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Constitutional Law - Discrimination - Executive Speeches Banning Lunch Counter Sit-Ins Held to Be State Action in Violation of the Fourteenth Amendment

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—DISCRIMINATION—EXECUTIVE SPEECHES BANNING LUNCH COUNTER SIT-INS HELD TO BE STATE ACTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Lombard v. Louisiana (U.S. 1963)

Petitioners, one white and three Negro college students, entered a Five and Ten Cent Store in New Orleans, Louisiana, sat down at a refreshment counter customarily reserved for whites, requested service and were refused. The restaurant manager asked petitioners to leave. When they did not, he closed the counter and called the police. Petitioners still declined to leave after the police arrived as a result of which they were arrested. One week prior to this incident, after a similar "sit-in" demonstration, both the Chief of Police and the Mayor of New Orleans had issued statements condemning such conduct and stating that the Police Department was prepared to act against "any person or group who disturbs the peace or creates disorder on public or private property."¹ Unlike other "sit-in" cases, however, there was in this instance "no state statute or city ordinance forbidding desegregation of the races in all restaurant facilities."²

The Supreme Court of Louisiana³ affirmed the conviction by the trial court, holding that the action of the store manager in refusing the petitioners service was in accordance with a policy established by the manager for the past several years and was not action by the state as contemplated by the Fourteenth Amendment. The Supreme Court, through Mr. Chief Justice Warren, reversed, *holding* that the official command of a city police chief directing continuance of segregated service in private restaurants and prohibiting any conduct by either white or Negro towards its discontinuance, is state action as contemplated by the Fourteenth Amendment. *Lombard v. Louisiana*, U.S., 83 S.Ct. 1122 (1963).

The Fourteenth Amendment provides that no state shall ". . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the *Civil Rights Cases*⁴ the Supreme Court clearly stated that this amendment placed no restrictions on the acts of a private individual. The defendants there had denied Negroes access to theatres and inns solely because of their race. The Court held the Civil Rights Act

1. *Lombard v. Louisiana*, 83 S.Ct. 1122, 1123 n.2 (1963).

2. 83 S.Ct. at 1122.

3. *State v. Goldfinch*, 241 La. 958, 132 So. 2d 860 (1961).

4. 109 U.S. 3, 3 S.Ct. 18 (1883).

of 1875,⁵ which made it a federal crime for the owner of public conveyances, theatres, and other places of public amusement to deny anyone the full and equal enjoyment of their accommodations, to be beyond the constitutional authority granted Congress by the Thirteenth and Fourteenth Amendments. The doctrine of "state action" evolved from this landmark case. The fundamental right to equality of opportunity in acquiring property of every kind was said to be free only from "state" interference and not from "private" discriminatory practices.

However, until *Shelley v. Kraemer*⁶ in 1948, it was generally believed that judicial enforcement of private discrimination did not constitute state action.⁷ In *Shelley*, the Supreme Court held that the enforcement of a racially restrictive covenant by a state court was a violation of the equal protection clause of the Fourteenth Amendment. The Court wrote as though all enforcements of private discrimination were state action, and all such state action denied equal protection. Carried to its most extreme point this doctrine indicates that there is state action whenever a will is probated or the state enforces a judgment in trespass. If this reasoning were to be followed, the instant case would hardly be worth noting, for it would certainly be judicial enforcement of a private discrimination. However, restrictive covenant cases differ from the social trespass and testamentary devise cases in that they present a different balance of our constitutional rights of liberty and equality as defined in the Fourteenth Amendment.

When the issue of discrimination affects one of these areas (restrictive covenant, social trespass or testamentary devise), the state cannot escape involvement. It must decide whether to encourage or discourage, to permit or outlaw, such discrimination. Moreover, the state's choice is limited by the Fourteenth Amendment which not only forbids the state from denying equality to the discriminated, but also forbids the state to deprive the discriminator of property and of liberty "without due process of law." Although these are conflicting rights, they are by no means equal.

