The Common Felonies in Pennsylvania

W.H. Hitchler

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation
Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol48/iss2/1

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
THE COMMON LAW FELONIES IN PENNSYLVANIA

W. H. Hitchler*

"At common law the principal, if not only, felonies, after treason, were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny."1

The Penal Code of Pennsylvania provides: "Every offense now punishable either by the statute or common law of this Commonwealth and not specifically provided for by this act, shall continue to be an offence punishable as heretofore."2

The effect of this section3 of the Code and similar sections in earlier statutes,4 of which this section is substantially a reenactment, is that all acts which were crimes under that portion of the common law which was adopted in Pennsylvania and which are not specifically provided for by statute, are crimes in Pennsylvania.5 The Penal Code does not supersede the common law with respect to cases not embraced within it.6

The Penal Code also provides: "In all cases where a remedy is provided or a duty enjoined or anything directed to be done by the penal provisions of any act of assembly, the direction of said act shall be strictly pursued; and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act into effect."7

*B.L., University of Virginia Law School, 1905; D.C.L., Dickinson College 1932; L.L.D., St. Francis College, 1932; L.L.D., Muhlenberg College 1939; L.L.D., Albright College 1943; Professor Dickinson School of Law of 1906—; Dean of Dickinson School of Law, 1930—; Chairman, Alien Enemy Hearing Board, Department of Justice, 1941—.

1COMMONWEALTH v. SCHOLL, 12 Pa. C. C. 554.
2Sec. 1101, Act of June 24, 1939, P.L. 872.
3It is a "saving section." COMMONWEALTH v. MOHR, 52 Pa. 243.
4Sec. 178, Act of March 31, 1860, P.L. 582.
7Sec. 1104, Act of June 24, 1939, P.L. 872.
The effect of this section and similar sections in earlier statutes, of which this section is substantially a reenactment, is that if an act is made criminal or a crime is defined by the statutory law, it is no longer a common law crime and cannot be defined by the common law.

The effect of the two sections is to leave the common law operative except so far as it has been supplied by statutory law.

The question to be considered is to what extent the common law is "operative" as to the crimes which the common law designated as felonies and how far has it been "supplied" by statutory law.

**ARSON**

"At common law, arson consists of the wilful and malicious burning of the dwelling house of another." Arson in Pennsylvania is defined by statute. The statutory definition includes arson at common law; but it also includes conduct which was not arson at common law. Arson at common law was committed only when (1) the dwelling house (2) of another (3) was burned (4) wilfully and maliciously.

At common law the thing burned must be a dwelling house. The burning of a dwelling house is arson in Pennsylvania but so also, by statute, is the burning of "any other building or structure used in connection with any industrial establishments or mine, or any bridge."

The extension of the crime of arson to buildings other than dwelling houses changes vitally the character of the crime. The crime of arson at common law was designed to protect the peculiar sacredness which the common law attributed to men’s habitations, for a dwelling house was regarded as being its occupiers' "castle and fortress," as well "for his defense against violence as for his repose." The crime was regarded as an offense against the security afforded by a man's dwelling house rather than as an injury to property. The law regarded the violation of the sanctity of one's home as a much graver wrong than mere injury to property.

---

8Sec. 183, Act of March 31, 1860, P.L. 382; Act of March 21, 1806, 4 Sm. Laws 326, para. 13.
9COMMONWEALTH v. RAILING, 113 Pa. 31; COMMONWEALTH v. CLARK, 123 Pa. Super. 277; Sadler, "Criminal Procedure" (1st Ed.) p. 101; Under our Criminal Code the defendant cannot be indicted at common law if there is a statute covering the same offense. COMMONWEALTH v. CLARK, 123 Pa. Super. 277.
10Sec. 1101 and 1104 supra.
12COMMONWEALTH v. BRUNO, 316 Pa. 394.
13Sec. 905, Act of June 24, 1939, P.L. 872.
14C. V. Bruno, 316 Pa. 394.
15C. V. Bruno, 316 Pa. 394.
16Sec. 905, Act of June 24, 1939, P.L. 872.
17Domus sua cuique est suissimum refugium.
At common law, the dwelling house burned must be that "of another," but, as arson was a crime against the habitation and not against property, the "dwelling house of another" is not that of the owner of the fee but that of the occupant.19 An owner, but not an occupant, could be guilty of arson.20

Statutes have modified this doctrine to some extent in Pennsylvania. The differences between the common law and the present Pennsylvania law appear from the following summary:

A person who burns a dwelling house of which he is
(a) neither owner nor occupant is guilty of arson at common law21 and is guilty of arson in Pennsylvania,22
(b) owner but not occupant is guilty of arson at common law23 and is guilty of arson in Pennsylvania,24
(c) occupant, but not owner, is not guilty of arson at common law,25 but is guilty of arson in Pennsylvania,26
(d) owner and occupant is not guilty of arson at common law,27 but is guilty of arson in Pennsylvania.28

The fact that an occupant may be guilty of arson shows that arson is no longer a crime against the habitation, and the fact that one who is owner as well as occupant may be guilty shows that arson is not a crime against property, unless the owner who burns his own property is punished because such a burning is necessarily or usually attended by great danger to the property of others.

It may be that burnings by the owner and occupant were made criminal because (1) such burnings are usually accompanied by some evil intent or (2) the conservation of property was considered highly desirable.

Arson at common law involves a burning.29 There must be an actual combustion of some part of the dwelling house.30

The Pennsylvania statute declares that one who "sets fire to or burns" shall be guilty of arson.31 There is a conflict of opinion as to whether, in interpreting

19 COMMONWEALTH v. BRUNO, 316 Pa. 394.
20 One wrongfully occupying a dwelling house could not be guilty of arson at common law. SULLIVAN v. STATE, 5 Stew. & P. 175.
22 HILL v. COMMONWEALTH, 98 Pa. 192; COMMONWEALTH v. WEIDERHOLD, 112 Pa. 584.
23 COMMONWEALTH v. BRUNO, 316 Pa. 394; COMMONWEALTH v. GENTZLER, 15 Dist. 934.
24 COMMONWEALTH v. BRUNO, 316 Pa. 395; COMMONWEALTH v. GENTZLER, 15 Dist. 934.
26 Sec. 906 of the Penal Code expressly so provides; but under the Pennsylvania statutes the law would probably be the same even in absence of this express provision. STATE v. DUELKS, 97 N.J.L. 431, 161 A. 865.
28 Under statutes providing, as does the Pennsylvania statute, that one who burns a house "the property of the accused or another is guilty," an owner in possession of his house may be guilty of arson. TURNER v. STATE, 155 Ark. 443, 244 S. W. 727; STATE v. KATZ, 107 N.J.L. 196, 130 A. 921.
29 3 Sec. 905, Act of June 24, 1939, P.L. 872.
the common law and statutory definitions of arson, the terms "burns" and "set fire to" are to be considered as being synonymous.

