COMPLICITY IN REGULATORY OFFENCES

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The main issue which arises in complicity in regulatory offences is the definition of the mental element. Most cases hold that complicity requires proof of *mens rea*[1] even where this is unnecessary against the principal offender.[2] For example, complicity in the offence of driving an uninsured motor vehicle would on this view require advertence to the fact that the vehicle driven by the principal offender was uninsured although clearly such advertence would not be required in the case of the principal offender. Consequently complicity here would not involve responsibility for negligent inadvertence or strict responsibility. There is, however, a considerable body of authority which denies that complicity in a regulatory offence requires *mens rea*. For example several cases indicate that complicity in a regulatory offence is a form of vicarious liability so that strict liability could be imposed upon an accomplice. Other cases indicate that the mental element of complicity in any offence, including a regulatory offence, is always similar to that of the principal offence, in which event liability for *mens rea* would not be imposed upon an accomplice except where the principal offence also imposes liability for *mens rea*. The purpose of this article is to examine whether the proposition that complicity in a regulatory offence always requires proof of *mens rea* represents the present law.

Johnson v. Youden

The leading case which supports the proposition that complicity in a regulatory offence requires *mens rea* is *Johnson v. Youden*,[3] a decision of the English Divisional Court. In this case three solicitors acted on behalf of a builder in respect of the sale of a house. The price was in excess of that permitted by a defence regulation. Only one solicitor was aware of the actual price. All three were charged with aiding and abetting the builder in his sale of the house at an excessive price.[4] On appeal against a dismissal of this charge the prosecution argued that it was immaterial whether any of the respondents were aware of the price since the principal offence, in respect of the price charged, was one of strict responsibility. This argument was rejected

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[1] *Mens rea* here means advertence to all the facts relevant to the definition of an offence. See Glanville Williams, *Criminal Law—The General Part* (2nd ed.) 31.

[2] Principal offender here means one who would be liable as a principal in the first degree in a felony.

[3] [1950] 1 K.B. 544.

[4] The principal offence was prescribed by Section 7(1) *Building Materials and Housing Act 1945*.

by the Court on the ground that to be liable for complicity D must 'know the matters which in fact consituted the offence'.[5] Thus since the price of the house sold was a matter constituting the principal offence the prosecutor's appeal in respect of the two solicitors who were unaware of the price charged was disallowed.

Johnson v. Youden has been approved in *Churchill v. Walton*,[6] a recent decision of the House of Lords concerning the mental element of conspiracy in a regulatory offence, and is consistent with numerous English authorities.[7] It has also been approved in several Australian decisions,[8] and is consistent with *Bergin v. Stack*[9] where, *obiter*, four members of the High Court approved the proposition that complicity in a regulatory offence requires proof of *mens rea*. However in none of these cases have clear reasons been articulated why this should always be so.

'1. Statutory Interpretation'

One possible explanation of the principle in *Johnson v. Youden* is that the relevant statutory provisions may usually be so interpreted. The common wording of provisions extending liability for complicity to summary offences includes the words 'abet', 'counsel' and 'procure'. These words could be interpreted as indicating that the legislature intended to impose liability only for *mens rea*. For example, words such as 'allow' and 'permit' which are commonly used in the definition of regulatory offences have often been interpreted as imposing liability for *mens rea*.[10] However several arguments militate strongly against this possible explanation.

First, in Australia (but not in England) the presence of words such as 'allow' and 'permit' in the definitions of regulatory offences is usually taken as evidencing a legislative intention to impose liability for negligent inadvertence and not liability for *mens rea*.[11] For ex-

5 [1950] 1 K.B. 544, 546.

6 [1967] 2 W.L.R. 683.

7 *Callow v. Tillstone* (1900) 64 J.P. 823; 19 Cox 576; *Thomas v. Lindop* [1950] 1 All E.R. 966; *Ackroyds Air Travel Ltd v. D.P.P.* [1950] 1 All E.R. 933; *Bateman v. Evans* (1964) 108 Sol. J. 522. See also *Churchill v. Walton* [1967] 2 W.L.R. 683.

8 *Canty v. Ivers* (1913) A.L.R. 403; *Abley v. Crosaro* [1946] V.L.R. 53; *Wilson v. Dobra* (1955) 57 W.A.L.R. 95; *Blackmore v. Linton* [1961] V.R. 374; *Lenzi v. Miller* [1965] S.A.S.R. 1, per Napier C.J. and Travers J.

9 (1953) 88 C.L.R. 248.

10 Edwards, *Mens Rea in Statutory Offences*, Chapters 4 and 7.

It should be noted that 'aid' does not have this subjective content. However it is synonymous with 'abet' (Mellinkoff, *The Language of the Law*, 43, 122) and in the phrase 'aid and abet' 'aid' is coloured by 'abet' and not vice versa. This is because it would be perverse if the ill-defined and often disregarded distinction between aiding and abetting and counselling and procuring (see Glanville Williams, *Criminal Law: The General Part* (2nd ed.), 406, n. 20) affected the mental element of complicity.)

11 *Ferrier v. Wilson* (1906) 4 C.L.R. 785; *Proudman v. Dayman* (1941) 67 C.L.R. 536. See generally Howard, *Strict Responsibility*.

ample, in *Proudman v. Dayman*[12] a majority of the High Court held that the offence of permitting an unlicensed driver to use a motor vehicle did not require proof of advertence to the absence of a driving licence. The defendant would be liable upon proof of advertence to the other external aspects of the offence (*e.g.* that the driver who was in fact unlicensed was driving a motor vehicle) unless he were able to show that he had believed the driver to be licensed and that he had not been negligent in entertaining this belief.[13] Consequently, it is highly doubtful whether the words 'abet', 'counsel' and 'procure' would be interpreted as imposing liability for *mens rea.*

Secondly, if in England the mental element of complicity in a regulatory offence is similar to that of the statutory offence of allowing or permitting the commission of a regulatory offence, it is not at all obvious that liability would be imposed only for *mens rea.* This is because under present English law the doctrine of vicarious liability, as manifested for example in the delegation principle, could readily be applied.[14] A case demonstrating this point is *Henshall Ltd v. Harvey*[15] a decision of the Divisional Court. In this case D Ltd was convicted of aiding and abetting X to use an overweight lorry.[16] X was an independent contractor employed for haulage work. X's lorry was allowed to be driven out onto a public road by Y, a weighbridge operator employed by D Ltd, although it was overweight. These facts were not known by any superior agent of the company.[16a] D Ltd's appeal against conviction was allowed. The Court held that complicity in the offence of using an overweight lorry was similar to an offence such as permitting the use of an overweight lorry, but that liability could not be imposed upon D Ltd in the absence of *mens rea* or a delegation by D Ltd to Y of the control of its business sufficient to satisfy the delegation principle. Since D Ltd did not possess *mens rea,* and Y had been entrusted only with the responsibility of operating the weighbridge, it could not be held liable.

Thirdly, it is now clearly established that those provisions which extend liability for complicity to regulatory offences do not affect the common law principles governing such liability but are merely declaratory of them.[17]

12 (1941) 67 C.L.R. 536.

13 See n. 92 infra.

14 *Vane v. Yiannopoullos* [1965] A.C. 486.

15 [1965] 2 W.L.R. 758.

16 The principal offence was prescribed under Section 64 *Road Traffic Act,* 1960.

16a Relevant because in England a distinction is drawn between primary and vicarious corporate criminal liability. See Fisse, 'The Distinction Between Primary and Vicarious Corporate Criminal Liability (1967) 41 A.L.J. 203.'

17 *Du Gros v. Lambourne* [1907] 1 K.B. 40; *Homolka v. Osmond* [1939] 1 All E.R. 154; *Walsh v. Sainsbury* (1925) 36 C.L.R. 464, 477; *Richards v. McPherson* [1943] V.L.R. 44.

'II. Common Law Principles'

A second possible explanation of the principle in *Johnson v. Youden* is that if complicity in a regulatory offence is a common law form of liability proof of *mens rea* is required since at common law criminal liability usually requires such proof.[18] This reasoning is supported by the linguistic content of the words 'abet', 'counsel' and 'procure', three of the four words usually employed to describe what conduct is required for complicity, since this content suggests that complicity requires *mens rea*.[19] For example, to say that D counselled X to drive an uninsured motor vehicle implies that D was aware both that the vehicle would be driven by X and that it was uninsured.

(a) *'The Link Principle'*

The argument that complicity requires proof of *mens rea* because it is a common law form of liability is not, however, convincing: it may equally be argued that at common law the mental element of complicity turns upon the mental element of the principal offence and that consequently complicity requires proof of *mens rea* only where this is required against the principal offender. This alternative argument is supported by considerable authority. For example, in *Creamer*,[20] a recent decision of the English Court of Criminal Appeal, it was held that the defendant was guilty of complicity in involuntary manslaughter since he had assisted and encouraged the unlawful and dangerous act (abortion) which had resulted in death. It was regarded as immaterial that he had not adverted to the likelihood of death occurring and consequently it is clear that liability for *mens rea* (which requires advertence to all external aspects of an offence)[21] was not imposed.

The position is similar where D is charged with complicity in felony-murder, or even where D is charged with complicity in murder if both D and the principal offender did not foresee the likelihood of killing V but merely intended to inflict grievous bodily harm upon him.[22] The position is also similar where D is charged with complicity in manslaughter by criminal negligence.[23] Assume, for example, that

[18] Glanville Williams, *Criminal Law: The General Part* (2nd ed.) 395. Cf. Sayre, 'Criminal Responsibility for the Acts of Another' (1930) 43 Harv. L. Rev. 689, 694-701.

