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Right to Enter as Defense to Charge of Burglary

clusion when it reinstated an alimony obligation upon the death of the second husband because the remarriage was invalid. This decision "to avoid a particular result in a particular case may produce a host of injustices in the cases to follow."[31]

B. WAYNE TUCKER

RIGHT TO ENTER AS DEFENSE TO CHARGE OF BURGLARY

Implicit in the definition of burglary is the idea that the entry must be an unlawful one. One recurring problem in this regard is whether consent to enter prevents the entry from being unlawful, even though it is accompanied by a criminal intent. There is particularly fertile ground for conflict when, as a defense to a burglary charge, such consent is claimed by virtue of the premises being open at the time to the public business.

This conflict is brought into focus by two recent cases, *State v. Keys*[1] from Oregon, and *Macias v. People*[2] from Colorado. In each case the defendant entered a pay telephone booth with intent to commit larceny of the money in the coin box. Both indictments were framed under substantially similar burglary statutes, which eliminate the requirement of a breaking.[3]

The defendant in *Keys* contended that an entry of a building to which the public is invited for business is not an unlawful entry, notwithstanding a contemporaneous larcenous intent, because it is an entry which has been consented to. In a four-to-three decision the Oregon Supreme Court rejected defendant's contention and affirmed the burglary conviction. It was held that, regardless of its character, any

[31]264 N.Y.S.2d at 120.

[1]419 P.2d 943 (Ore. 1966).

[2]421 P.2d 116 (Colo. 1966).

[3]"Every unlawful entry of any building, booth ... or other structure ... mentioned in ORS 164.240, with intent to steal or commit any felony therein, is a breaking and entering of the same within the meaning of ORS 164.240 [which defines burglary in terms of 'breaks and enters']." ORE. REV. STAT. § 164.220 (1965).

"Every person who shall willfully and forcibly break and enter or willfully, without force, enter any building ... with intent to commit ... larceny, or other felony or misdemeanor ... shall be deemed guilty of burglary ...." COLO. REV. STAT. ANN. § 40-3-5 (1963).

Nothing turned on any possible difference between the terms "unlawful entry" and "willfully.... enter" in the two statutes.

entry is unlawful if accompanied by an intent to commit larceny or a felony within the structure. The court noted that, although it is well established that an unlimited consent is a defense to a charge of burglary, it is equally well established that a consent limited as to place, time, or purpose is not a defense where entry occurs outside the stated or implied limitation. The court concluded that the invitation to enter the telephone booth was limited to an invitation for a lawful purpose only and that defendant's entry, having been made for an unlawful purpose, was outside the limitation.

The dissenting justices interpreted "unlawful," as used in the statute, as being limited "to wrongful means employed in gaining entry."[4] They said that under the majority's interpretation: one who enters a courthouse under subpoena, intending to commit perjury, or one who enters a bank, intending to forge a check, would be a burglar. They thought other statutes dealt adequately with such perjurers and checkforgers.

The appeal in *Macias* was based on the question whether a telephone booth is a "building" within the Colorado burglary statute. Even though the issue of consent was not raised as a defense at the trial or on appeal, the court deemed the point of "such paramount importance" that it met the problem on its own motion. In reversing the conviction the five-to-two majority noted that burglary has always included an element of trespass, either actual or constructive. The majority concluded that since the defendant, as a member of the public, was invited to enter the telephone booth, there was no trespass, that is, no unlawful entry into the booth.

The dissent said that because defendant did not enter the premises for a purpose connected with the owner's business, he was neither an an invitee nor a licensee, but a trespasser. By way of illustrating the fallacy of the majority's doctrine, the dissent suggested that if a negligently placed telephone had fallen on the defendant and injured him, he could not have asserted that he was a business visitor to whom the telephone company owed a duty of care not to injure.

As the principal cases make apparent, the conflict over the effect of consent to enter turns upon whether or not a right to enter is lost when it is accompanied by criminal intent.

> Under the "right to enter" principle, it is . . . held that when a store is open to the general public, the defendant is not guilty of burglary if he enters with the intent to steal. In some states this "right to enter" principle has been avoided by holding that

[4]419 P.2d at 948.

