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wherein this doctrine is applied, are in accord with the principal case.¹¹

It is believed that the instant case represents a tendency toward absolute liability predicated upon ownership alone for the negligent operation of the automobile by a third person. A few states have by statute practically achieved this result.¹²

CRIMINAL LAW — INDICTMENT AS ACCESSORY BEFORE THE FACT HELD SUFFICIENT TO SUSTAIN CONVICTION AS PRINCIPAL. — Defendant, indicted as an accessory before the fact to murder, was convicted of voluntary manslaughter. From an order of the trial court discharging defendant on a writ of habeas corpus, the sheriff brought error. *Held*, that an indictment for accessory before the fact to murder will sustain a conviction of voluntary manslaughter. Judgment reversed. *Moore v. Lowe, Sheriff*.¹

The principal case purports to apply by analogy the rule of *State v. Prater*² to the effect that a verdict of manslaughter under a murder indictment, where the evidence is compatible only with murder or innocence, will not be reversed. The thought is that the accused should not be permitted to complain of the propensity of the compassionate jury to convict of a lesser offense than the evidence warrants.³ As a matter of practical administration of criminal law, the doctrine is not without merit. It involves, how-

head of the family, supporting his wife and himself, and who maintained the car and who at the time of the accident was using it in his own business.' In an earlier decision, however, this same court had applied the family car doctrine where a minor son was driving the family car. See *King v. Smythe*, 140 Tenn. 217, 204 S. E. 296 (1918).

¹¹ *Steele v. Ages' Adm'x*, 233 Ky. 714, 26 S. E. 653 (1930); *Venghis v. Nathanson*, 101 N. J. L. 110, 127 Atl. 175 (1925).

¹² CAL. CIV. CODE § 1741½ provides: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." In the case of *O'Neil v. Williams*, 127 Cal. App. 385, 15 Pac. (2d) 879 (1932), this statute was applied and the wife held liable on facts similar to those of the principal case. For similar statutes see Codes of Michigan, Connecticut and New York. CONN. GEN. STAT. § 1572; New York, CAHILL'S CONSOL. LAWS (1930) c. 69A, § 59; MICH. COMP. LAWS (1915) § 4125.

¹ 180 S. E. 1 (W. Va. 1935).

² 52 W. Va. 132, 143, 43 S. E. 230 (1930).

³ A defendant cannot be heard to complain of an error in his favor. *State v. Johnson*, 111 W. Va. 653, 164 S. E. 31 (1932); *State v. Prater*, *supra* n. 2.

ever, the assumption, in direct contradiction to the verdict, that the defendant is guilty of the crime alleged in the indictment, thus constituting the appellate court final arbiter of evidentiary facts which a jury has previously found insufficient. When, as in the instant case, the record is not before the court,⁴ so that guilt is presumed solely from the verdict, the possibility of error is particularly apparent.

The common law regarded accessoryship and the principal crime as fundamentally distinct substantive offenses.⁵ In consequence, on the ground that an indictment must inform the defendant of the nature of the charge against him,⁶ an allegation of one would not sustain a conviction of the other, the resulting variance being considered fatal.⁷ Although some jurisdictions have by statute completely abolished this common law distinction,⁸ statutes, which merely provide that an accessory shall be treated as a principal for purposes of venue⁹ and punishment,¹⁰ have been held implicitly to retain the difference for the purpose of indictment.¹¹ Despite loose expressions in *State v. Ellison*¹² and *Weil v. Black*¹³ suggesting a contrary result, the previous construction

⁴ *Moore v. Lowe, Sheriff, supra* n. 1 at 2.

⁵ *Hatley v. State*, 15 Ga. 346 (1854); *Reggins v. State*, 116 Ga. 592, 42 S. E. 707 (1902); *State v. Wyckoff*, 31 N. J. L. 65 (1864). (The above cases arose on the question of the sufficiency of the indictment to sustain conviction). In *State v. Larkin*, 49 N. H. 36 (1869); *State v. Buzzell*, 58 N. H. 257 (1878); and *Morrow v. State*, 14 Lea 475 (Tenn. 1884), a plea of double jeopardy was interposed after acquittal of one offense. 1 East, P. C. 352. See *State v. Roberts*, 50 W. Va. 422, 425, 40 S. E. 484 (1901); *State v. Cremeans*, 62 W. Va. 134, 137, 57 S. E. 405 (1907). See 4 Br. Comm. (11th ed. 1791) 40, to the effect that despite indictment and acquittal as accessory there may be subsequent indictment as principal.