[19] *Oxford English Dictionary*. See also *Johnson v. Youden* [1950] 1 K.B. 544, 546 per Lord Goddard C.J. arguendo. 'Aid' does not have this content but see n. 10.

[20] [1965] 3 W.L.R. 583. See also *People v. Braune* 2 N.E. 2d 839 (1936); *People v. Le Grant* 76 Cal. App. 2d 148 (1946).

[21] n. 1.

[22] *Radalyski* (1899) 24 V.L.R. 687; *Betts and Ridley* (1930) 22 Cr. App. R. 148; *Ryan and Walker* [1966] V.R. 533.

[23] *Swindall* (1846) 2 C. & K. 230; *Salmon* (1880) L.R. 6 Q.B.D. 79; *Baldessare* (1930) 29 Cox C.C. 193; *State v. McVay* 132 A. & L. 436, 44 A.L.R. 572 (1926); *State v Di Lorenzo* 138 Comm. 281, 83 A.L.R. 2d 479 (1951); *Commonwealth v. Atencio* 189 N.E. 2d 223 (1963).

D encourages X to drive at a grossly excessive speed in a crowded street. As a result X kills V. Neither D nor X intended or foresaw the likelihood of death occurring. Provided X's failure to foresee the likelihood of death resulting is grossly negligent D may be guilty of complicity in the manslaughter committed by X since he encouraged the conduct of X which substantially caused V's death.

Nevertheless there are several possible arguments to the effect that the above examples have no connection with complicity in regulatory offences. First, in the context of the above examples D, on the facts as he believes them to be, is always aware that X is committing a lesser offence (for example, abortion in *Creamer's case*) or possibly a tort or moral wrong.[24] This would not usually be the position in the context of complicity in regulatory or other statutory offences, and therefore it is arguable that the two contexts are not analogous. This argument is, however, unsound. Consider the following situation where D and X go rabbit shooting. D encourages X to fire at an object 500 yards away which both believe to be a rabbit. In fact the object is a small child. Both D and X are grossly negligent in failing to realize this. X fires and as a result the child is killed. Here D would be guilty of complicity in the involuntary manslaughter committed by X although on the facts as he has believed them to be X has not committed any lesser criminal offence (assuming the gun is licensed *etc.*), tort, or moral wrong (assuming rabbits to be a pest). Furthermore the argument under scrutiny would not explain why D should not be held guilty of complicity in say the offence of driving under the influence without proof of *mens rea* where on the facts as D believes them to be the principal offender is committing the lesser offence of exceeding the speed limit or even the moral wrong of blowing a car-horn at 3 *a.m.* in a residential area.

Secondly, in the context of say complicity in involuntary manslaughter D's conduct is blameworthy. For example in *Creamer's case* D assisted in the felony of abortion; in complicity in manslaughter by criminal negligence D must be grossly negligent.[25] In the context of complicity in a regulatory offence which imposes strict liability D's conduct would not necessarily need to be blameworthy. Consider, for example, the situation where D is charged with complicity in the offence of driving an uninsured motor vehicle. Assume that this offence is one of strict liability, and assume further that the defence of reasonable mistake of fact is also unavailable to D.[26] Here if strict liability is imposed upon D for complicity clearly he may be held liable in the absence of any blameworthy conduct, as, for example, where

24 Cf. *Prince* (1875) L.R. 2 C.C.R. 154.
25 See text to n. 27.
26 See text to n. 84 (which is relevant only in the context of Australian law since the defence of reasonable mistake of fact as described in *Proudman v. Dayman* does not exist in other jurisdictions).

he has quite reasonably believed that the vehicle driven by the principal offender was insured. The weakness in this second argument is that it would not explain why D should not be held guilty of complicity in a regulatory offence which imposes liability for negligent inadvertence unless he possessed *mens rea.* As in the context of complicity in manslaughter by negligence it would surely be possible to impose liability for negligent inadvertence upon D. Further the argument in question would not explain why D should not be held guilty of complicity in a regulatory offence which imposes strict liability where he has been negligently inadvertent.

Thirdly, it might be argued that *Creamer* and other cases to similar effect represent exceptions to a general principle that complicity at common law requires proof of *mens rea.* However, it is submitted that this argument is also unsound. There is no indication in these cases that the position adopted represents a departure from a general principle. Instead they are quite consistent with the view that the mental element of complicity in any offence is linked with the mental element of the principal offence. In other words they suggest that if the principal offence imposes strict liability or liability for negligent inadvertence, strict liability or liability for negligent inadvertence may also be imposed upon an accomplice.

This 'link' principle is inconsistent with those statements of the law relating to complicity in manslaughter by criminal negligence which suggest that proof that D encouraged the conduct which substantially caused V's death would be sufficient without the additional proof that D (as well as the principal offender) was grossly negligent.[27] Such statements are, however, unsound. Consider the following example. D, a nurse, assists X, an experienced gynaecologist, to abort V. X decides to perform the abortion in a way which all gynaecologists of X's experience would regard as extremely dangerous and unnecessary. D has full knowledge of the nature of the operation but believes that X, who she realizes is an experienced gynaecologist, is acting quite properly. If V dies as a result of the abortion X would probably be guilty of manslaughter by criminal negligence. D would be guilty of complicity in this offence if the law is that mere encouragement of the conduct which substantially causes V's death is sufficient. If D exercised the skill reasonably expected of a nurse[28] in believing that the operation performed by X was appropriate this result would clearly be perverse. It is submitted therefore that complicity in manslaughter by criminal negligence requires not only advertence by D to the conduct which substantially causes death but also a grossly negligent failure to foresee the likelihood of death.[29]

27 Howard, *Australian Criminal Law,* 229.

28 The standard of care required would be lower than that required of a gynaecologist.

29 Cf. *Salmon* (1880) L.R. 6 Q.B.D. 79, 83 per Stephen J.

The 'link' principle has often been approved or applied outside the context of complicity in murder and manslaughter. In *Thomas v. The King*,[30] a decision of the High Court of Australia concerning the mental element of bigamy, Dixon J. (as he then was) stated in the course of a discussion of *Wheat's Case*[31] that 'there would seem to be no intelligible reason' why strict liability should not be imposed upon an accomplice in the offence of bigamy if strict liability were also imposed upon the principal offender.[32] In *McCarthy*,[33] a decision of the English Court of Criminal Appeal, D was convicted of aiding and abetting another to commit the statutory felony of knowingly being in possession of an explosive in such circumstances as to give rise to a reasonable suspicion that it was not possessed for a lawful purpose.[34] D appealed partly on the ground that there was not sufficient evidence of his participation for complicity. It was held that there was in fact evidence of sufficient participation for complicity. *Obiter* it was stated that the requisite mental element of complicity in the above offence was knowledge that the principal offender had an explosive in his possession, and knowledge of facts giving rise to a reasonable suspicion that the explosive was not intended for a lawful purpose. Presumably, had the principle in *Johnson v. Youden* been applied advertence by D to the explosive being intended for an unlawful purpose and not only advertence to facts giving rise to a reasonable suspicion that the explosive was intended for an unlawful purpose would have been required.[35] Instead the Court appeared to take the view that the mental element of complicity is similar to that of the principal offence.

Further, in the context of complicity in regulatory offences the 'link' principle has been accepted. Significant authority to this effect is to be found in *Lenzi v. Miller*,[36] a recent South Australian decision. In this case D, a carrier, instructed an employee to drive a motor vehicle. This vehicle, which was under D's control, was uninsured. D denied that he knew it was uninsured. The Magistrate convicted him of complicity in the offence committed by the employee of driving an uninsured motor vehicle.[37] An appeal against this conviction was rejected by Chamberlain J. of the Supreme Court of South Australia who held that in respect of whether the vehicle driven was insured strict liability was imposed upon both principal offender and accom-

30 (1938) 59 C.L.R. 279. See also *Wheat and Stocks* [1921] 2 K.B. 119; Section 2.06(3) of the Proposed Official Draft (1962) of the American Law Institute's Model Penal Code, and commentary thereon in Tentative Draft No. 1, 19.

31 [1921] 2 K.B. 119. 32 Id, 310-11. 33 [1964] 1 W.L.R. 196.

34 Prescribed by Section 4(1) *Explosive Substances Act, 1883*.

35 Cf. however, discussion below p. 285.

36 [1965] S.A.S.R. 1. See also *Ex p. Falstein* (1948) 49 S.R. (N.S.W.) 142, 150 per Davidson J.; *Kurucz v. Mayne* [1966] S.A.S.R. 81.

