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Criminal Law -- Burglary in North Carolina

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oaths, that evidence must show scienter on the part of the employee and in the case of dismissal for use of the privilege against self-incrimination in a federal investigation or proceeding, a proper inquiry that would show the employee's retention to be inconsistent with the best interest of the state. This is a minimum of protection for the employee but it is a recognition that some constitutional protection is necessary and shows some tendency on the part of the Court to liberalize its past interpretations of the Fourteenth Amendment in the area of loyalty oaths and statutes such as the one in the Slochower case.

CHARLES J. NOOE

Criminal Law—Burglary in North Carolina

At common law, burglary was a felony punishable by death;¹ it was regarded as an infamous offense against the habitation and not against the property,² or, as expressed at an early date, "... man's house is his castle, and its security must not be lightly invaded."³ To preserve this security the law created safeguards imposing severe penalties on their infringement. From the common law concept of burglary, however, a number of statutory crimes associated with burglary have evolved, each one extending the original scope further into the area of property protection. Illustrative of this expansion is a recent amendment⁴ to G. S. § 14-54,⁵ which states where non-burglarious breaking or entering "... shall be wrongfully done without intent to commit a felony or other infamous crime," (Emphasis added) a misdemeanor has been committed. This amendment virtually completes the statutory modification of crimes associated with the elements of common law burglary. A brief examination of the development of these related crimes within the framework of the North Carolina statutes and decisions is the purpose of this note.

Burglary was defined originally as the breaking and entering, in the night time, of a dwelling house of another,⁶ with intent to commit a felony therein.⁷ Since 1889, the offense has been divided into two degrees. The gravamen of first degree burglary is that the crime is

¹ 4 BLACKSTONE, COMMENTARIES *228.
² 12 C. J. S., Burglary § 1b (1944).
³ 9 AM. JUR., Burglary, 240 (1937); State v. Williams, 90 N. C. 728 (1884). See also State v. Surles, 230 N. C. 272, 52 S. E. 2d 880 (1949).
⁵ N. C. GEN. STAT. § 14-54 (Supp. 1955).
⁶ Under common law, it was immaterial that the occupant of the dwelling house was not present. State v. Foster, 129 N. C. 704, 40 S. E. 209 (1901); 4 BLACKSTONE, COMMENTARIES *225.
⁷ State v. Langford, 12 N. C. 253 (1827). Under common law, it was immaterial that the felony intended was not committed, State v. Morris, 215 N. C. 552, 2 S. E. 2d 554 (1939); State v. Allen, 186 N. C. 302, 119 S. E. 504 (1923).
committed when the dwelling house or sleeping apartment is actually occupied at the time of the commission of the crime. Second degree burglary is the crime committed when (1) the dwelling house or sleeping apartment is not occupied at the time of the commission of the crime, or (2) when the crime is committed on any house within the curtilage of a dwelling house, or (3) in any building not a dwelling house, in which is a room used as a sleeping apartment but is not actually occupied as such at the time of the commission of the crime. From these statutory distinctions it is apparent that common law burglary persists today under G. S. § 14-51 (defining first and second degree burglary); other related statutory crimes embrace one or more elements of the common law concept of burglary and might properly be said to be derivative.

For example, according to the early concept of burglary, there had to be a breaking, removing or putting aside of something material which constituted a part of the dwelling house relied on as security against intrusion. Any force employed to effect an entrance through any usual or unusual place of ingress was a breaking sufficient in law, but force or violence was essential. Obviously, this required such acts of force as knocking a hole in a wall, burning a hole in a house, and breaking out a window or door to effect an entry, or, under certain circumstances, breaking an inner door or window, even though entrance to the building itself was effected without a breaking. This requirement of a violent or forceful breaking was soon abandoned and breaking was held to be "any violation of the mode of security," which the occupant had adopted, using some measure of force, however slight. Consequently, unlocking or unlatching a door, lifting a hook with which a door was fastened, pushing open a door which was shut but neither locked nor latched, the mere picking of a lock, the turning of a key, and the raising of a window kept in its place only by its own weight, were adjudged to be "actual" breaking. The element of breaking was extended judicially by the concept of "constructive" breaking; so that conviction was made possible when, by some trick, the offender entered through an open door or window, or a hole in the wall or roof, or

