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LEGISLATION NOTES

CRIMINAL LAW—"INFAMOUS CRIMES" IN ILLINOIS TODAY

The term "infamous crime," often used merely in moralistic discussions, is one which, within the system of jurisprudence in Illinois, carries with it consequences of a very serious nature. An individual convicted of an infamous crime may suffer any or all of the following deprivations: loss of his vote at any state election,¹ ineligibility for the general assembly,² ineligibility for any office of profit or trust,³ inability to serve as a juror,⁴ weakening of his credibility as a witness,⁵ inability to serve as an executor⁶ and loss of the indigent citizen's privilege of appeal to the federal court of appeals.⁷ In addition such a conviction of an infamous crime may serve as grounds for divorce.⁸ The enormity of these consequences is self-evident, and the need for care in defining such a term is equally clear.

Legislation has been enacted in Illinois within the past three years which is of immediate importance regarding the scope and definition of the term "infamous crime." In 1961 the Criminal Code was revised,⁹ in 1963 Illinois' first Code of Criminal Procedure was enacted¹⁰ and in that same year the Election Code was amended.¹¹ The specific changes made by these statutes will be examined pursuant to an historical discussion of infamous crimes and a synopsis of the law prior to 1961. Also, in light of the importance attending a specific crime which has been designated infamous, an attempt will be made to discover exactly what crimes are infamous in Illinois today.

¹ ILL. REV. STAT. ch. 38, § 124-1 (1963); ILL. REV. STAT. ch. 46, § 29A-5 (1963); ILL. CONST. art. VII, § 7.

² ILL. CONST. art. IV, § 4.

³ ILL. REV. STAT. ch. 38, § 124-1 (1963); ILL. REV. STAT. ch. 46, § 29A-5 (1963); ILL. CONST. art. IV, § 4.

⁴ ILL. REV. STAT. ch. 38, § 124-1 (1963); ILL. REV. STAT. ch. 46, § 29A-5 (1963).

⁵ *People v. Decker*, 310 Ill. 234, 141 N.E. 710 (1923); *People v. Birdette*, 22 Ill.2d 577, 177 N.E.2d 170 (1961).

⁶ ILL. REV. STAT. ch. 3, § 77 (1963).

⁷ *Austin v. U.S.*, 40 F.Supp. (E.D. Ill. 1941).

⁸ ILL. REV. STAT. ch. 40, § 1 (1963).

¹⁰ ILL. REV. STAT. ch. 38 (1963).

⁹ ILL. REV. STAT. ch. 38 (1961).

¹¹ ILL. REV. STAT. ch. 46 (1963).

LEGISLATIVE AND CONSTITUTIONAL BACKGROUND

The foundation for the term "infamous crime" was established in the Roman law concept of *infamia* where ". . . moral censure . . . involved disqualification for certain rights both in public and in private law."¹² Such was the case in the English common-law, where one convicted of a *crimen falsi* (crime of falsifying) was not allowed to appear as a witness.¹³ It was the nature, or infamy, of the crime itself which determined whether or not it was to be accorded an infamous status.¹⁴

The constitution of 1818, Illinois' initial constitution, fathered the growth of the concept, infamous crime, in Illinois. Article II, section 30 thereof, read as follows:

The general assembly shall have full powers to exclude from the privilege of electing or being elected any person convicted of bribery, perjury or any other infamous crime.

The constitution of 1848 contained the same provision as above quoted,¹⁵ and also added Article VI, section 8, which provided that the general assembly "shall have full powers to pass laws excluding from the right of suffrage persons convicted of infamous crimes." The present constitution, adopted in 1870, renders one convicted of "bribery, perjury or other infamous crime" incapable of holding office or sitting on the general assembly,¹⁶ and further excludes suffrage from one convicted of an infamous crime,¹⁷ the latter restriction being conditioned upon the legislative enactment of appropriate laws. Preceding from the constitutional convention's intended scope of the term "infamous," it appears at the very least that the constitutions specifically included bribery and perjury within that term, since each convention employed the terminology, "bribery, perjury or *other* infamous crime." This is very significant in light of the legislative enactment of the criminal code, to be discussed forthwith, which omitted bribery from enumerated infamous crimes.