37 The principal offence was prescribed under Section 102 *Motor Vehicles Act*, 1959.

plice, and therefore it was irrelevant that D may not have known of the absence of insurance. In His Honour's opinion complicity in any offence, including a regulatory offence, required only the 'same degree of knowledge and intention' as would be necessary in the case of the principal offender.[38]

The appellant Lenzi then appealed against this decision to the Court of Criminal Appeal of South Australia, on the ground that complicity in a regulatory offence required proof of *mens rea* and that it had not been proven that he possessed *mens rea.* The appeal was disallowed on the narrow ground that on the evidence it was clear that D did know of the lack of insurance[39] but, *obiter,* all three members of the Court expressed their views on the issue whether complicity in a regulatory offence required proof of *mens rea.* Napier C.J. and Travers J. adopted the principle in *Johnson v. Youden,* subject to an important qualification which is considered below,[40] but Bright J., the remaining member of the Court, did not accept this principle as being valid, and expressed his own views as to the mental element of complicity in regulatory offences. These views are substantially consistent with the 'link' principle, as will be seen below.[41]

A further important case supporting the 'link' principle is *United States v. Dotterweich,*[42] a decision of the Supreme Court of the United States. Here D, the president and general manager of a company dealing in drugs was charged with aiding and abetting the company to commit the regulatory offence of introducing into interstate commerce adulterated and misbranded drugs.[43] The facts are not clear from the report. However, in holding that there had been sufficient evidence of D's complicity to be left to a jury, a majority of the Court held that the principal offence imposed strict liability and that strict liability would also be imposed 'upon all who according to settled doctrines of criminal law' are responsible for complicity in an offence.[44]

In the case of some offences it is of note that it is very difficult to apply the principle in *Johnson v. Youden.* Consider the offence of being in possession of goods reasonably suspected of having been stolen.[45] The application of the principle in *Johnson v. Youden* requires that D must advert to all the external aspects which constitute the principal offence.[46] It is difficult to say that D would possess *mens rea* if he had adverted only to the principal offender possessing the relevant goods. It is less difficult to regard D as possessing *mens rea*

38 [1965] S.A.S.R. 1, 3.
39 *Approving Eclipse Motors Pty Ltd v. Milner* [1950] S.A.S.R. 1, 3. See cogent criticism of this decision by Glanville Williams *Criminal Law: The General Part* (2nd ed.), 166.
40 p. 301 ff. 41 p. 294 ff. 42 320 U.S. 277 (1943).
43 Prescribed by the Federal Food, Drug and Cosmetic Act. 44 Id. 284.
45 E.g. as enacted by Section 41(1) *Police Offences Act, 1953-1961 (S.A.).*
46 See discussion supra pp. 278-9.

where he is also aware of those facts which give rise to a reasonable suspicion that the goods were stolen. However, it still seems unsatisfactory to do so since it is arguable that an external aspect of the offence is that the relevant goods be stolen, a point obscured by the requirement that to obtain a conviction the prosecution need not prove against the principal offender actual advertence to the fact that the goods were stolen, but only a reasonable suspicion that the goods were stolen. This is especially so where the defence of proving that the goods were acquired lawfully is available to the principal offender[47] since it is then more evident that an external aspect of the offence is that the relevant goods be stolen goods. All of the above difficulties disappear if the 'link' principle is applied, a fact which provides further support for the argument that the principle in *Johnson v. Youden* is not derived from the usual common law principles governing the mental element of complicity.

(b) *'The Link Principle Operates Subject to a Qualification'*

The cases which support the principle demonstrate that the legal meaning of the words 'abet' 'counsel' and 'procure' differs from their popular meaning, since where the principle is applied D need not necessarily advert to all the external aspects of the principal offence in order to be guilty of aiding and abetting or counselling and procuring. However, the bulk of these cases do indicate that the linguistic content of the words 'abet' 'counsel' and 'procure' is not completely ignored. D, to be guilty of complicity, must advert to something. For example, in *Creamer*[48] complicity in involuntary manslaughter by an unlawful and dangerous act was held to require advertence to the unlawful and dangerous act of abortion. Complicity in manslaughter by criminal negligence requires advertence to the act or omission which substantially causes death.[49]

The requirement above that, for complicity, D must advert to some conduct on the part of the principal offender has the important consequence that even where the 'link' principle is applied the mental element of complicity may differ from that of the principal offence. Consider the following illustration. D lends the keys of his car to X who he realizes will use the car. X is under the influence of a drug and is quite incapable of exercising effective control of the vehicle. D is not aware of this. If X drives D's car and, as a result of the influence of the drugs, kills V, another road user, he could be convicted of manslaughter by criminal negligence whether or not he realized that the drug had impaired the efficiency of his driving. However D could not be convicted of complicity in the manslaughter committed by X, no matter how negligent he may have been in failing to appreciate X's

[47] See e.g. Section 41(2) *Police Offences Act 1953-1961 (S.A.)*.
[48] [1965] 3 W.L.R. 583.
[49] *Baldessare* (1930) 29 Cox C.C. 193.

condition and thus failing to realize the likelihood of X killing some road user, since he did not advert to the conduct on X's part which substantially caused V's death (driving in an intoxicated condition).[50]

The operation of this qualification to the principle in the context of complicity in a regulatory offence (which does not impose liability for *mens rea*) may now be examined. Consider first complicity in an offence which prohibits the killing of a certain type of animal. This type of regulatory offence proscribes the causing of a particular result and for this reason is parallel to the offence of manslaughter. Consequently complicity in the above regulatory offence would require advertence only to the act or omission on the part of the principal offender which substantially caused the death of the animal.

Take next complicity in the offence of using an uninsured motor vehicle. This type of regulatory offence, unlike the first considered above, does not proscribe the causing of a particular result, but proscribes an act involving the use of a certain description of object; or, as one commentator has put it, the offence requires the use of an object of a particular 'status'.[51] Complicity in the above offence would require advertence only to the act of driving the relevant motor vehicle by the principal offender. This is evident from the judgment of Bright J. in *Lenzi v. Miller,* which is discussed below. His Honour, in demonstrating the application of his concept of 'inculpation' stated that where D is charged with complicity in the offence of driving an uninsured motor vehicle this concept would be satisfied where the prosecution established that D encouraged (and thus adverted to) simply the driving of the particular motor vehicle by the principal offender.[52]

Thirdly, consider complicity in an offence such as driving at a speed in excess of the legal speed limit. This type of regulatory offence differs from the two types discussed above in that it does not proscribe the causing of any result nor does its definition include any 'status'[53] element. Instead its requires an act performed in a certain manner, *viz* driving at an excessive speed. Complicity in the above offence would require advertence to the principal offender performing the act of driving at a time when in fact the principal offender was driving in excess of the legal speed limit. Although it might be argued that advertence not only to driving but also to driving at a speed in excess of the legal limit is required, it is submitted that the above conclusion is more consistent with the view that complicity in say manslaughter by criminal negligence does not require advertence to both the act which substantially causes death and the consequence of death, but only to the act which substantially causes death.[54]

50 Consider however the possibility of D being convicted as a principal offender. Cf. *People v. Marshall* 362 Mich. 170, 106 N.W. 2d. 842 (1961).

51 Howard, *Strict Responsibility,* 46-7.

52 See discussion infra p. 295.

53 n. 51.

54 See discussion supra pp. 281-2.

In some cases it may be difficult to determine which of the above three types of regulatory offence a given regulatory offence most closely resembles. The determination may be material. Consider, for example, the offence of driving without due care and attention. Initially this offence appears similar to the third type of regulatory offence considered above. On this view complicity is driving without due care and attention would require advertence only to the act of driving when performed by the principal offender in such a manner as to constitute driving without due care and attention. Advertence would not be required to the manner of driving which constituted driving without due care and attention. However, upon closer examination, the offence of driving without due care and attention resembles the first type of regulatory offence discussed above more than it does the third. If a person is driving without due care and attention he is driving without regard to some likely consequence, such as a minor collision with a car or a pedestrian. The offence therefore punishes conduct which is likely to cause some result. Thus it is submitted that complicity in driving without due care and attention requires advertence not merely to the act of driving performed by the principal offender, but also to the manner of driving which is likely to cause such results as collisions with other road-users.[55]

Consider finally complicity in an offence such as being in possession of illicit spirits. This type of regulatory offence differs from those above in that no act or omission need be established against the principal ffender. Liability is imposed merely in virtue of the offender's 'status'[56] which in the offence above is that of possessor. It is clearly established that it is possible to be guilty of complicity in such an offence, as is evident from *McCarthy*,[57] a decision which has already been descussed. Complicity in the offence of being in possession of illicit spirits would require advertence only to the fact that the principal offender has in his possession the relevant spirits.

There appears to be one significant case at variance with the above discussion of the significance of the linguistic content of the words abet', 'counsel' and 'procure'. In *United States v. Dotterweich*,[58] the majority imposed liability upon D on the basis of his authority and responsibility as president and general manager of the corporation which committed the principal offence,[59] apparently disregarding the question whether any advertence was required by D in respect of the relevant distribution of adulterated and misbranded drugs. However the absence of any discussion of this issue by the Court considerably

55 Cf. *Ashton v. Police* [1964] N.Z.L.R. 429, 431. 56 n. 51.
57 [1964] 1 W.L.R. 196. See also *U.S. v. Peoni* 100 F. 2d 401 (1938); but cf *McAteer v. Lester* [1962] N.Z.L.R. 485. 58 320 U.S. 277 (1943)
59 Id, 284, 286.

reduces the persuasive value the decision might otherwise have in respect thereof in Anglo-Australian jurisdictions.[60]

(c) *'The Principle in Johnson v. Youden Contrasted With Usual Common Law Position'*

The result of the above discussion is that the principle in *Johnson v. Youden* is not consistent with the usual common law principles which govern the mental element of complicity since the effect of these principles is not that complicity requires *mens rea* but that the mental element is linked to that of the principal offence (subject to the requirement that D advert to some conduct on the part of the principal offender). The problem arises whether the principle in *Johnson v. Youden* is supportable on some other basis. The solution appears to lie in various policy considerations.