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9 N. C. GEN. STAT. § 14-51 (1953). For a development of this statute, see Laws of 1889, c. 434, s. 1; Rev. s. 3331 (1905); C. S., s. 4232 (1919).
10 State v. Boon, 35 N. C. 244 (1852).
11 State v. Foster, 129 N. C. 704, 40 S. E. 209 (1901). See also 9 AM. JUR., BURGLARY § 9 (1937); 12 C. J. S., BURGLARY § 4 (1944); 5 WORDS AND PHRASES 777 (1938).
15 Ibid.
where entrance was gained by procuring an occupant by stratagem to remove the inner lock. "Constructive" breaking was defined loosely as an entrance through an open door or window obtained by conspiracy, fraud or threat of violence. This included the entrance obtained by procuring the servant or some inmate to remove the fastening, once even by imitation of a voice of a friend. It was extended to the point where it was held that when the defendant encountered the owner of a dwelling house immediately outside the house at night time, marched him into the house at the point of a gun and stole money hidden in the house, the method of entry was held to be a constructive breaking.

Perhaps the first statute modifying the common law concept of burglary was the English statute of Anne. By this statute, breaking out of a dwelling house in the night time was made a crime of the same degree of gravity as breaking in, making the crime of burglary complete when a person entered a dwelling house by day or night with intent to commit a felony therein and broke out in the night time. This statute of Anne was incorporated into the statutory law of North Carolina in 1854 and has remained since that time. It is important to note that although the modification of "actual" breaking, "constructive" breaking, and the statute involving a "breaking out" extended the original concepts of what constituted "breaking," they did not change the requisite elements of burglary. Breaking, whether "actual," "constructive," "in" or "out" was essential to the commission of the offense until 1879, at which time a crime related to burglary was formulated to eliminate this element. The North Carolina legislature passed "An Act to Punish the Entering of a Dwelling House in the Nighttime otherwise than by Breaking," (Emphasis added) the very title of which suggests the object: to make indictable the entry into a dwelling house in the night time by other than a burglary breaking. Under this section, now part of G. S. § 14-54, a breaking has never been a prerequisite of guilt, and proof thereof is not required.

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16 State v. Rowe, 98 N. C. 629, 4 S. E. 506 (1887).
17 Ibid.
19 State v. Rodgers, 216 N. C. 572, 5 S. E. 2d 831 (1939).
20 Anne c. 7, s. 3 (1713).
21 See further 12 C. J. S., Burglary § 15 (1944).
23 Public Laws 1879, c. 323; this act amended an act of 1875, which had been a legislative attempt to extend limited protection to buildings other than dwelling houses. See State v. Hughes, 86 N. C. 662 (1882).
24 State v. Alston, 233 N. C. 341, 64 S. E. 2d 3 (1950); State v. Chambers, 218 N. C. 341, 11 S. E. 2d 280 (1940); State v. McBryde, 97 N. C. 393 (1886). For a development of this statute, see Laws of 1874-5, c. 166; 1879, c. 323; Code, s. 996 (1883); Rev., s. 3333 (1905); C. S., s. 4235 (1919); 1955, c. 1015; N. C. GEN. STAT. §14-54 (Supp. 1955).
Both at common law and under G. S. § 14-51, the offense of burglary is not committed unless there is an entry. However, "entry" does not require intrusion of the entire body into the building, but may consist of the insertion of any part thereof for the purpose of committing a felony, such as a hand, arm, or foot through the place broken. Entry of any part of the body is sufficient if the ultimate intent is to commit a felony, although the immediate intent may be only to make a further opening for the body. It is not even necessary that the entry be by any part of the body. It can be by instrument, as where a hook is put into a dwelling to take out goods, or a pistol with intent to kill. There is no North Carolina case to demonstrate that a breaking without an entry is sufficient to constitute the offense created by G. S. § 14-54, although it would probably be sufficient to constitute an "attempt" under either G. S. § 14-51 or G. S. § 14-54.