In 1827 the legislature enacted a statute specifying those crimes declared to be infamous and provided that the punishment for the conviction thereof was the loss of the right to vote, hold office, serve as a juror and appear as a witness.¹⁸ The crimes listed were: rape, kidnapping, willful and cor-

¹² IV POUND, JURISPRUDENCE § 363.

¹³ PERKINS, CRIMINAL LAW § 15 (1957).

¹⁴ 1 ROSCOE ON CRIMINAL EVIDENCE § 134 (5th Am. ed. 1861); 1 GREENLEAF ON EVIDENCE § 373 (16th ed. 1899); 5 ILL. L. REV. 108 (1910).

¹⁵ ILL. CONST. art. II, § 30 (1848).

¹⁶ ILL. CONST. art. IV, § 4 (1870).

¹⁷ ILL. CONST. art. VII, § 7 (1870).

¹⁸ Ill. Laws 1827, Criminal Code, 15th division, § 162.

rupt perjury or subornation of perjury, arson, burglary, robbery, sodomy or other crime against nature, forgery, counterfeiting, bigamy and larceny.¹⁹ Amendments to this statute have added three crimes to this list, namely, incest in 1845,²⁰ murder in 1874,²¹ and sale of narcotics in 1953.²²

In addition, the disability of testifying was eliminated from the sanctions of the statute in 1874,²³ and in 1911 larceny was limited to that for which the penalty was imprisonment in the penitentiary.²⁴

Strikingly apparent from the above enumeration of infamous crimes is the absence of the crime of bribery, despite the apparent intent of the constitutional convention to clothe this crime with an infamous designation. Also clear is a seeming lack of consistency in the choice of the crimes which were specified as infamous. All of the crimes so listed apparently have an element of moral turpitude therein; however, very serious crimes, such as treason and abortion, were not included, and the crimes of murder and incest, both extremely heinous, were missing from the initial statute. Thus, the criteria upon which the original selection was made are not at all clear, resulting in confusion as to the meaning of the term infamous.

JUDICIAL INTERPRETATION

With the meaning of the term infamous crime left in such a nebulous state, it would seem that the courts, as ultimate arbiters, would have settled upon a judicial interpretation of the term. Such is not the case, however, and the courts have vacillated between two different positions based upon conflicting theories. One theory is that the legislature has the power to define infamous crimes and that such definition *limits* infamous crimes to those crimes which the legislature has listed. The other theory rests upon the common law and is to the effect that the definition of infamous crime is not limited to the specific crimes so enumerated, but is broader and includes crimes which were infamous within the meaning of the common law at the time of the adoption of the constitution.

The former view was relied upon by the court in *People v. Russell*,²⁵ in which a conviction of petit larceny on information was reversed. The reversal was on the grounds that petit larceny was an infamous crime by statute, the conviction of which carried with it punishment in addition to the fine and imprisonment, thereby requiring prosecution by indictment.

¹⁹ *Ibid.*

²⁰ Ill. Laws 1845, Criminal Jurisprudence, § 174, at 182.

²¹ Ill. Laws 1874, Criminal Jurisprudence, div. 2, § 7, at 348.

²² Ill. Laws 1953 ch. 38, § 1 at 1529.

²³ Ill. Laws 1874, Criminal Jurisprudence, div. 2, § 6 at 348.

²⁴ Ill. Laws 1911, Criminal Jurisprudence, div. 2, § 7 at 290.

²⁵ 245 Ill. 268, 91 N.E. 1075 (1910).

