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NOTES

CLASSIFICATION OF CRIMES AS FELONIES OR MISDEMEANORS

HISTORY

At early common law, the various crimes were classified generally as either treason, felonies or misdemeanors.¹ The first of these, treason, was further divided into high treason, which was an offense against the Crown, and petit treason, which was an offense against landlords, masters, etc. This division of the crime of treason no longer exists in this country, for the only crime of treason known to our law consists of levying war against the United States or a state thereof, or adhering to their enemies, or giving such enemies aid and comfort.²

Coke states that a felony consists of any crime perpetrated *felleo animo*, the word *felleo* being derivative from the old English word *fel*, meaning cruel, fierce or inhuman.³ Other writers state that the origin of the word is in doubt and contend that a felony involves any offense which caused a forfeiture of goods or land.⁴

The usual punishment for a felony at early common law was either death or loss of limb, except in cases where the defendant could claim benefit of clergy.⁵ The right to claim benefit of clergy was abolished in the Federal Courts of the United States in 1790,⁶ but was not abolished as a part of the common law of South Carolina until shortly after the year 1850.⁷ Since that time there has been no further division of felonies according to whether or not benefit of clergy could be claimed. At the present time, there are common law and statutory felonies, with a further division into capital and non-capital felonies. A capital felony is one requiring a death sentence (in the absence of a mercy recommendation by the jury), while a non-capital felony carries a lesser punishment.

"Misdemeanor" is a classification used to denote any offense other than a felony.⁸ A great many misdemeanors existed at common

1. WHARTON, CRIMINAL LAW 36 (12th Ed. 1932).

2. U. S. CONST., Art. 3, § 3; CONST. OF 1895 (S. C.), Art. I, § 23.

3. BURDICK, LAW OF CRIME, § 78, p. 78.

4. 4 BL. COMM. 94.

5. I POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 303-305. (2d Ed.).

6. REV. STAT. § 5329 (1790).

7. For one of the last cases involving benefit of clergy in this country, see *State v. Sutcliffe*, 4 STROB. 372 (S. C. 1850).

8. *State v. O'Shield*, 163 S. C. 408, 161 S. E. 692 (1931); *Ops. Att'y GEN.* 217 (S. C. 1948-49).

law, many others have been created by statute, and some of the common law misdemeanors, such as kidnapping, have been made felonies by statute.⁹

There is another and distinct classification of crimes according to the nature of the criminal act, which divides all crimes into either offenses *mala in se* (evil in themselves) and offenses *mala prohibita* (crimes by statute). Most crimes *mala in se* are considered felonies, and most crimes *mala prohibita* are considered misdemeanors.¹⁰ Except insofar as this type of classification reflects on the division of crimes into felonies and misdemeanors, it will not be considered further in this note.

EFFECT OF CLASSIFICATION

The distinction between felonies and misdemeanors has many far-reaching and important effects, and this is particularly true in the field of procedure. Before considering the methods and means of classifying particular crimes, it is important to examine in some detail the results of the distinction.

Arrest. An officer of the law does not have the right to arrest for the commission of a misdemeanor without a warrant unless the misdemeanor was committed in his presence.¹¹ Further, a defendant has a right to demand that warrant be issued before his trial if theretofore he was improperly arrested for a misdemeanor without the necessary warrant.¹² It should be noted, however, that special circumstances may justify an arrest without a warrant, provided the misdemeanor constitutes a breach of the peace, and the officer arrives on the scene shortly after the commission of the offense and finds the offender still present.¹³ On the other hand, an officer may arrest without a warrant anyone whom he has reasonable and probable grounds to suspect of having committed a felony, the test of the sufficiency of his grounds being whether a man of ordinary prudence acting in good faith would have done likewise.¹⁴

A private citizen has no right to arrest for the commission of a

9. S. C. CODE § 1122 (1942).

10. 14 AM. JUR. § 13, p. 763.

11. *State v. Rivers*, 186 S. C. 221, 196 S. E. 6 (1938); *State v. Francis*, 152 S. C. 17, 149 S. E. 348, 70 A. L. R. 1133 (1929). "Within officer's presence" has been construed to include those acts within his presence. *State v. Williams*, 36 S. C. 493, 15 S. E. 544 (1892).

12. *Town of Honea Path v. Wright*, 194 S. C. 461, 9 S. E. (2d) 924 (1940).

13. *State v. Rivers*, 186 S. C. 221, 196 S. E. 6 (1938); *State v. Simms*, 16 S. C. 486 (1881).

