

Opinion No. 57-270

October 21, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: The Honorable Luis E. Armijo, District Judge, Las Vegas, New Mexico

QUESTION

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Is that part of § 40-9-6, N.M. S.A, 1953 Comp., which prescribes punishment superseded by § 40-9-1, N.M.S.A., 1953 Compilation?

CONCLUSION

No.

OPINION

ANALYSIS

Section 40-9-6 supra and § 40-9-1 supra contain penalty provisions for the commission of the offense of burglary. Section 40-9-1 states:

"Every person convicted of the crime of robbery, or of the crime of burglary, shall be punished by imprisonment in the state penitentiary not less than three, nor more than fifteen years."

It should be noted that the above section provides a penalty for burglary of not less than three nor more than fifteen years. Section 40-9-6 contains a penalty provision for committing the offense of burglary of not more than three nor less than one year. The Section is as follows:

"Every person who shall break and enter, in the night-time, any office, shop, or warehouse, not adjoining to nor occupied as a dwelling-house, with the intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state penitentiary not more than three years nor less than one year."

The Compiler's note under § 40-9-6 states:

"That part of this section prescribing the punishment may be superseded by 40-9-1."

As indicated above in our "Conclusion," we do not believe that the section prescribing punishment in 40-9-6 is superseded by Section 40-9-1, as indicated by the Compiler's note. As a general rule, where a criminal statute does not define the criminal offense but at the same time gives the offense a name known to the common law and prescribes the penalty, the statute is construed according to the common law definition. 20 C. J.69. Therefore, in the instant case, we believe that § 40-9-1 refers to the common law crime of burglary. At common law burglary was the breaking and entering in the night-time of the dwelling house or the mansion house of another with intent to commit a felony therein. See 9 Am. Jur. p. 239.

Section 40-9-6 refers to the breaking and entering in the night-time into places other than dwellings. This section, we believe, should be differentiated from § 40-9-1 which, as indicated above, concerns itself with the burglary of a dwelling house. We therefore conclude that the penalty provision for burglary found in § 40-9-6 is not superseded by § 40-9-1.