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OBSERVATIONS ON THE ATTEMPT TO COMMIT BURGLARY

In the recent case of *People v. Glickman,* 377 Ill. 360 (1941), a defendant was indicted for burglary and found guilty of an attempt to commit burglary by the trial court but the Supreme Court reversed the finding.

In Illinois there are three layers of law relating to the crime of *attempted burglary*: (1) the common law; (2) the statutory crime of *attempted burglary* in the nighttime (Ill. Rev. Stat. 1941, chap. 38, par. 85); and (3) the statutory catch-all criminal attempt where no express provision is made by law for the punishment of such attempt (Ill. Rev. Stat. 1941, chap. 38, par. 581). Are these three layers mutually exclusive? The question is raised in light of the fact that the Supreme Court in the principal case ruled that a defendant indicted for burglary that neither specified daytime or nighttime, could not be found guilty of an attempt to commit that crime.

In the instant case the accused was in the business of selling kink-proof cord in offices and apartments. The manager of a hotel on North Dearborn Street in Chicago discovered the defendant on the eighth floor near the suite of the manager and thereupon detained the defendant. The manager claimed his rooms had been entered and that the defendant told him he was in the room repairing a faucet but this the defendant denied. These brief facts will be sufficient for this note that is primarily concerned with the law of the case.

Besides the three layers of law relating to the *criminal attempt* to commit burglary there is another very important rule that might be identified as a fourth layer. That rule is the one that holds a defendant indicted for a projected crime can be found guilty of an *attempt* to commit that crime if the evidence does not sustain a finding of guilty for the projected crime. For example, a defendant indicted for the crime of rape has been held guilty of an *attempt* to commit rape. *Reynold v. People,* 83 Ill. 479. The decision of the lower court in the Glickman case would seem to fall within this rule.

In the face of the ruling of the Supreme Court in the principal case the State's Attorney faces difficulty in the burglary cases. The court referring to the catch-all general attempt provision found in par. 581 of the Criminal Code and mentioned above as the third layer of attempt law in Illinois, said: "This section applies only 'where no express provision is made by law for the punishment of such attempt.' Although the word 'burglary' is not mentioned therein, there is such an express provision defining and punishing attempted burglary (the court should have added in the nighttime), and, therefore, the general statute relied on by the People does not apply." The court seems to say since par. 85, or the second layer of law as mentioned in the beginning of this note, provides for an attempt to commit burglary in the nighttime, the lower court improperly found the defendant guilty of an attempt to commit burglary upon an indictment for burglary that did not contain an allegation that the burglary was in the nighttime. The court says: "The indictment in the case before us does not contain the essential allegation that the attempt for which the defendant was found guilty was committed in the nighttime . . . this indict-

ment and proof will not support that judgment." Why should the court insist upon the People using and being limited by par. 85, or the second layer of attempt-law as classified in this note? Why is it unsound to let the People fall back on (1) the common law layer of criminal attempt, or the (3) third layer of criminal attempt law as referred to above, *viz.*, par. 581, the general catch-all criminal attempt provision. The court when requested to recognize the rule mentioned above as the fourth layer of criminal-attempt law, *viz.*, the law that holds that when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the defendant may be acquitted of the greater crime and convicted of the lesser if the evidence justifies it, was of the opinion that this case did not come within that principle. That conclusion seems doubtful. In this case the defendant was indicted for burglary but the evidence did not sustain burglary. Surely it is impossible to deny that the evidence did show an attempt to commit burglary and therefore the view of the lower court should have been upheld on that ground as there are different types of attempts to commit burglary . . . the common law recognized various types and the statutory general attempt likewise recognized various types. But the Supreme Court only would recognize the "nighttime" type of attempted burglary as being within the ambit of the principal case. That is a dangerous construction as it prevents the People from successfully prosecuting the burglar who plys his trade in the daytime but fails to burglarize yet disturbs the public peace by his criminal conduct.