(d) *'Justification of the Principle in Johnson v. Youden'*

Consider first the relevant issues of policy which arise in such jurisdictions as England, Canada, New Zealand, and those in the U.S.A., where regulatory offences are commonly interpreted as imposing strict liability.[61] If the 'link' principle is applied (even subject to the requirement that D advert to some conduct on the part of the principal offender) the resultant extension of the doctrine of strict liability to accomplices would be absurd.[62] For example, the Good Samaritan who assists a woman driver parking her car by giving her directions would be guilty of complicity in the offence of using an uninsured motor vehicle if the vehicle he directed was uninsured even where he believed, quite reasonably, that it was in fact insured. He would have encouraged (and thus have adverted to) the use of a motor vehicle, and, in respect of the 'status' of the vehicle liability would be strict since strict liability would be imposed upon the principal offender.[63] It may be noted that possibly the results would be less undesirable where the principal offence is so defined that advertence would be required to some conduct on the part of the principal offender which is more significant than say the mere act of driving a vehicle. For example if D is to be held liable for complicity in the offence of driving without due care and attention, advertence to the act of driving a motor vehicle in the particular way which constitutes driving without due care and attention would be required.[64]

60 Note however that the popular usage of the words 'aid' 'abet' and 'procure' probably now corresponds to their legal usage. Only 'counsel' seems to have a significant separate common usage. See *Oxford English Dictionary*.

61 See Howard, *Strict Responsibility*.

62 Glanville Williams, *Criminal Law: The General Part* (2nd ed.) 395.

63 The defence of reasonable mistake of fact would not be available to the Good Samaritan under the reasoning suggested infra p. 293 since this defence is not available except in Australia.

Only in a very limited number of situations could it be thought necessary in any of the above jurisdictions to extend the doctrine of strict liability to accomplices. Consider the following example, which involves certain English statutory provisions. D operates a fleet of heavy transport vehicles. He employs X as a driver. X is only 20 years of age but D negligently assumes that he is over 21. X, with D's permission, drives a heavy vehicle belonging to D. X has committed the offence of driving a heavy motor vehicle whilst under the age of 21.[65] Vicarious liability cannot be imposed upon D since the offence of *driving* a heavy vehicle whilst under 21 years of age would not be so interpreted.[66] Nor can D be convicted of the offence of causing or permitting X to drive a heavy vehicle whilst under the age of 21[67] since in England (and probably in the other jurisdictions referred to above) it is most likely that this offence would require proof of *mens rea*,[68] and D does not possess *mens rea*. Although it seems desirable that D should not escape criminal liability he must unless he can be convicted of complicity. This would not be possible if the principle in *Johnson v. Youden* were applied since, again, D does not possess *mens rea*. However, clearly liability for complicity could be imposed upon D if the 'link' principle were applied since in this event strict liability would be imposed upon him (assuming that the offence of driving a heavy motor vehicle whilst under 21 imposes strict liability upon the principal offender).

Yet if the 'link' principle is applied, there seems no possible way in which to avoid imposing strict liability upon accomplices in the very large number of situations where this would be undesirable. For example, it would be unsatisfactory to require a higher degree of encouragement, instigation, or assistance on the part of an accomplice than would be sufficient for complicity in a felony or misdemeanour. Although in the illustrations used above this device might avoid the conviction of the Good Samaritan directing a woman parking her car for complicity in the offence of using an uninsured motor vehicle, but would enable the conviction of the operator of a fleet of heavy vehicles for complicity in the offence of driving a heavy vehicle whilst under the age of 21,[69] strict liability would still be imposed upon too wide a range of accomplices. Consider the following example. D requests

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64 See discussion supra p. 288, and cf. *Rubie v. Faulkner* [1940] 1 K.B. 571; *Theeman v. Police* [1966] N.Z.L.R. 605. It should be noted however, that the offence of driving without due care and attention imposes not strict liability but liability for negligence.

65 Section 9(3)(4) *Road Traffic Act, 1930.*

66 Glanville Williams, *Criminal Law: The General Part (2nd ed.) 281.*

67 n. 65.

68 Edwards, *Mens Rea in Statutory Offences*, Chapters 4 and 6. Cf. *Grays Haulage Co. Ltd v. Arnold* [1966] 1 W.L.R. 534. Nor is vicarious responsibility likely. Cf. *Henshall Ltd v. Harvey* [1965] 2 W.L.R. 758.

69 In virtue of the degree of control possessed by an employer over the activities of an employee (and by an owner of a vehicle over the activities of another.)

his friend X to drive him somewhere. X is reluctant to do so but upon being strongly pressed by D, agrees. X's car is uninsured but D, quite reasonably, is unaware of this. D has actively instigated X to drive his car (unlike the Good Samaritan in the example above) but it would still seem highly undesirable to convict him of complicity. Furthermore, if a higher degree of instigation, encouragement or assistance is required than for complicity in more serious offences, it would not be possible to impose strict liability in some situations where this would be desirable. Consider the following illustration. D travels as a passenger in X's car but because of his drunken state fails to realize that X is so much under the influence of alcohol as to be incapable of exercising effective control of the car. If a high degree of instigation, encouragement, or assistance in respect of the driving of the car by X is required of D he could not be convicted, arguably an undesirable result where he has been negligent in failing to appreciate X's condition.

The view here expressed that it would be unsatisfactory to extend strict liability to accomplices in a regulatory offence conflicts with the view expressed by the Supreme Court of the United States in *United States v. Dotterweich*,[70] a case referred to above. In this case the majority justified the hardship resulting from the extension of strict liability to accomplices on the grounds that 'the good sense of prosecutors'[71] could be relied upon and that

> 'balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[72]

Further, it is evident from the judgment that a higher degree of implication in the offence would be required than would be necessary in England. For example, since the majority restricted liability for complicity to those persons who had a 'responsible share' in the activities resulting in the introduction of adulterated and misbranded drugs into inter-state commerce,[73] it would seem likely that a minor employee of a company who packages adulterated drugs for distribution would not be held guilty of complicity. In England however the degree of assistance rendered by such an employee might well be a sufficient degree of participation for complicity.[74]

The attitude of the majority in *United States v. Dotterweich* is open to criticism. First, it is clearly undesirable to leave the definition

[70] 320 U.S. 277 (1943). See also *Lenzi v. Miller* [1965] S.A.S.R. 1, per Chamberlain J.
[71] Id, 285. [72] Ibid. [73] Id, 284-285.
[74] Glanville Williams, *Criminal Law: The General Part* (2nd ed.) 379-380, 381-383; Howard, *Australian Criminal Law*, 224 ff.

of any criminal liability in the hands of prosecutors since their opinions are likely to vary considerably.[75] Secondly, the balance of hardships is excessively weighted against innocent persons even if a very high degree of implication in the conduct constituting the principal offence is required. Thirdly, it is unsatisfactory to attempt to restrict the extension of strict liability to accomplices by the device of requiring a high degree of implication in the conduct constituting the principal offence, a point which has already been demonstrated.[76]

As a matter of policy therefore, the principle in *Johnson v. Youden* that complicity in a regulatory offence requires proof of *mens rea* seems clearly preferable to the 'link' principle in jurisdictions such as England, Canada, New Zealand and those in the U.S.A. where the doctrine of strict liability is in force. The principle in *Johnson v. Youden* may therefore be seen as a specific common law rule devised by the courts in order to avoid a vast extension of the doctrine of strict liability, an extension quite possible at common law as a matter of analysis.[77] Such rules are in fact often devised in order to overcome difficulties resulting from statutory interpretation, one notable example being the defence of reasonable mistake of fact propounded by Dixon J. (as he then was) in *Proudman v. Dayman*.[78]

(e) *'The Link Principle may be Applicable in Australia Rather than the Principle in Johnson v. Youden'*

In Australia it is far less obvious that the principle in *Johnson v. Youden* is preferable to the 'link' principle.[79] The relevant policy considerations are very different from those which arise in England and other jurisdictions where regulatory offences are often construed as imposing strict liability. This is because the Australian courts have demonstrated a strong tendency to construe regulatory offences which do not require proof of *mens rea* as imposing liability for negligent inadvertence rather than as imposing strict liability.[80] Clearly it would be less objectionable to extend liability for negligent inadvertence to all accomplices in a regulatory offence than it would be to so extend strict liability. Consider for example the illustration above of the Good Samaritan directing a woman parking a car which he quite reasonably assumes to be insured. In Australia it is probable that the offence of

[75] *U.S. v. Dotterweich* 320 U.S. 277, 292-293 per Murphy, Roberts, Reed and Rutledge JJ.

[76] p. 290.

[77] See discussion supra, p. 281 ff.

[78] (1941) 67 C.L.R. 536, 540. Consider also the rule in *Travers v. Holley* [1953] p. 246.

[79] The following discussion relates to the law in all jurisdictions including Western Australia and Queensland where the principles of complicity are governed by the respective Criminal Codes, even where the principal offence is a regulatory one. (See cases cited by Howard, *Australian Criminal Law*, 231, n. 45.). These principles are however the same as those at common law (see Howard, *Australian Criminal Law*, 231; but see *Wilson v. Dobra* (1955) 57 W.A.L.R. 95; *West v. Perrier* (1962) Q.W.N. 10).

[80] Howard, *Strict Responsibility*.

using an uninsured motor vehicle, in respect of the absence of insurance, would be construed as imposing liability for negligent inadvertence and not strict liability upon the principal offender. This is because the defence of reasonable mistake of fact would probably be held applicable to the offence.[81] Consequently, if the 'link' principle is applied, the defence of reasonable mistake of fact would be available to the Good Samaritan, and since he reasonably assumed that the car he directed was insured, he could successfully employ this defence to exculpate himself.[82]

Furthermore, even if a regulatory offence was construed as imposing strict liability upon the principal offender it is arguable that nevertheless the defence of reasonable mistake of fact may still be available to an accomplice in that offence, in which event complicity would involve not strict liability but liability for negligent inadvertence. In Australia there is a presumption that the defence of reasonable mistake of fact is available to a principal offender charged with a regulatory offence which does not impose liability for *mens rea* 'unless from the words, context, subject-matter, or general nature of the enactment some reason to the contrary appears'.[83] The reason which might possibly be found for excluding the defence from the principal offender (in which event strict liability would be imposed) would not justify excluding the defence from accomplices since as a matter of policy it would clearly be unnecessary and undesirable to impose strict liability upon all accomplices in that offence.[84] Thus, although the presumption that the defence of reasonable mistake of fact is available might be rebutted in the case of the principal offender it would not be in the case of accomplices.