"Sophistication and 'realism' have long taught that there is no escape from—or anodyne for—the pains of judgment, of drawing lines, of weighing, balancing, distinguishing and dividing."⁸ Herein lies the task of the Supreme Court in the "sit-in" cases, for it would be an impossible task to fashion and apply a precise formula to tell "whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."⁹

5. 18 Stat. 336 (1875).

6. 334 U.S. 1, 68 S.Ct. 836 (1948).

7. See, e.g., *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1920); *Queensborough Land Co. v. Cayeaux*, 136 La. 724, 67 So. 641 (1915). *But see Grandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892).

8. Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473, 505 (1962).

9. *Lombard v. Louisiana*, 83 S.Ct. 1122, 1133 (1963). (Harlan, J., dissenting.)

Realizing the extreme of *Shelley*, the Court has withheld expanding this line of logic beyond racially-restrictive covenants.¹⁰ It is not prohibited state action for a court to enforce discriminatory provisions of a will.¹¹ Where a testamentary trust established a private school for white male orphans, a private trustee has a right to refuse Negro applicants on the grounds that only white males were qualified for admission under the terms of the trust.¹²

However, in "social" trespass cases the Court has found (without relying on the logic of judicial enforcement expounded in *Shelley*) state action in many varying and unique ways, the latest of which is the present case. The decisions favoring Negro claims have relied on a variety of formal state connections to impose standards of equal protection on private businesses. The state is responsible when it permits "a corporation to govern a community of citizens."¹³ The state which owns and leases property to a private body is responsible for the conduct of its lessee, when the property is owned and leased in the manner used in *Burton v. Wilmington Parking Authority*.¹⁴

The Supreme Court neatly avoided state action considerations in deciding the first "sit-in" case.¹⁵ There the Court held that a passenger on an interstate trip has a *federal* right to be served without discrimination by a restaurant. Again, in *Garner v. Louisiana*,¹⁶ the Court avoided a decision based on the concept of state responsibility by holding there was not sufficient evidence to convict the petitioners; while in *Peterson v. City of Greenville*,¹⁷ the companion case to *Lombard*, the Court held that the presence of a statute requiring segregation in restaurant facilities created state action no matter how voluntary the private discrimination.

In the present case, there was no legislative action to enforce discrimination. However, the Court found state action in the speeches by the executive branch of the city government. The Court treated the two speeches exactly as if there had been an ordinance prohibiting such conduct. Thus, under the *Peterson* reasoning, no matter how voluntary the private discrimination, state action is present. These speeches must be interpreted in the light of "sit-ins" during this period.¹⁸ This is a time of social

10. *Barrow's v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031 (1953). The Court expanded *Shelley* by finding state action in the awarding of damages for breach of a racially restrictive covenant.

11. See *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 226 (1955), *cert. denied*, 349 U.S. 947, 75 S.Ct. 875 (1955).

12. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), *cert. denied*, *Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570, 78 S.Ct. 1383 (1958).

13. *Marsh v. Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 280 (1946).

14. 365 U.S. 715, 81 S.Ct. 856 (1961). The state was held responsible for allowing discrimination which, as lessor, it could have prevented, in a restaurant privately operated for personal profit, which was leased from a public authority, and was part of a complex of parking and other facilities built by the state on public land partly with public funds.

15. *Boynnton v. Virginia*, 364 U.S. 454, 81 S.Ct. 182 (1960).

16. 368 U.S. 157, 82 S.Ct. 248 (1961).

17. 83 S.Ct. 1119 (1963).

18. Pollit, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 *DUKE L.J.* 315.

unrest in the South, where "sit-ins" have resulted in violence.¹⁹ Such speeches do tend to promote discrimination in the distant future; however, in the immediate future they promote peace. Justice Harlan in his dissenting opinion points out that the two speeches "are more properly read as an effort by these two officials to preserve the peace in what they might reasonably have regarded as highly charged atmosphere."²⁰ Thus, once again, the majority of the Supreme Court has avoided the issue of whether it is a violation of the equal protection clause for a private restaurant owner to refuse service to customers because of their race.

