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CRIMINAL LAW
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ALWAYS LEARNING
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Criminal Law

the spectators were aiding an illegal boxing match. Hawkins J said that 'some active steps must be taken by word or action'. The accused would have been guilty had he cheered or applauded. Another old case is ***Atkinson*** (1869) 11 Cox CC 330. An employer was not guilty of being a secondary party to a riot by his employees when he did nothing to stop it. More recent is ***Clarkson*** [1971] 3 All ER 344 (CMAC) where drunken soldiers stood around while a girl was raped in a barracks. A perhaps worse case is the Ontario one of ***Salajko*** [1970] 1 Can CC 352 where the accused, who had his trousers around his ankles, watched a gang rape. There are several similar cases such as ***Bland*** [1988] Crim LR 41 (CA): the accused was not guilty of being a secondary party to the crime of unlawfully possessing controlled drugs by continuing to share a room with the principal offender after she found out about the drugs. It could not be inferred that she assisted him in his possession of the drugs. She would be guilty if she encouraged the principal or if she had a right of control (see below).

Accordingly, mere presence at the scene of the principal offence does not give rise to secondary liability, but it does not take much to move beyond mere presence into aiding. For example, in ***Robinson* v *R***, above, the accused stood inside a room guarding a door while in that room twins were being beaten to death constituted aiding. Presence at a crime is therefore some evidence that the accused did encourage the principals: for example ***Allen* v *Ireland*** [1984] 1 WLR 903 (CA). A secret resolve to help one's friend in a fight is not sufficient: ***Allan*** [1965] 1 QB 130 (CCA). Accordingly there must be an act of encouragement or assistance (but see below for duty situations). A case drawing the line is ***Wilcox* v *Jeffery*** [1951] 1 All ER 464 (CCA) where the accused invited an alien saxophonist, Coleman Hawkins, into the UK contrary to the Aliens Order (since repealed), met him at the airport, clapped his performance and wrote about him. He was guilty of aiding and abetting the breach of the Order by encouraging the principal party. Encouraging attackers is participating in crime; it would have been different if, as in ***Clarkson***, the accused had simply stood around while the victim was being beaten up. ***McCarry*** [2009] EWCA Crim 1718 also draws the line. The accused was in the same car as the killer when the latter strangled the victim. There was evidence for the jury that he was a wilful participant, not a mere bystander. The recent authority is ***Martin*** [2010] EWCA Crim 1450 where the Court found it doubtful on the facts that a qualified driver was responsible for failing to control a learner who lost control, crashing into another car and seriously injuring the driver.

There is, moreover, no need for the accused to be present at the scene of the principal offence: ***JF Alford Transport Ltd*** [1997] 2 Cr App R 326 (CA). In this case the accused, a company and its managers, were guilty of aiding and abetting employees to make false entries on tachograph records (which state how many miles the driver has driven in the day). They knew what the employees were doing. They had the legal right to stop them, but they had done nothing.

Omission is described in Chapter 2.

Where there is a duty to act in order to control the behaviour of the principal, the accused is guilty of being an accessory (provided the other elements are fulfilled) if he does nothing to prevent the occurrence of the crime. The accused must know that he had an opportunity of intervening to prevent the commission of the substantive crime: ***Webster*** [2006] EWCA Crim 415. In ***Rubie* v *Faulkner*** [1940] 1 KB 571, an instructor of a learner driver was convicted of aiding and abetting driving without due care and attention. There was no need for direct control over the steering wheel. Hilbery J said: '. . . the supervisor could see the driver was about to do the unlawful act of which he was convicted [careless driving] and the magistrates found that the supervisor remained passive . . . For him to refrain from doing anything when he could see that an unlawful act was about to be done, and his duty was to prevent an unlawful act, if he could, was for him to aid and abet.' In