The prosecutor argued that petit larceny was by its nature a misdemeanor and that the intention of the legislature in enacting the statute specifying the infamous crimes was to limit said crimes to felonies. The court disagreed, saying that other misdemeanors carried with them the loss of certain civil rights,²⁶ thus indicating the intention of the legislature not to limit the scope of the statute to felonies. The court then said, "Whether or not a crime is infamous in this state depends, not upon the common law, but upon the statute."²⁷

A conviction of burglary was reversed in *People v. Green*²⁸ where the state submitted evidence of a prior conviction of one of the defendants of assault with intent to commit robbery. The court held that assault with intent to commit robbery was not infamous according to the statute and could therefore not be shown to discredit the witness. In rebuttal to the state's allegation that the crime was as depraved as actual robbery and, hence, should be includable within the definition of infamous crime, the court said:

"Whether the crime is infamous depends not upon the common law or the court's view of its moral aspects but upon the statute."²⁹

An allegation was made in *Getz v. Getz*³⁰ that the conviction by a general court-martial of deserting the United States Army in time of war was a felony and hence, was grounds for divorce. The court held the offense not to be a felony within the meaning of the statute, and in a dictum said:

... [N]either is military desertion nor any offense of similar nature included in the list of infamous crimes as defined by the statute.³¹

The other theory, viz. that the interpretation must be made with regard to the meaning accorded infamous crime by the common law at the time of the constitution's adoption, was impliedly followed by the court in *Holmes v. Illinois*,³² in which the lower court was held to be in error due to its instructing the jury that malicious slander is an infamous offense. In its rationale the court did not rely upon the statute in effect at the time, but instead quoted Blackstone and held that by the *common law* such slander was never classified infamous.

The crime of bribery in elections was held to be included within the

²⁶ *Id.* at 277, 91 N.E. at 1077. E.g., malfeasance in office, habitual intoxication of officers and most interestingly, bribery in elections.

²⁷ *Id.* at 275, 91 N.E. at 1077.

²⁸ 292 Ill. 351, 127 N.E. 50 (1920).

²⁹ *Id.* at 35, 127 N.E. at 52.

³⁰ 332 Ill. App. 364, 75 N.E.2d 530 (1947).

³¹ *Id.* at 36, 75 N.E.2d at 531.

³² 64 Ill. 294 (1872).

meaning of infamous crimes in Article VII, section 7 of the constitution³³ by the court in *Christie v. People*,³⁴ despite its absence from the statute.³⁵ In making this determination the court stated:

The offense of bribery in elections involves moral turpitude and falls within the class of crimes deemed infamous, . . . We do not see how it can be said that the framers of the constitution, or the people, did not intend that bribery in elections should be includable, within the meaning of section 7.³⁶

In a decision carefully restricted to the creation of vacancies in office, the court in *People ex rel Keenan v. McGuane*,³⁷ held a federal conviction of tax evasion³⁸ carrying a penalty of two years imprisonment, to be infamous within the meaning of section 25-2 of the Election Code.³⁹ In holding that a determination of the meaning of infamous insofar as a vacancy in office is affected, the court stated:

. . . we conclude that any public officer convicted, in the Federal court or in the court of any sister State, of a felony which falls within the general classification of being inconsistent with commonly accepted principles of honesty and decency, or which involves moral turpitude, stands convicted of an infamous crime under the common law as interpreted when our constitution was adopted in 1870, and that such conviction creates a vacancy in such office.⁴⁰

Although the decision in *People ex rel Keenan v. McGuane*⁴¹ is clearly limited, it represents a marked departure from the trend toward the strict statutory dependence exhibited in *People v. Russell*,⁴² *People v. Green*,⁴³ and *Getz v. Getz*.⁴⁴

Thus, prior to the enactment of the legislation, viz. the amendment to the Criminal Code in 1961,⁴⁵ the passage of the Code of Criminal Procedure in 1963,⁴⁶ and the revision of the Election Code in 1963,⁴⁷ very little could be said with assurance concerning the definition and scope of the term infamous crime in Illinois. One comment is worthy of note, however, and this may be the only established criterion existing. That is, the trend,

³³ ILL. CONST. art. VII, § 7 (1870).