There is authority to the effect that the terms are synonymous, and that the use of the term "set fire to" does not change the rule that there must be a burning.\(^\text{32}\) Thus in Crow v. State,\(^\text{33}\) the court said: "Under the statute it is sufficient to complete the offense to set fire to the building. This means of course that there must be a burning."

This view is said to rest largely upon the authority of East,\(^\text{34}\) who stated, "Merely putting fire into or toward a house if the fire does not take and no part be burned does not amount to arson at common law. The Statute of 9 George I chap. 22, does indeed in enacting the felony use the words "set fire to," but I am not aware of any decision which puts a larger construction on these words than prevails by the rule of the common law." In criticism of this statement it has been said: "With all the respect which is justly due this writer, upon an attentive inspection of the authorities which he has referred to, it will be discovered that there is nothing in these cases which decides that these expressions are identical in their meaning."\(^\text{35}\)

There are authorities which assert that the terms "burn" and "set fire to" are not synonymous.\(^\text{36}\) This doctrine was apparently approved by Blackstone, who stated: "As to what shall be said to be a burning, so as to amount to arson * * * * an attempt to do it by actually setting fire to a house unless it absolutely burns does not fall within the description 'incendit' and 'combussit,'"\(^\text{37}\)

---

\(^\text{32}\) State v. Taylor, 45 Me. 332: "The words set fire to and burn are generally understood as equivalents." Benboro v. State, 128 Ala. 1, 29 So. 553: Both words were used disjunctively in an indictment. The court said "either means that the house or part thereof must be consumed by fire." Fairchilds v. People, 48 Mich. 31, 11 N.W. 773; Graham v. State, 40 Ala. 659: "We come to the conclusion that the words 'set fire to' used in our statute are equivalent to the word burn as defined by common law and when they refer to a house they mean that some portion of the house must be consumed or destroyed by fire." State v. Jones, 106 Mo. 302, 17 N.W. 366: An indictment charging that the defendant set fire to and burned a certain barn is not open to the objection of charging two crimes conjunctively.

\(^\text{33}\) 136 Tenn. 333, 189 S.W. 687, 1 ALR 1160.

\(^\text{34}\) P.C. p. 1020.

\(^\text{35}\) Howell v. Commonwealth, 5 Gratt. 664. "Of the cases referred to by East but one East 'fully ascertain' his statement and that the cases cited by Judge Lomax in Howell v. Commonwealth, in support of a contrary doctrine, 'are not in point, nor do they, with the weight of the very able and forcible reasoning of his opinion in that case, break down the authority and wisdom of the English adjudications on this question, sustained as they are by the most learned jurists of this country." Graham v. State, 40 Ala. 659.

\(^\text{36}\) Howell v. Commonwealth, 5 Gratt. 664: "We are not satisfied that setting fire to and 'burning' have been established by any legal authority to be synonymous." Cockran v. Commonwealth, 6 Md. 400. An indictment charging that a defendant did 'set fire to' was defective as an indictment for arson because it did not charge that the house was burned. State v. Hall, 93 N.C. 571: "The distinction may appear to be a refinement unworthy to be upheld, but it is better to follow approved precedents." Mary v. State, 24 Ark. 44: "It is safest to follow common law precedents." State v. McCoy, 162 Mo. 353, 62 S.W. 991; State v. Babcock, 51 Vt. 570. The English judges appear to have felt somewhat embarrassed in saying that the words 'set fire to' meant the same thing as 'burn.' State v. Dennin, 32 Vt. 158.

In Graham v. State, 40 Ala. 659, it is said: "Ordinarily, and in common acceptance the phrase 'set fire to' would be understood to convey a different meaning from the word burn."

\(^\text{37}\) Comm. 422.
The term "set fire to," it is asserted, may mean "put fire to" or "place fire upon" or "against," or put "fire in connection with," and therefore be not synonymous with "burn" and not require a "burning." The word "to" indicates that "the fire must not only be applied but applied directly to, or in immediate contact, with the building and not at a distance, although it was thereby designed to burn it."  

It has been decided that even though the legal meaning of the term "set fire to" has been decided by a long course of judicial decision and construction to be synonymous with "burn" the intention of the legislature to give to the words a different meaning may be shown by "the connection in which they are used and the evident purpose and object of the enactment itself."

In interpreting the term, as used in a statute, it is necessary to consider "the already existing statutes, and the evident purpose and object of the statute as to the mischief to be remedied." The term must be interpreted so as to give to the statute a sensible effect as to every part of the statute so that it can stand sensibly with other statutes on the same subject and fully carry out the intention of the legislature.

Applying this doctrine it has been held that the words "set fire to" in a statute which provides that "if any person shall * * * set fire, with intent to burn, to the dwelling house of another * * *" etc., are not synonymous with burn. The qualifying words, "with intent to burn," must clearly imply that the offense intended to be covered by the statute was something short of an actual burning. The opposite construction would make the statute read, "If any person shall * * * burn with intent to burn," and this construction would render the statute wholly nugatory and neither add to nor in the slightest degree affect the existing law of the state.

Relying upon this general theory, it may be argued that since the Pennsylvania statute uses the words "set fire to or burn" the legislature must have intended to give to each of the terms a different meaning, "for if they are synonymous, why were both used?" The word "or," it may be argued, "implies distinction, difference, etc."

To this it may be replied that this form of expression is used to convey a variety of meanings besides the one designated; as e.g., similarity, opposition, explanation. It is allowable to say similitude or resemblance, vice or virtue, to destroy by fire or by burning with fire. The conjunction used does not necessarily convey an idea of dissimilitude, resemblance or identity.

