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PRINCIPALS, ACCESSORIES AND THE CONTINUING CRIME

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The legal status of a person entering into a crime after the crime has been partially completed is a problem which has not been satisfactorily resolved by either state courts or legislatures. The recent Illinois case of *People v. Zierlion*[1] serves as an effective illustration. The case involved a burglary in which four men broke into a warehouse office and pushed a safe from the second floor into the building yard. The burglars found the safe too heavy for them to remove and left to obtain assistance. Meanwhile, a company employee who had observed their activities summoned the police. When the burglars returned they were accompanied by several other men, one of whom was the defendant. They attempted to remove the safe and were apprehended.

The court was thus squarely presented with the issue of whether the defendant should be classified as a principal or as an accessory after the fact. In the trial court the defendant was convicted on a charge of burglary. Upon appeal the Illinois Supreme Court reversed the conviction, concluding that since the elements of the crime of burglary had been completed when the defendant entered the crime, he could not be convicted as a principal. The court adopted the appellant's theory "that to warrant a conviction for burglary it must be shown that the accused entered a building with intent to commit a felony, and that since the evidence fails to show such conduct on the part of the defendant the present conviction cannot stand."[2] Thus, on the basis of the statutory definition of burglary, the crime was complete when the defendant joined the perpetrators, and he therefore could not be convicted as a principal.

The lone dissenter, disagreeing with the majority's method of determining when a crime is complete for purposes of principal-accessory analysis, pointed out:

> While we have held that a burglary is complete upon the breaking and entering with intent to steal . . .this does not preclude the crime from being a continuing one as long as the participants are still in the process of committing larceny of the property.[3]

The conclusion expressed in the dissent is that since the crime was continuing when Zierlion entered, the appellant, if guilty of any crime, was guilty as a principal.[4] This case presents the

[1] 16 Ill. 2d 217, 157 N.E.2d 72 (1959).

[2] *Id.* at 219, 157 N.E.2d at 73 (1959).

[3] *Id.* at 220, 157 N.E.2d at 73 (1959) (dissenting opinion).

[4] When cases involving the status of the "late joiner" arise, courts have difficulty reaching conclusions

primary issue to be considered—the determination of the criminal status of the "late joiner."

Parties to a Crime

A brief survey of the classification of parties to a crime will be helpful in understanding the problem. At common law parties to a crime were typically classified either as principals or accessories.[5] Further division was traditionally made in the following manner: principals, in the first or in the second degree (aiders and abettors); accessories before or after the fact.[6]

The classification of principals into the first degree, *i.e.*, "one who is the actual perpetrator of the criminal act,"[7] and the second degree, *i.e.*, "those who are present aiding and abetting the commission of the offense,"[8] is primarily of only historical significance.[9] Today aiders and abettors are regarded by statute as equally guilty with, and are punished in the same manner as, principals in the first degree.[10]

An accessory before the fact is one who aids and counsels another in committing a crime but is not present at its commission.[11] Most modern statutes, however, have abolished this distinction and equated accessories before the fact with principals.[12]

An accessory after the fact, one who with knowledge aids and assists a principal after commission of the felony, was, by common law, regarded as tainted by the felon and equally guilty with him.[13] Present day legislation, however, has established a lesser punishment for these individuals, although some states regard the crime as a misdemeanor and others consider it a felony.[14]

The only distinction remaining is that between principals and accessories after the fact. The basis for the legal difference between these categories is reflected in their definitions. The statutory definition of accessory after the fact assumes that the crime has been completed, and thus the accessory's intent was not to commit the principal crime but merely to aid the principal in his escape.[15] This is clearly a lesser crime, and therefore the punishment should be less severe for the accessory than for the principal. Abolition of this distinction would result in inequity and unnecessary confusion. For, if all persons connected with a crime were subject to conviction only as principals, the courts would be faced with the problem of convicting minor participants of the major offense or setting them free.