14. *Bushardt v. United Inv. Co.*, 121 S. C. 324, 113 S. E. 637 (1922).

misdemeanor,¹⁵ except where a breach of the peace is occurring, and then it is the arresting citizen's duty to take the arrested party to the nearest officer, magistrate or police station.¹⁶ However, by statutory enactment,¹⁷ any person may arrest a felon without a warrant. Under this statutory authority, there is no requirement that a felony has been actually committed; so long as the arresting person has reasonable and probable grounds to suspect the person arrested, the arrest is justified, provided the arrested person is taken without unreasonable delay before a judge or magistrate to be dealt with according to law.¹⁸ Further, the escape of a suspect of a felony may be prevented by a private citizen, even if the suspect's life should be taken in the process, but it should be added that the grounds for suspicion of a felony must be sufficiently strong to prompt the same action by a reasonable man, for in case of hasty or ill-advised action, one takes human life at his own peril.¹⁹

Certain persons in South Carolina are privileged from arrest for the commission of misdemeanors under certain circumstances, including: electors acting in their official capacity on election day;²⁰ the volunteer and militia forces while in active service;²¹ and members of the legislature during sessions and ten days before and after adjournment.²² These privileges do not protect any person who is charged with treason, a felony, or a breach of the peace.²³

Joinder. At common law, several distinct offenses could be joined in an indictment, by different counts, if they were misdemeanors in grade, since they were of the same nature and required similar punishment.²⁴ This rule has been held applicable, although different punishments attach to the offenses, and although the punishment for one is positive and the other is discretionary, provided the judgments to be given for the different offenses are not necessarily different in character.²⁵ At common law, a count for felony could not be joined with one for a misdemeanor, but the trend of the modern decisions is to permit such joinder where one and the same

15. *State v. Davis*, 50 S. C. 405, 27 S. E. 905 (1896).

16. *State v. Byrd*, 72 S. C. 104, 51 S. E. 542 (1904).

17. S. C. CODE § 907 (1942).

18. *Burton v. McNiel*, 106 S. C. 250, 13 S. E. (2d) 10 (1941); *Westbrook v. Hutchison*, 195 S. C. 101, 10 S. E. (2d) 145 (1940).

19. *State v. Irby*, 166 S. C. 430, 164 S. E. 912 (1932); *State v. Jones*, 104 S. C. 141, 88 S. E. 444 (1915).

20. CONST. OF 1895 (S. C.), Art. 2, § 14.

21. *Ibid.*, Art. 13, § 2.

22. *Ibid.*, Art. 3, § 14.

23. *Id.*

24. 42 C. J. S. 1144.

25. *Id.*

criminal transaction is involved, or where the felony and misdemeanor charged formed distinct stages in the same offense.²⁶ Where two felonies occur in the commission of one criminal transaction, there is no merger of the lesser offense into the larger, and the felon may be tried and convicted on either or both offenses; for a lesser crime merges into the greater only where the criminal act constitutes both a felony and a misdemeanor, in which event there can be no conviction except for the felony.²⁷ Where an attempt is made by the state to join several felonies, the judge, in his discretion, may require the solicitor to elect on which he will proceed,²⁸ but this practice has never been extended to misdemeanors,²⁹ although the court has the power, also in its discretion, to order separate trials in the case of misdemeanors.³⁰

Accessories. So great is the distinction between misdemeanors and felonies where the subject of accessories is concerned, that it has been suggested that the true test in determining whether a crime is a misdemeanor or a felony is whether or not accessories are punishable.³¹ There are no such parties as accessories to misdemeanors,³² for all who take part are regarded as principals.³³ However, there may be accessories before and after the fact to felonies,³⁴ except in manslaughter there can be no accessory before the fact because manslaughter is a crime of "heat and passion".³⁵

Attempts. An attempt to commit a misdemeanor is not a crime,³⁶ whereas an attempt to commit a felony is punishable.³⁷ One who solicits another to commit a felony may be indicted for the misdemeanor of soliciting a crime.³⁸ However, it is apparently an open question in South Carolina as to whether a bare solicitation to com-

26. *State v. Maxey*, 218 S. C. 106, 62 S. E. (2d) 100 (1950).

27. *State v. Woods*, 189 S. C. 281, 1 S. E. (2d) 190 (1939).

28. *State v. Lee*, 147 S. C. 480, 145 S. E. 285 (1928).

29. *City of Greenville v. Chapman*, 210 S. C. 157, 41 S. E. (2d) 865 (1947); *State v. Roundtree*, 80 S. C. 387, 61 S. E. 1072 (1908).

30. *State of Kansas v. Nossaman*, 117 Kan. 715, 193 Pac. 347, 20 A. L. R. 92 (1920).