⁶ One object of the indictment is to furnish the accused with such descriptor of the charge against him as will enable him to make his defense. *State v. Parkersburg Brewing Co.*, 53 W. Va. 591, 594, 45 S. E. 924 (1903); *State v. Wohlmut*, 78 W. Va. 404, 408, 89 S. E. 7 (1916); *State v. Vaughan*, 97 W. Va. 563, 125 S. E. 583 (1924); W. Va. Const. (1872) art. 3, § 14.

⁷ *Carter v. State*, 106 Ga. 372, 32 S. E. 345 (1899); *State v. Wyckoff, supra* n. 5; *Thornton v. Comm.*, 24 Gratt. 65 (Va. 1874); *State v. Roberts, supra* n. 5; *State v. Cremeans, supra* n. 5.

⁸ Representative cases indicate that statutes in some states have completely abolished the distinction for all purposes. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774 (1904); *McCracken v. People*, 209 Ill. 215, 70 N. E. 749 (1904); *State v. Smith*, 106 Ia. 701, 77 N. W. 499 (1898); *People v. Mills*, 178 N. Y. 274, 70 N. E. 786 (1904); *Brandt v. Comm.*, 94 Pa. 290 (1880).

⁹ W. VA. REV. CODE (1931) c. 61, art. 11, § 7.

¹⁰ W. VA. REV. CODE (1931) c. 61, art. 11, § 6.

¹¹ *Smith v. State*, 37 Ark. 274 (1881); *State v. Ricker*, 29 Me. 84 (1848); *Sandage v. State*, 61 Neb. 240, 84 N. W. 35 (1901); *Barnett v. State*, 46 Tex. Cr. App. 459, 80 S. W. 1013 (1904); *Hatchett v. Comm.*, 75 Va. 925 (1882).

¹² 49 W. Va. 70, 38 S. E. 574 (1901).

¹³ 76 W. Va. 685, 86 S. E. 666 (1916). See Syl. 5, "Secs..... Code....., in effect, abolish the common law distinction between an accessory before the

of the local statute would seem to place it in the latter group. Prior to the instant case it was apparently settled law in West Virginia that an indictment as a principal would not sustain a conviction for an accessory.¹⁴ It is difficult to reconcile this rule with the present holding.

DEEDS — ESTOPPEL — CONFIRMATION OF MARRIED WOMAN'S CONVEYANCE. — W, living apart from her husband, executed an oil and gas lease of her own realty in 1930 for four years and as long thereafter as oil and gas should be produced, but did not acknowledge it in the form required by the West Virginia statute.¹ In 1931 the statute was changed so as to permit a married woman to execute a deed as if she were a single woman.² The lessee paid delay rentals until 1933, when W executed a deed purporting to lease the same property to the plaintiffs, who brought this action to enjoin the former lessee from operating. *Held*, that although in the view of the court the lease of 1930 was void,³ W and her assignees were estopped to deny the validity of that lease. *Hanley v. Richards*.⁴

Although the result reached by the court is palpably sound, it seems that a consistent use of terms strictly applied would not permit "estoppel" to give this "void" deed effect as a conveyance.⁵ This result might well have been attained by treating the

fact and a principal felon, by making such accessory, in every felony, punishable as if he were the principal in the first degree, and punishable in the county in which the principal felon might be indicted."

¹⁴ *State v. Roberts*, *supra* n. 5; *State v. Cremeans*, *supra* n. 5; see *State v. Lilly*, 47 W. Va. 496, 497, 35 S. E. 837 (1900); *State v. Powers*, 91 W. Va. 737, 747, 113 S. E. 912 (1922).

¹ W. VA. CODE (1923) c. 73, § 6.

² W. VA. REV. CODE (1931) c. 48, art. 3, § 3.

³ *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. 972 (1898).

⁴ 178 S. E. 805 (W. Va. 1935).

⁵ W. VA. REV. CODE (1931) c. 36, art. 1, § 1: "No estate of inheritance or freehold, or for a term of more than five years, in lands, or any other interest or term therein of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will." A lease of land for the purpose of extracting oil or natural gas is, in effect, a grant of a part of the corpus of the land. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533 (1903).

In *Drake v. O'Brien*, 83 W. Va. 678, 99 S. E. 280 (1919), the lessee took possession under a parol oil and gas lease and paid the royalties for many years. The court held it to be an implied tenancy from year to year, saying it could not be more than that, for lack of deed or will creating it. In 1931