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Criminal Law - Burglary in the Nighttime

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The instant case extends the principle no further than the court had previously gone in protecting such other interest as that recognized in the right to picket even on the property of the employer[19] and that recognized in allowing an employee to solicit union membership upon the employer's property.[20] The court has experienced no difficulty in preventing this interference.

A distinction is noted between the invasion of private property for commercial ends and an invasion in the furtherance of religious principles. The attitude of the courts makes it clear that the advertiser and Fuller Brush salesman will not be afforded the same protection granted the colporteur and the picketeer.[21] The explanation of this distinction derives from the types of interests being protected.

It remains to be seen to what extent freedom of religion and expression will brush aside private property concepts. The question as it now stands cannot be considered as finally settled, for the Supreme Court is split on this general issue and a change of personnel may bring with it a change in constitutional interpretation with respect to this question.

GEORGE D. ERNEST, JR.

CRIMINAL LAW—BURGLARY IN THE NIGHTTIME—Defendant was convicted on a charge of breaking and entering in the nighttime with intent to steal.[1] The sole witness testified that the defendant broke and entered the burglarized apartment "at night" "between six and seven." Upon further interrogation she declared that the breaking and entering was at the time of day when it is "just getting dark." Official records show that the sun set at 8:04 p.m. on the day of the burglary. The supreme court upheld the jury's finding that the crime had been committed after sunset. Chief Justice O'Niell and Justice Higgins dissented on the ground that the witness' testimony clearly showed the breaking and entering to have been in the daytime. *State v. McDonell*, 23 So. (2d) 230 (La. 1945).

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19. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) is illustrative of this right.

20. Republic Aviation Corporation v. National Labor Relations Board, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 914 (1945).

21. See cases cited supra note 6.

1. The offense had been committed prior to the effective date of the Criminal Code; and the prosecution, therefore, was under Section 851 of the Revised Statutes as amended by La. Act 71 of 1926. This statute was superseded by Art. 60, La. Crim. Code of 1942, and the offense is now designated as "burglary in the nighttime."

One of the essential elements of common law burglary was breaking and entering in the nighttime. According to Blackstone:

> "the malignity of the offense does not so properly arise from its being done in the dark, as in the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner and rendered his castle defenceless."[2]

Although the offense may be committed at any time of day under modern burglary statutes, almost all states, including Louisiana,[3] have retained the distinction between burglary in the daytime and burglary in the nighttime, providing a more severe penalty for the latter offense.

In ancient days night was considered to begin with the setting of the sun and ended with its rising on the next morning. By the eighteenth century England had adopted the pragmatic approach, defining night as that time when there was no longer sufficient light whereby the countenance of a person could be discerned at a reasonable distance.[4] Moonlight in such cases was not taken into consideration. No intervening time between night and day existed—when the light of day was entirely gone, night began. Night, in turn, terminated with earliest dawn. This line of demarcation has become a part of our jurisprudence,[5]

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2. 4 Blackstone, Commentaries on the Laws of England (1769) 224.

3. Arts. 60, 61, La. Crim. Code of 1942.

4. Bishop, Commentaries on the Law of Statutory Crimes (Early's 3 ed. 1901) 303, § 276; 4 Blackstone, loc. cit. supra note 2; 3 Chitty, A Practical Treatise on the Criminal Law (3 Am. 1836) 1105; 3 Coke, Institutes of the Laws of England (1797) 63; 3 Greenleaf, A Treatise on the Law of Evidence (1853) 70, § 75. See also authorities and cases cited in the above works.

5. The People v. Griffin, 19 Cal. 578 (1862); State v. Morris, 47 Conn. 179 (1879) (The state was permitted to introduce an almanac to show the precise time of sunset so that the court might take judicial notice. The court held it to be some evidence on the question of light, but adhered to its old standard of sufficient daylight to discern the features of another.); Petit v. Colmery, 20 Del. 266, 55 Atl. 344 (1903); Bethune v. Georgia, 48 Ga. 505 (1873); State v. Mecum, 95 Iowa 433, 436, 64 N.W. 286 (1895) (" 'nighttime' means the time between darkness after sundown and dawn of daylight in the morning"); Thomas v. State, 6 Miss. 20 (1840); State v. Bancroft, 10 N.H. 105 (1839); State v. Robinson & McClune, 35 N.J. Law 71 (1871); State v. McKnight, 111 N.C. 690, 16 S.E. 319 (1892); State v. Clark, 42 Vt. 629 (1870); Nicholls v. State, 68 Wis. 416 (1887); Klieforth v. State, 88 Wis. 163, 59 N.W. 507 (1894).