Therefore, only if it were thought undesirable to extend liability for negligent inadvertence to all accomplices in regulatory offences not requiring proof of *mens rea* would the principle in *Johnson v. Youden* be relevant in Australia. Possibly a further relevant consideration would be whether placing a persuasive burden of proof upon accomplices in the majority of instances (where the defence of reasonable mistake in fact is applicable)[85] is desirable. However if this were thought undesirable it would be a relatively simple matter to remove this persuasive burden of proof from accomplices and to require the prosecution to establish beyond reasonable doubt all facts relevant to the issue of negligence.[86]

81 For a discussion of this defence see Howard, *Strict Responsibility*, Chapter 5.
82 See discussion infra, pp. 294-5.
83 *Proudman v. Dayman* (1941) 67 C.L.R. 536, 540 per Dixon J.
84 See discussion supra p. 289.
85 *Vines v. Djordjevitch* (1955) 91 C.L.R. 512.
86 Wigmore, *Treatise on Evidence*, IX, 278. Note also *Cain v. Doyle* (1946) 72 C.L.R. 409, 427, but cf. *McLeod v. Police* [1965] N.Z.L.R. 318; *McCarthy* [1964] 1 W.L.R. 196.

Only in one reported case has an Australian judge indicated an awareness of the problem which the principle in *Johnson v. Youden* creates in Australian jurisdictions. In *Lenzi v. Miller*[87] Bright J. expressed the view *obiter* that liability for complicity in any regulatory offence turned upon two concepts, 'inculpation' and 'exculpation'.[88] The concept of 'inculpation' requires that the prosecution establish, beyond a reasonable doubt, 'a nexus sufficient in character and degree' between D and the commission of the principal offence.[89] For example, complicity in the offence of driving an uninsured motor vehicle would require that the driving of the particular motor vehicle by the principal offender be 'wholly or partly a consequence' of D's aiding abetting counselling or procuring.[90] If 'inculpation' is established against D he will be convicted of complicity unless he can satisfy the concept of 'exculpation'. This latter concept is derived from the judgment of Dixon J. (as he then was) in *Proudman v. Dayman*,[91] a decision of the High Court. In that case Dixon J. stated that although most regulatory offences do not require proof of *mens rea* they do not usually impose strict liability. In the majority of cases D could obtain an acquittal by establishing, on the balance of probabilities, that he made a relevant mistake of fact which the court considered reasonable (*i.e.* not negligent).[92] The concept of 'exculpation' formulated by Bright J. is based upon this defence of reasonable mistake of fact. Thus if 'inculpation' could be established on a charge of complicity in the offence of driving an uninsured motor vehicle, D could exculpate himself by establishing, on the balance of probabilities, that he believed the vehicle driven by the principal offender to be insured, provided the court considered that he had not been negligent in entertaining this belief.

Bright J. did not expressly state that he considered the principle in *Johnson v. Youden* to be irrelevant in Australia or that his approach was based upon the 'link' principle. However the principle in *Johnson v. Youden* is quite inconsistent with the concept of 'exculpation', which His Honour considered applicable in all cases,[93] and His Honour's approach is substantially consistent with the 'link' principle. The concept of 'exculpation' is clearly consistent with the 'link' principle in cases where the defence of reasonable mistake of fact is

87 [1965] S.A.S.R. 1. 88 [1965] S.A.S.R. 1, 13-16.
89 Id, 14. 90 Id, 15. 91 (1941) 67 C.L.R. 536.
92 It is not entirely clear from the judgment that Dixon J. intended that a persuasive burden of proof be placed upon an accused. However, see now *Vines v. Djordjevitch* (1955) 91 C.L.R. 512; *Martin* [1962] Tas. S.R. 103. Nor is it entirely clear perhaps that His Honour wished to impose liability for negligent inadvertence. However see now *Howard, Strict Responsibility*, 99-105 and cases there cited; *Martin* [1963] Tas. S.R. 103; but cf. *O'Sullivan v. Harford* [1956] S.A.S.R. 109; *August v. Fingleton* [1964] S.A.S.R. 22.
For a full discussion of the defence of reasonable mistake of fact see Howard, *Strict Responsibility*, Chapter 5; Howard, *Australian Criminal Law*, 323-336.
93 *Reynhoudt v. The Queen* (1962) 107 C.L.R. 381, 399 per Menzies J.

available to the principal offender and indeed also where strict liability is imposed upon the principal offender (as has been seen above).[94] The only situation where the concept of 'exculpation' would be inconsistent with the 'link' principle would be as follows.[95] In Australia there is a small number of regulatory offences which impose liability for negligent inadvertence but where a persuasive burden of proof lies upon the prosecution to establish sufficient facts to indicate negligence.[96] It is not sufficient for the prosecution merely to establish the external aspects of the offence. An example would be the offence of driving without due care and attention.[97] This type of regulatory offence is therefore somewhat different from that where the defence of reasonable mistake of fact is applicable since in the case of the latter usually the prosecution need prove only the external aspects of the offence and a persuasive burden of proof is cast upon an accused to prove that he made a mistake of fact in circumstances which indicate that he had not been negligent.[98] There is no need here to provide any explanation why the defence of reasonable mistake of fact should not be held applicable to all regulatory offences which impose liability for negligent inadvertence.[99] However where the principal offence is one which imposes liability for negligence but the defence of reasonable mistake of fact is not applicable it would be inconsistent with the 'link' principle to apply the concept of 'exculpation' since this is based upon the defence of reasonable mistake of fact. The inconsistency, however, would be minor: a persuasive burden of proof would be placed upon an accomplice when a persuasive burden does not lie upon the principal offender.[1]

[94] p. 293. Even if the argument expressed there is not adopted, any inconsistency would be slight since in Australia few regulatory offences are interpreted as imposing strict liability.

[95] Note that Bright J. was probably considering only complicity in regulatory offences which do not impose liability for *mens rea*. Otherwise the concept of 'exculpation' would also be inconsistent with the 'link' principle where the principal offence requires proof of *mens rea*.

[96] *Ferrier v. Wilson* (1906) 4 C.L.R. 785; and cases discussed in *Howard, Strict Responsibility,* 133-137.

[97] Cf. however *Coventry* (1938) 59 C.L.R. 633.

[98] See discussion supra p. 294.

[99] *Howard, Strict Responsibility,* 139-140.

Howard states (at p. 140) that the defence of reasonable mistake of fact is available in the case of regulatory offences the definitions of which include 'some significant status element'. Thus the defence would be available in the case of the offence of driving an uninsured motor vehicle (since the absence of insurance would be a 'significant status element') but not in the case of the offence of driving without due care and attention (which proscribes conduct performed in a particular way). The same writer supports the above distinction on the ground that 'if liability does not turn on the possession by some person or object of a status which is unlawful in the circumstances it is difficult to find anything relevant about which to be mistaken'. However, with respect, the difficulty is not apparent. And see e.g. *Coventry* (1938) 59 C.L.R. 633.

[1] Unless a requirement of the defence of reasonable mistake of fact is that an accused must have made a conscious mistake of fact, as opposed to a mere tacit assumption. This issue is discussed in Howard, *Strict Responsibility,* 88-96, and Howard, *Australian Criminal Law,* 324-327.

In addition it should be noted that the concept of 'inculpation' is consistent with the view expressed above that the 'link' principle is qualified by the requirement that D must advert to some conduct on the part of the principal offender to be guilty of complicity. This is because one requirement of this concept is that D, to be guilty of complicity in the offence say of driving an uninsured motor vehicle, must advert to the fact that the principal offender is driving the particular vehicle which is uninsured.[2]

Whether liability for negligent inadvertence should be extended to all accomplices in regulatory offences which do not require proof of *mens rea* is however a difficult question of policy. Some advantage would result from this extension. For example, full effect could be given to several statutory provisions which might not be adequately enforced if the principle in *Johnson v. Youden* is applied. Consider the offence of driving a motor vehicle whilst so much under the influence of alcohol or a drug as to be incapable of exercising effective control of a motor vehicle,[3] which does not impose liability for *mens rea*.[4] Assume that D allows his friend X who is drunk and, as a result, incapable of exercising effective control of a motor vehicle, to drive his car. D, who is drunk also, remains as a passenger. He is aware that X is driving his car but because of his intoxicated condition does not realize that X is incapable of exercising effective control. If complicity in the offence of driving under the influence requires proof of *mens rea*, D will escape criminal liability no matter how negligent he has been in failing to appreciate the nature of X's condition.[5] This is because the offence of driving under the influence would not be construed as imposing vicarious liability upon D, one reason being that the offence requires physical performance by the principal offender (which would be D if the doctrine of vicarious liability applied) of the act of driving.[6] Admittedly D would be guilty of the offence of causing or permitting X to drive under the influence,[7] (provided he could not establish the defence of reasonable mistake of fact), but this offence has not been enacted in all jurisdictions.[8] Furthermore, even where the offence of causing or permitting another to commit an offence has been enacted there are still situations where it may be desirable to impose liability for complicity without requiring proof of *mens rea*. Consider the position where, to modify the illustration set out above, X is the owner of the car, and not D. D could not be convicted of causing or permitting X to drive under

2 [1965] S.A.S.R. 1, 14.
3 Section 47(1) *Road Traffic Act, 1961-1964* (S.A.). Similar offences exist in other Australian jurisdictions.
4 *August v. Fingleton* [1964] S.A.S.R. 22.
5 Cf. *Keardon v. Williamson* (1955) Crim. L. Rev. 183. 6 n. 66.
7 Section 167(1) *Road Traffic Act, 1961-1964* (S.A.).
8 Such an offence does not exist in N.S.W.

the influence because, as a mere passenger in X's car, he would not possess the degree of control over X's activities that this offence would require.[9] There would be, however, a sufficient degree of encouragement by D of X's act of driving for the purposes of complicity.[10] Thus, if the 'link principle' were applied, D would be convicted of complicity provided he could not establish that he made a reasonable mistake of fact in respect of the nature of X's condition.[11] Arguably this would be a desirable result.

