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Double Test for Infamous Crimes

Obviously society has a definite interest in protecting marital status, and this interest has in fact been traditionally protected by the courts. If *Hinsdale* establishes a rule that all alleged libel affecting marital status, by placing it in a derogatory light, is actionable without proof of special damages, it has added a fifth category to the libel per quod areas presently not requiring special damages. Perhaps, in light of society's interest in marital union this is good. But if the court has indeed established this category, without clearly stating so, it has only added more confusion for the future.

It appears more logical, however, that the result in *Hinsdale* clarifies the New York dispute over special damages by adhering to the rule of *Sydney* that all libel whether proved by extrinsic facts or not is actionable without proof of special damages. *Hinsdale* rejects *O'Connell* as a holding that special damages are required in libel per quod action, a proposition for which it has been cited, and in so doing appears to completely eliminate libel per quod as a necessary categorical distinction in determining recovery.

If this is indeed the result, *Hinsdale* will be of strong persuasive authority to other jurisdictions to follow New York and the common law in eliminating this requirement of special damage in libel per quod.[42]

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A DOUBLE TEST FOR INFAMOUS CRIMES

The moralistic term "infamous crime" is used in different contexts. Consequently, the courts have not been able to formulate a satisfactory, all encompassing definition. Two basic tests have evolved for defining an infamous crime: the nature of the crime and the punishment which may be imposed.

In the California case of *Otsuka v. Hite*,[1] plaintiffs had been convicted of violation of the Selective Service Act, a federal felony. Though the convictions had occurred twenty years earlier, the Registrar of Voters for Los Angeles County refused to register plaintiffs as qualified electors. In so doing, the Registrar relied upon a California constitutional provision which prohibits any person convicted of an in-

[42]This rule concerning libel is advocated by many legal writers. See HARPER, TORTS § 243, at 519 (1933); SEELMAN, THE LAW OF LIBEL AND SLANDER 64-65 (1933).

[1]64 Cal. 2d —, 51 Cal. Rptr. 284, 414 P.2d 412 (1966).

famous crime from exercising the privileges of an elector in that state.[2] Concededly, in all other respects plaintiffs were qualified as electors, and the sole reason for registration denial was the felony conviction. The Registrar urged that this was an infamous crime conviction upon the theory that the phrase "infamous crime" includes *any* felony. The trial court ruled, as a matter of law, that the felony sentence rendered plaintiffs ineligible to vote under the constitutional prohibition. The Supreme Court of California reversed and held that under the California Constitution the plaintiffs could not be excluded as electors. To preserve the constitutionality of the provision, the term "infamous crime" was held not to comprehend all felonies. Rather, the phrase "must be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process." [3] A dissent would have affirmed the judgment of the lower court for the reason that the majority opinion requires the Registrar of Voters to ascertain when a felony involves moral corruption and dishonesty sufficient to menace the elective process without providing a standard by which to reach such a determination.[4]

The term "infamous crime" had its genesis in the Roman law concept of *infamia* wherein moral censure of certain actions resulted in disqualification of both public and private legal rights.[5] Additional disqualifications subsequently have been added.[6] At common law, specific

[2]CAL. CONST. art. II, § 1, provides in relevant part that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State. . . ."

[3]51 Cal. Rptr. at 286, 414 P.2d at 414.

[4]The California legislature has made provision for restoration of the voting privilege by executive pardon to a person convicted of a crime in that State. CAL. PEN. CODE ANN. §§ 4852.01-4852.17 (Deering 1961). Although plaintiffs were convicted of a federal crime, a similar method for regaining civil rights, including the franchise, is available under federal administrative procedure through executive clemency. 28 C.F.R. §§ 1.1-1.9 (1966). These processes objectively determine when rehabilitation has progressed to a point that all the rights and privileges of citizenship safely may be restored. Plaintiffs did not pursue this administrative remedy though long eligible to do so, the waiting period subsequent to release having expired. The dissent would have affirmed the judgment for this reason, also.

[5]4 POUND, JURISPRUDENCE 363 (1959).

[6]Conviction of an infamous crime may subject an individual to numerous deprivations such as ineligibility for the General Assembly, ILL. CONST. art. IV, § 4; or for any office of profit or trust, State *ex rel.* Moore v. Blake, 225 Ala. 124, 142 So. 418 (1932); ineligibility for letters of administration, Nichols v. Smith, 186 Ala. 587, 65 So. 30 (1914); weakening of credibility as a witness, People v. Birdette, 22 Ill. 2d 577, 177 N.E.2d 170 (1961); ineligibility to serve as a juror, ILL. REV. STAT. ch. 38, § 124-2 (1964); and loss of the franchise, Washington v. State, 75 Ala. 582 (1884). Conviction of an infamous crime also may constitute grounds for divorce. Hartwig v. Hartwig, 160 Mo. App. 284, 142 S.W. 797, 799 (1912).

crimes were labeled infamous on the basis of the nature of the crime.[7]

