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Charles E. Knox

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Criminal Law—Infamous Offenses—Attempted Burglary Punishable as a Felony

"All misdemeanors," says the North Carolina Statute,¹ "where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or state prison for not less than four months nor more than ten years, or shall be fined." In *State v. Surles*,² with one justice dissenting, the Supreme Court of North Carolina, construing this statute, held an attempt to commit burglary infamous, and therefore a felony; thus affirming the sentence of the trial judge that defendant be imprisoned in the State's Prison for a term of ten years. Had the Court held the offense a misdemeanor, to be punished as at common law, the maximum penalty would have been a fine, or imprisonment in the county jail, or both. Imprisonment in such case could not exceed two years.³

The offense of attempt to commit burglary has never been the subject of legislation in North Carolina,⁴ but in *State v. Jordan*⁵ our Court held it to be a common law misdemeanor.⁶ At the time of this decision the above statute covered only offenses made misdemeanors by statute, and therefore the question of infamy was not raised therein.⁷

The real difficulty in applying the above statute lies in the want of

¹ N. C. GEN. STAT. §14-3 (1943).

² 230 N. C. 272, 52 S. E. 2d 880 (1949).

³ *State v. Wilson*, 216 N. C. 130, 45 S. E. 2d 440 (1939); "Recurring to the many decisions imposing sentence for misdemeanors, we find none where a sentence of more than two years has been approved." *State v. Tyson*, 223 N. C. 492, 494, 27 S. E. 2d 113, 115 (1943).

For a general discussion of North Carolina's penal policy see, Coates, *Punishment of Crime in North Carolina*, 17 N. C. L. REV. 205 (1939).

⁴ Certain attempts have by statute been made felonies: "Attempted arson," N. C. GEN. STAT. §14-67 (1943); "Attempted train robbery," N. C. GEN. STAT. §14-89 (1943); "Attempted carnal knowledge of married woman," N. C. GEN. STAT. §14-24 (1943).

⁵ 75 N. C. 27 (1876); but see *State v. Harris*, 120 N. C. 577, 579, 26 S. E. 774, 775 (1897) where the Court said: "Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for 'Kuklux' troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor." The Court seems to infer that an attempt to commit burglary, one of the four capital offenses, has always been a felony.

⁶ "All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state." N. C. GEN. STAT. §4-1 (1943).

⁷ In 1905, the statute was partially rewritten so as to cover "all misdemeanors," without regard to whether they arose at common law or were created by legislative fiat. N. C. REV. STAT. §3293 (1905).

a rule by which infamous crimes may be designated with definiteness. Two different tests have, in the past, been employed in determining this question, and, as might be expected, have led to conflict in the decisions as to what crimes are infamous. Under the earlier decisions,⁸ both in England and this country, the courts inclined to the doctrine that it is the nature of the crime, and not the character of the punishment, which renders it infamous. But it is now well settled that the test to be applied by federal courts, in determining whether an offense is an infamous crime, is the character of the punishment which may be inflicted.⁹ The North Carolina Court¹⁰ and other state courts¹¹ have also adopted the "character of the penalty" test, holding an infamous crime to be one which subjects the offender to an infamous punishment. However, this test is inoperative as a key to the meaning of the term as used in the above statute, for the statute specifically applies only to those misdemeanors for which no punishment is prescribed.

The federal doctrine and the doctrine heretofore applied in this State being inapplicable, apparently the Court attempted to apply the common law test, namely, the nature of the crime. This is evidenced by the fact that the opinion stated that "infamous," as used in the statute "necessarily refers to the degrading nature of the offense, and not to the measure of punishment then being set down."¹²

At common law, the term infamous was applied to crimes disqualifying convicts as witnesses and causing the suppression of their political rights.¹³ They were enumerated as treason, felony, and the *crimen falsi*.¹⁴ The latter term would seem to cover "infamous misdemeanors," as used in the above statute. In the Roman Law, from which the term was borrowed, *crimen falsi* is used to describe that class of crimes which involve falsification, that is to say, forgery, false declarations or false oaths such as perjury.¹⁵ Such an element is not present in an attempt

⁸ *Drazen v. New Haven Taxicab Co.*, 95 Conn. 500, 111 Atl. 861 (1920); *People v. Sponsler*, 1 Dak. 289, 46 N. W. 459 (1876); *State v. Vashon*, 123 Me. 412, 123 Atl. 511 (1924).