Despite possible advantages such as that outlined above, however, it might well be thought undesirable to extend liability for negligence to all accomplices in a regulatory offence. It is arguable, in view of the controversy as to whether criminal liability should be imposed for negligent inadvertence,[12] that only in a limited number of situations, such as those discussed above, would it be desirable to impose liability for negligent inadvertence upon accomplices.[13] Yet if the 'link' principle is applied it seems that liability for negligent inadvertence must be imposed in all cases.

In *Lenzi v. Miller* it seems that Bright J. sought to avoid this result by requiring a higher degree of encouragement, instigation, or assistance in respect of the act or omission of the principal offender for complicity in a regulatory offence than would be required for complicity in a felony or misdemeanour. This is apparent from His Honour's statement that when an R.A.A. guide sits alongside the driver of an uninsured car and gives directions, there would not be a sufficient degree of implication in the act of driving the car for complicity in the offence of driving an uninsured motor vehicle.[14] Arguably, according to present English and Australian authority there would be a sufficient degree of implication for complicity in such a case if the decisions upon complicity in serious offences are regarded as applicable.[15] The approach of Bright J. would undoubtedly avoid

9 Hart and Honoré, *Causation in the Law,* Chap. 13; *O'Sullivan v. Truth and Sportsman Ltd.* (1957) 96 C.L.R. 220, 228.

The observation of Chamberlain J. in *Lenzi v. Miller* [1965] S.A.S.R. 1, 4, that 'part of being accessory is somewhere between "causing" and "permitting"' is incorrect, it is submitted.

10 Cf. *Coney* (1882) 8 Q.B.D. 534. See also n. 74, but cf. e.g. *O'Sullivan v. Truth & Sportsman Ltd.* (1957) 96 C.L.R. 220, 228.

11 A reasonable mistake of fact either that X was not under the influence of alcohol or a drug or that X was capable of exercising effective control of a motor vehicle (provided the other requirements of the defence are satisfied e.g. 'innocence', discussed in Howard, *Australian Criminal Law,* 332-336).

12 For discussions relevant to this controversy see Hall, *General Principles* (2nd ed.) 135-139; Glanville Williams, *Criminal Law: The General Part* (2nd ed.) 122-124; Howard, *Australian Criminal Law,* 321-322.

13 But cf. *Cain v. Doyle* (1946) 72 C.L.R. 409, 427 per Dixon J.

14 [1965] S.A.S.R. 1, 15.

15 n 74. Bright J. relied upon the following definition of Stephen referred to obiter by the High Court in *O'Sullivan v. Truth and Sportsman Ltd* (1957) 96 C.L.R. 220, 228: 'An accessory before the fact is one who directly or indirectly counsels procures or commands any person to commit any felony or piracy which is committed in consequence of such counselling procuring or commanding.' (*Digest*

the imposition of liability for negligent inadvertence upon accomplices in regulatory offences in many instances. It is submitted, however, that the decisions upon the degree of instigation, encouragement or assistance required for complicity in serious offences must also be applied to complicity in regulatory offences. This is because the requiring of a higher degree of instigation, encouragement or assistance produces unsatisfactory results. Consider the following illustration. X is driving his car. He is intoxicated to such an extent that he is incapable of exercising effective control of the vehicle. There are two passengers, D1 and D2, who are also intoxicated. Both are negligent in failing to realize that X is so intoxicated as to be incapable of exercising effective control of the car, but both realize that X is driving the car. D1, who is an excitable drunk, actively encourages X to drive the vehicle. D2, who is a well-mannered drunk, approves of X's driving the car and manifests his approval in an unspectacular way. If the approach of Bright J. is applied D1 would be guilty of complicity (since he could not establish the defence of reasonable mistake of fact in respect of any belief he entertained as to X's ability to drive the car) whereas D2 would not be. Yet it is difficult to appreciate why D2 should escape liability. He has been as negligent as D1 in failing to realize that X was so intoxicated as to be incapable of exercising effective control of the car; and whether D2 has been negligent in this way is more important than the extent to which he has encouraged X's driving of the car. Reference need be made only to complicity in manslaughter by criminal negligence where the issue of negligence is more important than the issue of encouragement and instigation, a point evident from one example which has already been given.[16]

The possible undesirability of extending liability for negligent inadvertence to all accomplices in a given regulatory offence would be less in the case of some regulatory offences, as for example, the offence of driving without due care and attention. This is because complicity in this type of offence, as has been discussed above, requires advertence to and encouragement or instigation of more significant conduct on the part of the principal offender than complicity in say, an offence such as driving an uninsured motor vehicle.[17] Indeed in Australia some decisions suggest that the 'link' principle is applicable in the context of complicity in driving without due care and attention.[18]

As a matter of policy therefore, in Australia it is far from clear that the principle in *Johnson v. Youden*, that complicity in any regulatory offence requires proof of *mens rea*, is preferable to the 'link' principle.

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of the Criminal Law (9th ed.), 18).

However it is doubtful whether this definition represents the present law. See Hart and Honoré, *Causation in the Law*, 336 ff.

[16] p. 282. Cf. however, the example given at p. 286. [17] p. 288.

[18] *Smith v. Dayman* [1938] S.A.S.R. 477. See also *Theeman v. Police* [1966] N.Z.L.R. 605.

The bulk of Australian decisions are clearly in support of the principle in *Johnson v. Youden*.[19] In the absence, however, of any binding pronouncement of the High Court, or any detailed examination of the relevant issues by another Australian court, the support indicated by the views of Chamberlain J. and Bright J. in *Lenzi v. Miller* for the 'link' principle may well influence future Australian courts to depart from the principle in *Johnson v. Youden*.

'III. Statutory Exceptions—
(a) The Cases'

Several cases are to the effect that although complicity is a common law form of liability, as a matter of statutory interpretation it is possible to impose strict liability or liability for negligent inadvertence upon an accomplice in a regulatory offence where such liability would not be imposed at common law. The first is *Provincial Motor Cab Co. v. Dunning*,[20] a decision of the English Divisional Court. An employee of D Ltd drove one of the company's motor vehicles with a defective light. D Ltd was convicted of complicity in the offence committed by the employee of using a vehicle with a defective light[21] although there was no evidence that any of its employees had adverted to the existence of the defect. This conviction was upheld by the court but the reasoning is not clear from the judgment. Two possible explanations of the decision are as follows. First, that the offence of using a vehicle with a defective light imposed vicarious liability upon D Ltd and for this reason strict liability could be imposed upon D Ltd on a charge of complicity in this offence.[22] Alternatively, that the relevant statutory provisions indicated a legislative intention to impose strict liability upon accomplices in the position of D Ltd.

The next authority is *Gough v. Rees*,[23] also a decision of the English Divisional Court. Here, D was the employer of a conductor who permitted a bus owned and operated by D to be overloaded. There was evidence that D may have been negligent in allowing this to happen, or possibly reckless or wilfully blind. In holding that D was guilty of complicity in the offence committed by the conductor of permitting a bus to be overloaded[24] Lord Hewart C.J. stated:

19 *Canty v. Ivers* (1913) A.L.R. 403; *Abley v. Crosaro* [1946] V.L.R. 53; *Bergin v. Stack* (1953) 88 C.L.R. 248; *Wilson v. Dobra* (1955) 57 W.A.L.R. 95; *Blackmore v. Linton* [1961] V.R. 374; *Lenzi v. Miller* [1965] S.A.S.R. 1, 8 per Napier C.J. and Travers J.

20 [1909] 2 K.B. 599. See also *Ex p. Coorey* (1945) 45 S.R. (N.S.W.) 287, 310-311 per Davidson J.

21 Prescribed by Art. 11 Motor Car (Registration and Licensing) Order, 1903.

22 That this reason was relied upon is perhaps suggested by the discussion at [1909] 2 K.B. 599, 603.

23 (1929) 46 T.L.R. 103.

24 Prescribed by Section 13 *Railway Passenger Duty Act*, 1842.

> 'But it is said that a man cannot counsel or procure unless he knows and intends what is to be done, and that there is no finding to that effect. In form that statement is correct. But it is clear that the appellant knew what would happen unless he took precautions and was rightly held responsible for the consequences. That which he did and that which he omitted to do seem to me as much a counselling and procuring as if he had called the conductor and instructed him to overload to his utmost capacity and best opportunity.'[25]

The above decision does not support any clear proposition since it is not evident whether Lord Hewart C.J. intended to impose liability for advertence or negligent inadvertence. If liability for advertence was intended the decision is consistent with the principle later formulated in *Johnson v. Youden* that complicity in a regulatory offence requires proof of *mens rea*. If liability for negligent inadvertence was intended, however, the decision is supportable only on the basis that the relevant provisions could be so interpreted. It should be noted that this basis would be unconnected with the doctrine of vicarious liability, for if it were so connected, strict liability and not liability for negligent inadvertence would have been imposed.

