in terms of these comments, the uniformity of the law of commercial transactions which the Code contemplates<sup>30</sup> will not be realized.

WILLIAM EMMETT UNDERWOOD, JR.

#### Criminal Law—Procedure—Indictments—Principal Includes Accessory Before the Fact as Lesser Offense

The common law defines a principal in crime as a person who actually participates in the commission of a felony.<sup>1</sup> A principal in the first degree commits the crime either by his own hand or by the hand of his agent, and such principal must be actually or constructively present at the act. A principal in the second degree is present, actually or constructively, and aids or abets in the commission of

---

<sup>27</sup> The result reached by the court may have been contemplated by comment 2, but this is impossible to determine since the court did not consider the possibility that the relationship of the parties and their prior dealings indicated that an agreement may have been reached at the time the acknowledgment was dispatched.

<sup>28</sup> Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania and Rhode Island.

<sup>29</sup> Alaska, Arkansas, Georgia, Illinois, Michigan, New Jersey, New York, Ohio, Oklahoma, Oregon and Wyoming.

<sup>30</sup> Section 1-102(2) provides: "Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."

<sup>1</sup> There are no accessories to treason and misdemeanors at common law. I WHARTON, CRIMINAL LAW AND PROCEDURE § 102 (1957).

the crime but does not himself perpetrate it. An accessory before the fact procures, counsels or commands another to commit a felony but is not present, actually or constructively, at its commission.<sup>2</sup>

A sharp split of opinion concerning the law of principals and accessories divided the North Carolina Supreme Court in a recent decision, and this division reflects a general split of authority among other jurisdictions. In *State v. Jones*,<sup>3</sup> the court, by a four to three majority, held that accessory before the fact is a lesser included offense<sup>4</sup> in an indictment for murder. It seems worthwhile to examine the background of this decision and to ponder its ramifications.

The applicable North Carolina statutes,<sup>5</sup> augmenting the common law, provide that an accessory before the fact may be indicted and convicted of a "substantive felony" whether the principal shall or shall not have been previously convicted, and that the punishment for accessory before the fact of murder, arson, burglary, and rape shall be life imprisonment.

The North Carolina court laid the groundwork for the *Jones* opinion in its decision in *State v. Bryson*,<sup>6</sup> where it interpreted the statutes as implying that the common-law distinction between principal and accessory was abolished. This would indicate that the accused could be found guilty as a principal regardless of proof that he was not present at the criminal act. Indeed, the court in the *Bryson* case approved of this situation.<sup>7</sup>

---

<sup>2</sup> *Id.* at §§ 102-10. See *State v. Bass*, 255 N.C. 42, 120 S.E.2d 580 (1961).

<sup>3</sup> 254 N.C. 450, 119 S.E.2d 213 (1961). For a brief discussion of this case, see *Criminal Law, Ninth Annual Case Law Survey*, 40 N.C.L. Rev. 517 (1962).

<sup>4</sup> "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. GEN. STAT. § 15-170 (1953).

<sup>5</sup> N.C. GEN. STAT. §§ 14-5, -6 (1953).

<sup>6</sup> 173 N.C. 803, 92 S.E. 698 (1917).

<sup>7</sup> Upholding the trial court's refusal to instruct the jury that the accused could not be convicted as a principal if he was not present at the murder, the court said that it was "of opinion that the indictment and conviction of the prisoner in this case comes within the language and intent of Revisal, 3287, and 3269 [N.C. GEN. STAT. §§ 14-5, 15-170 (1953)], which made accessory before the fact the 'substantive felony,' and which are intended to destroy the technical distinctions which had so often led to such miscarriages of justice as would be caused here if the prisoner, who has been tried and convicted upon evidence of his active participation in causing the death of his wife by counseling, aiding and procuring his daughter to slay her, should be discharged of all liability." *State v. Bryson, id.* at 806, 92 S.E. at 699.