Congress is now considering President Kennedy's proposed civil rights bill to outlaw racial discrimination in places of public accommodation. The bill would ban racial discrimination by business establishments catering to the public which are part of the interstate chain and serve, for the most part, interstate travelers. Recognizing that Congress is in the process of acting in this area, the Court may continue to avoid making so major a constitutional decision. However, the Court must eventually grapple with the heart of the matter for the proposed bill deals only with the Commerce Clause, leaving the balance between liberty and equality to the Court. In view of the fact that Congress realizes the change in our society and is working on legislation, it seems that the nation is ready for a new balance between liberty and equality.

Mr. Justice Douglas in his concurring opinion has attempted to meet the issue that the majority has avoided. Having failed to persuade the Court to accept his theory that the custom of the state to segregate Negroes from whites is state action,²¹ he has strengthened his previous argument that restaurants are a public accommodation. Due to the change in our times, the Louisiana courts, by enforcing such criminal statutes, "are denying some people access to the mainstream of our highly interdependent life solely because of their race."²² Douglas then argues that such judicial enforcement is in violation of the principles of *Shelley v. Kraemer*²³ and *Barrows v. Jackson*.²⁴ Moreover, he maintains that state licensing and surveillance of such businesses becomes a service to the public rather than a mere income-producing licensing requirement. Therefore, no state can endow such a restaurant "with the authority to manage that business on the basis of *apartheid* which is foreign to our Constitution."²⁵

19. *Id.* at 323-37.

20. *Lombard v. Louisiana*, 83 S.Ct. 1122, 1136 (1963). (Harlan, J., dissenting.)

21. *Garner v. Louisiana*, 368 U.S. 157, 181, 82 S.Ct. 248, 261 (1961). Mr. Justice Douglas concluded that customs may comprise state action. It is then argued that state enforcement of a "custom of segregation" is invalid state action. This suggests that the state may be responsible when it enforces segregation in Louisiana, but not in Pennsylvania.

22. *Lombard v. Louisiana*, 83 S.Ct. 1122, 1128 (1963). (Douglas, J., concurring.)

23. 334 U.S. 1, 68 S.Ct. 836 (1948).

24. 346 U.S. 249, 73 S.Ct. 1031 (1953).

25. *Lombard v. Louisiana*, 83 S.Ct. 1122, 1130 (1963). (Douglas, J., concurring.)

The restaurateur, for his advantage, has opened his property to the public in general, and his rights have become circumscribed by the statutory and constitutional rights of the public in general. Ownership under these circumstances no longer means absolute dominion. Thus, Douglas' reasoning appears to be the logical step for the Court to advance in the future. This step must be taken with limits. State licensing is certainly not sufficient state control from which to find state action, for nearly all businesses require some type of state license. State licensing must be coupled with state surveillance of the business for the benefit not only of the public, but also of the owner. Similarly, the business must also be only "nominally" private, thus giving the state an interest in its service so that the mainstream of life may go on, free of discrimination.

Mr. Justice Harlan in his dissents to both the *Peterson* and *Lombard* cases sees the issue as falling between liberty and equality, but he objects to the Court's refusal to consider whether the discrimination by the restaurateur was in fact voluntary. In so doing, Harlan has missed the entire thrust of the state action concept. The logic of judicial enforcement expounded in *Shelley* shows that the state cannot escape involvement. Placing this logic in the light of our present "mass society"²⁶ demonstrates that the state must draw the balance between liberty and equality. It is this balance that the Supreme Court must review.

The balance may be struck differently at different times, reflecting differences in prevailing philosophy. Moreover, the continuing movement from a laissez-faire to a welfare state has caused a reappraisal of this balance. The need for equality has presently become more evident than it was in the laissez-faire era.

Liberty and property rights are deeply rooted in the common law and are fundamental to individual autonomy and privacy. There is a point where the state must protect the liberty of the discriminator. The state is involved in every discrimination. When it chooses to enforce or reject, encourage or discourage discrimination, it must balance liberty and equality. It is this balance that the Supreme Court must review. Thus it is the state courts that must initially decide whether the liberty of the discriminator will give way to the need for equality of the discriminated or, if the balance should be struck in favor of the discriminator. In either case the task of the Supreme Court will be to focus on the state's selection of the interest to be protected rather than to fit the acts complained of into neat formulas of "state action" or "federal right."