Two further decisions of the English Divisional Court relevant here are *Carter v. Mace*[26] and *Davies Turner Ltd v. Brodie*.[27] In *Carter v. Mace*, D, who operated a transport clearing-house, hired a lorry for the transport of certain goods. The lorry owner carried these goods contrary to the terms of his transport licence. D had not enquired as to these terms. His conviction on a charge of aiding and abetting the lorry owner to use a lorry to carry goods contrary to the terms of a transport licence[28] was upheld by the court, apparently on the ground that his failure to enquire as to the terms of the licence was negligent.[29] The opposite conclusion was reached in *Davies Turner Ltd v. Brodie*, where the facts were similar to those in *Carter v. Mace* except that the appellant had enquired as to the terms of the transport licence and had received an assurance by the lorry owner that the licence extended to the goods carried. Since the appellant had not been negligent his conviction for complicity in the offence committed by the lorry owner was quashed.

In neither of the above decisions were reasons expressed for the conclusion that complicity in the offence of carrying goods contrary to the terms of a transport licence could be committed negligently by a person operating a transport clearing-house. It is difficult to find a reason other than that the relevant provisions were so interpreted. This conclusion is reached as follows. If the principle that complicity

[25] (1929) 46 T.L.R. 103, 105.
[26] [1949] 2 All E.R. 714.
[27] [1954] 1 W.L.R. 1364.
[28] The principal offence was prescribed by Section 9(1) *Road and Rail Traffic Act, 1933*.
[29] See note by Montgomerie, (1950) 66 L.Q.R. 222.

in a regulatory offence requires proof of *mens rea* had been applied, negligent inadvertence would have been insufficient. If the principle, that the mental element of complicity corresponds to that of the principal offence, had been applied, strict liability and not liability for negligent inadvertence would have been imposed since the above offence probably imposes strict liability.[30] Finally, if the reasoning that strict liability may be imposed upon an accomplice who could be held vicariously liable if charged as the principal offender had been adopted, clearly strict liability and not liability for negligent inadvertence would have been imposed (assuming that the offence of using a lorry to carry goods contrary to a transport licence could be interpreted as imposing vicarious liability upon a transport clearing-house operator.)[31]

The last case is *Lenzi v. Miller*,[32] the South Australian decision discussed above. In this case two members of the South Australian Court of Criminal Appeal, Napier C.J. and Travers J., accepted the principle in *Johnson v. Youden* as being valid. It is not at all clear from the judgment why this conclusion was reached.[33] Possibly the principle was considered valid as a matter of statutory interpretation; possibly it was considered valid on the ground that it was consistent with common law principles relating to the mental element of complicity. More important, however, is Their Honours' statement that this principle should be qualified by the principle supported by *Mousell Bros. v. L. & N.W. Rly*,[34] a decision of the English Divisional Court, that a regulatory offence may be interpreted as imposing vicarious liability. The qualification made was as follows:

> "In (*Mousell Bros. Ltd. v. L. & N.W. Rly.*) and in *Provincial Motor Cab Co. v. Dunning*[35] and *Gough v. Rees*,[36] there was the relation of master and servant; but it seems to us that the reasoning is capable of general application, and in recent cases (*Carter v. Mace*,[37] and *Quality Dairies (York) Ltd. v. Pedley*)[38] it has been carried to its logical conclusion.These authorities show that the Special Act may be couched in such terms as to imply a duty to foresee and prevent the act or thing that is the offence. In such circumstances, any party, who could and should prevent the act or thing, but omits to do so, is a party to and participates in the offence."[39]

30 The defence of reasonable mistake of fact would not have been relevant for the reason stated in n. 26.

31 This is far from clear. Although the verb 'use' is employed in the definition of the offence (which readily admits of the imposition of vicarious liability) vicarious liability has usually been confined to situations where D has been an employer, principal, or a partner. However see e.g. *Quality Dairies (York) Ltd v. Pedley* [1952] 1 K.B. 275.

32 [1965] S.A.S.R. 1.
33 [1965] S.A.S.R. 1, 10-11.
34 [1917] 2 K.B. 836.
35 [1909] 2 K.B. 599.
36 (1929) 46 T.L.R. 103.
37 [1949] 2 All E.R. 714.
38 [1952] 1 K.B. 275.
39 [1965] S.A.S.R. 1, 12.

Proudman v. Dayman,[40] a decision of the High Court, and *Davies Turner & Co. Ltd v. Brodie*[41] were also cited by Their Honours as supporting this qualification.

It is difficult to delimit the situations where Their Honours would apply the above qualification. It is not limited to cases where the principal offence may be interpreted as imposing vicarious liability upon D.[42] This emerges from Their Honours' conclusion that complicity in the offence of driving an uninsured motor vehicle would not require proof of *mens rea* against a person such as the appellant in the instant case since this offence would not be construed as imposing vicarious liability upon anyone. Physical performance of the act of driving is required on the part of the principal offender.[43] Possibly the qualification is limited to cases where D is in a position to control the activities of the principal offender, as for example where D is the owner of a vehicle driven with its permission by the principal offender, or where D is the employer of the principal offender. This is suggested by Their Honours' approval of *Carter v. Mace*[44] and *Davies Turner & Co. Ltd v. Brodie,*[45] where D was in a position to control the actions of the principal offender, and also by Their Honours' interpretation of the relevant provisions in the present case. If, however, the reasoning in *Mousell Bros Ltd v. L. & N.W. Rly* is 'capable of general application',[46] the qualification could be applicable in any situation, depending upon what is meant by the statement that this reasoning had been 'carried to its logical conclusion'[47] in such a case as *Carter v. Mace*. This statement could mean either that the reasoning had been applied logically in *Carter v. Mace* but could be applied in a wider range of situations, or that the reasoning had there been applied to the limits of its logic.

Napier C.J. and Travers J. did not make it clear whether strict liability or liability for negligent inadvertence should be imposed where complicity in a regulatory offence does not require proof of *mens rea*. Several parts of the judgment suggest that Their Honours contemplated the imposition of strict liability. This would seem to follow, for example, from the reliance placed upon *Mousell Bros Ltd v. L. & N.W. Rly* and *Provincial Motor Cab Co. v. Dunning*. Furthermore, a reference appears in the judgment to the well-known dicta of Devlin J. (as he then was) in *Reynolds v. G. H. Austin & Sons Ltd*[48] which are to the effect that a regulatory offence should not be construed as imposing strict liability but as requiring proof of *mens rea* where imposing strict liability would result in 'pouncing on the most convenient victim'. However other parts of the judgment

[40] (1941) 67 C.L.R. 536. [41] [1954] 1 W.L.R. 1364.
[42] Cf. Discussion of *Provincial Motor Cab Co. v. Dunning* supra.
[43] n. 66 [44] n. 37 [45] n. 41.
[46] [1965] S.A.S.R. 1, 12. [47] Ibid. [48] [1951] 2 K.B. 135, 149

suggest that the imposition of liability for negligent inadvertence was contemplated. For example Their Honours relied upon *Carter v. Mace* and *Davies Turner & Co. Ltd v. Brodie,* two English decisions examined above[49] in which liability for negligent inadvertence was considered appropriate for complicity in one regulatory offence. Furthermore, reliance was placed upon *Proudman v. Dayman,*[50] a decision of the High Court which Their Honours were able to equate with *Carter v. Mace* and *Davies Turner & Co. Ltd v. Brodie.*[51] In *Proudman v. Dayman*[52] the mental element of the statutory offence of permitting an unlicensed driver to drive a motor vehicle was in issue. All three members of the High Court[53] held that proof of advertence was required in respect of the driving of a motor vehicle but not in respect of the fact that the person driving did not possess a driving licence. In respect of this aspect of the offence the majority held that liability was not strict but that it would be a defence to establish a reasonable belief that the driver possessed a licence. Since this belief was required to be reasonable as a matter of law the purpose of raising this defence, therefore, was to show an absence of negligent inadvertence.

(b) *'Statutory Exceptions—Strengths and Weaknesses'*

The statutory exceptions to the common law principles governing the mental element of complicity in regulatory offences contemplated in the above cases would have several advantages. First, whichever of the above cases is followed it would be possible to apply the principle in *Johnson v. Youden* in the vast majority of instances where it would be unsatisfactory to extend the doctrine of strict liability to accomplices and yet to impose strict liability (under *Provincial Motor Cab Co. v. Dunning* and *Lenzi v. Miller* (per Napier C.J. and Travers J.) or liability for negligent inadvertence (under *Gough v. Rees, Carter v. Mace, Davies Turner & Co. Ltd v. Brodie and Lenzi v. Miller* (per Napier C.J. and Travers J.)) in these few situations where this is desirable.[54] Second, in none of the above cases was any stress placed upon the linguistic content of the words 'abet' 'counsel' and 'procure'. Consequently D could be convicted of complicity without having adverted to any conduct at all on the part of the principal offender. In some situations this might be advantageous. Consider the following example. D negligently fails to realize that X, his alcoholic son, will drive D's car whilst so much under the influence of alcohol as to be incapable of exercising effective control of the vehicle. Clearly D cannot be convicted of complicity

[49] p. 300. [50] n. 40.

[51] With respect, it is submitted that the equation is erroneous since there is no equivalent of the defence of reasonable mistake of fact in England.

[52] See text to n. 92 supra. [53] Rich A.C.J. Dixon and McTiernan JJ.