³⁴ 206 Ill. 337, 69 N.E. 33 (1903).

³⁵ Ill. Laws 1874, Criminal Jurisprudence, div. 2, § 7 at 348.

³⁶ *Christie v. People*, *supra* note 34, at 341, 69 N.E. at 35.

³⁷ 13 Ill.2d 520, 150 N.E.2d 168 (1958).

³⁸ 18 U.S.C. § 371 (1958); 26 U.S.C. § 145(b) (1958).

³⁹ ILL. REV. STAT. ch. 46, § 25-2 (1958).

⁴⁰ *People ex rel Keenan v. McGuane*, *supra* note 37, at 534, 150 N.E.2d at 175.

⁴¹ *Supra* note 38.

⁴² *Supra* note 25.

⁴³ *Supra* note 28.

⁴⁴ *Supra* note 30.

⁴⁵ ILL. REV. STAT. ch. 38 (1961).

⁴⁶ ILL. REV. STAT. ch. 38 (1963).

⁴⁷ ILL. REV. STAT. ch. 46 (1963).

solidified by legislation, to limit the scope of the infamous crime to those crimes for which the penalty is imprisonment in the penitentiary. Spurred by the decision in *People v. Russell*,⁴⁸ the legislature in the following year changed the provision of the Criminal Code⁴⁹ which defined infamous crimes, providing that larceny should be infamous only if punishment was by imprisonment in the penitentiary.⁵⁰ Further, the provision of the Election Code⁵¹ defining infamous crimes was enacted in 1943 and limited the scope of infamous crimes to those crimes for which the punishment was imprisonment in the penitentiary. Accordingly, one would be led to expect the legislature to attempt to remedy the deficiencies heretofore indicated with regard to the meaning of the term infamous crime. Certainly that opportunity was afforded the legislature when it enacted and amended the statutes now in question.

STATUTORY CHANGES

The provision of the Criminal Code which defines infamous crimes, as amended,⁵² quite naturally includes altered terminology to accompany the change in the titles of the substantive crimes, but more important is the omission of the crime of counterfeiting. The legislative committee made no comments regarding this omission, thus lending credence to the possibility that the omission was one of error, not of intention. This position seems to have been supported when the drafting committee for the Code of Criminal Procedure⁵³ stated in their comments appended to the proposed draft:

. . . Article 60 of this Code will replace section 587 of chapter 38, which was modified in 1961 to conform to the terminology of the new Criminal Code of 1961.⁵⁴ (Emphasis added.)

Since the drafting committee took the pains to explain the purpose of the amendment, namely, that it was modified to conform to the terminology of the Criminal Code, it follows that if there had been any other purpose it would surely have been indicated, especially when it amounts to a change in the substance of the provision.

The adoption of the Code of Criminal Procedure in 1963 brought an-

⁴⁸ *Supra* note 25.

⁴⁹ Ill. Laws 1911, Criminal Jurisprudence, div. 2, § 7 at 290.

⁵⁰ *Ibid.*

⁵¹ Ill. Laws 1943, ch. 46, § 29-38 at 253.

⁵² ILL. REV. STAT. ch. 38, § 587 (1961).

⁵³ COMMITTEE COMMENTS, TENTATIVE FINAL DRAFT OF THE PROPOSED ILLINOIS CODE OF CRIMINAL PROCEDURE, (1963).

⁵⁴ *Id.* at 154.

other change to the list of enumerated, infamous crimes, viz. the addition of the crime of bribery. The drafting committee, in its comments in the proposed draft,⁵⁵ indicated that this addition had already been made judicially by the decision in *Christie v. People*.⁵⁶ In the same breath, however, the committee stated:

The purpose of this section is to define what crimes are infamous. The Supreme Court has held that whether or not a crime is infamous depends entirely on the statute; *People v. Green*.^{57/58}

The committee is in the anomalous position of accepting a judicial determination of the scope of infamous crimes and at the same moment declaring that the legislature has the exclusive right to declare what is infamous. The committee would have been on much stronger ground had they based such a determination on the constitutional inclusion of bribery and the intent of the framers of the constitution to render this crime infamous.