Tuck* v *Robson [1970] 1 All ER 1171 (DC), a pub landlord did not make his customers leave. He was convicted of aiding their consumption of alcohol after time. Simply calling 'Time, glasses please' and turning off the main lights did not serve to exonerate the landlord. Failure to prevent was also taken to be assistance or encouragement (that is, one need not prove that the accused's omission did in fact encourage or assist the principal) in ***Du Cros* v *Lambourne*** [1907] 1 KB 40 (DC), where the owner of the car, who was at the time of the principal offence a passenger, did not stop the driver from driving at a dangerous speed. (In fact it could not be proved who was driving. If the owner was driving, he was the principal offender. If he was the passenger, he had a right of control. Whichever seat he was in, he was guilty.) The same result occurs where, for example, a mother watches her husband killing their child. She has a duty to intervene. (A stranger has no such duty.) Similarly a police officer is under a duty to prevent another officer hitting a suspect: ***Forman*** [1988] Crim LR 677, a Crown Court decision of HHJ Woods.

See Chapter 2 for the duty of strangers.

The outcome in these cases would have been different if the accused had no right of control or duty to act. In that eventuality inactivity would not constitute being a secondary party. To secure a conviction, the prosecution would have to prove that the accused encouraged or assisted. For example, in ***Du Cros* v *Lambourne*** if the car had belonged to the other party, the accused would have had no right of control over it. As a passenger he would not have been guilty unless he authorised or encouraged the dangerous driving. Cases such as ***Tuck* v *Robson*** are getting a bit aged. Modern authorities are necessary to determine the scope of this exception to the general rule of non-liability for omissions.

The Law Commission's draft Criminal Code, Law Com. No. 177, 1989, would rationalise present law in cl 27(3) by creating a general principle. Assistance or encouragement includes assistance or encouragement arising from a failure by a person to take reasonable steps to exercise any authority or discharge any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence.

Mens rea

A person is not liable as an accessory unless he has the required mental elements. These elements apply to all principal offences, including strict liability ones. There is therefore a difference between the *mens rea* of the secondary offence and that of the principal party. The Court of Appeal in ***Rook***, above, which was approved in ***Bryce***, above, stated that the mental element is the same for aiding, abetting, counselling and procuring. The law is relatively underdeveloped. The following strives to encapsulate it.

The accused must intend to do the act which constitutes the encouraging, advising or assisting. One authority among several is ***Bryce***.

Intention to encourage, advise or assist

An accessory is guilty only if he did acts which he knew were capable of encouraging and assisting: ***JF Alford Transport Ltd*** (above). There is no need to prove that the accused intended that the crime be committed: ***Rook***, above, which was endorsed in ***Bryce***, above. Potter LJ said in ***Bryce***: '. . . it is sufficient if the secondary party at the time of his actions . . . contemplates the commission of the offence, that it knows that it will be committed or realises that it is a real possibility that it will be committed'. As elsewhere in the criminal law motive is irrelevant. The principal authority is ***NCB* v *Gamble***.

NCB v *Gamble* [1959] QB 11(DC)

An employee of the National Coal Board, the precursor of British Coal, was the weighbridge operator. He told a driver that his lorry was overladen. Driving an overladen vehicle is an offence. The driver said that he was prepared to take the risk of being caught and the employee gave him a weighbridge ticket, without which the driver could not have left the pit. Was the employee guilty of being a secondary party to the principal offence of driving an overladen lorry?

The Court held that he was. Devlin J said:

> An indifference to the result of the crime does not of itself constitute negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.

Since the employee had intentionally assisted the principal he was liable as accessory. The effect of ***NCB* v *Gamble*** should be noted. If the accused knows that the bag of sugar he has just sold to the principal may be used by him to cosh an old lady in a house in which the principal will be rummaging for money to steal, he will be guilty of being an accessory to aggravated burglary. His intention is not that the principal will cosh the old lady. He is happy to have made the sale and does not care how the principal will use the sugar. The principle also catches the landlord who sells alcohol to a man who he knows intends to drive.