38STATE v. DENNIN, 32 Vt. 158.  
39STATE v. DENNIN, 32 Vt. 158.  
40STATE v. DENNIN, 32 Vt. 158.  
41STATE v. DENNIN, 32 Vt. 158.  
42GRAHAM v. STATE, 40 Ala. 659.  
43GRAHAM v. STATE, 40 Ala. 659.
If a setting fire to does not constitute a burning, it certainly constitutes an attempt to burn, and, since attempts to burn are made criminal by another section of the same statute, it may be argued the section defining arson should not be interpreted as making a mere attempt to burn, arson.

There are two answers to this argument: (1) The legislature may have intended to avoid the doubt and uncertainty as to what constitutes an attempt under the section providing for attempts generally by providing specifically that an attempt which amounted to a setting fire to should be criminal. (2) The legislature may have intended that an attempt which consisted of setting fire to should be a more serious crime than other attempts.

The fact that the statute making attempts criminal uses the words "attempts to set fire to or attempts to burn" is of no particular importance. If the legislature used the words "set fire to" and "burn" in one section as meaning the same thing, the words "attempt to set fire" and "attempt to burn" as used in another section may be reasonably interpreted in the same manner.

If the words "set fire to," as used in the section defining arson, mean less than a burning, then "burning" has been eliminated as an essential element of arson, but this is not of serious importance. Any actual ignition of a portion of the building however small was a burning. There should be little, if any, difference in the punishment imposed upon a person who sets fire to but does not burn and one who burns slightly. One deserves the same punishment as the other and the harm caused in both cases is practically the same.

The words used to describe the mental element in both the common law definition and the statutory definition are "wilful and malicious." These words as used in the common law definition were interpreted in a somewhat technical manner. There is no indication that the words as used in the statute will be interpreted in a different manner.

BURGLARY

At common law, burglary is the breaking and entering of the dwelling house of another in the night time with intent to commit a felony therein, whether or not the felony is committed.

---

44 State v. Dennin, 32 Vt. 158.
45 Sec. 908, Act of June 24, 1939, P.L. 872.
46 Sec. 908, Act of June 24, 1939, P.L. 872.
47 State v. Dennin, 32 Vt. 158.
48 "Burning" or "setting fire to" is by section 905 a felony for which the maximum punishment is ten years imprisonment.
49 An "attempt to burn or set fire to" is by section 908 a misdemeanor for which the maximum punishment is two years imprisonment.
50 5 C.J.S. 723.
51 "The distinction may appear to be a refinement unworthy to be upheld." State v. Hall, 93 N.C. 371.
52 5 C.J.S. 543; Sec. 905, Act of June 24, 1939, P.L. 872.
53 5 C.J.S. 721.
54 12 C.J.S. 664; Hackett v. Commonwealth, 15 Pa. 98.
Burglary in Pennsylvania is defined by statute. The statute provides: Whoever, at anytime, wilfully and maliciously enters any building with intent to commit any felony therein is guilty of burglary.2

The statutory definition differs from the common law definition in respect to
1. The character of the structure which may be the subject of burglary.
2. The character of the act which the commission of burglary requires.
3. The time at which burglary can be committed.

At common law burglary could be committed only upon a dwelling house,3 and a dwelling house was defined as a house in which the occupant or some member of his family or servant habitually slept.4 Furthermore the crime could be committed only in the night time,5 a time at which, at least in those days, people usually slept.

The crime was regarded as a forcible invasion of one's habitation,6 one's "castle of defense"7 at a time when sleep had disarmed the owner and rendered his castle defenseless.8

Because the crime was an attack upon one's habitation at a time when there was not light enough "to discern a man's face"9 so as to enable him to distinguish "friend from foe,"10 burglary was regarded as one of the most detestable11 of crimes and every burglar was regarded12 as a potential assassin.

The statutes which provide that burglary may be committed upon any building13 or upon any car, caboose, locomotive, motor vehicle, trailer, boat, aircraft, or other vehicle14 change very radically the entire nature of the crime, for such buildings or structures "are not under the same privileges, nor looked upon as a man's castle of defense, nor is the breaking of houses wherein no man resides attended with the same circumstance of midnight terror."15

At common law in order to be guilty of burglary one must break and enter.16 The requirement that there must be a breaking was substantial and important. It was not satisfied by "a mere legal clausum fregit, by leaping over invisible boundaries, which may constitute a civil trespass." There must be "a substantial and

---

2Sec. 901, Act of June 24, 1939, P.L. 872. See also Sec. 902 and 903.
3Hollister v. Commonwealth, 60 Pa. 103.
6Blackstone, 4 Comm. 225.
7Blackstone, 4 Comm. 224.
812 C.J.S. 677.
912 Blackstone, 4 Comm. 225.
10Blackstone, 4 Comm. 225.
13Sec. 901, Act. of June 24, 1939, P.L. 872.
14Sec. 903, Act of June 24, 1939, P.L. 872.
15Blackstone, 4 Comm. 225.
forcible" irruption.\textsuperscript{17} There must be a moving or displacement of some part of the dwelling house "which was relied upon as a security against intrusion and a means of safety to persons and property" and which if not moved or displaced, would have prevented an entry.\textsuperscript{18} But the requirement that the thing moved or displaced must have been relied upon as security against intrusion was gradually so interpreted by the courts that it came to mean very little. It was held that no provision for safety was required beyond what is included in the barest construction of a building intended to meet the requirements of civilized life and that the occupant of a dwelling house might rely upon substances and conditions which were altogether wanting in real security provided no opening were left.

The requirement as applied to ordinary means of entrance became limited to measures which are about equally adapted to guard against the entry of strangers bent upon crime and the unceremonious intrusion of friends.\textsuperscript{19}

The Pennsylvania Statute\textsuperscript{20} eliminates the requirement that there must be a breaking from the definition of burglary; but because of the interpretation which the courts had placed upon this requirement and the invention of the doctrine of "constructive breaking"\textsuperscript{21} this change in the law is not important.

At common law the breaking and entering must both be done at night.\textsuperscript{22} The "malignity of the offense" was said to "arise from its being done at the dead of night when all creation except beasts of prey are at rest; when sleep has disarmed the owner and rendered his castle defenseless."

The object of punishing burglary was not to prevent the trespasses involved in the breaking and entering but to punish such trespasses when done with felonious intent. Burglary was regarded as a serious crime because it was usually the first step to a wrong of greater magnitude.\textsuperscript{24} As stated by the Pennsylvania court every burglar was regarded as a potential assassin.\textsuperscript{25} The probability that these "wrongs of greater magnitude" may occur is surely greater when the breaking and entering is at night when it is impossible "to discern a man's face withal"\textsuperscript{26} so as to be able to distinguish friend from foe.\textsuperscript{27}

The provision of the Pennsylvania statute that burglary may be committed at any time\textsuperscript{28} is important.