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26. KORNHAUSER, *THE POLITICS OF MASS SOCIETY* 32 (1959). Kornhauser defines mass society as a "situation in which the aggregate of individuals are related to one another only by way of their relation to a common authority, especially the state. That is, individuals are not directly related to one another in a variety of independent groups. A population in this condition is not insulated in any way from the ruling group, nor yet from elements within itself."

CRIMINAL LAW—INVOLUNTARY MANSLAUGHTER—PARTICIPANTS IN
RUSSIAN ROULETTE GAME CRIMINALLY RESPONSIBLE FOR DEATH
OF COPARTICIPANT.

Commonwealth v. Atencio (Mass. 1963)

The two defendants and the decedent, after drinking wine for a time, decided to play "Russian roulette."¹ Defendant Marshall inserted a cartridge into a revolver, spun the cylinder, pointed the gun to his head, and pulled the trigger. Nothing happened. He handed the gun to defendant Atencio who repeated the process with the same result. Atencio passed the gun to the decedent, who spun it, put it to his head, and pulled the trigger. The cartridge exploded, fatally wounding him. The Supreme Court of Massachusetts affirmed the conviction of the defendants for the crime of involuntary manslaughter, *holding* that the Commonwealth had an interest that the decedent should not be killed by the wanton and reckless conduct of himself and others. *Commonwealth v. Atencio*, 189 N.E. 2d 223 (Mass. 1963).

The defendants could be convicted for the homicide in the instant case on either of two theories. The first theory is that the defendants' acts caused the death. The second is that the killing of the decedent is imputed to the defendant.² The opinion is unclear as to which theory applied.

Involuntary manslaughter is the unintentional non-malicious killing of another which results from wanton and reckless conduct of the defendant.³ As defendants' conduct must be the proximate cause of death, the first inquiry into the decision of the instant case is to determine whether the defendants' acts could be said to be proximate. The recent case of *Commonwealth v. Root*⁴ presented issues similar to those in *Atencio*. In *Root*, the decedent and the defendant were participants in a drag race. Decedent passed the defendant on a curve, collided with an oncoming truck and was killed. The court held that the causal connection between defendant's reckless conduct and the death of the decedent was insufficient to sustain a conviction of involuntary manslaughter.⁵

Although the two cases are analogous in the sense that there was a challenge to do an illegal act that would endanger the lives of either or both participants, the court makes the skill in drag racing the controlling

1. "Russian roulette" is a "game" in which each participant spins the chambered cylinder of a revolver, one of the chambers being loaded, and then points the gun to his head and pulls the trigger. In a six chambered cylinder the odds are five to one that he will live.

2. *Commonwealth v. Campbell*, 89 Mass. 541 (1863).

3. *Commonwealth v. Bouvier*, 316 Mass. 489, 55 N.E.2d 913 (1944); *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944); *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).

4. *Supra*, note 3.

5. *Contra*, *State v. Fair*, 209 S.C. 439, 40 S.E.2d 634 (1946).

distinction between them. It cannot be denied that Russian roulette is far more dangerous than drag racing.⁶ Since the boundary lines of proximate cause are governed by many considerations, they may, and in fact do, vary according to the jural consequences of the particular case involved.⁷ Conceivably then, a different set of tests of proximate cause might be established for each particular crime. It has been said that any intended consequence of an act is proximate for the following reason: "It would be plainly absurd that a person should be allowed to act with an intention to produce a certain consequence, and then when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate."⁸ The line of demarcation between causes which will be recognized as proximate and those which will be recognized as remote "is really a very flexible line."⁹ Thus, the Massachusetts Court, in holding that defendants' acts proximately caused decedent's death, in effect said that because "Russian roulette" is more dangerous than drag racing, the limitations of proximate cause are broader, as public policy requires. Although such a distinction is valid, it should be understood that it is based on policy considerations, not scientific principles.