The committee, in the proposed draft, also included within the offense, conspiracy to commit any of the listed crimes.⁵⁹ In justification for such inclusion, the committee said that, since an act in furtherance of the conspiracy was now required by the Criminal Code,⁶⁰ the moral turpitude involved therewith is as great if not greater than committing the principal offense alone.⁶¹ Despite this apparent reliance on what would appear to be the classical approach to the definition of infamous crimes, the legislature omitted this provision from the final draft.⁶²

One change was made in the Election Code,⁶³ with regard to the scope of the infamous crime, which is worthy of note. The prior section thereof⁶⁴ defined infamous crime, insofar as the Election Code was concerned, as the conviction of any crime under the act if the punishment was by imprisonment in the penitentiary. The amended version⁶⁵ conditions such declaration of infamy on the *sentencing* to the penitentiary and not simply the conviction of an offense, the punishment for which is sentencing to the penitentiary. That is, the legislature has specifically exempted those individuals from the sanctions of the act who are convicted but not sen-

⁵⁵ *Id.* at 154, 155.

⁵⁶ *Supra* note 34.

⁵⁷ *Supra* note 28.

⁵⁸ COMMITTEE COMMENTS, *supra* note 53, at 154.

⁵⁹ *Id.* at 155.

⁶⁰ ILL. REV. STAT. ch. 38, § 8-2 (1961).

⁶¹ COMMITTEE COMMENTS, *supra* note 53 at 155.

⁶² ILL. REV. STAT. ch. 38, Code of Criminal Procedure (1963).

⁶³ ILL. REV. STAT. ch. 46, § 29A-5 (1963).

⁶⁴ ILL. REV. STAT. ch. 46, § 29-26 (1963).

⁶⁵ ILL. REV. STAT. ch. 46, § 29A-5 (1963).

tenced, or who are convicted but sent to an institution other than the penitentiary. It would seem that this statute indicates that the legislature has taken one more step toward acceptance of more strict requisites in defining the infamous crime, *i.e.*, the trend started in the *People v. Russell*⁶⁶ decision has been extended to actual sentencing, rather than simply conviction.

CONCLUSION

Emerging from this hodgepodge of constitutional, legislative and judicial history, appears the infamous crime, a dangerous, unpredictable element lost in a labyrinth and lacking any guideposts by which it may be led therefrom.

As indicated heretofore, the term infamous crime carries with it serious consequences, thereby demanding clarification of such term. The legislature clearly has not satisfied this need, but has instead, fathered an abortive definition listing specific infamous crimes based on what appears to be an arbitrary selection. The judiciary has done little more to clarify this problem since it has vacillated between two theories, one of which is based upon the notion that the legislature has the exclusive power to define infamous crimes, arbitrary or not.

Thus, suggestions would appear to be in order. Initially, the legislature should determine the *theory* upon which a crime will be declared infamous, whether it be the nature of the crime, the penalty attached to the crime or some other basis.

Then a standard can be chosen which reasonably satisfies the theory upon which infamous crimes are based. The term felony has seemed to be too broad a definition, or standard, in the past, but this was indicated originally because of the inclusion of certain misdemeanors, such as petit larceny within the scope of infamous crimes. In addition, the legislature and the judiciary have alluded to moral turpitude as being present in the infamous crime. Can it be said that there are any felonies in Illinois today which do not involve moral turpitude?

At any rate, a listing of specific infamous crimes is apparently inadequate in face of our changing society, and an intelligent definition of the term infamous crime should take this factor into account. Whether the legislature decides on conviction of a felony as the standard or any other standard, the choice should be made with regard to the problems which have been pointed out herein. Furthermore, the legislature should take care to specifically incorporate this standard into all areas of the law wherein the infamous crime lurks.

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⁶⁶ *Supra* note 25.