> when a person having the right to enter for a lawful purpose does so with the intention of stealing, it is burglary, since such person has no right to enter for the purpose of stealing.[5]

People v. Barry[6] is the leading case in a long line of California decisions[7] which have qualified or avoided the "right to enter" principle. The California statute defines burglary simply as an entry with a requisite criminal intent.[8] *Barry* noted that the requirements of statutory burglary had been met by *any* entry made with larcenous intent into an open grocery store. To defendant's contention that his entry was lawful because he entered under invitation to the public, the court answered that one "who enters with the intention to commit a felony enters without an invitation."[9]

Barry is the leading authority for this rule, even in jurisdictions where an Oregon or Colorado-type statute is in force. In Arkansas, for example, where the statute used the term "unlawful entering," *Barry* was quoted with approval and defendant was found guilty of burglary where he had stolen liquor from a saloon which was open for business at the time.[10]

Right to enter is also raised as a defense to burglary in situations analogous to an invitation to the public. For example, under the "right to enter" principle an employee is not guilty of burglary if he enters with intent to steal, during his hours of employment, a place

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[5]2 WHARTON, CRIMINAL LAW AND PROCEDURE § 414, at 38-39 (1957).

[6]94 Cal. 481, 29 Pac. 1026 (1892).

[7]People v. Brittain, 142 Cal. 8, 75 Pac. 314 (1904); People v. Garcia, 214 Cal. App. 2d 681, 29 Cal. Rptr. 609 (Dist. Ct. App. 1963); People v. Hildreth, 202 Cal. App. 2d 468, 21 Cal. Rptr. 5 (Dist. Ct. App. 1962); People v. Wilson, 160 Cal. App. 2d 606, 325 P.2d 106 (Dist. Ct. App. 1958); People v. Corral, 60 Cal. App. 2d 66, 140 P.2d 172 (Dist. Ct. App. 1943). These cases all deal with business premises open to the public. The *Barry* rule of avoiding the "right to enter" principle has also been applied in other situations where defendant had consent to enter: *E.g.,* People v. Talbot, 414 P.2d 633, 51 Cal. Rptr. 417 (1966) (consent of owner to enter so that house guest of owner could be robbed); People v. Sears, 62 Cal. 2d 737, 401 P.2d 938, 44 Cal. Rptr. 330 (1965) (entry of defendant's own home); People v. Garrow, 130 Cal. App. 2d 75, 278 P.2d 475 (Dist. Ct. App. 1955) (entry of dwelling house pursuant to express personal invitation).

[8]"Every person who enters any house... or other building... with intent to commit grand or petit larceny or any felony is guilty of burglary." CAL. PEN. CODE § 459. The basic requirements of this statue have not been changed since 1876.

[9]29 Pac., at 1027; *accord,* State v. Bull, 47 Idaho 336, 276 Pac. 528 (1929) (nearly identical statute).

[10]Pinson v. State, 91 Ark. 434, 121 S.W. 751 (1909); *accord,* People v. Schneller, 69 Ill. App. 2d 50, 216 N.E.2d 510 (1966) (entry of public museum under statute making one guilty of burglary "when without authority he knowingly enters"); Commonwealth v. Schultz, 168 Pa. Super. 435, 79 A.2d 109 (1951) (theft of vending machine from men's room of bar under statute defining burglary as "wilfully and maliciously" entering); see Walders v. State, 101 Ark. 345, 142 S.W. 511 (1912).

he is generally authorized to enter. In one case[11] it was found that because defendant employee had a key to all company depot doors and there was no regulation governing its use, he had a right to enter the company freight house at the time he committed petit larceny. "Hence this offense, if burglary, is raised to that grade solely by his unlawful intent. But intent alone is not always sufficient for that purpose. There is 'no burglary, if the person entering has a right so to do, although he may intend to commit, and may actually commit, a felony....'[12] Some authority avoids the "right to enter" principle under these circumstances by holding that entering with a criminal intent is not within the trust or employment and so not within any right.[13] Under either view an employee who enters with criminal intent after working hours the premises where he works is guilty of burglary because he has no right to enter at such time.[14] Likewise, an employee entering during his working hours a place which he has been given authority to enter is guilty of burglary because he has no right to enter such place.[15]

The "right to enter" principle is treated the same in jurisdictions which require a breaking as an element of burglary as it is in jurisdictions where no breaking is required. Thus, an early case[16] held there

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[11]Stowell v. People, 104 Colo. 255, 90 P.2d 520 (1939).