The *Bryson* court, faced with a problem of statutory interpretation, ap-

But apparently this is the only occasion when the court has expressly discounted the element of presence.<sup>8</sup> Even the principal case,<sup>9</sup> although relying on *Bryson* in holding that accessory is a lesser included offense, recognized that presence distinguishes a principal from an accessory. The accused in the *Jones* case was indicted and tried for murder. The court stated that since the crime of accessory before the fact was included in the indictment as a lesser offense, the trial judge should have instructed the jury as to the elements of accessory if evidence was offered tending to show that the accused procured, counseled or commanded the murder, *but was not present at its commission*. It would seem that if the distinction is abolished, no such instruction would be necessary inasmuch as the jury could convict as principal regardless of presence or absence.<sup>10</sup>

Two cases<sup>11</sup> decided prior to the *Bryson* case held that the distinction between accessory and principal was not abolished and, consequently, that accessory before the fact was not a lesser included offense. It should be pointed out that the *Bryson* court, although aware of the earlier decisions, was faced with a fact situation whereby the accused stood to receive a lighter sentence for second degree murder than he could have received as an accessory before the fact of first degree murder. The court reasoned that since the sentence imposed (20 years imprisonment) was less than that to which he

---

parently concluded that "substantive felony" meant the offense of the principal. *Contra*, the Maine court's interpretation of a similar statute: "[T]he offense for which an accessory before the fact may be indicted and convicted is a substantive felony, a form of expression, which is general, and not meant to refer to either [principal or accessory] . . . . A substantive felony is that which depends upon itself, and is not dependent upon another felony, which is established by the conviction of the one, who committed it, alone." *State v. Ricker*, 29 Me. 84 (1848).

<sup>8</sup> *But see* *State v. Bryson*, *supra* note 7, at 806, 92 S.E. at 699, which cited *State v. Chastain*, 104 N.C. 900, 10 S.E. 519 (1889) as holding that the element of presence is not a prerequisite for a conviction as a principal. In the latter case the accused, armed with a rifle and concealed 150 yards behind his brother, who was lying in wait for the victim, was indicted and convicted as a principal. It seems, however, that the accused was constructively present and indictable, consequently, as a principal in the second degree. "A person is constructively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or 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 enterprise." CLARK AND MARSHALL, *LAW OF CRIMES* § 167 (5th ed. 1952).

<sup>9</sup> *State v. Jones*, 254 N.C. 450, 119 S.E.2d 213 (1961).

<sup>10</sup> *Cf.*, jury instruction in *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917).

<sup>11</sup> *State v. Green*, 119 N.C. 899, 26 S.E. 112 (1896); *State v. Dewer*, 65 N.C. 572 (1871).

was liable if he had been tried and convicted as an accessory before the fact (life imprisonment), the accused could not complain that he was not convicted as an accessory. In reaching this result the court apparently left the door open for future misunderstandings. While the strict, narrow holding of the *Bryson* case was that the accused could be convicted of second degree murder under an indictment for murder, whether or not he was *present* at the crime, the court three years later interpreted this to mean that accessory before the fact is a lesser included offense in an indictment for the principal's crime.<sup>12</sup>

This problem has arisen in North Carolina and elsewhere as a result of the enactment of statutes that have altered the common-law concepts of accessory and principal. Some jurisdictions have adopted statutes<sup>13</sup> which provide that the distinction between accessory before the fact and principal is abolished, while others have enacted statutes<sup>14</sup> which do not expressly abolish the distinction but at the same time provide the same punishment for both offenders. The North Carolina statutes would appear to occupy a third category.<sup>15</sup> We have seen that under their provisions the punishments for a principal and for an accessory before the fact are not necessarily identical. The matter of the abolition of the distinction in North Carolina is less clear.

Other jurisdictions have held<sup>16</sup> that statutes providing for the prosecution of accessories before the fact jointly with the principal, and for their trial regardless of whether or not the principal is tried, do not abolish the common-law distinction between accessory and principal. It has also been held<sup>17</sup> that the distinction is not abolished by statutes making one who aids, abets or procures another to commit a felony, guilty of a substantive crime. Despite a statute providing that their punishments are identical, it has been held<sup>18</sup> that

---

<sup>12</sup> *State v. Simons*, 179 N.C. 700, 103 S.E. 5 (1920) (dictum).

<sup>13</sup> See, e.g., 18 U.S.C. § 2 (1950); CAL. PENAL CODE § 31 (1955); FLA. STAT. ANN. § 776.011 (Supp. 1961); N.Y. PENAL CODE § 2 (Supp. 1962); WASH. REV. CODE ANN. § 9.01.030 (1961).

<sup>14</sup> See, e.g., CONN. GEN. STAT. § 54-196 (1958); GA. CODE ANN. §§ 26-602, -603 (1953); MASS. LAWS ANN. ch. 274, § 2 (1956); S.C. CODE § 16-1 (1952); W. VA. CODE § 6118 (1955).