Neither breaking nor entering is essential for a conviction under G. S. § 14-55, originally passed in 1883, which makes it a crime to make "preparation to commit burglary or other housebreakings," and includes the possession, without lawful excuse, of implements of house-breaking, making separate the crimes of preparation and possession. This statute is designed to allow the apprehension of potential offenders before their criminal intent is fulfilled by a burglary or an attempt.

Probably the greatest modifications in the concept of burglary have taken place in the definition of the "dwelling house." Laborious distinctions have been made in defining which buildings fall within the definition. Such distinctions as "buildings within the curtilage," or "buildings appurtenant to the dwelling," and the exceptions to these general rules were all defined, including a rebuttable presumption that buildings contiguous to the dwelling were prima facie within the coverage of burglary; all were utilized to bring the building within the definition of a "dwelling house," upon which, occupied or not, burglary could be committed. In 1875, the predecessor of G. S. § 14-54 was

28 The North Carolina Supreme Court has not been faced with the delineation of these borderline areas, since the question has never been raised on appeal. See, however, 9 Am. Jur., Burglary, § 16 (1937); 12 C. J. S., Burglary §§ 10-12 (1944).
24 State v. Twitty, 2 N. C. 102 (1794).
23 State v. Langford, 12 N. C. 253 (1827). See also State v. Jenkins, 50 N. C. 430 (1858).
enacted; and in 1889, with the passage of the now G. S. § 14-51, burglary became a crime of degrees, as follows:

1) Breaking and entering an occupied dwelling house is first degree burglary, punishable by death;\(^{32}\)

2) breaking and entering an unoccupied dwelling house, or any house within the curtilage of a dwelling house, is second degree burglary, punishable by life imprisonment or a term of years, in the discretion of the court;\(^{33}\)

3) breaking or entering otherwise than by a burglarious breaking into any storehouse, shop, warehouse, banking-house, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, is punishable as a felony by imprisonment of not more than ten years;\(^{34}\)

4) merely being found in "a dwelling, or other building whatsoever," with intent to commit a felony or other infamous crime therein, is a felony punishable by fine or imprisonment;\(^{36}\)

5) breaking into or entering railroad cars containing any thing of value has been a crime since 1907, punishable by not more than five years; and this section is accompanied by the statutory presumption that "any person found unlawfully in such car shall be presumed to have entered in violation of this section."\(^{38}\) Thus, from occupied dwelling houses to railroad cars, protection has been extended to an ever increasing area. The gradual expansion of protection from the dwelling to the curtilage to the warehouse to the railroad car demonstrates the shift to the policy of property protection.

To constitute burglary, the common law required the felonious breaking and entering to be in the night time, defined as "insufficient light to discern a man's face."\(^{37}\) This is still the law in North Carolina as to first and second degree burglary. However, it seems clear that the words of G. S. § 14-54 "... otherwise than by a burglarious breaking ..." would include a breaking or entering in the day time as well. This applies to both G. S. § 14-55 ("Preparation to commit burglary or other housebreakings")\(^{38}\) and G. S. § 14-56 ("Breaking

\(^{32}\) N. C. GEN. STAT. § 14-51 (1953).

\(^{33}\) Ibid.

\(^{34}\) N. C. GEN. STAT. § 14-54 (Supp. 1955).

\(^{35}\) N. C. GEN. STAT. § 14-55 (1953).

\(^{36}\) N. C. GEN. STAT. § 14-56 (1953).

\(^{37}\) State v. McKnight, 111 N. C. 690, 16 S. E. 319 (1892). See also State v. Whit, 49 N. C. 349 (1857).

\(^{38}\) As to the evolution of the now N. C. GEN. STAT. § 14-54: the original act (1874-5, c. 166) made no mention of the element of "night time"; however, the subsequent act in 1879 (1879, c. 323) specifically mentioned "in the night time"; by the time the Code of 1883 (sec. 996) was printed, the words "in the night time" were omitted. An amending act causing this revision cannot be found in the laws of 1881, where it would logically seem to be. However, it is a fairly safe presumption that the omission was deliberate.

In the case of the present N. C. GEN. STAT. § 14-55, however, the words "by
into or entering railroad cars”) since both specifically omit reference to day or night time. However, G. S. § 14-57 ("Burglary with explosives") defines the crime “... either by day or by night.”