The determination of when the crime is completed, however, is not always an easy matter. The *Zierlion* case suggests an objective approach to the problem. The court's reasoning implies that if the defendant entered the crime while it was "continuing," he is presumed to have intended

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which appear both just and logical. 1 WILLIAMS, CRIMINAL LAW §55 (1953). In a Canadian case similar to Zierlion, an opposite result was reached, although the basis of the court's decision is not clear. The Queen v. Campbell [1899] Qué. Q.B. 169, 2 Can. Crim. Cas. 357.

[5] State v. Rodosta, 173 La. 623, 138 So. 124 (1931).

[6] However, at common law and under most state statutes these distinctions are applicable only to felony cases. State v. Churchill, 105 N.J.L. 123, 143 Atl. 330 (1928). Thus, accessories are recognized neither in treason nor misdemeanor cases. Treason was historically considered so serious that all involved were subject to the capital penalty. In the case of misdemeanors, "perpetrators, abettors and inciters are all principals, because the law 'does not descend to distinguish the different shades of guilt in petty misdemeanors.'" The historical justification for making no distinction in misdemeanor cases seems to be acceptable, since punishment for misdemeanors is generally light. This view continues to prevail in the majority of jurisdictions. Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 586 (1941).

[7] 1 WHARTON, CRIMINAL LAW §240 (12th ed. 1932).

[8] *Id.* §245; *In re* Vann, 136 Fla. 113, 186 So. 424 (1939).

[9] "A number of old statutes prescribed different punishments for the two classes of offenders. To-day, however, these distinctions have been removed." 4 STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 30 (21st ed. 1950).

[10] Red v. State, 39 Tex. Crim. 667, 47 S.W. 1003 (1898); People v. Smith, 271 Mich. 553, 260 N.W. 911 (1935). A distinction remains only in rare instances where a different penalty is stipulated for a principal in the first degree vis-a-vis a principal in the second degree. State v. Woodworth, 121 N.J.L. 78, 1 A.2d 254 (1938).

[11] Clayton v. State, 244 Ala. 10, 13 So. 2d 420 (1942).

[12] CAL. PENAL CODE §971; ILL. REV. STAT. ch. 38, §582 (1959); IOWA CODE §12895 (1939). For bibliography see WHARTON, *op. cit. supra* note 7, § 239 n. 1. The reason for equating the two is that those planning a crime, though not participating in its commission, are as culpable as the actual perpetrators. For example, it is clear that one who organizes and aids in a conspiracy but who is not present at its commission should be punished equally with the perpetrators. Perkins, *supra* note 6, at 602.

[13] Newborn v. State, 106 Tex. Crim. 354, 292 S.W. 247 (1927); Hightower v. State, 78 Tex. Crim. 606, 182 S.W. 492 (1916).

[14] *Compare*, White v. Commonwealth, 301 Ky. 228, 191 S.W.2d 244 (1945), *with* ILL. REV. STAT. ch. 38, §584 (1959); see generally Perkins, *supra* note 6, at 605.

[15] The Illinois provision is typical: "He . . . who conceals, maintains or assists any principal felon . . . knowing him to be such, shall be an accessory after the fact." ILL. REV. STAT. ch. 38, §584 (1959).

to aid in completing the crime, and he is therefore a principal. On the other hand, if the defendant entered after the crime was completed, then he is assumed to have intended to aid the principal only in his escape, and thus he is guilty as an accessory after the fact. Evidence of true intent would seem to be disregarded as a factor.

In an attempt to examine the validity of this approach it is necessary, first, to ascertain whether there are definitive tests which may be utilized in an attempt to determine when a crime is complete, and, second, whether the intent of the late joiner should be disregarded.