A different infamous crime criterion has been used by the United States Supreme Court in interpreting the fifth amendment requirement that "a capital or otherwise infamous crime" prosecution must be made by grand jury presentment or indictment. In *Ex parte Wilson*[8] the Court emphasized that the foremost word "capital" delineated the criminal act solely on the basis of punishment. Therefore, the Court reasoned, by a simple rule of construction, immediately following the phrase, "or otherwise infamous crime," necessarily relates to punishment.[9] However, *Wilson* only held that confinement for a term of years at hard labor[10] constitutes infamous punishment sufficient to establish an infamous crime within the fifth amendment.[11] One year later, in *Mackin v. United States*[12] the Court extended *Wilson* by holding that a federal crime punishable by imprisonment in a prison or penitentiary,[13] with or without hard labor,[14] is an infamous crime.[15]

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[7]See, *e.g.*, United States v. Field, 16 Fed. 778 (C.C.D. Vt. 1883); United States v. Yates, 6 Fed. 861, 866 (E.D.N.Y. 1881); King v. State, 17 Fla. 183, 185-86 (1879); State v. Keyes, 8 Vt. 57, 64-65 (1836). In United States v. Block, 24 Fed. Cas. 1174, 1175 (No. 14609) (D. Ore. 1877), it is said that to be infamous at common law a crime involving a charge of falsehood must not only be of such nature and purpose as to make it likely that "the party committing it is void of truth and insensible to the obligation of an oath," but the falsehood must also be "calculated to injuriously affect the public administration of justice. . . ."

[8]114 U.S. 417 (1885).

[9]*Id.* at 423-24. The Court further held that a crime may be infamous although not so declared by Congress. *Id.* at 426.

[10]See Wong Wing v. United States, 163 U.S. 228, 237 (1896), wherein it is expressed that for more than a hundred years in both England and America, confinement at hard labor in a penitentiary, state prison or similar institution has been considered infamous punishment.

[11]114 U.S. at 429.

[12]117 U.S. 348 (1886).

[13]By congressional definition a felony is any offense punishable by death or imprisonment for a term exceeding one year. 18 U.S.C. § 1(1) (1964). Federal statutes provide that one sentenced to imprisonment for a term of more than one year may be confined in a federal penitentiary. 18 U.S.C. § 4083 (1964).

[14]See *In re* Bonner, 151 U.S. 242, 254-55 (1894); Falconi v. United States, 280 Fed. 766 (6th Cir. 1922). An exception is made where the status of the crime clearly indicates it is not infamous. In Green v. United States, 356 U.S. 165, 183-87 (1958), the Supreme Court, holding that criminal contempt is not infamous, rejected the argument that criminal contempt is an infamous crime solely on the basis that it may be punishable for more than one year in the penitentiary. In consideration of factors such as absence of a statutory limitation of the amount of a fine or length of a prison sentence which may be imposed for their commission, traditionally criminal contempts have differed from the usual federal statutory crime and are of unique constitutional character.

[15]117 U.S. at 352.

The test depends on the punishment that *may* be imposed, not that which actually is imposed.[16]

While the punishment test is used to ensure fifth amendment protection, the nature of a crime is material in the determination of eligibility for a civil right.[17] At common law the competency of a witness to testify was governed by the character of the crime committed and not by the extent or type of punishment inflicted.[18] The theory for disqualification was that a person capable of committing such a heinous act was so wretched that his testimony was unworthy of belief.[19]

For the purpose of ascertaining eligibility for a civil right, some courts, adhering to the *Wilson* principle, had held that any felony is an infamous crime.[20] For example, the highest court in Iowa, in interpreting its Constitution,[21] which provides that "no idiot, or insane person, or person convicted of an infamous crime, shall be entitled to the privileges of an elector," held in *Blodgett v. Clarke*[22] that any crime punishable by penitentiary confinement is an infamous crime. A like result was reached in *Briggs v. Board of County Comm'rs*.[23] There an Oklahoma statute provided for vacancy in office upon conviction of an infamous crime. The sheriff of Muskogee County sought to enjoin the Commissioners from disqualifying him

16United States v. Moreland, 258 U.S. 433, 441 (1922); Fitzpatrick v. United States, 178 U.S. 304, 307 (1900); *In re* Claasen, 140 U.S. 200, 205 (1891); United States v. J. Lindsey Wells Co., 186 Fed. 248, 250 (W.D. Tenn. 1910).

17County of Schuylkill v. Copley, 67 Pa. 386, 390-91 (1871).

18Butler v. Wentworth, 84 Me. 25, 24 Atl. 456 (1891). Crimes which disqualified a person as a witness were treason, felony, forgery, and "the *crimen falsi*, of the Roman law, such as perjury, subornation of perjury, barratry, conspiracy, swindling, cheating, and other crimes of kindred nature." *Id.* at 458.

19Wick v. Baldwin, 51 Ohio St. 51, 36 N.E. 671, 672 (1894).