There is no need for the accused's *purpose* to be the commission of the crime; oblique intent suffices, as was said in ***JF Alford Transport Ltd***, above. It is the intent to aid, abet, counsel or procure which counts, and it has indeed at times been suggested that knowledge that acts may assist is sufficient for liability, though cases such as ***Gamble*** reject this approach. There is earlier authority for the proposition that it is not counselling or procuring when the accused hopes that the offence will not be committed, at least if the accused tries to stop the principal party committing the offence (cf. ***Lynch* v *DPP for NI***, above, where the accused, who drove terrorists to a place where they murdered their victim, was guilty but it has to be said that he did not make strenuous efforts to prevent the killing). In ***Fretwell*** (1862) 9 Cox CC 471 (CCR), a lover gave his woman a drug to cause an abortion under threats of her suicide. He hoped that she would not take it but she did. She died. He was held not to be a secondary party to her suicide, which at that time was an offence. The case appears to be wrongly decided in the light of ***NCB* v *Gamble*** because it is one in which motive exonerated the accused: he did not wish to see her dead. It has been said in the civil case of ***Attorney-General* v *Able*** [1984] QB 795 (DC) to be restricted to its own facts. However, ***Fretwell*** was cited approvingly in ***Gamble*** for the proposition that knowingly supplying an article does not amount to an intent to aid, and it has not been overruled. In ***Bryce***, above, the Court of Appeal reiterated the law that one could intend to assist a principal even though one intended to hinder his plans. The same was true in ***Lynch***.

There is a statement in ***NCB* v *Gamble*** that an accessory is not liable if before delivery ownership passed and the accused was not aware of the illegal purpose until after ownership passed. (On the facts ownership of the coal passed when the employee gave the driver the ticket.) If this *dictum* were correct, and the law remains uncertain, then if the alleged accessory sold a gun to the principal but before handing it over found out that it was to be used to kill someone, he would not be guilty, whereas he would be guilty if he knew from

the start of the transaction that the gun would be used to kill. Similarly, to use the facts of an early case, if the accused handed over the principal's jemmy to him, he would not be liable, for he was doing what in law he was obliged to do. It is suggested that this distinction does not serve any purpose. It is also not soundly based on civil law, as the Divisional Court seemed to think. An illegal contract is unenforceable no matter when the seller, the accessory, comes to know of the illegality. More recent is ***Garrett* v *Arthur Churchill (Glass) Ltd*** [1970] 1 QB 92 (CA). Lord Parker CJ said that the legal duty to hand the item over is subordinated to the public interest in preventing a crime being committed with the item.

This issue is dealt with in cl 27(6)(c) of the draft Criminal Code, where the accused is not guilty if he believes that he is under a legal obligation to do the act and acts 'without the purpose of furthering the commission of the offence'. A person supplying an article in the ordinary course of business would, therefore, not be liable.

Knowledge of 'the essential matters'

Lord Goddard CJ said in ***Johnson* v *Youden*** [1950] 1 KB 544 (DC), which was approved in ***Churchill* v *Walton*** [1967] 2 AC 224 (HL), a case on conspiracy, by the Privy Council in ***Mok Wai Tak* v *R*** [1990] 2 AC 333 and by the Court of Appeal in ***Roberts*** [1997] Crim LR 209, that:

> [B]efore a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence.

Solicitors were not guilty of conveying a house at a price above the maximum, when they did not know the price. While not pellucid, the phrase 'essential matters' seems to include the circumstances of the *actus reus*, any relevant consequences and perhaps the principal's fault element. The circumstances are the facts which give rise to the offence. If a person supplies a ladder, he is not guilty of aiding burglary unless he knows 'the facts [which] constitute the offence'. However, as Lord Goddard CJ said, the accused is guilty whether or not he knows that what he did constitutes a crime. 'Wilful blindness' is sufficient: ***D Stanton & Sons Ltd* v *Webber*** [1973] RTR 86 (DC) and ***Roberts***, above.