31. MURRAY, CRIMINAL LAW 4 (1917).

32. *State v. Flintroy*, 178 S. C. 89, 182 S. E. 311 (1935); *State v. Harkness*, 1 BREV. 276 (S. C. 1803).

33. *State v. Center*, 144 S. C. 81, 142 S. E. 61 (1928); *Town of Hartsville v. McColl*, 101 S. C. 277, 85 S. E. 599 (1915).

34. S. C. CODE §§ 1021, 1022 (1942); *State v. Burbage*, 51 S. C. 284, 28 S. E. 937 (1897).

35. *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152 (1909); *State v. Putnam*, 18 S. C. 175 (1882).

36. *State v. Redmon*, 121 S. C. 139, 113 S. E. 467 (1922).

37. *State v. Batson*, 220 N. C. 441, 17 S. E. (2d) 511, 139 A. L. R. 614 (1941).

38. *State v. Bowers*, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199 (1892).

mit a felony unaccompanied by any overt act is a crime, for it has recently been reiterated that the law does not concern itself with mere guilty intention unconnected with any overt act.³⁹

Trial. A person indicted for a felony must appear in person to plead to the indictment,⁴⁰ and must be personally present throughout the trial.⁴¹ Where a misdemeanor is charged, however, the arraignment itself may be waived,⁴² and the defendant may be tried in his absence.⁴³ Further, where a misdemeanor is charged, the defendant is not entitled to a warrant for the attendance of a witness,⁴⁴ and is not entitled as a matter of right to a copy of the indictment except in cases where a capital felony is charged,⁴⁵ although many solicitors furnish copies of the indictments for misdemeanor as a matter of courtesy. The distinction between a felony and a misdemeanor can also determine the number of preemptory challenges, for where two or more defendants are tried jointly for a misdemeanor, the challenges of all the defendants are limited to ten, while if the two or more are jointly tried for a felony, the maximum number of challenges is twenty to all the defendants.⁴⁶

Crime of Burglary. The crime of burglary is defined as the breaking and entering of a dwelling house at night with the intent to commit a felony.⁴⁷ It follows that if the breaking is with an intent to commit only a misdemeanor, it is not burglary.⁴⁸ Therefore, any conviction for this crime must of necessity be based on the characterization of some offense as a felony, and not a misdemeanor.

METHODS OF CLASSIFICATION

Having seen that in many cases and instances, the necessity for distinguishing between a felony and a misdemeanor can be of great importance, it remains to determine what rule or rules can be used to place any particular crime in one category or the other. Although several states have statutes, by which all offenses which call for death or imprisonment as punishment are made felonies, and all

39. *State v. Evans*, 216 S. C. 328, 57 S. E. (2d) 756 (1950).

40. *State v. Brock*, 61 S. C. 141, 39 S. E. 359 (1901).

41. *Hopt v. People of Utah*, 110 U. S. 574 (1884).

42. *State v. Moore*, 30 S. C. 69, 8 S. E. 437 (1889).

43. *State v. Locker*, 40 S. C. 549, 18 S. E. 891 (1893).

44. *State v. Thomas*, 8 RICH. 295 (S. C. 1855).

45. S. C. CODE § 978 (1942).

46. *Ibid.*, § 1002.

47. *State v. Christensen*, 194 S. C. 131, 9 S. E. (2d) 255 (1940).

48. *Id.*

other offenses misdemeanors,⁴⁹ South Carolina has no statute providing such a relatively simple solution of the problem. Therefore, one must look elsewhere for the answer.

As has been said, most crimes *mala in se* are considered felonies, and most crimes *mala prohibita* are misdemeanors.⁵⁰ However, this is only a guide at best and not a firm rule, as may be readily seen by examining a particular crime, such as bigamy. Bigamy is clearly an offense which is *mala prohibita*, yet at common law it was considered a felony,⁵¹ and was by statute expressly made a felony by Act of 1712.⁵²

Nor is the test of whether accessories are punishable of any aid as the character of the crime must first be determined before the question of accessories can be resolved.