20See Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182 (1959); Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (Dist. Ct. App. 1953). *Stephens* and *Truchon* were mandamus proceedings to compel the registrar of voters to register petitioner where refusal to do so was on the basis of CAL. CONST. art. II, § 1. While the issue involved conviction only, the court in both instances stated that a felony was an infamous crime within the constitutional provision. In equating felony with infamous crime, both *Truchon* and *Stephens* relied on *Ex parte* Westenberg, 167 Cal. 309, 139 Pac. 674 (1914), wherein it was stated: "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the state prison." *Id.* at 679. However, the *Westenberg* definition of "infamous crime" was in the context of right to prosecution by indictment or presentment for a capital or other infamous crime, which distinction was omitted in *Stephens* and *Truchon*.

21IOWA CONST. art 2, § 5.

22177 Iowa 575, 159 N.W. 243, 244 (1916).

23202 Okla. 684, 217 P.2d 827 (1950).

and appointing someone to fill his vacancy under this statute. Relying on the *Wilson* doctrine, the Supreme Court of Oklahoma held that conviction of the felony of conspiracy to violate federal law by conducting a wholesale liquor business without paying the federal tax constituted an infamous crime.

Concomitantly, for a civil right disqualification as a result of a felony conviction, other courts have relied on the common law nature of the crime without regard to severity of the punishment which was or could have been prescribed.[24] Such was the common law rule under which the blemish on moral character which rendered a party incompetent to testify was founded in the nature of the offense and not in the magnitude of the penalty.[25] Where a state statute dealt with witness disqualification for conviction of an infamous crime, it was stated that the term bore the common law connotation unless otherwise defined by the statute.[26]

In *State v. Laboon*[27] a South Carolina court was presented the question whether a party previously convicted of manslaughter, a felony, was qualified to testify as a state witness. In deciding affirmatively for competency of the testimony, the court declared that for disqualification of a witness on the basis of conviction of an infamous crime, the crime not only had to encompass falsehood or fraud, but had to be of such character as to reasonably imply that the person convicted was "devoid of truth and insensible to the obligations of an oath." [28] The *Laboon* court stated that "clearly . . . neither a change in the nature of the punishment, nor the designation of an offense as a felony, alters the moral qualities which must be taken into consideration in determining whether the offense is infamous." [29]

The prior conviction in *Laboon* was apparently from the same state. Thus the state was free to determine whether the crime was infamous by applying its own standards. However, a subtle question arises as to what effect a prior conviction in a federal court of a crime made infamous by conviction alone has on a state court proceeding involving possible loss of a civil right as a consequence of such conviction. Must a state accept the initial federal determination that the crime is in-

[24]Dutton v. State, 123 Md. 373, 91 Atl. 417, 420 (1914).

[25]See Sylvester v. State, 71 Ala. 17, 25 (1881), wherein it is stated: "The test seems to be, 'whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath.' "

[26]Smith v. State, 129 Ala. 89, 29 So. 699 (1901).

[27]107 S.C. 275, 92 S.E. 622 (1917).

[28]*Id.* at 623.

[29]*Ibid.*

famous, or should it make an independent inquiry through application of its own standards?

In *Garitee v. Bond*,[30] wherein appellant had been denied letters of administration because of a federal felony conviction, the court, in reversing, held that a state court is not required to regard a crime as infamous for disqualification purposes solely because it is infamous within federal fifth amendment protection contemplation. *Garitee* cited *State v. Bixler*,[31] a case in which the same state court had occasion to interpret the phrase "infamous crime" within the state's constitutional provision excluding as an elector any person convicted of an infamous crime unless pardoned by the governor. *Bixler* stated,

> The Constitution in providing for exclusion from suffrage of persons whose character was too bad to be permitted to vote, could only have intended, by the language used, such crimes as were "infamous" at common law, and are described as such in common law authorities.[32]

Thus the federal felony of which appellant was convicted in *Garitee* was insufficient to render him ineligible for letters of administration since it did not involve "the degree of moral turpitude which would have been requisite to make his transgression an infamous crime at common law." [33]

Logically the classification of a crime for loss of a civil right should be established by its quality and not by its penalty.[34] As between the two categories, the nature of the crime is preferable for the reason that punishment does not always characterize the infamous crime, but the presence or absence of moral turpitude always distinguishes it.[35] Therefore the characteristics of a crime and not its nomenclature should be of primary concern.[36]

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[30]102 Md. 379, 62 Atl. 631, 633 (1905).

[31]62 Md. 354 (1884).

[32]*Id.* at 360.

[33]62 Atl. at 633.

[34]Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861, 863 (1920). The court recognized that infamous crimes affecting credibility of witnesses should not be limited to those common law categories of treason, felony and the *crimen falsi* but should be expanded to other crimes of grievous import created by the necessities of a changing society. *Ex parte* Wilson, 114 U.S. at 427, and Mackin v. United States, 117 U.S. at 351, also declared that evolution in public opinion from one period to another may affect what punishment is considered infamous.

[35]Drazen v. New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 861, 863 (1920).

[36]People *ex rel.* Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 177 (1958). Under an Illinois statute, conviction of an infamous crime creates a vacancy in