Because the Legislature of Illinois enacted a general criminal attempt catch-all (Ill. Rev. Stat. 1941, chap. 38, par. 581) provision and also enacted a specific type of attempted burglary in the night time (Ill. Rev. Stat. 1941, chap. 38, par. 85) it does not follow that the specific provision in par. 85 is exclusive or that it should be exclusively related to the indictment for the completed crime where the burglary projected fails and the conduct amounts only to an attempt to commit burglary. Is it not reasonable to conclude that the Legislature intended the catch-all attempt provision to be available at all times?

In conclusion it should be noted that it might be claimed that the decision in the instant case means only that the People must use the second layer of attempt law, *viz.*, par. 85 of the Criminal Code above mentioned when the burglary attempt was in the nighttime. When the attempt is in the daytime the People must use the third layer of attempt law, *viz.*, par. 581, previously mentioned. If this is the result of the Glickman decision then it is bound to be a great boon to defense lawyers because the philosophical disquisitions on the meaning of "nighttime" and "daytime" and "dusk" are most confounding. One recalls in this respect the cases that held it was not embezzlement because it was larceny and it was not larceny because it was embezzlement. So here, it would not be "nighttime" because it was "daytime" and it would be neither "nighttime" nor "daytime" because it was "dusk." By recognizing in burglary cases of this type, (1) the common law, (2) the general attempt provision of the Criminal Code, par. 581, (3) the specific provision relating to attempted burglary in the nighttime, and (4) the rule that recognizes a defendant can be held guilty of an attempt if he fails to perfect the projected crime, the difficulty arising if cases similar to the Glickman would be avoided as (1), (2), (3), (4), are not mutually exclusive as each are like a finger on the hand stemming from a common source and available to attain a common end by either individual or united action. The People should be able to use any or all of the rules in order to prevent a defendant who is guilty of criminal conduct from "beating the rap."

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HOW DOES COMPULSION OF STATUTE AFFECT THE USE OF VEHICLE ACCIDENT REPORTS AS EVIDENCE?

The time honored rule as to self incrimination requires that no person in any criminal case can be compelled to witness against himself. The recent decision of the Canadian Supreme Court in the case of *Rex. v. Walker*[1] constitutes an interpretation of the rule that may be of exceptional significance in the field of traffic accident reduction.

On the night of July 16, 1937, a motor car was proceeding down hill near the village of Wyebridge, Ontario. The driver skidded into a ditch. Several persons died as a result of injuries. When the constable interrogated Walker, he stated that one George was the driver. Later, Walker admitted that he was the driver. He was charged with manslaughter. The prosecution placed the constable on the stand to testify as to Walker's admission. The judge refused to permit the testimony on the ground that Walker was *required* to supply information under compulsion of statute. Since the statement was not voluntary, it violated the common law rule. In consequence, the case was withdrawn from the jury in the absence of other evidence identifying Walker as the driver.

The Supreme Court reversed the decision of the lower court and held it was error to refuse the constable's evidence. Decision of the higher court hinged upon an interpretation of several sections of the Ontario Traffic Law which resemble provisions of many state motor vehicle laws in the United States. Briefed, Section 40 of the Ontario Act, requires that in the event of accident, the driver shall remain at the scene and upon request supply information as to his name, address, etc. It was by virtue of this that the constable secured Walker's admissions. Another section (No. 88) requires that the driver involved in an accident submit a report to proper authorities. But such report cannot be used as evidence in any case arising out of said accident.

The issue was therefore raised: did that part of Section 88 prohibiting use of report as evidence constitute a limitation or restriction on Section 40? Said the court: "There is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them." Since Section 40 contained no excluding rule, the court held that information obtained by virtue of it was admissible. Similar interpretations relative to state motor vehicle codes would open the way to the introduction of evidence of exceptional value to enforcement officials.

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[1] 70 C.C.C. 240.