The Continuing Crime

The typical felony-murder situation also involves the problem of distinguishing between the completed and the continuing crime and an analogy may be drawn from solutions there developed. In this context, if a death is caused during the commission of a felony, a murder conviction may be sought.[16]

Various formulae have been developed by the courts in an attempt to determine when a crime is complete for felony-murder purposes. A number of courts rely on *the technical definition of the crime committed.*[17] When this approach is used it becomes important to distinguish between various crimes, for, by their very definition some crimes will extend for a longer period of time than others. For example, the traditional common law definition of burglary is to break and enter the house of another at night with intent to commit a felony, although the felony need not be accomplished.[18] Larceny and robbery, however, include a "taking" of property as a necessary element of the crime.[19] Thus, some courts are prone to regard these crimes as continuing for a longer period due to the asportation of the property by the felons.[20]

Since this approach is derived from the definition of the felony involved without regard to the surrounding circumstances, it may be concluded that its application need not be limited to the felony-murder situations. The definition test is extremely narrow and is the one used by the majority of the court in the *Zierlion* case to render the late joiner in the crime an accessory after the fact. An appropriate criticism of this strict view was presented by the California court in *People v. Boss*,[21] where it was pointed out that the definition of burglary "was adopted to make punishment of this class of crime more certain. It was not intended to relieve the wrongdoer from any probable consequences of his act by placing a limitation upon the res gestae which is unreasonable or unnatural."

The preceding statement recognizes the second formula, the *res gestae* test, which is accepted by many courts.[22] The term is borrowed from the law of evidence and refers to "circumstances and declarations . . .contemporaneous with the commission of the crime and so connected with it as to illustrate its character."[23] The *res gestae* test furnishes a flexible approach for determining when a crime is completed. Indeed, this test may be so flexible as to offer no more than a restatement of the problem, for it is not illuminating to submit that anything which is part of the *res gestae* is part of the crime. Nevertheless, it appears that a majority of the courts adopt the *res gestae* approach, at least as a part of their determinative standard, possibly because the approach does lend itself to flexible application.[24] On the other hand, when a court uses *res gestae* language, it may be that the determination has already been made through use of one of the other formulae, and thus the court is simply pointing out that since the crime is continuing, the activities under consideration are part of the *res gestae*.[25]

The *res gestae* theory was developed as a result of considering each crime in its natural circum-

[16] For a summary of applicable statutes see: Morris, *The Felon's Responsibility for Lethal Acts of Others*, 105 U. PA. L. REV. 50, 59 (1956).

[17] State v. Habig, 106 Ohio St. 151, 140 N.E. 195 (1932); State v. Brown, 7 Ore. 186 (1879).

[18] United States v. Brandenburg, 144 F.2d 656, 660 (3rd. Cir. 1944).

[19] People v. Braverman, 340 Ill. 525, 173 N.E. 55 (1930).

[20] State v. Adams, 339 Mo. 926, 932, 98 S.W.2d 632, 636–37 (1936).

[21] 210 Cal. 245, 250, 290 Pac. 881, 884 (1930).

[22] *E.g.*, State v. Daniels, 119 Wash. 557, 205 Pac. 1054 (1922); State v. Hershon, 329 Mo. 469, 45 S.W.2d 60 (1931).

[23] People v. Jarvis, 306 Ill. 611, 614, 138 N.E. 102, 103 (1923).

[24] For a collection of these cases see: 108 A.L.R. 847 (1937); 22 A.L.R. 850 (1923).

[25] Although some courts do undoubtedly use the *res gestae* theory as the sole formula, other courts use the term to describe the result of their inquiry. This is indicated by the language of the court in People v. Boss, 210 Cal. 245, 290 Pac. 881, 883 (1930):

> Without revolvers to terrify, or, if occasion requires, to kill any person who attempts to apprehend them at the time of, or immediately upon gaining possession of said property, their plan would be childlike. The defense of felonious possession which is challenged immediately upon the forcible taking is a part of the plan of robbery, or, as the books express it, it is res gestae of the crime.

stances. This test, then, is not peculiar to felony-murder situations for which it was developed, but its application to all crimes should be equally valid. Indeed, the State, in *People v. Zierlion*, advanced the *res gestae* argument as adopted from the law of evidence but made no reference to its use in the felony-murder cases in which context it is generally thought to assume broader proportions.[26] Therefore, its employment in the *Zierlion* case would probably have resulted in a determination that the crime was not terminated when the defendant entered since the participants were still involved in the "perpetration of the crime."[27]