[12]*Id.* at 521; *accord,* People v. Carstensen, 420 P.2d 820 (Colo. 1966).

[13]*E.g.,* State v. Howard, 64 S.C. 344, 42 S.E. 173, 175 (1902). "A servant's right to enter his master's dwelling depends upon the purpose with which he enters."

[14]Pointer v. State, 148 Ala. 676, 41 So. 929 (1906); Lowder v. State, 63 Ala. 143 (1879); State v. Corcoran, 82 Wash. 44, 143 Pac. 453 (1914).

[15]Van Walker v. State, 33 Tex. Crim, 359, 26 S.W. 507 (1894); Morrow v. State, 25 S.W. 284 (Tex. Crim. App. 1894).

[16]State v. Newbegin, 25 Me. 500 (1846). State v. Stephens, 150 La. 944, 91 So. 349 (1922), is often cited as standing for the proposition that when one enters a store open to the public with intent to commit a felony it is not a burglary because there is consent. *E.g.,* People v. Sine, 277 App. Div. 908, 98 N.Y.S.2d 588 (1950) (cited by dissent); PERKINS, CRIMINAL LAW 153 n.34 (1957); 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 414 n.12 (1957); 12 C.J.S. *Burglary* § 12 n.50 (1938). However, *Stephens* simply held that because a Louisiana statute defining burglary as "break or enter" really meant "break and enter," defendant could not be guilty of burglary under an indictment charging that he did "willfully... and with intent to commit a crime... enter the store...."

State v. Moore, 12 N.H. 42 (1841), is another case which dealt with this problem but is dubious authority for the proposition because the opinion is confused. It is difficult to tell whether the decision was based on the first or second, or both, of the following grounds: (1) insufficiency of proof that defendant's larcenous intent existed at the time of his entry; (2) defendant's lawful presence on the premises precluded a burglarious breaking and entry of a public room on those premises. The majority in *Barry* laid the basis of the *Moore* decision upon the first ground, while the dissent in that case cited *Moore* for the second ground.

was no breaking, and therefore no burglary, because at the time of entry the store was open for business:

> The opening of a shop door in the day time, which had been closed only to exclude the dust or cold air, with a design that it should be opened by all, who should be inclined to enter, could not be a violation of any security designed to exclude, and therefore not a breaking. It would not even be a trespass, for the custom of trade in it would be evidence of a general license to enter.[17]

But in New York[18] and Texas [19] burglary convictions based on breaking and entering of premises open to the public have been affirmed on the ground that there is no license to enter to commit a crime.

In an analogous situation, where one has a personal invitation or license to enter premises at any time, a burglary conviction is precluded because of the right to enter in jurisdictions requiring a breaking.[20] The same rule applies where the premises are defendant's own.[21] On the other hand, where burglary is defined in terms of an entry with the requisite intent, it is possible for one to burglarize premises which he has been given an unlimited personal consent to enter.[22] But some jurisdictions with such statutes also require a trespassory entry,[23] which is precluded when there is consent.[24]

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[17]State v. Newbegin, *supra* note 16, at 504.

[18]People v. Sine, 277 App. Div. 908, 98 N.Y.S.2d 588 (1950) (department store open for business.)

[19]Trevino v. State, 158 Tex. Crim. 252, 254 S.W.2d 788 (1952) (church open to the public); Trevino v. State, 158 Tex. Crim. 255, 254 S.W.2d 786 (1952); Thurston v. State, 132 Tex. Crim. 287, 130 S.W.2d 770 (1937) (boarding house); Gonzales v. State, 50 S.W. 1018 (Tex. Crim. App. 1899) (storehouse open for business).