Also analogous to *Atencio* is *Commonwealth v. Bolish*,¹⁰ where defendant and deceased planned to set a building on fire to collect insurance. The decedent entered the building and spread kerosene near a hot plate, causing an unexpected explosion which inflicted him with fatal burns. Defendant was indicted for murder and convicted under the felony-murder doctrine. The trial judge instructed the jury that the Commonwealth had to prove beyond a reasonable doubt that defendant's action was the proximate cause of the killing. However, if the victim's own, willing, understanding action superseded all other causes in the chain of events as the substantial factor causing his own death, they would have to acquit the defendant. Rather than declare the defendant's acts were, as a matter of

6. The *Atencio* court said, "There is a very real distinction between drag racing and 'Russian roulette.' In the former much is left to the skill, or lack of it, of the competitor. In 'Russian roulette' it is a matter of luck as to the location of one bullet, and except for a misfire . . . the outcome is a certainty if the chamber under the hammer happens to be the one containing the bullet." By this the court meant that when a person engages in Russian roulette the trigger is, in effect, pulled for him. In drag racing the situation is not the same. If the participant drives poorly there is the chance of a fatal injury but if he drives in an expert manner the chance of a fatal injury is small. In Russian roulette the participant does not have a choice nor can he, in anyway, direct the outcome.

7. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 83 (1928).

8. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 358 (1924); Terry, *Proximate Consequence in the Law of Torts*, 28 HARV. L. REV. 10, 17 (1914).

9. 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* 111 (1906); See generally, GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932); James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369 (1950); Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911).

10. 381 Pa. 500, 113 A.2d 464 (1955), *affirmance upheld on rehearing*, 391 Pa. 550, 138 A.2d 447 (1958).

law, proximate, the court submitted the question to the jury which readily could have found that decedent's acts caused his own death independent of the defendant's acts.¹¹ Such a procedure was entirely correct.¹²

Justice Musmanno vigorously dissented in the *Bolish* case. Although his views appear meritorious, one can discern that they have been fostered due to an unsatisfactory disposition of the case, rather than through procedural error.¹³ Others have disagreed with *Bolish*. They point out that what is imputed to the felon through the felony-murder fiction is malice, not the act of killing. However, the majority correctly decided this problem by saying, in effect, that if the jury found that defendant killed the cofelon, *then* malice would be implied.

Comparing *Bolish* with *Atencio*, one can see very little, if any, significant difference in the proximity between defendants' conduct and the deaths. In *Bolish*, the defendant set the stage by procuring the kerosene and flammable material and by driving the decedent to the house; in *Atencio* defendants set the stage by procuring the gun and by playing the game. In the *Bolish* case, notwithstanding the claim of the defense that the decedent's acts were a supervening cause of the death, the jury could and did find that the defendant's acts were the indirect, but yet proximate, cause of the death. The jury in *Atencio* could have found that the defendants' acts were proximate in that they gave impetus to the game and engendered circumstances where decedent's acts were a natural reaction to the stimulus of the situation. In that respect, the victim's acts were a dependent intervening cause. Moreover, the jury could have decided that this dependent intervening cause was not superseding so as to terminate defendants' liability, either because they thought the victim's response was normal or because they thought that under the circumstances, it was foreseeable.

It is frustrating to attempt to rationalize the cases of *Bolish* and *Atencio* to determine their validity, because the point at which proximate cause becomes remote is essentially a matter of opinion. In criminal law, such an opinion is influenced by many intangibles, including the judge's philosophy of punishment and his view of the limits of the court's role in developing and expanding the criminal law.

A person may also be found guilty of homicide because the killing is imputed to him. One who joins in a common design to commit an unlawful act involving danger to life is responsible for a death committed in the furtherance of the design, although he was not the actual perpetrator, and the plan did not involve the taking of life.¹⁴ A person who joins in such an

11. *Contra*, *People v. LaBarbera*, 159 Misc. 177, 287 N.Y.S. 257 (1936); *Compare*, *People v. Ferlin*, 203 Cal. 587, 265 Pac. 230 (1928), where the court missed the point entirely by overlooking the problem of causation.