At common law, a criminal intent to commit a felony at the time of the breaking and entering was an essential element of the crime of burglary. It was among the few offenses, if not the only one, where crime in the highest degree was not dependent upon the execution of the felonious intent. The offense was complete when the dwelling house was entered with the required intent; what the accused did afterward was merely evidence of his intent at the time of the entering. It was, therefore, no defense that the intent was abandoned after entry or before actually being committed; or that the defendant changed his mind and committed ... or attempted to commit ... a different crime, or that the circumstances prevented him from carrying out his intent. This concept of intent to commit a felony runs through the statutory crimes associated with burglary as an integral part of first and second degree burglary, of the crime of breaking out, of the crime of “non-burglarious breaking or entering,” of the crime of preparation to commit burglary, and of breaking into or entering railroad cars. “Intent to commit crime” is essential under G. S. § 14-57 (“Burglary with explosives”), while the offense of having implements of housebreaking requires a negative “without lawful excuse.” The latter phrase is the only apparent effort to depart from the requirement of the proof of intent until the 1955 amendment to G. S. § 14-54, which made it a misdemeanour to wrongfully break or enter without intent to commit a felony or other infamous crime.

Thus, the full cycle in the breakdown of the common law elements has been reached. It has been suggested that the delineation between first and second degree burglary (depending upon whether or not the dwelling house is occupied) would suggest a concern for the protection of life and limb rather than the one-time rationale of the protection of the security of the habitation. Further, the words in G. S. § 14-54 “...
Criminal Law—Presumption of Coercion—Crimes Committed by Wife in Husband’s Presence

With the exception of certain crimes, when a wife commits a criminal offense in the presence of her husband, there arises a common-law presumption that she was acting under his threats, commands, or coercion; thus, in the absence of any rebutting evidence, the wife must go free. The two basic requisites to the raising of this presumption are that there must have been a marriage, and that the criminal act must have been committed in the physical or constructive presence of the husband. Although there is a tendency in the courts recently to hold that the presumption is a slight one and more or less easily rebuttable


2 This defense of marital coercion, even without the accompanying presumption, is different from the general defense of coercion. In order to obtain benefit of the general defense, “one must have acted under apprehension of imminent and impending death, or of serious and immediate bodily harm. Fears . . . of future bodily harm do not excuse an offense . . .” 1 Burdick, Crime p. 262 (1946). A wife on the other hand is excused if she committed the criminal act under her husband’s coercion, 1 Burdick, Crime p. 210 (1946), which does not require “apprehension of imminent and impending death, or of serious and immediate bodily harm.” The defense has been allowed when the husband was in jail at the time of the criminal offense and therefore could have done no more than make threats of future consequences. State v. Miller, 162 Mo. 253, 63 S. W. 692 (1901).

Quaere whether or not the defense of marital coercion and the general defense of coercion had the same historical basis. The general defense seems to be based on the doctrine that: “Since every crime requires a willing or voluntary mind, it may be a defense to a criminal charge that the criminal act was not committed voluntarily but was the result of coercion, compulsion, or necessity.” 1 Burdick, Crime p. 260 (1946). The basis for the defense of marital coercion is less certain. One theory is that it is based on the principal that a wife owes her husband the highest obedience. 1 Hawkins, Pleas of the Crown p. 4, n. 7 (Curwood ed. 1824). Others suggest that the defense arose from the practice of granting the husband benefit of clergy and leaving the wife to bear the harsh punishments that were administered for relatively minor crimes. 1 Burdick, Crime p. 209 n. 84 (1946).

3 Davis v. State, 15 Ohio 72, 45 Am. Dec. 559, 560 (1846).

4 State v. Shee, 13 R. L. 535 (1882). Although it is agreed that the act must have been committed in the presence of the husband in order for the presumption to apply, there arises the problem of what constitutes presence within the meaning of the rule. It has been held in an extreme case that a wife was in her husband’s constructive presence when he was confined in jail and she took him a revolver to aid in his escape. The court there held that the wife was entitled to the benefit of the presumption. State v. Miller, 162 Mo. 253, 63 S. W. 692 (1901). It is not the intention of this note to deal with the problem of presence. See Annot., 4 A. L. R. 265 (1919), 71 A. L. R. 1118 (1931).