[54] See discussion supra pp. 16-17.

in his son's offence if the principle in *Johnson v. Youden* is applicable since he does not possess *mens rea.* He cannot be convicted of complicity, however, even if the 'link' principle is applied since this principle is limited by the requirement that D must advert to some act or omission required by the definition of the principal offence.[55] In the above example D would be required to advert to the fact that his son was driving a motor vehicle on a road[56] and this he has not done. Nor can D be held liable under the doctrine of vicarious liability since the offence of driving under the influence would not admit of this construction.[57] Possibly D could be convicted of an offence such as causing or permitting another to drive under the influence but this has not been enacted in all jurisdictions.[58] Furthermore in some jurisdictions, such as England, this offence would be interpreted as imposing liability only for *mens rea,*[59] and even in Australia although liability for negligent inadvertence would be imposed in respect of any belief D might have entertained as to whether or not his son was so much under the influence of alcohol as to be incapable of exercising effective control,[60] according to the High Court decision in *Proudman v. Dayman* advertence would still be required to the fact that his son was driving a motor vehicle on a road.[61] Since D has been negligent, however, it might be argued that it would be desirable to apply such a case as *Carter v. Mace* and to impose liability for complicity on the ground that the common law principles relating to the mental element of complicity have been departed from as a matter of statutory interpretation.

Despite these possible advantages, however, all of the above cases[62] are open to strong criticism. *Provincial Motor Cab Co. v. Dunning* and *Lenzi v. Miller* (per Napier C.J. and Travers J.), which support the view that there is a connection between liability for complicity and vicarious liability, may be criticised on the ground that there is no obvious reason for this connection. Vicarious liability is imposed by imputing to D as a matter of statutory construction the conduct of an employee, agent or delegate, D being convicted as the principal offender. Liability for complicity, however, exists at common law, and common law principles therefore govern the mental element of complicity unless altered by statute. It does not follow that these principles were intended to be departed from by the legislature simply because the relevant offence may be construed as imposing vicarious liability upon D. Indeed if the offence may be construed as imposing vicarious liability upon D it would be unnecessary to have recourse to complicity

55 See discussion supra p. 286 ff.
56 See p. 287. 57 n. 66 supra. 58 n. 8. 59 n. 10.
60 *Proudman v. Dayman,* op. cit.
61 See discussion of this case by Howard, *Strict Responsibility,* 60-1.
62 I.e. *Provincial Cab Co. v. Dunning; Gough v. Rees; Carter v. Mace; Davies Turner Ltd v. Brodie; Lenzi v. Miller* per Napier C.J. and Travers J.

in order to impose liability upon D, a fact which clearly suggests that the legislature did not intend to alter the common law principles relating to the mental element of complicity.

A more important criticism to be levelled against all of the cases discussed above is that to interpret provisions enacting a regulatory offence which include no reference to the position of accomplices as affecting common law principles relating to the mental element of complicity requires an excessively impressionistic technique of statutory interpretation. An examination of the construction of the relevant statutory provisions in *Lenzi v. Miller* by Napier C.J. and Travers J. demonstrates the force of this criticism. Their Honours stated that the principle that complicity in a regulatory offence requires proof of *mens rea* did not apply to the facts of this case by virtue of section 143(2) of the *Motor Vehicles Act 1959–1962 (S.A.)*. Section 143(2) provides that the enactment in section 143(1) of the offence of causing or permitting another to commit an offence prescribed by the *Motor Vehicles Act* does not 'restrict' liability for complicity in such an offence.[63] Section 143(2) was construed as indicating that a person who causes another to commit an offence against the Act could be guilty of causing or permitting under section 143(1) *or* of complicity.[64] In Their Honours' opinion had the appellant been charged with causing or permitting another to drive an uninsured vehicle he would clearly have been convicted since this offence would not require advertence to the absence of insurance.[65] Thus, relying on the construction of section 143(2) set out above, Their Honours were also of the opinion that the appellant's conviction on the charge of complicity in the offence of driving an uninsured motor vehicle would have been upheld even if the court had not been satisfied that he had in fact adverted to the absence of insurance.

It is doubtful whether section 143(2) of the *Motor Vehicles Act* was intended to affect the mental element of complicity in this or in any other way. Probably the provision was designed merely to prevent the operation of the rule of statutory interpretation that a later specific

63 Section 143 *Motor Vehicles Act* provides:

'(1) A person who causes or permits another person to drive a motor vehicle in contravention of any provisions of this Act shall be guilty of an offence and liable to the penalty prescribed for the contravention which he so causes or permits.

(2) This section shall not restrict the operation of Section 53 of the Justices Act 1921-1957.'

64 [1965] S.A.S.R. 8, 12-13.

65 It was conceded by the appellant's counsel that this offence had been committed, presumably on the basis that the defence of reasonable mistake of fact could not have been pleaded successfully (in view of the appellant's probable negligence—see discussion of *Proudman v. Dayman* supra in text to n. 92). Perhaps it could be argued that the word 'causes' in Section *143(1)* necessitates proof of advertence to all the external aspects of this offence (see *O'Sullivan v. Truth and Sportsman Ltd* (1957) 96 C.L.R. 220) but it seems probable that 'causes' would be interpreted as being coloured by 'permits', in which event *Proudman v. Dayman* would be in point.

statute overrides a prior general one,[66] because but for section 143(2) the creation of the offence of causing or permitting another to contravene the provision of the *Motor Vehicles Act* could be construed as over-riding the *Justices Act 1921–1960 (S.A.)*, an earlier general statute, section 53 of which extends liability for complicity to summary offences. This would be undesirable. Causing or permitting another to commit an offence requires a type of relationship between the person caused or permitted and the person causing or permitting which may be present but often is not where liability for complicity is imposed.[67] Consider the following illustration. D travels as a passenger in X's car. X is driving. Both D and X are drunk. Assuming that X has committed the offence of driving whilst so much under the influence of alcohol as to be incapable of exercising effective control of a motor vehicle[68], D could not be convicted of causing or permitting X to commit this offence.[69] He would not possess the degree of control over the actions of X implicit in the words 'cause' and 'permit'. Provided the requisite mental element was present, however, D could be convicted of complicity despite the absence of such a degree of control. Clearly, to exclude liability for complicity in offences prescribed by the *Motor Vehicles Act* in all instances where an accused does not possess the degree of control over the actions of the principal offender required for the offence of causing or permitting would considerably reduce the effectiveness of the Act.[70]

It could be argued, however, that section 143(2) was intended not only to avoid this construction being adopted of section 143(1) but also to equate the mental element of complicity in offences prescribed by the Act with the mental element of the offence prescribed by section 143(1) of causing or permitting. This argument has little force since it is unlikely that such a legislative intention would have been expressed so obliquely. In any event it is very doubtful that the conclusion reached by Napier C.J. and Travers J. may be supported on this ground. Their Honours interpreted section 143(2) as equating the mental element of complicity with that of the offence of causing or permitting only in those instances where the relationship between D and the principal offender is of the type required for the offence of causing or permitting. For the reason advanced above it would be unsatisfactory if this were the only effect section 143(2) were intended to have. Yet to interpret section 143(2) as having this effect as well as the effect of preserving liability for complicity under the Act in those instances where the type of relationship between D and

66 *Craies on Statute Law* (6th ed.), 372.
67 nn. 9, 10.
68 Contrary to e.g. Section 47(1) *Road Traffic Act 1961-1964 (S.A.)*.
69 Contrary to e.g. Section 167(1) *Road Traffic Act 1961-1964 (S.A.)* This offence has not been enacted in all jurisdictions.
70 See also the views of Chamberlain J. in *Lenzi v. Miller* [1965] S.A.S.R. 1, 3-4.

the principal offender would not suffice for the offence of causing or permitting, requires an extremely subtle, and, it is submitted, erroneous construction of the word 'restrict' in section 143(2).

It is therefore submitted that the common law principles relating to the mental element of complicity should not be departed from in the absence of the clearest statutory indication that this is intended by the legislature.

CONCLUSION

In conclusion, the results of this examination may be briefly stated. First, the mental element of complicity in regulatory offences is governed by common law principles.[71] Second, that at common law the mental element of complicity is not necessarily *mens rea.* Instead it is arguable that the mental element is similar to that of the principal offence subject to the requirement that D must advert to some act or omission required by the definition of the principal offence even where such advertence would not be required of the principal offender.[72] Third, that in jurisdictions where regulatory offences are commonly interpreted as imposing strict liability there is a common law principle that complicity in a regulatory offence requires *mens rea.* This rule has been devised in such cases as *Johnson v. Youden* in order to prevent the considerable extension of the doctrine of strict liability which would occur if the 'link' principle were applied to complicity in regulatory offences which impose strict liability.[73] The decision, however, of the United States Supreme Court in *United States v. Dotterweich*[74] perhaps suggests that such a rule is not applicable in the U.S.A. Fourth, that in Australia where regulatory offences which do not impose liability for *mens rea* are commonly interpreted as imposing liability for negligent inadvertence it is less evident that a common law principle that complicity in a regulatory offence requires *mens rea* exists. The bulk of authority supports the existence of this principle.[75] Attention has not been directed expressly, however, to the important question whether such a principle is necessary when the application of the 'link' principle would not result in the imposition of strict liability upon accomplices, but in the imposition of liability for negligent inadvertence. Fifth, that whatever common law principle governs the mental element of complicity in regulatory offences, it should not be departed from in the absence of a clear statutory direction.[76]

[71] pp. 279-80. [72] p. 280. [73] p. 292.
[74] Discussed at pp. 290-1.
[75] pp. 278-9. [76] p. 304 ff.