A *conspiracy analysis* is the third test used for determining when a crime is completed in felony-murder situations. The primary inquiry is in relation to the activities which the conspirators included in their plans. A conspiracy to commit robbery, for example, naturally includes plans for escape with the stolen property. Within reasonable limits, therefore, the crime continues until the escape is successful.[28] The conspiracy test undoubtedly will produce the same result as the *res gestae* test in many cases, and, in fact, the two tests are often combined.[29] The conspiracy test, as the *res gestae* test, is not peculiarly applicable to felony-murder situations but is amenable to broader applications. A prior Illinois felony-murder case[30] adopted the "conspiracy to rob and escape" formula which suggests that this approach could have been used in the *Zierlion* case. The analogy, however, was not presented to the *Zierlion* court, and whether the court would have accepted it is mere speculation. It does appear, however, that such an application would have been valid and would have caused the defendant to be regarded as a principal.

As might be expected, most courts adopt combinations and variations of these formulae,[31] and it is often difficult to determine which factors are controlling. The conspiracy approach, however, seems to be the most logical solution to the problem. The circumstances involved in each case may be considered without the necessity of sacrificing fairly definitive standards. The only inquiry is in relation to the activities involved in the original plans for commission of the crime. Thus, the restrictiveness of the definition test and the ambiguity of the *res gestae* test are eliminated.

Justice Davis, dissenting in *People v. Zierlion*, adopted the theory that the crime was continuing and that, if guilty of any crime, the defendant should be convicted as a principal.[32] The difficulties encountered here, however, are aggravated by the question of whether the activities engaged in by the defendant with intent to aid in the crime were sufficient to constitute him a principal even though committed while the crime was continuing. An examination of the elements of a principal in the second degree is essential in reaching a conclusion in relation to the minimum activity required to regard a late joiner as a participant.[33]

A guilty first degree principal, presence (actual or constructive) and participation are necessary requisites in constituting one a principal in the second degree.[34]

The first of these elements is indisputably present in the *Zierlion* case. The principals in the first degree were indicted and convicted on the charge of burglary. However, the second element

[26] The determination of what constitutes a 'continuous act' must, of course, depend upon the evidence in each case, but once it is considered established, the rule [is] somewhat similar to that formulated in cases adopting the theory of 'res gestae'. . . . This does not mean that the homicide must occur within the technical limits of what would ordinarily be considered 'res gestae' as to time, but must form a substantial part of the 'perpetration' of the felony with regard to the rules of cause and effect and the 'unities of time, manner and place'. . . . 108 A.L.R. 850–51 (1936).

[27] A Missouri case involving a burglary and a homicide during the escape was decided on the ground that the jury could have found that the defendant fired the fatal shot, but by way of dictum the court pointed out:

> It is held in many jurisdictions, including Missouri, that when the homicide is within the *res gestae* of the initial crime and is an emanation thereof, it is committed in the perpetration of that crime in the statutory sense. State v. Adams, 339 Mo. 926, 933, 98 S.W.2d 632, 637 (1936).

[28] State v. Messino, 325 Mo. 743, 30 S.W.2d 750 (1930).

[29] *Ibid.*

[30] People v. Bongiorno, 358 Ill. 171, 192 N.E. 856 (1934).

[31] Brady v. Maryland, 154 A.2d 434 (Md. 1959).

[32] See *supra* note 3.

[33] The reader will recall that it was earlier pointed out that the distinction between principals in the first and in the second degree (aiders and abettors) has largely been abolished. Nevertheless, the classification of a criminal as a principal, though not the actual perpetrator, necessitates an inquiry into the elements of the common law aider and abettor. This approach is required since most of the statutes involved simply declare an abrogation of the distinction. The Illinois statute is representative:

> An accessory is he who stands by, and aids, abets or assists. . . . He who thus aids, abets, assists, advises or encourages, shall be considered as a principal, and punished accordingly. ILL. REV. STAT. ch. 38, §582 (1959).

[34] CLARK & MARSHALL, CRIMES §8.02 (6th ed. 1958).