\textsuperscript{17}Blackstone, 4 Comm. 225.
\textsuperscript{18}\textsc{State} v. \textsc{LaPoint}, 87 Vt. 115, 88 A. 523, 47 LRA(NS) 717.
\textsuperscript{19}\textsc{State} v. \textsc{LaPoint}, supra.
\textsuperscript{20}Sec. 901, Act of June 24, 1939, P.L. 872.
\textsuperscript{21}\textsc{Rolland} v. \textsc{Commonwealth}, 82 Pa. 306.
\textsuperscript{22}12 C.J.S. 677.
\textsuperscript{23}Blackstone, 4 Comm. 224.
\textsuperscript{24}Holmes, Common Law, p. 74.
\textsuperscript{25}\textsc{Commonwealth} v. \textsc{Le Grand}, 336 Pa. 511, 9 A. 2d 896.
\textsuperscript{26}Blackstone, 4 Comm. 224.
\textsuperscript{27}Blackstone, 4 Comm. 425.
\textsuperscript{28}Sec. 901, Act of June 24, 1939, P.L. 872.
LARCENY

Larceny at common law is "a phantom—an impalpable subtlety that eludes comprehension, and makes thoughts and fictions and relations the rule of conduct as to crime." Consequently no definition, however elaborate, can satisfactorily embody the various distinctions of the crime. Blackstone defines larceny as "the felonious taking and carrying away of the personal goods of another." This definition has been quoted with approval in many cases, and is sufficient for our present purpose.

The Penal Code does not define larceny but simply declares that "Whoever commits larceny is guilty of a felony." In spite of this declaration, however, "whoever commits larceny" is not under any and all circumstances "guilty of a felony" for it is specifically provided that one who commits larceny of "growing property" or "coal or iron ore" is guilty of a misdemeanor.

Although there is no general statutory definition of larceny in Pennsylvania the nature and extent of the crime has been changed in important respects by statutes.

These statutes may be classified as follows:

1. Those which relate to the character of the property which may be the subject of larceny.

2. Those which relate to the character of the acts which must be done in order to commit larceny.

3. Those which relate to the mental element of the crime of larceny. *Choses in Action* — In England, as in all Germanic countries, the idea of theft was too crude to go beyond punishing such dishonest dealings with another's personal property as took the violent and unmistakable form of change of possession. There can be little doubt that the "taking and carrying away" has been from the first the very core of the common law definition of larceny. It followed that the subject of larceny must have a corporeal existence, that is it must be something the physical presence, quantity or quality of which is detectable by the senses or by mechanical contrivance. It must be something which can be "taken and carried away," some portion of matter which could be separated bodily from the place where it was and transported into another place.

---

9. 11 Dick. L. Rev. 163.
It is physically impossible to "take and carry away" a right of action. No one can commit larceny of a debt or a share in a corporation. There is however, no difficulty in taking and carrying away the documents which are valuable as evidence of such rights. Nevertheless the common law held that such documents could not be the subject of larceny. "Strictly speaking a chose in action is an incorporeal right and of course cannot be subject to larceny; but the rule means that those instruments which are evidence of a chose in action are not the subject of larceny."10

Various reasons were given for this rule11 but it was very probably simply a technique employed by the judges to narrow the scope of larceny which was punishable by death and thus prevent executions for theft.

The rule that documents evidencing choses in action could not be the subject of larceny became unsuited to more modern economic conditions and has been almost entirely abrogated by statutes both in England and the United States. The rule can be abrogated entirely by a general statute of a very few appropriate words. The Penal Code, however, attempts to abrogate the rule by specifically enumerating the documents which may be the subject of larceny.12 Criminal statutes are strictly construed in Pennsylvania.13 In such a statute important omissions are almost sure to be discovered.14

Land — The common law conception of larceny as "a taking and carrying away" rendered land incapable of being stolen.15 It may seem strange that land, by far the most important form of wealth at that time, should have been left unprotected by the common law of larceny. The failure of the common law so to frame or modify its definition of larceny as to render land the subject of larceny was probably due to the fact that the successful permanent appropriation of property is ordinarily possible only where the property appropriated can be concealed or moved. This is not true of land, and it is nearly impossible to misappropriate land permanently, otherwise than by certain definite methods which are themselves criminal, such as forgery or impersonation, or the destruction of landmarks.16

The rule that land is not the subject of larceny was extended to all things which any legal fiction identified with land and included:

(1) Things growing out of the land or which adhere to the soil.
(2) Things so affixed to land by man that they acquire the character of land.
(3) Things which "savour of land."

10Reg. v. Watts, 6 Cox C.C. 304.
1126 Col. L. Rev. 676.
13Sec. 58, Act of May 28, 1937, P.L. 1019.
Things growing out of land — Things growing out of the land such as trees, crops of grain, vegetables and so forth are not the subject of larceny at common law.\textsuperscript{17}

This rule has been changed by a section of the penal code which provides that whoever unlawfully takes or carries away "any kind of property whatsoever growing on land" shall be guilty of larceny of growing property.\textsuperscript{18}

This statute is remarkable in three respects:

(1) It applies to property "growing or being on the land of another."\textsuperscript{19}

(2) It makes criminal the taking or carrying away of such property.\textsuperscript{20}

(3) It provides that such taking or carrying away shall be a misdemeanor, the maximum punishment for which is three years imprisonment, although larceny is declared by another section of the Penal Code to be a felony the maximum punishment for which is five years imprisonment.\textsuperscript{21}

Minerals — Minerals in the soil or the soil itself are not the subject of larceny at common law.\textsuperscript{22} This rule has been changed by a section of the Penal Code which provides "whoever mines or digs out any coal, iron or other minerals knowing the same to be upon the land of another without the consent of the owner "shall be guilty of larceny."\textsuperscript{23} This statute is remarkable in three respects:

(1) It substitutes a "mining or digging" for a "taking and carrying away" as the physical element of larceny.\textsuperscript{24}

(2) It makes the crime a misdemeanor although larceny is declared by another section of the Penal Code to be a felony.\textsuperscript{25}