It was said in ***Carter* v *Richardson*** [1976] Crim LR 190 (DC) that 'know the essential matters' extends to recklessness as to circumstances and wilful blindness as to a risk that the facts constituting the principal offence probably would occur. The supervisor of a learner driver was held to be guilty of abetting the learner to drive with a blood-alcohol concentration above the limit. He knew that the learner was above the limit, but *obiter* the court said that he would have been guilty if he thought that the driver was probably over the limit, the state of mind known as subjective recklessness. In ***Blakely* v *DPP***, above, the accused's conviction for procuring a person to drive above that limit was quashed because the justices had used the ***Caldwell*** definition. The accused were the principal's mistress and a friend. They spiked his non-alcoholic drink with vodka in an attempt to prevent him driving back to his wife. In fact he drove off before they could tell him the truth. The Divisional Court said that the accused's knowledge that his act might help the commission of the principal offence was sufficient for aiding, abetting and counselling and probably for procuring. ***Blakely* v *DPP*** was approved in ***Webster*** [2006] EWCA Crim 415. Moses LJ said: 'It is the defendant's foresight that the principal was likely to commit the offence which must be proved and not merely that he ought to have foreseen that the principal was likely to commit the offence.'

See Chapter 3 for more on recklessness and wilful blindness.

Caldwell recklessness is described in Chapter 3. Compare with *Cunningham* recklessness.

It may be that ***Blakely*** is wider than ***Carter* v *Richardson***. In the latter case the secondary party was reckless as to circumstances, namely the amount of alcohol in the blood, but was intentional as to encouraging this principal's driving, whereas in the former case she was reckless as to both and would have been convicted on a proper direction. If so, the spectre of liability of hosts at parties resurrects itself. He will be guilty of aiding drunk-driving if he was aware that his conduct might encourage the commission of this offence. By definition, however, procuring requires that the accused must intend to bring about the principal offence. As the court said in ***Blakely* v *DPP***: '. . . mere awareness that [the principal offence] might result would not suffice'. Nevertheless, while stating that ***Caldwell*** recklessness, which existed at that time, would also not suffice, it did not rule subjective recklessness out. If ***Carter* v *Richardson*** is correct, it may apply only to strict offences.

The draft Criminal Code does not permit ***Caldwell*** recklessness and would confirm the court's view in ***Blakely* v *DPP*** that recklessness is defined in ***Cunningham*** terms. Clause 27(1)(b) would preserve recklessness as to circumstances, an outcome in accord with the present law of attempt, but there must be intent as to the principal's conduct: ***Carter* v *Richardson*** would be overruled.

The Divisional Court in ***Blakely* v *DPP*** said that in procuring and perhaps counselling and commanding it must be shown that the accused intended to bring about the principal offence and that the position might be different in relation to other forms of participation where the accused assisted the principal. In relation to forms of secondary participation such as counselling where the accused is encouraging the principal before the commission of the offence, the accused can hardly be said to 'know' the facts surrounding the crime. It is better to say that the accused must believe that action will occur which will give rise to an offence. It is difficult to square these authorities with the definition of procuring as 'produce by endeavour'. Procuring would seem to require intent alone.

An example of the requirement of knowledge is ***Ferguson* v *Weaving*** [1951] 1 KB 814 (DC). A pub landlady was not guilty of aiding and abetting the offence of consuming alcohol after hours when she did not know that the customers were so doing. This rule even applies to strict offences. In ***Callow* v *Tillstone*** (1900) 19 Cox CC 576 (QBD), a butcher was convicted of the strict offence of exposing unsound meat for sale. The vet who had examined the heifer at the butcher's request was not guilty of aiding and abetting the offence because he did not know of the unsoundness of the meat. He was not guilty even though he had performed his inspection carelessly. In terms of justice, the case looks topsy-turvy. The butcher who had done his best not to expose unsound meat for sale was guilty, while the vet, who was careless over such an important matter, was not guilty.