12. See HOLMES, *THE COMMON LAW* 56 (1923).

13. Mr. Justice Musmanno dissented for two reasons. First, he argued that the majority did not construe the felony-murder statute correctly; secondly, he thought the decedent's death was accidental. "His [decedent's] death was an accident. No one attempted to shoot him, no one tried to poison him, no one sought to explode him." 391 Pa. 550, 559, 138 A.2d 447, 451 (1958).

14. *State v. Scott*, 80 Conn. 317, 323, 68 Atl. 258, 260 (1907).

unlawful act is either a principal in the first degree, a principal in the second degree, or an accessory before or after the fact.¹⁵ As the defendants in *Atencio* were present when the gun was discharged, there is no possibility of their being accessories. Moreover, because deceased was not an innocent agent of the defendants and assuming the court had found the defendants' acts were not the proximate cause of the death, the defendants are not principals in the first degree. The remaining possibilities are that deceased killed himself either intentionally or accidentally. Had deceased killed himself intentionally, he would have been guilty of suicide in jurisdictions where there is such a crime.¹⁶ However, in the instant case, it is clear from the nature of the game that deceased did not intend to kill himself. Consequently, one must conclude that deceased accidentally killed himself, and the death resulted from his own criminal negligence. Although one who negligently causes his own death is guilty of no crime, the ultimate question in resolving this issue is whether defendants can be held as principals in the second degree to an act that does not exist in law as a crime.

Until the decision in *R. v. Bourne*,¹⁷ the answer would undoubtedly have been in the negative, but that case compels a closer examination of the problem. Having forced his wife to commit an unnatural act with an animal, defendant was convicted of aiding and abetting his wife to commit buggery. The defendant contended that because his wife could not be found guilty of buggery, having been forced to commit the act, he could not be guilty as a principal in the second degree since there was no crime committed by the wife. The Court of Criminal Appeals affirmed the conviction, stating that the defense of duress "admits that she committed the crime but prays to be excused from punishment by reason of duress. . . ."¹⁸ This reasoning is difficult to accept. Duress is more than a request for relief from punishment; it is a legal defense, and if established, the person is acquitted because he did not have the requisite *mens rea*.¹⁹ If there is no *mens rea*, there is no crime. The finding of a crime where the *actus reus* was committed without *mens rea* is unprecedented in criminal law in an offense of this nature. That a coconspirator or principal in the second degree is guilty of a crime is founded in the theory that the crime committed

15. *State v. Powell*, 168 N.C. 134, 138, 83 S.E. 310, 313 (1914); PERKINS, CRIMINAL LAW § 8 (1957). A principal in the first degree is one who either is the actual perpetrator or who acts through an innocent agent. See *Beausoliel v. United States*, 107 F.2d 292, 297 (D.C. Cir. 1939); *In re Vann*, 136 Fla. 113, 118, 186 So. 424, 426 (1939). A principal in the second degree is one who aids and abets a person in the commission of a crime. See *Beausoliel v. United States*, *supra*. Accessories before or after the fact are those who are not present when the act takes place. See *Duke v. State*, 137 Fla. 513, 188 So. 124 (1939); *Commonwealth v. Bloomberg*, 302 Mass. 349, 19 N.E.2d 62 (1939); *State v. Farne*, 190 S.C. 75, 1 S.E.2d 912 (1939).

16. *Southern Life Ins. Co. v. Wynn*, 29 Ala. App. 207, 194 So. 421 (1940); *Borron v. Missouri-Kan.-Tex. R. Co.*, 351 Mo. 229, 172 S.W.2d 835 (1943).

17. [1952] 36 Crim. App. R. 125.

18. *Id.* at 128.

19. *Tomoya Kawakita v. United States*, 343 U.S. 717, 72 S.Ct. 950 (1952); *Perryman v. State*, 63 Ga. App. 819, 12 S.E.2d 388 (1940); *People v. Jackerson*, 247 N.Y. 36, 159 N.E. 715 (1928).