(3) It provides that it shall not apply "to persons picking coal for their own domestic use."\textsuperscript{26}

Fixtures — Personal property so annexed to land by man as to acquire the character of realty are not the subject of larceny at common law.\textsuperscript{27} This rule has been changed by a section of the Penal Code. The rule could have been abrogated entirely by a general statute of a few appropriate words. The Penal Code attempts to abrogate it by specifically enumerating the fixtures which may be the subject of larceny.\textsuperscript{28} The statute provides that "whoever steals, or rips, cuts or breaks

\textsuperscript{17}STITZELL v. REYNOLDS, 67 Pa. 54.
\textsuperscript{18}Sec. 811, Act of June 24, 1939, P.L. 872.
\textsuperscript{19}No reason appears why stealing things being on the land of another should be only a misdemeanor. The stealing of such things was larceny at common law.
\textsuperscript{20}Larceny at common law requires a taking and carrying away. COMMONWEALTH v. HOLLISTER, 157 Pa. 13; COMMONWEALTH v. MARTIN, 12 Dist. 644.
\textsuperscript{21}Sec. 807, Act of June 24, 1939, P.L. 872.
\textsuperscript{22}See supra, note 7.
\textsuperscript{23}Sec. 812, Act of June 24, 1939, P.L. 872.
\textsuperscript{24}See supra, note 7.
\textsuperscript{25}Sec. 807, Act of June 24, 1939, P.L. 872.
\textsuperscript{26}Economic necessity has been held not to be a defense at common law. STATE v. MOE, 174 Wash. 303, 24 P2d 658; PEOPLE v. WHIPPLE, 100 Cal. Ap. 261, 279 P. 1008.
\textsuperscript{27}Sec. 813, Act of June 24, 1939, P.L. 872.
with intent to steal" shall be guilty of the crime. A ripping, cutting or breaking
"with intent to steal" may constitute what at common law would be only an at-
ttempt to commit larceny.29

Another section of the Penal Codes declares that it shall be larceny to "steal,
attempt to steal, cut or break with intent to steal" electric equipment of various
sorts.30

*Things which Savor of Realty* — A deed to land or other document evidencing
rights in land is not the subject of larceny at common law, because although not
growing out of or attached to land, they "savored of land."31 Applying this rule
it was held that a box or chest containing such documents was not the subject of
larceny because the documents "concerned realty" and the box or chest though it
be of great value shall be of the same nature as the charters.32

The rule has been abrogated by a section of the Penal Code which provides
that "whoever steals" an instrument in writing respecting any property, real or
personal shall be guilty of larceny.33

**Value** — At common law a thing to be the subject of larceny must be a thing
of value. 34 The exact measure of this value was never fixed and its indefiniteness
gave an opportunity for the exercise of ingenuity by the judges.35

In early times the rule apparently was that value meant serious, practical
important, as opposed to mere whim or fancy, and many things in which property
rights existed and which were of such appraisable importance that damages could
be recovered for their conversion were held not to be of such value as to be
the subject of larceny.36 This view was carried to an extreme by Hales, J., who
thought it "no felony to take a diamond, ruby, or other stone, (not set in gold or
otherwise), because they be not of a price of all men, howsoever, some do hold
them dear and precious."37

Applying this rule it was held that animals not fit for food or draught were
not larcenable.38. This principle was applied to dogs.39 and thus one of "man's
two best friends—his wife and his dogs—was singularly disregarded by the com-
mon law."40 Dogs are now made the subject of larceny by statute.41

---

30*Sec. 814, Act of June 24, 1939, P.L. 872.
32*Rex v. Wody*, Y.B. 49 Henry VI, 14 pl 9. "One of the most pedantic and unmeaning de-
33*Sec. 808, Act of June 24, 1939, P.L. 872.
37Standford, P.C. 275.
381 Hale P.C. 512.
40Ingham, Law of Animals, p. 57.
41See *Commonwealth v. Depuy*, 148 Pa. 201, 23 A. 896.
Larceny by Servant — At common law one who was in possession of a thing could not commit larceny of it. The technical reason for this rule was that larceny involved a "taking," and not merely a conversion, and, obviously, one could not take possession of a thing of which he already had possession. Criminal irresponsibility in such cases was probably due to "the peculiar genius and principles of the ancient law, which, as a man usually has the power of selecting those whom he chooses to trust, regarded any loss or prejudice resulting from the breach of trust rather as the entrustor's fault in not having taken proper pains to ascertain the character of the person trusted than as giving a title to criminal interposition."

There were originally probably no exceptions to this rule, but a number of exceptions to the rule were created by the courts by what has been called a process of "constructive enlargement."

At an early period it was held that the possession of property delivered by a master to his servant remained in the master and the servant had merely custody and therefore could commit larceny of such property. This rule, in course of time, was applied not merely to cases where domestic or other servants had the custody of property under the superintendence of the master, or upon his premises, but also to cases where the servant was entrusted with the property to use it beyond the scope of the master's superintendence.

Notwithstanding this apparently general rule, that the possession of a servant is to be regarded as the possession of the master, it was held, by a subtle and apparently unreasonable distinction, that where the master had no possession of the goods except by delivery to a servant, i.e. where the goods were delivered by a third person to the servant for his master, the servant could not be guilty of larceny of the goods.

The rule gave rise to many questions as to whether the possession of the property delivered to the servant had not previously vested in the master or whether subsequent to delivery possession had not been transferred to the master by some act of the servant.

This rule has been changed by statute everywhere. The Penal Code provides: "Whosoever, being in the employ of another, by virtue of such employment, receives or takes into his possession and chattel, money, or valuable security, which is or may be made the subject of larceny, for, or in the name of, or on account of his employer, and fraudulently embezzles the same, or any part thereof, although such

---

42 Peale, Borderland of Larceny, 6 Harv. L. Rev. 244; Kenny, Criminal Law, 15th Ed. p. 210
43JOHNSON v. PEOPLE, 113 Ill. 99.
44Fourth Report of the Criminal Law Commissioners, p. 58.
46Beale, Borderland of Larceny, 6 Harv. L. Rev. 244.
49First Report of the Criminal Law Commissioners, p. 6; COMMONWEALTH v. RYAN, supra.
chattel, money, or valuable security was not received into possession of such master, otherwise than by the actual possession of the employee, is guilty of larceny."