⁹ *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89 (1885); "It is not the character of the crime but the nature of the punishment which renders the crime infamous." *Weeks v. U. S.*, 216 Fed. 292, 298 (2d Cir. 1914).

¹⁰ *Gudger v. Penland*, 108 N. C. 593, 13 S. E. 168 (1891).

¹¹ "Whether a crime is infamous or not is to be determined by the nature of the punishment inflicted." *Perry v. Bingham*, 265 Ky. 133, 137, 95 S. W. 2d 1099, 1101 (1936); *O'Hara v. Montgomery*, 275 Mich. 504, 267 N. W. 550 (1936).

¹² *State v. Surlles*, 230 N. C. 272, 276, 52 S. E. 2d 880, 883 (1949).

¹³ *U. S. v. Barefield*, 23 Fed. 136, 137 (E. D. Texas 1885); UNDERHILL, CRIMINAL EVIDENCE 332 (3rd ed. 1923); 1 WHARTON, CRIMINAL LAW 41 (11th ed. 1912); CLARK AND MARSHALL, CRIMES 10 (4th ed. 1940).

¹⁴ *U. S. v. Sims*, 161 Fed. 1008, 1012 (C. C. N. D. Ala. 1907). *Drazen v. New Haven Taxicab Co.*, 95 Conn. 500, 111 Atl. 861, 862 (1920).

¹⁵ "Infamous crimes are every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice." *Wick v. Baldwin*, 51 Ohio St. 51, 56, 36 N. E. 671, 672 (1894); *State v. Clark*, 60 Kan. 450, 56 Pac. 767 (1889); 1 GREENLEAF, EVIDENCE 373 (13th ed. 1876); 1 BOUVIER, LAW DICTIONARY (3rd rev. ed. 1914) 730.

to commit burglary. Neither is it present in an attempt to commit *buggery*; nevertheless, that was held to be an infamous misdemeanor in *State v. Spivey*,¹⁶ the Court construing the same statute. In neither the *Surles* case nor the *Spivey* case did the Court advance any criteria by which one might determine other infamous crimes. In the *Surles* case, the majority of the Court, through Chief Justice Stacy, said that an attempt to commit burglary is "an act of depravity, which involves moral turpitude, reveals a heart devoid of social duties and a mind fatally bent on mischief," and therefore infamous. If this was intended to be a definition of the term infamous, it seems the Court has given birth to a new meaning of the term. This is especially true in view of *State v. Tyson*¹⁷ where, in remanding a judgment, rendered under this same statute, that defendant be confined for not less than eight nor more than ten years, following a plea of guilty to assault upon a female, it was said: "while his Honor found that the assault was aggravated, shocking, and outrageous to the sensibilities and decencies of right-thinking citizens, the Court did not find the offense to be infamous."

In order to further strengthen its decision, the Court pointed out that not only is the crime of burglary a felony,¹⁸ but that the mere preparation to commit burglary is likewise made a felony by statute.¹⁹ "In between mere preparation and actual commission lies the crime of attempt, which, if not a felony," said the Court, "undoubtedly arises from an artless omission in the statutes."²⁰ It is submitted, by the writer, that such is not necessarily an artless omission. The gravamen of the offense of preparation to commit burglary is the possession of burglar's tools without lawful excuse²¹ which seems to indicate that the statute was designed to enable law enforcing officers to apprehend the professional burglar before the consummation of any crime. Even, if it be conceded that there would be a discrepancy in the statutes if an attempt to commit burglary was not a felony, it is submitted that the discrepancy still exists since the maximum penalty possible for an attempt to commit burglary is ten years while a sentence of twenty-five to thirty years has been upheld under the statute against preparation.²² Besides, it would seem that the duty to correct any such inconsistency, if such exists, lies with the legislature and not the judiciary.

CHARLES E. KNOX.

¹⁶ 213 N. C. 45, 195 S. E. 1 (1937).

¹⁷ 223 N. C. 492, 493, 27 S. E. 2d 113, 114 (1943).

¹⁸ N. C. GEN. STAT. §14-1 (1943).

¹⁹ N. C. GEN. STAT. §14-55 (1943).

²⁰ *State v. Surles*, 230 N. C. 272, 277, 52 S. E. 2d 880, 883 (1949).

²¹ *State v. Vicks*, 213 N. C. 235, 195 S. E. 779 (1938).

²² *State v. Cain*, 209 N. C. 275, 183, S. E. 200 (1936).