[20]People v. Kelley, 253 App. Div. 430, 3 N.Y.S.2d 46 (1938) (card carrying members entered athletic club open to its members twenty-four hours a day); Jones v. State, 155 Tex. Crim. 481, 236 S.W.2d 805 (1951) (nephew had consent to enter at will); Britton v. State, 140 Tex. Crim. 408, 145 S.W.2d 878 (1940) (neighbor had consent to enter at will); Shaffer v. State, 137 Tex. Crim. 476, 132 S.W.2d 263 (1939); Miller v. State, 136 Tex. Crim. 345, 125 S.W.2d 596 (1939) (defendant frequently visited filling station); Davis v. Commonwealth, 132 Va. 521, 110 S.E. 356 (1922) (defendant had key to premises and came and went as member of family). *Contra,* State v. Skillings, 98 N.H. 203, 97 A.2d 202 (1953) (defendant had license to enter freely on errands for victim's benefit).

[21]Clarke v. Commonwealth, 66 Va. (25 Gratt.) 908 (1874); State v. Howard, 64 S.C. 344, 42 S.E. 173, 175 (1902) (dictum).

[22]State v. Owen, 94 Ariz. 354, 385 P.2d 227 (1963) (permission to enter filling station); McCreary v. State, 25 Ariz. 1, 212 Pac. 336 (1923) (permission to pass through complaining witness' adjoining room any time); People v. Garrow, 130 Cal. App. 2d 75, 278 P.2d 475 (Dist. Ct. App. 1955) (express invitation to enter dwelling house); see State v. Hall, 168 Iowa 221, 150 N.W. 97 (1914) (invitation from owner's wife to commit adultery with her).

[23]*I.e.,* an entry in which wrongful means are employed, as opposed to an otherwise lawful entry accompanied by criminal intent.

[24]State v. Starkweather, 89 Mont. 381, 297 Pac. 497 (1931) (defendant entered

Generally, a jurisdiction will be consistent in its treatment of the issue of consent to enter and will allow or disallow it as a defense whether it arises from an invitation to the public or from an analogous situation.[25] However, New York and Texas are curious in that consent to enter is apparently a defense depending upon whether the right or privilege is extended to the defendant personally or to him as a member of the public at large. Where defendants, as members of a New York City athletic club open twenty-four hours a day, had a personal right to enter the club premises it was held: "It is fundamental that there can be no breaking or entering a building if the person entering has the right to do so."[26] This "fundamental" principle apparently had no application where the right to enter a department store was by invitation to the public to transact business.[27] Likewise, in the Texas cases[28] consent was held to preclude burglary when defendant had a personal invitation to enter private or public premises at any time. However, when defendant's only claimed invitation was that the premises were open to the public at the time, burglary could be established, notwithstanding the express or implied consent to enter for lawful purposes.[29]

voluntary consent, express or implied, will affect a burglary charge

New York and Texas are exceptions, however. In most states a voluntary consent, express or implied, will affect a burglary charge uniformly, regardless of whether it is personal or public in nature.[30]

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premises he was leasing to steal landlord's goods); State v. Mish, 36 Mont. 168, 92 Pac. 459 (1907) (defendant entered his own room); see State v. Evans, 74 Utah 389, 279 Pac. 950 (1929) (defendant entitled to instruction that he honestly believed he had permission to enter the premises).

[25]*E.g.*, California consistently follows the *Barry* rule and holds that consent to enter is never a defense. See cases cited note 8, *supra*.

[26]People v. Kelley, 253 App. Div. 430, 3 N.Y.S.2d 46, 49 (1938).

[27]People v. Sine, 277 App. Div. 908, 98 N.Y.S.2d 588 (1950). However, it should be noted that *Sine* and *Kelley*, *supra* note 26, were decided by separate departments of the Appellate Division of the New York Supreme Court. The decisions of one department are not necessarily binding on the other departments. Only the Court of Appeals decisions are binding on all the departments of the Supreme Court.