Larceny by Bailee — The fiction of "constructive possession," according to which two persons may be in possession of the same thing at the same time—one actually and the other constructively or legally, by the use of which it was held that a servant could commit larceny of goods delivered to him by his master, was extended to cases where property was delivered by the owner to a person not in his regular employ in order that the latter may use it in the presence and under the control of the owner. It was also extended to cases where property in a covering had been delivered to a person who had broken the covering and converted some or all of the property therein. It was held that the converter was guilty of larceny. The theory of this rule was that the act of breaking the covering vested a constructive possession in the owner, and that the owner thus being, in legal construction, repossessed of the thing, the person in actual possession was considered to have taken it from the constructive possession of the owner.

This exceptional doctrine was originally confined to cases where property was delivered inclosed in an outside covering and there was a breaking of the covering. The taking of any parts of the contents was held to be larceny. The doctrine has been called larceny "by breaking the bale."

But the doctrine was extended to cases where there was no breaking of an outside covering but where several articles or a quantity of a substance was delivered to the defendant and he appropriated some, but not all, of the articles, or some, but not all, of the substance. The doctrine of larceny by "breaking bale" thus became the doctrine of larceny by "breaking bulk."

Still later it was held, in some cases, that where possession of property was delivered to a person for a certain purpose or time and was used for a different purpose or kept for a longer time, the bailment was terminated and constructive possession was in the owner, though the physical possession was in the bailee, and a subsequent conversion by the bailee was taking from the possession of the owner and therefore larceny. This doctrine may be called larceny "after termination of bailment."

Both the doctrine of "larceny by breaking bulk" and larceny "after termination of bailment" have been impliedly recognized by the legislature as being part of the common law of Pennsylvania.

---

50Sec. 815, Act of June 24, 1939, P.L. 872.
53Perkins, Elements of Police Science, p. 482.
54COMMONWEALTH v. JAMES, 1 Pick. 375; COMMONWEALTH v. BROWN, 4 Mass. 580.
55Tunnard's Case, 2 East P.C. 694; JOHNSON v. PEOPLE, 113 Ill. 99. There are authorities contra. HILL v. STATE, 57 Wis. 377, 15 N.W. 405.
56Sec. 816, Act of June 24, 1939, P.L. 872.
The general rule of the common law however continued to be that a bailee could not be guilty of larceny of the bailed property. This general rule has been changed by statute. The Penal Code provides: "Whoever, being a bailee of any property, fraudulently takes or converts the same to his own use or to the use of any person except the owner although he does not break bulk, or otherwise determine the bailment is guilty of larceny." 

Embezzlement — The "crude and early notion" that every person must or ought to know the character of every person to whom his property was entrusted, which greatly tended to encourage villainy was partially impugned by the courts and the legislature in creating exceptions to the rule that one in possession of a thing could commit larceny of it.

The effects of the rule were also obviated by the creation by the legislature of the crime of embezzlement. The crime of embezzlement in Pennsylvania is the result of enactment, reenactment and amendment without any apparent plan. The Penal Code makes criminal embezzlement by public officers, by tax collectors, by bankers, brokers, etc., by attorneys in fact, by consignees or factors, by officers of corporations, by officers of trust, annuity and insurance companies, by officers, and agents of banks, corporations and associations, by trustees and by transporters. There is also a statute providing generally that "Whoever, having received or having possession, in any capacity or by any means or manner, of any money or property of any kind whatsoever, of or belonging to any other person fraudulently withholds, converts or applies the same is guilty of a felony." The crime defined by this statute is not named larceny or embezzlement but fraudulent conversion. The general language of this statute is broad enough to include many of the crimes provided for by the embezzlement statutes. Indeed, the other statutes seem to be so detailed, and complete in their specifications that there seems to be little need of the general statute. It has been specifically held that the statute applies to persons already covered by the other statutes.

68 Sec. 816, Act of June 24, 1939, P.L. 872.
69 See supra. Notes 52 and 55.
60 See sec. 815 and 816, Act of June 24, 1939, P.L. 872.
61 Criminal Breaches of Trust, 39 Col. L. Rev. 1004.
62 Sec. 822, Act of June 24, 1939, P.L. 872.
63 Sec. 823.
64 Sec. 824.
65 Sec. 825.
66 Sec. 826.
67 Sec. 826.
68 Sec. 827.
69 Sec. 828.
70 Sec. 829.
71 Sec. 829.
72 Sec. 830.
73 Sec. 831.
74 Sec. 834.
75 40 Dick. L. Rev. 58.
Criminal Intent — At common law an intent to deprive the owner permanently of his property in the thing taken was an essential element of the crime of larceny.76 This rule has been changed as to bailees by the Penal Code which provides that if a bailee "wilfully fails to return" the bailed property to the owner "in accordance with the terms of the agreement between the bailee and the owner," he is guilty of larceny.77

Mayhem

"Mayhem, at common law, is defined to be the violently depriving of another of the use of such of his members as may render him less able in fighting."1

By the ancient common law mayhem was punished by a forfeiture of member for member, *membrum pro membro*, and, as a consequence of this forfeiture, it was considered a felony.2 The authorities are in conflict as to whether it was a felony after the retaliatory punishment was superseded by fine and imprisonment.8 In Pennsylvania it has been held that mayhem was always a felony at common law.4

The creation and punishment of the crime of mayhem was an early recognition by the criminal law of the social interest which a community has in the life and strength of its members, but this recognition was "not only on a narrow basis but at a low level."5 In these early days fighting and war were the rule rather than the exception, and the need for an efficient fighting force was sufficient to establish a social interest in preserving the individual members of the community from being harmed in such manner as to weaken them as fighting men. The law of mayhem discloses this social interest in crude form.6

The physical element of the crime, at common law, is the infliction, upon the person of another, of an injury that "debilitates or renders him less warlike and not merely one which disfigures him."7 The limbs, the injury of which is mayhem, were later particularly enumerated and include the arms, legs, eyes, front teeth and the male organs of generation.8 The injury must be permanent.9 and such as to deprive substantially the injured party of the member.10