The cases involving the time of day at which search warrants were issued have also adhered to the common law definition of "nighttime." Atlanta Enterprises v. Crawford, 22 F. (2d) 834 (N.D. Ga. 1927); Moore v. United States, 57 F. (2d) 840 (C.C.A. 5th, 1932); Linnen v. Banfield, 114 Mich. 93, 72 N.W. 1 (1897).

United States v. Liebrich, 55 F. (2d) 341, 343 (W.D. Pa. 1932), having cited and discussed all the old cases defining "nighttime," the court concludes that "nighttime" extends from thirty minutes after sunset to thirty minutes before sunrise; Distefan v. United States, 58 F. (2d) 963 (C.C.A. 5th, 1932) (cited in Chief Justice O'Niell's dissent to the principal case).

and is typified by Justice Sibley's statement that "daylight does not in law or by common understanding, begin at sunrise or end at sunset, but includes dawn at the one end and twilight at the other."[6]

In an effort to achieve a more precise distinction, a number of states have essayed a statutory definition of "nighttime." In Louisiana,[7] as in many states,[8] "nighttime" is defined as the period between sunset and sunrise according to the ancient test. In a few states the legislatures have attempted to define a "nighttime" period that will be determinable with some degree of certainty and yet will not extend arbitrarily from sunrise to sunset. In this way they hope to preserve some of the pragmatic advantages of the common law approach. They have established a mensurable period which covers arbitrary portions of dawn and dusk. For example, in Massachusetts[9] and Wisconsin[10] "nighttime" extends from one hour after sunset to one hour before sunrise, while in Texas this period is limited to thirty minutes.[11] England ignores the varying daylight periods of the different seasons and defines "nighttime" as a set period from 9:00 p.m. to 6:00 a.m.[12]

The Louisiana Criminal Code and a number of other statutes have adopted an arbitrary definition of "nighttime" instead of the more flexible eighteenth century criterion of sufficient light to discern a person's features at a reasonable distance. The formula has the advantage of certainty, for one need only look to the almanac to ascertain definitely that point at which the sun

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In Bailey v. Shrader, 265 Ky. 663, 97 S.W. (2d) 575 (1936), a case of false imprisonment where the town marshal had the duty of keeping the lawfully arrested prisoner in custody until morning if arrested at night, the witness said that it was "just about dark," and the court invoked Webster's definition of "night" as "the beginning of darkness; nightfall."

The old common law definition of "daytime," the opposite of "nighttime," has also been upheld in the case of prisoners claiming liberty of the yard during the day. Trull v. Wilson, 9 Mass. 154 (1812). See also the following railroad cases: United States v. Southern Pac. Co., 157 Fed. 459 (N.D. Cal. 1907); United States v. Boston & W. R. R., 269 Fed. 89 (C.C.A. 1st, 1920), cert. denied 255 U.S. 577, 41 S.Ct. 448, 65 L.Ed. 794 (1920).

6. Atlanta Enterprises v. Crawford, 22 F. (2d) 834, 837 (N.D. Ga. 1927).

7. Art. 60, La. Crim. Code of 1942.

8. Ariz. Code Ann. (1939) § 43-903; Cal. Pol. Code (Deering, 1944) § 3260; Minn. Stat. (Mason, 1927) §§ 6673, 6681; Mont. Rev. Codes Ann. (Anderson and McFarland, 1936) § 11350; Nev. Comp. Laws (Hilyer, 1929) §§ 9978(19), 10319; New York Gen. Construction Laws, § 51; N.D. Comp. Laws Ann. (1913) § 9881; Okla. Stat. Ann. (1937) tit. 21, § 1440; Ore. Code Ann. (1930) § 14-1025; S.D. Code (1939) § 13.3708; Utah Code Ann. (1943) § 103-9-7.

9. Mass. Gen. Laws (1932) c. 278, § 10 et seq. This definition of "nighttime" is the "nighttime" of the old game laws.

10. Wis. Stat. (1937) § 4637a.

11. Tex. Ann. Pen. Code (Vernon, 1938) art. 1396.

12. (1861) 24 and 25 Vict. c. 96, § 1.

rises or sets on a given day. Since the distinction is, at best, an arbitrary one, it was probably considered more important to fix the line between burglary in the daytime and burglary in the nighttime in an unequivocal manner than to invite controversy in the not too important issue of whether or not it was actually dark when the offense was committed. The general distinction between daytime and nighttime burglaries is not without some merit, and it is so well rooted in our law that its suggested abolition by the reporters who drafted the Criminal Code met with almost universal opposition. However, it is not so sacred that a factual definition of "nighttime," though possibly more accurate, should have been chosen in lieu of the greater certainty inherent in an almanac definition. At most the distinction is a vestige of the old common law conception of the aggravated nature of a burglary committed in the dark of night when all law-abiding people have retired to the presumed quiet and security of their homes.