As stated above, knowledge of the 'essential matters' includes knowledge of the principal's *mens rea*. The accused does not aid murder if the principal does not possess malice aforethought.

Both intention to encourage or assist and knowledge (subject to ***Carter* v *Richardson***) of the essential facts are necessary for conviction as an accessory. The width of these rules should be noted. If a person provides the principal with a room, turning a blind eye to the fact that the principal is going to set up girls in a brothel, he is guilty of being an accessory to living off the earnings of prostitutes. The question of whether a doctor who prescribes contraceptives to a girl under the age of 16 intends to aid and abet unlawful sexual intercourse has exercised minds. The House of Lords thought not in ***Gillick* v *West Norfolk and Wisbech AHA*** [1986] AC 112, a civil case, but the decision looks incorrect. It has been suggested that doctors are not guilty because of their good motive, despite the fact that elsewhere in the criminal law motive provides no defence. Another idea is that the defence of necessity applies. An alternative view is that 'intent' in this area of law means 'direct

intent'. Since it was not the doctors' purpose to encourage unlawful sex, they are not accessories. Other authorities, however, do not restrict intent to purpose. If ***Gillick*** is correct, ***Fretwell*** (discussed above) may also be correct.

In respect of secondary participation, where the *actus reus* is an omission, as in ***Tuck* v *Robson*** (above), the *mens rea* was stated in ***JF Alford Transport Ltd*** (above) as being: (i) knowledge that the principal was committing a crime; (ii) deliberately turning a blind eye to that crime; and (iii) knowledge that the principal was being encouraged to commit the crime.

Contemplation of a range of offences

It does not matter that the accessory does not know when and how the principal offence will take place: ***Bullock*** [1955] 1 WLR 1 (CCA). On the other hand, it is not sufficient that the principal is going to break the law *simpliciter*. In ***Bainbridge*** [1960] 1 QB 129 the accused thought that oxyacetylene equipment was to be used to cut up stolen goods. In fact it was used to break into the Midland Bank, Stoke Newington, London. The accused was not guilty. He would have been guilty if he knew that a burglary would take place but he did not know when or in which building (following ***Bullock***).

After ***Bainbridge*** it was thought that the accused was guilty if he knew, in the words of Lord Parker CJ, that 'a crime of the type in question was intended'. This requirement is additional to 'knowledge of the essential matters'. The principal authority despite ***Bainbridge*** never being overruled and being an English case now is ***DPP for NI* v *Maxwell***, above. Four Law Lords held that the same type of case test was to be widened. Lord Scarman adopted the formulation of Lord Lowry CJ in the Northern Irish Appeal Court. The guilt of the accessory springs 'from the fact that he contemplates the commission of one (or more) of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime will be committed'. The accused is convicted of counselling the offence which actually occurs if he contemplated a range of offences and the actual offence which took place was one of those. ***Maxwell*** differs from ***Bainbridge***, which it did not overrule, because (a) there is no need for knowledge; (b) the accused must foresee the offence committed; (c) the 'type' of offence is not relevant: one looks at the contemplated range of offences. The fifth Law Lord, Lord Hailsham, said 'bullet, bomb or incendiary device, indeed most if not all types of terrorist violence' gave rise to offences of the same type within ***Bainbridge***. 'The fact that, in the event, the offence committed by the principals crystallised into one rather than the other of the possible alternatives within his contemplation only means that in the event he was an accessory to that specific offence rather than one of the others.'

As a result of the majority in ***Maxwell***, the law can be stated thus:

(a) if the accused knows of the offence, he is liable as accessory;

(b) if the accused knows that one or more of a range of offences will take place, he is guilty if one or more of those offences occur;

(c) if the accused contemplates that one offence is to be committed, but another similar crime took place, he is not guilty. The result would have been different under ***Bainbridge***;

(d) if the accused knows only the general class of offence, not the specific offence, it appears that he is guilty.