—presence during the commission of the offense —presents some difficulty. The defendant was present during a portion of the crime but was neither present nor aware of the commission of the major part thereof. However, it has been held that actual physical presence during the crime is not essential, the classic example being the lookout in a robbery or burglary.[35] The theory of this doctrine is, of course, that the absent party is aware of, and approves, the activities of his accomplices. Thus, the difficulties of application of this hypothesis are compounded by the requirement of knowledge and approval of the principals' activities. The dissent in the *Zierlion* case intimated that this problem may be circumvented through use of a legal fiction of ratification of all of the prior acts which the aider's cohorts had committed in perpetration of the crime. This is supported by an analogy drawn from the legal principle that one may withdraw from a criminal activity and thereby purge himself of guilt for subsequent acts of the perpetrators.[36] "Conversely," the dissent points out, "one who joins and participates in completing a criminal enterprise should be responsible for both the prior and subsequent acts committed in furtherance of such venture."[37] This is a compelling argument when it is realized that the party joining the crime is aware of what has taken place and unites to complete the crime successfully.

The third element, that of participation in the crime, is at least partially satisfied by the aid rendered in attempting to secure the stolen goods. Although there was no tangible participation in the technical burglary, it has often been held that such physical participation is unnecessary.[38] Thus, on this basis, the dissent in the *Zierlion* case concludes that the defendant was a principal in the major crime of burglary.

The Subjective Approach

As previously indicated, an application of the *res gestae* and conspiracy formulae to the *Zierlion* case would extend the burglary at least to the point of escaping with the loot, thereby causing the defendant to be regarded, if a criminal at all, as a principal. Although an application of either of these formulae may produce the same result, depending upon the jurisdiction, the objections to the *res gestae* test should be kept in mind. It may, therefore, be logically concluded that the crime was continuing to the point at which the defendant entered into it, and thus he is removed from the category of accessory after the fact. As has been pointed out, the *Zierlion* approach presumes at this point that the requisite intent to aid the crime is also present.

An opposite extreme would be a complete reliance on a subjective or intent analysis. An application of the intent approach to the *Zierlion* case would appear to render the defendant a principal since he apparently intended to aid in rendering the principal crime a success. However, should the late joiner's sole purpose be to aid the perpetrator in escaping, a different result might occur. Nevertheless, it would undoubtedly be difficult, if not impossible, for Zierlion to prove that he did not intend to commit larceny of the stolen property which he was aiding in transporting.

This analysis, however, breaks down when applied to a case in which the major crime is complete and the late joiner enters with the thought that the crime is not consummated and intends its completion. In such a situation it would seem that intent is not enough to constitute one a principal, for it is well settled that there must be some actual participation in the major crime.[39]

Proposed Solution

What then should be the significance of the aider's intent in a continuing crime situation? An analysis of another case may afford some aid in obtaining an answer. In *Baker v. State*,[40] the deceased, during the course of an argument, was attacked and struck with a fire poker. While the attacker fled, the defendant hid the body of the

[35] Schmid v. State, 77 Ga. App. 623, 49 S.E.2d 134 (1948); People v. Arnett, 408 Ill. 164, 96 N.E.2d 535 (1951).

[36] State v. Klein, 97 Conn. 321, 116 Atl. 596 (1922); State v. Peterson, 213 Minn. 56, 4 N.W.2d 826 (1942).

[37] People v. Zierlion, 16 Ill. 2d 217, 222–23, 157 N.E.2d 72, 75 (1959) (dissenting opinion).

[38] People v. Blackwood, 35 Cal. App. 2d 728, 96 P.2d 982 (1939); Warden v. State, 24 Ohio St. 143 (1873).

Perkins, *supra* note 6, at 597 points out:

> 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.

[39] Smith v. State, 41 Ohio App. 64, 179 N.E. 696 (1931).