76*Commonwealth v. Wilson*, 1 Phila. 80.
77Sec. 816, Act of June 24, 1939, P.L. 872.
3Blackstone, 4 Comm. 285. The retaliatory punishment was considered inadequate because upon a repetition of the crime the punishment could not be repeated.
5Perkins, 'Elements of Police Science,' p. 411.
6Perkins, *supra*.
8Robinson, Elementary Law, sec. 32; 16 ALR 955.
9*State v. Johnson*, 58 Ohio St. 417; 16 ALR 959.
The mental element of mayhem at common law is a specific intent to maim the person maimed\textsuperscript{11} or another person.\textsuperscript{12} The purpose of the offender must be to maim and not simply to beat or disfigure him. Therefore wounds inflicted by accident, or negligence, or in the ordinary course of combat or even in a premeditated assault, do not amount to mayhem at common law unless mayhem as such is intended, whatever other crime of greater or less magnitude they may involve.\textsuperscript{13}

It is held, however, in some cases, that “such intent may be inferred or presumed if an act is done deliberately and the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act.”\textsuperscript{14} But this would seem to be true only where the character of the act and the circumstances which attended it, as distinguished from its consequences, afford reasonable ground for the inference.\textsuperscript{15}

The Penal Code\textsuperscript{16} defines mayhem. The definition is substantially a reenactment of a section of the Penal Code of 1860,\textsuperscript{17} which was itself taken from the acts of 1794\textsuperscript{18} and 1829.\textsuperscript{19}

The statutory crime of mayhem differs from the common law crime in respect to both (a) the physical element and (b) the mental element.

The statutory definition of the physical element of the crime indicates that there is at present a greater social interest in bodily integrity of individuals than formerly. The statutory crime includes the disfigurement of the body by injuries which do not affect the fighting power.\textsuperscript{20} Injuries to the nose, tongue, ears and lips are specifically included.\textsuperscript{21}

The mental element of the statutory crime is not clearly defined. The statute in reality defines two kinds of mayhem.\textsuperscript{22}

In the first, it is necessary that the injury be inflicted "on purpose, of malice aforethought, by lying in wait" and "with intent to maim or disfigure" the person injured.\textsuperscript{23} These words have been held to imply more than the malice required in murder and to require express proof of an intent to disfigure previously conceived.\textsuperscript{24} The infliction of the injury by one who is "lying in wait" is an indispensable\textsuperscript{25} requisite, but one who intends to inflict the kind of injury mentioned

\textsuperscript{11}COMMONWEALTH v. PETCK, 2 D. \& C. 227. See LRA 1916E 494.
\textsuperscript{12}East P.C. 396.
\textsuperscript{13}Robinson, Elementary Law. Sec. 540.
\textsuperscript{14}COMMONWEALTH v. PETCK, 2 D. \& C. 227. See LRA 1916E 494.
\textsuperscript{15}Robinson, Elementary Law, sec. 540.
\textsuperscript{16}Sec. 715, Act of June 24, 1939, P.L. 872.
\textsuperscript{17}Sec. 80, Act of March 31, 1860, P.L. 382.
\textsuperscript{18}Sec. 6, Act of April 22, 1794, 3 Sm. L. 188.
\textsuperscript{19}Sec. 4, Act of April 22, 1829, 10 Sm. L. 440.
\textsuperscript{20}See 16 ALR 955.
\textsuperscript{21}SCOTT v. COMMONWEALTH, 6 S. \& R. 224.
\textsuperscript{22}Trickett, Criminal Law, v. 1, p. 658.
\textsuperscript{23}REPUBLICA v. REIKER, 3 Yeates 282; SCOTT v. COMMONWEALTH, 6 S. \& R. 224.
\textsuperscript{24}STATE v. McBIRNIE, Add. 28.
\textsuperscript{25}REPUBLICA v. REIKER, 3 Yeates 282.
in the statute and by deliberately watching for an opportunity carries this intention into execution may be said to "lie in wait" and to act "on purpose." The crime is not committed, however, when "in a hasty quarrel a young ruffian frantic with liquor gouges and bruises the eye and bites a piece out of the nostrils of his opponent."

In the second kind of statutory mayhem, the statute requires that the injury be inflicted "voluntarily, maliciously and of purpose." It has been held that although a general intention to maim or disfigure is sufficient in the first kind of statutory mayhem, in the second kind there must be an intent to maim or disfigure in "the particular manner" in which it was accomplished. One cannot be convicted of this class of mayhem for putting out an eye unless there was a specific intent to put out the eye.

It has been held that the enactment of the statute of which the section of the Penal Code defining mayhem is a reenactment did not abolish the common law crime of mayhem. It may therefore be argued that one may still be indicted and convicted of common law mayhem.

**MURDER**

Murder, at common law, was unlawful homicide with malice aforethought. The specific distinction between murder and other forms of homicide was expressed by the phrase "malice aforethought." This phrase is peculiarly confusing to laymen, and to many lawyers and judges, because it has a meaning, in the definition of murder, different from that which it has in popular speech or, ordinarily, in legal language. It is merely a convenient comprehensive expression by which to describe all the various states of mind and circumstances which have been held to render and are now deemed to constitute a homicide murder. It includes any one of the following states of mind, preceding or co-existing with the act by which death is caused:

1. An intention to kill.
2. An intention to cause grievous bodily harm.

---

26 *Respublica v. Langcake*, 1 Yeates 415.
28 *Respublica v. Langcake*, 1 Yeates 415.
29 *Respublica v. Langcake*, 1 Yeates 415.
30 *Respublica v. Langcake*, 1 Yeates 415.
31 *Respublica v. Langcake*, 1 Yeates 415.
33 *Trickett, Criminal Law*, v. 1, p. 660.

---

129 Dick. L. Rev. 68.
229 Dick. L. Rev. 68.
3. Knowledge that the act which causes death would probably cause death or grievous bodily harm.  
4. An intention to commit a felony.  
5. An intention to oppose any officer of justice in discharging certain of his duties.  

It may therefore be truly said that the term "malice aforethought" is now only an arbitrary symbol. The malice may have in it nothing really malicious, and need never be aforethought, except that every desire must necessarily come before—though perhaps only an instant before—the act which is desired. The word "aforethought" has therefore become either false or superfluous. The word "malice" is neither; but it is apt to be misleading for it is not now employed in either its original or popular meaning.

There is no statutory definition of murder in Pennsylvania. It is only by the common law that murder is defined. But although there is no statute defining murder, there are statutes which affect the scope and extent of the crime of murder although they do not define it.

These statutes are of three classes:

(1) Those which declare that a certain kind of homicide shall be murder which was not murder at common law.
(2) Those which declare that a certain kind of homicide shall not be murder, which was murder at common law.
(3) Those which divide murder into degrees.