<sup>15</sup> *But see State v. Bryson*, 173 N.C. 803, 806, 92 S.E. 698, 699 (1917), where the court seemed to consider North Carolina's statutes as among those abolishing the distinction.

<sup>16</sup> *Able v. Commonwealth*, 68 Ky. 698 (1869); *State v. Ricker*, 29 Me. 84 (1848); *State v. Roberts*, 50 W. Va. 422, 40 S.E. 484 (1901).

<sup>17</sup> *State v. Ricker*, *supra* note 16.

<sup>18</sup> *Able v. Commonwealth*, 68 Ky. 698 (1869); *State v. Ricker*, 29 Me. 84

the distinction between principal and accessory prevails. Conversely, it has been held<sup>19</sup> that a statute providing that accessories shall be punished in the same manner as the principal in effect makes principals of accessories before the fact.

The primary problem born of this controversy is that of the proper manner of drawing the indictment. The common-law rule is that an accessory before the fact in a felony case must be indicted as such and not as a principal.<sup>20</sup> But by virtue of statutes<sup>21</sup> in some jurisdictions it has been held<sup>22</sup> that an accessory before the fact may be indicted as though he were the principal without setting out the facts by which he advised, counseled, or procured another to commit the crime. In some instances the statutes<sup>23</sup> expressly provide that an accessory before the fact may or shall be indicted as a principal. But even in the absence of such a provision, where the distinctions between principals and accessories before the fact have been abolished, the indictment has been held<sup>24</sup> to have been properly drawn against a principal. By following the opinions in *State v. Simons*<sup>25</sup> and *State v. Jones*,<sup>26</sup> it is now permissible in North Carolina to draw an indictment against the accused as a principal and convict him thereunder as an accessory before the fact.

---

(1848); *State v. Lacoshus*, 96 N.H. 76, 70 A.2d 203 (1950); *State v. Patriarca*, 71, R.I. 151, 43 A.2d 54 (1945); *State v. Jennings*, 158 S.C. 422, 155 S.E. 621 (1930); *Pierce v. State*, 130 Tenn. 24, 168 S.W. 851 (1914). *State v. Patriarca*, *supra*, raises an interesting point concerning limitation of actions. It holds that where a felony and being an accessory before the fact to a felony are regarded as distinct offenses, a statute excepting murder from a limitation of the time for instituting criminal prosecution cannot be regarded as also excepting a prosecution on the charge of being an accessory before the fact to the crime of murder, even though the statute provides that the accessory shall suffer the same punishment as the principal. *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122 (N.Y. 1830) is sometimes cited as opposing the Rhode Island case, but its opinion on this point is dictum.

<sup>19</sup> *Buie v. State*, 68 Fla. 320, 67 So. 102 (1914). Subsequent to this decision the Florida statute was rewritten, abolishing the distinction. See note 13 *supra*.

<sup>20</sup> 42 C.J.S. *Indictments and Informations* § 148 (1944).

<sup>21</sup> *E.g.*, COLO. REV. STAT. § 40-1-12 (1953); MICH. STAT. ANN. § 28.979 (1954); WASH. REV. CODE ANN. § 9.01.030 (1961).

<sup>22</sup> *Newton v. People*, 96 Colo. 246, 41 P.2d 300 (1935); *People v. Knoll*, 258 Mich. 89, 242 N.W. 222 (1932); *State v. Cooper*, 26 Wash. 2d 405, 174 P.2d 545 (1946).

<sup>23</sup> *E.g.*, IOWA CODE § 688.1 (1950); MICH. STAT. ANN. § 28.979 (1954); VT. STAT. ANN. tit. 13, § 4 (1958); VA. CODE § 18.1-11 (1950); WASH. REV. CODE ANN. § 9.01.030 (1961).

<sup>24</sup> *People v. Bliven*, 112 N.Y. 79, 19 N.E. 638 (1889).

<sup>25</sup> 179 N.C. 700, 103 S.E. 5 (1920).

<sup>26</sup> 254 N.C. 450, 119 S.E.2d 213 (1961).