[40] 184 Tenn. 503, 201 S.W.2d 667 (1947).

decedent, who, at that point, was still alive. The sheriff arrived in a few moments and located the body, but the victim died a number of days later. An indictment for murder in the first degree was brought against the perpetrator. He was convicted of voluntary manslaughter and did not appeal. The defendant was indicted and convicted as an accessory after the fact of voluntary manslaughter. Upon appeal the conviction was reversed. The Tennessee Code definition of accessory, a codification of the common law, required that the felony be completed. The court was supported by ample authority[41] in reaching the conclusion that:

> the offense of the voluntary manslaughter of Staggs was not consummated until the death of Staggs 11 days after the combat had ended, this death also being 11 days after the acts for which plaintiff-in-error, Baker is indicted as an accessory after the fact.[42]

The court, in determining that the crime of homicide was incomplete, applied the technical definition test, as used in the *Zierlion* case, and thus concluded that the defendant could not be an accessory after the fact.[43] Application of the definition test to the *Zierlion* case was unduly restrictive, while application in the *Baker* case appears unduly liberal since the crime may be regarded as continuing for a period as long as a year and a day.[44]

[41] Chapman v. People, 39 Mich. 357 (1878); Harrel v. State, 39 Miss. 702 (1861). The conclusion has also been supported by more recent authority. State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); Commonwealth v. Tilley, 327 Mass. 540, 99 N.E.2d 749 (1951).

[42] Baker v. State, 184 Tenn. 503, 507, 201 S.W.2d 667, 668 (1947).

[43] It has also been suggested that the consummation of the crime would relate back to the original element. Thus, a person rendering assistance in a murder after the fatal blow has been struck, but before death, may be indicted as an accessory after the fact of murder on the assumption that the victim's death relates back to the blow. However, such a legal fiction seems to be generally rejected in relation to murder. In United States v. M'Gill, 4 U.S. (4 Dall.) 426, 429 (1806), the court was presented with a similar problem. There, a mortal blow was struck by the defendant while at sea. The victim, however, died in a foreign country. If jurisdiction was to be gained, the court had to find that the death of the victim related back to the time when the blow was struck. The court refused jurisdiction since, "murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas, to give jurisdiction. . . ." Comment, 1 VAND. L. REV. 127 (1948); State v. Hartigan, 32 Vt. 607 (1860).

[44] "A year and a day" is the traditional common law and statutory limitation requiring death of the victim within the said length of time after the mortal blow in order to justify a conviction for murder or manslaughter. Thomas, *Homicide—Permissible Duration of Time Between Injury and Death*, 25 J. CRIM. L. C. & P. S. 632 (1934). Some states allow an even longer period of time. People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934).

An application of the *res gestae* theory would also support the conclusion that Baker acted before the crime was completed since the perpetrator was making his escape, and only a few moments had passed since the blow was struck. However, the *res gestae* test would not extend the duration of the crime for as substantial a period of time as would the definition approach.

The conspiracy formula seems to present insuperable difficulties when applied to the *Baker* case. A criminal conspiracy assumes that one or more persons are involved in planning the crime.[45] Here, the criminal attack was performed by a single individual. Even if, for purposes of this case, the test was based upon prior plans of the individual rather than conspiracy, another problem would preclude use of the test. The crime of which the attacker was convicted was voluntary manslaughter, a crime requiring no malice aforethought and therefore no prior planning.

In any event, whatever the outer limitations of the crime may be, application of both the broadest and narrowest objective tests to the *Baker* case seem to indicate that the defendant's activities were performed before the crime was completed. Thus, through objective analysis the defendant could have been considered a principal; and intent to commit the major crime may be implied, therby disregarding actual intent.

It seems inequitable to rely completely on the objective tests and thus penalize the late joiner for the passage of a few crucial moments which may represent the difference between a continuing and a completed crime. Baker, for example, apparently entered into the criminal activity not with the intent to aid the killer in successfully achieving his goal of destroying a life, but rather for the purpose of aiding the perpetrator to escape.

It appears, therefore, that in order to be considered guilty as a principal in a continuing crime situation the late joiner must enter before the crime is complete and with the intent to aid in the successful consummation of the crime. However, when intent cannot be proven, an objective test should be used, and, when its application renders the crime continuing, a presumption should be raised that the late joiner is a principal. This presumption should be rebuttable by a showing of intent to aid the criminal in escape rather than to aid in successfully consummating the crime.

[45] Pettibone v. United States, 148 U.S. 197 (1893).