Even with Louisiana's new statutory definition of "nighttime," difficulty will continue to arise where the exact time of the entering is not known. By the very nature of the crime eye-witnesses will seldom be found, and in their absence circumstantial evidence will be determinative of the time of the entering.[13] The problem is not lessened when, as in the *McDonell* case, the available eyewitnesses are not certain of the exact time of the burglary. In such cases the court may revert to the former test of sufficient light reasonably to discern a man's features. In two other cases the approach adopted in the principal decision was resorted to; testimony as to the degree of darkness was relied upon almost entirely to establish the time of the crime. In *State v. Perkins*[14] a burglary victim twice testified that it was "not light, but dark," when he awakened and discovered that his barn had been burglarized. This testimony was given more weight than the same man's estimate of the hour at which the crime was committed. In California, where the statutory definition of

13. Taylor v. Territory, 7 Ariz. 224, 64 Pac. 423 (1901); People v. Lowrie, 4 Cal. App. 137, 87 Pac. 253 (1906); People v. Schafer, 161 Cal. 573, 119 Pac. 920 (1911); People v. Ross, 61 Cal. App. 61, 214 Pac. 267 (1923); People v. Helsley, 41 Cal. App. (2d) 935, 108 P. (2d) 97 (1940); Houser v. Georgia, 58 Ga. 78 (1877); Brown v. Georgia, 59 Ga. 457 (1877); Williams v. Georgia, 60 Ga. 446 (1878); People v. Taylor, 93 Mich. 638, 53 N.W. 777 (1892); State v. Gray, 23 Nev. 301, 46 Pac. 801 (1896); State v. Whitaker, 39 Nev. 159, 154 Pac. 927 (1916); Long v. State, 58 Tex. Cr. App. 207, 127 S.W. 208 (1910); Clark v. State, 140 Tex. Cr. App. 25, 143 S.W. (2d) 378 (1940); State v. Miller, 24 Utah 312, 67 Pac. 790 (1902); State v. Richards, 29 Utah 310, 81 Pac. 142 (1905); Simon v. State, 125 Wis. 439, 103 N.W. 1100 (1905); Winsky v. State, 126 Wis. 99, 105 N.W. 480 (1905); Gray v. State, 243 Wis. 57, 9 N.W. (2d) 68 (1943).

14. 342 Mo. 560, 116 S.W. (2d) 80 (1938).

"nighttime" is "the period between sunset and sunrise,"[15] the court has held[16] that evidence showing entry to have been made "in the evening sometime after dark"[17] was clearly sufficient to justify the jury's conclusion that the offense was committed after sunset. Massachusetts by statute[18] similarly defines "nighttime," but in the tort case of *Sodekson v. Lynch*,[19] where there was no direct testimony as to the exact time of the injury, the court held that night had begun at the time described by the plaintiff as "dusk turning to dark" and at a time when she, being possessed or normal eyesight, could not see.

According to a decision of the Supreme Court of Georgia[20] the defendant will be given the benefit of the doubt where the evidence shows that the burglary was committed within a relatively short period—one-half of which was day and one-half night. This decision is in accord with the usual policy of strict construction of criminal statutes in favor of the accused.

The desirability of a statutory definition of "nighttime," to be applied wherever possible, is well illustrated by the principal case wherein Chief Justice O'Niell and Justice Higgins filed vigorous and well reasoned dissents based upon the theory that the so-called "twilight period" is not included in "nighttime." Still, this same difficulty would have been present, if the burglary had occurred after the adoption of the Criminal Code, for there was no direct evidence as to the precise time when the apartment was entered—thus excluding the ready availability of the almanac to establish the nature of the crime.

NINA J. NICHOLS

CRIMINAL PROCEDURE—SHORT FORM INDICTMENTS—The bill of information charged that the defendant, Davis, "did commit the crime of gambling as defined by Article 90 of the Louisiana Criminal Code." Defendant tendered a motion for a bill of particulars which was granted and the particulars furnished. The motion to quash the indictment and the plea of unconstitutionality were overruled. Defendant excepted and appealed. *Held*, the use of the short form, authorized by Article 235 of the Code of Criminal Procedure of 1928 as amended by Act 223 of 1944, was sufficient

15. Cal. Pol. Code (Deering, 1944) § 3260.
16. People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964 (1911).
17. 17 Cal. App. 157, 159, 118 Pac. 964, 965.
18. Mass. Gen. Laws (1932) c. 278, § 10 et seq.
19. 314 Mass. 161, 49 N.E. (2d) 901 (1943).
20. Caesar Water v. Georgia, 53 Ga. 567 (1875).