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## Burglary

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## BURGLARY\*\*

### *Definition*

Burglary was defined by the common law as the breaking and entering of the dwelling house of another at night time with intent to commit a felony therein.

### *Elements*

The crime as defined at common law involves six concepts:

1. Dwelling house
2. Of another
3. Breaking
4. Entering
5. Night time
6. Intent to commit a felony

In addition, it is necessary to consider the mental attitude of the defendant in regard to first five of these elements.

### *Dwelling House*

The common law crime was confined to dwelling houses, but for this purpose, outhouses within the curtilage were considered a part of the dwelling house. The determination whether a building was

- (1) a dwelling house,
- (2) an outhouse within the curtilage,

required some fine distinctions.

This extension of the crime of burglary to all "buildings" by statute, as in Pennsylvania, has removed these difficulties but has given rise to the question what constitutes a building.

### *Of Another*

At common law the building must be the dwelling house "of another". A house was, however, regarded as the dwelling house of the person who dwelt in it and not the dwelling house of the person who owned it but did not dwell in it.

The Pennsylvania statute extends the crime to any building and does not expressly require that it should be a building "of another", but does require that the entering be done maliciously.

### *Double Purpose Buildings*

Much difficulty has arisen in regard to buildings part of which is used for dwelling purposes and part for other purposes. A breaking and entering of the

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\*\*This note is one of a series of similar summaries intended for the use of first year students of Criminal Law.

*dwelling house part* is burglary. Is a breaking and entering of the other part burglary? There are four classes of cases:

- (1) Where both parts are occupied by the *same person*, and
  - (a) there is internal communication between the parts,
  - (b) there is *no* internal communication between the parts.
- (2) Where the parts are occupied by *different* persons, and
  - (a) there is internal communication between the parts,
  - (b) there is *no* internal communication between the parts.

### *Breaking*

The term breaking has three different meanings:

- (a) ordinary meaning,
- (b) meaning in the law of torts,
- (c) meaning in *burglary*.

The breaking in *burglary* may be

- (a) actual,
- (b) constructive.

### *Actual Breaking*

An actual breaking is the creation of an aperture or opening in the house by which an entry may be effected. It consists of the removal, displacement or putting aside, by a person himself, of something material which constitutes a part of the dwelling house which, if left as found, would have prevented an entry and by the removal of which an entry may be effected.

### *Enlarging an Existing Aperture*

It was held by the early cases that enlarging an existing aperture was not a breaking. But the majority of modern cases hold that this is a sufficient breaking.

### *Breaking Within*

A breaking committed within the house, if followed by an entry through the aperture created thereby, and if done with intent to commit a felony thereafter in the house, will constitute burglary.

### *Breaking Out*

This is not sufficient according to the common law of Pennsylvania.

### *Right to Enter*

It has been held that there is no breaking if the person entering has, under ordinary circumstances, the right to enter at that time and place even though, upon the particular occasion, he enters with intent to commit a felony and in such a way that there would be a breaking if he had no right to enter.

But there is a breaking in such cases if the person entering exceeds his rights with respect to either the time or place of entering.

And by some authorities it is held that a *servant* who does that which would constitute a breaking if done by a stranger is guilty if he does so with intent to commit a felony, even though he ordinarily has the right to enter.

#### *Constructive Breakings*

Are of two classes: (1) Where the aperture is created by someone within the house who is induced to do so by fraud or threats or in order to better repel the thieves or by one who is a confederate of the burglar. (2) Where there is no displacement at all and the entry is through an existing aperture which is as much closed "as the nature of things will permit".

#### *Consent of Occupant*

The breaking must constitute a trespass and, therefore, except in cases of constructive breaking where an entry is effected by fraud or intimidation, there is no breaking where the owner, or his agent having authority, invites or consents to the entry.

#### *Entry*

At common law there must be an entry. But the term "entry" is a technical one and that is regarded as an entry which in ordinary speech would not be so considered. It is not necessary that the defendant go into the house in the ordinary sense or that the entry be to any defined distance or in any particular manner.

The entry may be made by any part of the defendant's body or by any part of an instrument, but the insertion of an instrument, unlike the insertion of a part of the defendant's body, is not regarded as an entry unless it is inserted for the immediate purpose, not of merely breaking or entering, but of accomplishing the ultimate felony with intent to commit which the house was broken and entered.

#### *Right to Enter*

There is authority to the effect that there is not an entry, in the legal sense, if the defendant had a right to enter at that time and place, although he did acts which would ordinarily constitute an entry, and although he intended to commit and did commit a felony within. There are authorities contra. The question is of importance in those states in which the statutes require an entry but not a breaking.

#### *Intent to Commit a Felony*

An intent to commit a felony must exist both at the time of breaking and the time of entering. The felony intended may be either common law or statutory. The interest must be to commit the felony *within* the dwelling house but it is not necessary that there be an intent to commit the felony *at night*.

The commission of the felony need not be accomplished, attempted or even possible.

It is not sufficient for the indictment to allege that the defendant intended to commit a "felony", or a particular named felony, e.g., "larceny". It must allege the *acts* which he intended to do and they must be such, that, if done, they could constitute a felony.

### *Night Time*

The breaking and entering must both be done at night, but they need not be done on the same night. The Pennsylvania courts seem to have adopted the common law definition of nighttime. The breaking may require a period which includes both day and night. It is regarded as occurring when an actual perforation or aperture is made.

The fact that the defendant thought it was

- (a) nighttime does render him guilty if it was in fact daytime,
- (b) daytime does not excuse him if it was in fact nighttime.

### *Pennsylvania*

Of the six concepts which burglary at common law includes, only two seem to be required by the Pennsylvania statutes. Sec. 901 of the Penal Code extends the crime of burglary to any building and Sec. 903 extends the crime to cars, motor vehicles, trailers, aircraft, etc.

The statutes do not expressly require that the building, etc., be that of another, but do require that the entry be *malicious*. Perhaps this would prevent a person from being guilty of burglary who entered his own building, etc.

The statutes do not require a breaking.

The statutes do require an entry.

The entry may be "at any time".

The entering must be with intent to commit a felony.