[28]Jones v. State, 155 Tex. Crim. 481, 236 S.W.2d 805 (1951); Britton v. State, 140 Tex. Crim. 408, 145 S.W.2d 878 (1940); Shaffer v. State, 137 Tex. Crim. 476, 132 S.W.2d 263 (1939); Miller v. State, 136 Tex. Crim. 345, 125 S.W.2d 596 (1939).

[29]Thurston v. State, 132 Tex. Crim. 287, 103 S.W.2d 770 (1937); Gonzales v. State, 50 S.W. 1018 (Tex. Crim. App. 1899); Trevino v. State, 158 Tex. Crim. 252, 254 S.W.2d 788 (1952).

Unlike New York there is no ground for distinguishing the opposite results of the analogous cases on the basis of the court which decided them. There is only one Court of Criminal Appeals in Texas.

[30]*E.g.*, People v. Barry, 94 Cal. 481, 29 Pac. 1026 (1892), and People v. Garrow, 130 Cal. App. 2d 75, 278 P.2d 475 (Dist. Ct. App. 1955); Macias v. People, 421 P.2d 116 (Colo. 1966), and Stowell v. People, 104 Colo. 255, 90 P.2d 520 (1939). *Macias*, one of the principal cases, cited *Stowell* (employee entering company depot during

Therefore, the precise issue of consent in regard to places open to the public will be settled by answering the broader question whether a contemporaneous criminal intent itself makes an entry an unlawful one.[31] The case law on this question reveals an irreconcilable conflict based on adherence to or avoidance of the "right to enter" principle.

Whether burglary is defined in terms of a breaking and entering, an unlawful or wilful (or like term) entry, or any entry accompanied by requisite criminal intent, a trespassory entry as a prerequisite for a burglary conviction seems justifiable. One undesirable result of not reguiring a trespassory entry is that it may be possible to commit burglary of one's own house.[32] Not only would such a result be manifestly harsh, but it is contrary to the common law rule that "one cannot commit burglary of his own dwelling house, since burglary is the breaking and entering... of the dwelling house of another...."[33]

Furthermore, there is less danger of the occurrence of incidental crimes against the person when the thief or felon has entered under a right, than when he is a trespasser.[34] The American Law Institute

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his hours of employment) as being "almost directly in point." The court said that the "precise question" decided in *Stowell* was that in spite of a felonious intent, there is no burglary if there is a right to enter.

Even in jurisdictions which treat the issue of consent uniformly in burglary cases, there may be one situation where it is treated differently from the other cases where consent is pleaded as a defense. This exception arises when defendant is allowed to enter so that he can be entrapped. The basis for the distinction lies in a general rule of entrapment, which is applicable to all crimes, rather than in a rule of burglary. Where there is an active procurement or inducement by the victim of a crime there can be no conviction; but where there has been only passive consent to the perpetration of the crime a conviction is not precluded. As applied to burglary the rule is: " 'The fact that the owner of a building having knowledge of a contemplated burglary therein remains silent and presumably permitted entry into the building for the purpose of arresting the intruder does not constitute a consent to the act, and will not furnish a defense to the prosecution therefor, for the reason that it in no wise affects the guilt of the accused.... Owner persuading a person to enter building and take his property constitutes a consent to such entry and taking, and for that reason is a complete defense...for the act charged as burglary.' " Adams v. State, 13 Ala. App. 330, 69 So. 357, 359 (1915) (quoting from 11 WHARTON, CRIMINAL LAW § 1043 (11th ed.)). See generally Annot., 18 A.L.R. 146, 155-58 (1922).

[31]One writer suggests that contemporaneous criminal intent should always make an entry into *business* premises unlawful since necessity requires the public to enter and the business proprietor has no effective control over the particular people who desire to enter. 19 FORDHAM L. REV. 323, 324 (1950).

[32]People v. Sears, 62 Cal. 2d 737, 401 P.2d 938, 945, 44 Cal. Rptr. 330 (1965) (concurring opinion).

[33]State v. Howard, 64 S.C. 344, 42 S.E. 173, 175 (1902).

[34]Note, 51 COLUM. L. REV. 1009, 1025-27 (1951). "When a person committing a crime in a building is not a trespasser but is present as a guest or by right, there