Although it is usually highly indicative, the penalty prescribed for any particular offense does not by itself fix the character of the offense as a felony or a misdemeanor, in the absence of a statute to that effect. For example, the offense of indecent exposure of the person is made a felony by statute,⁵³ and carries a penalty of a fine or imprisonment in the discretion of the court; on the other hand, the offense of receiving stolen goods of a value over twenty dollars is by statute⁵⁴ made a misdemeanor, and also carries a penalty of a fine or imprisonment in the discretion of the court, under which sentences as high as three years imprisonment have been upheld.⁵⁵ Obviously, since a given misdemeanor may carry the same punishment as a given felony, the punishment test is far from infallible. Further, an offense may be a misdemeanor by the express words of the statute, yet carry a penalty which is of a severity more often prescribed for felonies, but in such cases the character of the crime is conclusive as stated by the statute.⁵⁶

While the South Carolina Court has not laid down or followed any specific test, it has furnished the following, somewhat vague guide with which to grope for the distinction:

“The question of whether a particular offense is felony or misdemeanor can be answered only by reference to the history

49. I WHARTON CRIMINAL LAW, § 26 (12th Ed. 1932). For an enumeration of states having such statutes, see Anno. 95 A. L. R. 1112.

50. *Supra*, note 10.

51. *State v. Brewer*, 113 S. C. 177, 102 S. E. 15 (1919); 4 BL. COMM. 464.

52. 2 STAT. AT LARGE, § 508 (S. C. 1712).

53. S. C. CODE § 1442 (1942).

54. *Ibid.*, § 1161.

55. *State v. Johnson*, 119 S. C. 55, 110 S. E. 460 (1918).

56. MURRAY CRIMINAL LAW 3 (1917).

of the offense, and not by any logical test.' (Court is quoting from Ency. Brit. vol. X, p. 244)

A statute may define felony; in some jurisdictions so much is true, but there exists no such statute in this State, so 'we look into the books upon common law crimes, and see what was felony and what was not under the older laws of England'. 1 Bish., Sec. 616.⁵⁷

The most obvious defects in this guide are its failure to recognize the obscurity of the common law classification of crimes, and its failure to take into account the multitude of crimes created but not classified by statute, which were not known to the common law.

CONSIDERATION OF CERTAIN PARTICULAR CRIMES

The chief felonies at common law were murder (including suicide), manslaughter, rape, sodomy, robbery, larceny, burglary and mayhem.⁵⁸ Today, statutes have changed and enlarged the various crimes, but have often left in doubt whether the newly created offense should be considered as a felony or a misdemeanor. A discussion of a few of the particular crimes that have been affected by statutory enactment will be undertaken to indicate the extent to which statutory expansion, variation and addition to common law crimes has resulted in confusion and doubt as to the classification of the varied offenses.

At common law, arson was a crime against possession and habitation and by definition excluded the burning of one's own home.⁵⁹ Today in South Carolina, due to a statutory definition, arson may be committed by a person on his own dwelling.⁶⁰ In addition, the distinct crime of burning one's own home with an intent to defraud an insurance company has been created by statute,⁶¹ but the statute does not specify whether this crime is a felony or a misdemeanor. Attempts to commit arson, broadly defined, are by statute⁶² made punishable, but the statute is silent as to their classification. And lastly, to the common law arson, now defined by statute, there has been added a similar, but distinct offense,⁶³ which is the malicious burning of any building *not* subject to arson, but again the statute

57. *State v. Brewer*, 113 S. C. 178, 102 S. E. 16 (1919).

58. I WHARTON, CRIMINAL LAW § 26 (12th Ed. 1932). There are no common law crimes against the United States, only statutory ones. *Wilkins v. United States*, 96 F. 837, 37 C. C. A. 588 (1899).

59. 4 AM. JUR. 87.

60. S. C. CODE § 1132.

61. *Ibid.*, § 1135.

62. *Ibid.*, §§ 1136, 1137.

63. *Ibid.*, § 1133.

is silent as to whether this offense is a felony or a misdemeanor.⁶⁴

Larceny is generally divided into two classes — grand larceny and petit larceny. Grand larceny is a felony⁶⁵ and is the taking of property of a value of more than twenty dollars. However, the statute⁶⁶ provides that stealing *privily* from the person of another, regardless of the value of the article stolen, is grand larceny, and therefore a felony. Petit larceny, the stealing of property of a value less than twenty dollars, is a misdemeanor.⁶⁷ Receiving stolen goods, as well as obtaining them by false pretenses, is also made a misdemeanor, regardless of the value of the property involved.⁶⁸ Thus, there is created the anomaly that a pick-pocket who steals a dime from a person's pocket is guilty of a felony, while one receiving thousands of dollars worth of stolen goods is guilty of only a misdemeanor.