A question still to be adjudicated, in the light of the North Carolina cases herein discussed, is the interesting one of former jeopardy. It was the common-law rules that prosecution as a principal did not forbid a subsequent prosecution as an accessory. Where it is considered that principal and accessory are distinct offenses and not different degrees of the same crime, the general rule is that an acquittal of one indicted as a principal is not a bar to a subsequent indictment against him as an accessory; and, conversely, an acquittal as an accessory is no bar to an indictment as a principal. On the other hand, jeopardy does attach when accessories may be indicted as principals.<sup>27</sup> However, the North Carolina court has indicated that it is at least sympathetic with the idea that jeopardy should attach, under the proper circumstances, when the offenses are separate and distinct.<sup>28</sup>

Where the courts do rule that jeopardy attaches upon the indictment of an accessory as a principal, it seems that, speaking for the accused, this rule is one salutary result of such changes in the common law as have been discussed in this note. Balancing this result is the possibility that the accused could be unduly burdened in preparing his defense in those jurisdictions, including North Carolina, where he may be convicted as an accessory before the fact under an indictment as a principal.

A reconsideration of the holding of the *Bryson* case, when the opportunity next presents itself, may be in order.<sup>29</sup> If the *Jones* case can be interpreted as maintaining the distinction between principal and accessory before the fact for purposes of the trial court's instruc-

---

<sup>27</sup> 22 C.J.S. *Criminal Law* § 294 (1961); *Contra*, *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122 (N.Y. 1830) (dictum).

<sup>28</sup> N.C. GEN. STAT. § 14-5 (1953) provides that "no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense." The *Bryson* court expressed the opinion that the proviso "gives force to the prisoner's motion for an absolute discharge and exemption from liability if it was error to try him for the substantive felony of murder in counseling, procuring, or commanding his daughter to slay her mother . . ." *State v. Bryson*, 173 N.C. 803, 805-06, 92 S.E. 698, 699 (1917). But because the court found no error in the trial, the question was not adjudicated.

<sup>29</sup> The holding of the *Bryson* case was not disputed in the argument of the principal case before the court. Note also that in its appellate brief the state submitted that a charge of conspiracy would provide another means of arriving at a verdict of murder in the first degree. "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which may afterwards be done by any one of the others, in furtherance of such common design." *State v. Jackson*, 82 N.C. 565 (1880), quoted in Brief for the State, p. 8, *State v. Jones*, 254 N.C. 450, 119 S.E.2d 213 (1961).

tions to the jury, this result still does not answer the important questions that arise in the area of former jeopardy. Perhaps the General Assembly may see a need to revise our law of principals and accessories, as numerous other legislatures have done.<sup>30</sup> A clarification is needed to remove the state of uncertainty that now exists.

WILLIAM R. HOKE

#### Evidence—Presumptions and Burden of Proof—Agency—Motor Vehicles—Identifying Markings

In 1947 the North Carolina Supreme Court in *Carter v. Thruston Motor Lines Inc.*,<sup>1</sup> held that proof of identifying markings on a commercial vehicle, taken in conjunction with adequate evidence of negligent operation of the vehicle, was not sufficient to sustain the necessary inferences of ownership, agency, and scope of employment<sup>2</sup> to make out a prima facie case of respondeat superior liability against the party suggested by the markings as being the owner. A note writer in this *Review* at that time<sup>3</sup> suggested that the difficulties of proof frequently confronting plaintiffs in respect of ownership, agency, and scope, as illustrated in that case, might well justify judicial adoption of a rule by which the master-servant relationship and scope of employment would be inferred from proof of ownership. The court did not do so, but the legislature in 1951 enacted such a rule in G.S. § 20-71.1,<sup>4</sup> which contained the additional element of inferring ownership from proof of registration.

Whatever the intention of the legislature, the language of this statute, that proof of the basic facts of ownership or agency shall "be prima facie evidence" of the inferred essential facts invoking vicarious liability, has proved a somewhat illusory weapon for plaintiffs. Since it is couched in the language of prima facie evidence, and not of presumption, and since it does not in terms shift the burden of proof to the defendant, it has quite predictably<sup>5</sup> been construed to have no

---

<sup>30</sup> See statutes cited notes 13 and 14 *supra*.

<sup>1</sup> 227 N.C. 193, 41 S.E.2d 586 (1947).

<sup>2</sup> Scope of employment will hereafter be referred to as "scope."

<sup>3</sup> Note, 25 N.C.L. REV. 491 (1947).

<sup>4</sup> N.C. GEN. STAT. § 20-71.1 (1953).

<sup>5</sup> Interpretative difficulties are inevitable whenever a statute uses the terms "prima facie evidence," or "presumption," without further directive as to what if any effect is intended to be had upon pleading burden, burden of proof, and probative force by virtue of the operation of statutory prima facie evidence or presumptions. There is no unanimity as to (1) the distinctions, if any, between prima facie evidence and presumption as concepts; (2) their