The offenses against morality and decency afford another example of the confusion that is met in the field of classification. Bigamy, while not expressly made a felony by statute,⁶⁹ was classed as a felony at common law.⁷⁰ Among those crimes of this type made felonies by statute are buggery⁷¹ and indecent exposure of the person.⁷² Among those offenses the statutes declare to be misdemeanors are seduction under promise to marry⁷³ and miscegenation.⁷⁴ The crimes of incest,⁷⁵ adultery,⁷⁶ and fornication,⁷⁷ while defined and made punishable, are not declared by the statutes to be either felonies or misdemeanors. An examination of the penalties fixed for those declared to be felonies, those declared to be misdemeanors, and those the classification of which is not declared, will show that the legislature did not consider there was any great difference in degree in these various offenses — which would further indicate that the declared classifications are merely arbitrary, and those not declared, impossible to classify.

Assault and battery is not defined by statute in South Carolina,

64. That "statutory arson" is a distinct crime from arson is illustrated by the punishment, which is one to ten years imprisonment for the former, two to twenty for the latter. S. C. CODE §§ 1132, 1133 (1942).

65. *Supra*, note 59.

66. S. C. CODE § 1147 (1942).

67. *Ibid.*, § 1160.

68. *Ibid.*, §§ 1161, 1171.

69. *Ibid.*, § 1434.

70. *Supra*, note 52.

71. S. C. CODE § 1439 (1942).

72. *Ibid.*, § 1442.

73. *Ibid.*, § 1441.

74. *Ibid.*, § 1438.

75. *Ibid.*, § 1440.

76. *Ibid.*, § 1435.

77. *Ibid.*, §§ 1435, 1437.

but common usage has divided the offense into three degrees: (1) assault and battery with the intent to kill and murder; (2) assault and battery of a high and aggravated nature; and (3) simple assault and battery. While there is no definition of degrees of crimes in this state, it has been the practice of the court to assimilate the law in cases of the first degree above mentioned to the law applicable to murder, for the presence of malice is apparent, and should the victim die, the offense would be murder. In the second and third degrees above mentioned, if death results from the act, the offense would be manslaughter.⁷⁸ Thus, upon similar reasoning, it has been held that assault and battery with intent to kill and murder is a more serious offense than assault and battery with intent to kill.⁷⁹ Although it has been a point of dispute, all three degrees of assault and battery have been declared by the South Carolina Court to be misdemeanors.⁸⁰ There seems to be little room for doubt, however, that assault with intent to ravish is regarded as a felony. While this latter offense is defined by statute,⁸¹ the punishment is fixed as the same as that for rape, and the majority view seems to hold that one guilty of assault with the intent to ravish is guilty of rape.⁸² It has also been strongly indicated that this offense does not include assault and battery of a high and aggravated nature.⁸³ It must also be noted that there is a technical distinction in law between an attempt to commit a felony, which is only a misdemeanor, and the offense of assault with intent to ravish, which is probably a felony.⁸⁴

CONCLUSION

Transition of law is always gradual, and necessarily so, in order to insure that the change is in the right direction. There can be no doubt, however, that change can be too gradual, and South Carolina has been most reluctant in divorcing itself from the common law of England. This is particularly true with respect to the classification of felonies and misdemeanors. The only guide laid down by the Court is rooted in the vague generalities of the historical development of the common law, which was based on a society far removed from present day South Carolina both as to social and eco-

78. *State v. Jones*, 133 S. C. 167, 130 S. E. 747 (1925).

79. *State v. Milan*, 88 S. C. 127, 70 S. E. 447 (1911).

80. *State v. Smith*, 125 S. C. 307, 118 S. E. 626 (1923).

81. S. C. CODE § 1110 (1942). Conviction of rape or assault with intent to ravish carries the death penalty unless the jury recommends mercy.

82. *State v. Wilson*, 162 S. C. 413, 161 S. E. 104 (1931).

83. *State v. Galtin*, 208 S. C. 414, 38 S. E. (2d) 238 (1946).

84. *Supra*, note 83.

nomic conditions. By the guide laid down, neither the judiciary nor the bar can tell with certainty what crimes are felonies and what crimes are misdemeanors. Yet the distinction is of admitted importance to the courts, the bar, the law enforcing authorities, the private citizen, and especially to the defendant charged with a crime the classification of which is in doubt. It cannot be too strongly asserted that the classification of crimes should be clear, certain and definitely fixed for all to be able to discern.

An attempt has been made in this cursory review to illustrate the disparity which develops in trying to determine the proper classification of particular crimes. Most jurisdictions have made crimes a felony or misdemeanor accordingly as they are or are not punishable by imprisonment in the state penitentiary. This, perhaps, is not a complete remedy, but it does insure a certainty that does not exist in the classifications of crimes in South Carolina today. It is to be hoped that sound and early changes in the law affecting the classification of crimes will take place in keeping with the trend of other jurisdictions in this field and of South Carolina in other fields.

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