The Penal Code declares that death resulting from wilful and malicious injury to railroads committed with intent to "obstruct, upset, derail, overthrow, injure or destroy an engine, tender, carriage, car or track, or to endanger the safety of any person" is a felony and that "where the life of a human being is destroyed by, or as a result of" such conduct the offender shall be deemed guilty of murder in the first degree.

This statute apparently makes certain conduct murder in the first degree, and consequently murder, which would not have been murder at common law.

The Penal Code, in a section entitled "Protection of Accused from Mob Violence," declares that the taking or rescuing of a person held in custody under a warrant issued in pursuance of the statute, if followed by the killing of such a person, shall constitute murder. As the statute does not require that death or great bodily harm should have been intended or that there be a consciousness of the

---

8 The correctness of this doctrine has been questioned. See 18 Corn. L. Q. 373.
11 Sec. 919, Act of June 24, 1939, P.L. 872.
12 Sec. 326, Act of June 24, 1939, P.L. 872.
danger of death or great bodily harm, the statute seems to designate as murder, homicides which would not be murder at common law, unless the principle that the fifth class of homicide is murder at common law is adopted.

It has been held that the unintentional killing of a woman resulting from an attempt to commit an abortion upon her when she was quick with child is murder at common law and murder in the second degree in Pennsylvania because "although death was not intended, yet the acts are of a nature deliberate and malicious and necessarily attended with great danger to the person upon whom they are practiced." But the Penal Code declares that such a killing shall be a felony, and it is held that since the passage of this statute death resulting from an attempt to commit abortion is not murder, because the statute took such a killing out of the class of killings designated as murder and made it a felony of a lesser grade.

The Penal Code divides murder into degrees by declaring that all "murder" perpetrated in certain designated ways shall be murder in the first degree and all other kinds of "murder" shall be murder in the second degree.

This statute does not define murder or change the definition of murder in any way. It makes nothing murder which would not be murder in absence of the statute; nor does it make anything which would be murder without the statute less or other than murder. It simply divides murder at common law into two degrees.

It follows that:

1. Murder in the first degree plus murder in the second degree equals murder at common law.
2. Murder at common law minus murder in the first degree equals murder in the second degree.

Indeed, as the statute, after defining murder in the first degree, simply declared that "all other kinds of murder shall be deemed murder in the second degree," it is necessary to solve the second equation in order to ascertain what murder in the second degree is.

Manslaughter

Manslaughter, at common law, was unlawful homicide with malice aforethought. The sole difference between murder and manslaughter was the absence of malice aforethought. It has been said that there is no crime known to our law so various in the considerations applicable to it as that of manslaughter. The com-
mon law focused its attention upon homicides committed with malice aforethought and homicides committed with justification or excuse. All homicides not committed with malice or with justification or excuse were considered manslaughter. Manslaughter is therefore a residual crime, and confusion may be avoided by thinking of the crime by a process of elimination. Manslaughter is any homicide which is neither murder or justifiable or excusable.

At common law, and in the colony, and originally, in the state, of Pennsylvania there was no difference in respect to indictment or punishment between what are now called voluntary and involuntary manslaughter. Both were embraced within the term manslaughter and punishable as a felony without benefit of clergy.

Blackstone seems to have been the first to make a formal classification of manslaughter into voluntary or involuntary.\(^4\) The act of 1794\(^5\) made a similar classification and this classification was followed in the Criminal Code of 1860\(^6\) and in the Penal Code of 1939.\(^7\)

**Voluntary Manslaughter**

Voluntary manslaughter, at common law, is \((1)\) an unlawful homicide \((2)\) by an act committed with \((a)\) an intent to kill or inflict great bodily harm or \((b)\) knowledge that it is likely to kill or inflict great bodily harm, \((3)\) as a result of passion \((4)\) caused by legally adequate provocation \((5)\) before the expiration of a reasonable time for the passion to cool.\(^1\)

The first \((1)\) element prevents the homicide from being justifiable or excusable. The second \((2)\) element prevents it from being involuntary manslaughter. The third \((3)\), fourth \((4)\) and fifth \((5)\) elements prevent it from being murder.

The Penal Code\(^2\) adopts the common law definition of voluntary manslaughter by declaring that "Whoever is convicted of voluntary manslaughter is guilty of a felony."

There is therefore no difference between voluntary manslaughter in Pennsylvania and at common law.

**Involuntary Manslaughter**

Involuntary manslaughter at common law is frequently defined as "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily
harm, or, in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.”

Involuntary manslaughter is said to be of three classes; by malfeasance, by misfeasance, and by non-feasance. But in reality there are but two classes, by malfeasance and by misfeasance. Involuntary manslaughter may result from an omission, but to classify it as a special class is misleading. Death caused by an omission is not always involuntary manslaughter. It may be murder or excusable homicide.

The act of 1794 declared that “involuntary manslaughter happening in consequence of an unlawful act” should be criminal, and this was substantially reenacted in section 79 of the Criminal Code of 1860. The Penal Code now declares that “Whoever is convicted of involuntary manslaughter happening in consequence of an unlawful act, or the doing of a lawful act in an unlawful way is guilty of a misdemeanor.”

The definition of involuntary manslaughter in the act of 1794 and the act of 1860 as homicide “in consequence of an unlawful act” was construed by the courts “in accordance with the best authorities in England to apply to and embrace not only accidental death caused by an unlawful act but also accidental death caused by an act not strictly unlawful but done in an unlawful manner without due caution.” It would seem that, a fortiori, the more specific statement of the act of 1939 will receive a similar construction. It follows therefore that the definition of involuntary manslaughter in Pennsylvania is the same as at common law.

Rape

Rape, at common law, is defined by Blackstone as “the carnal knowledge of a woman forcibly and against her will.” This definition has been quoted frequently, and has been declared to be “reasonably explicit,” but it is inadequate and somewhat misleading.

---

2 Clark and Marshall, Crimes, p. 324.
3 Perkins, Elements of Police Science, p. 421.
4 Act of April 22, 1794, 3 Sm. L. 186.
5 Act of March 31, 1860, P.L. 382.
6 Sec. 703, Act of June 24, 1939, P.L. 872.
10 Trickett, Criminal Law v. 2. p. 657.
The phrase "against her will" has been interpreted by the courts to mean no more than "without her consent," and "force," as an element of rape, has become a very attenuated concept, because it has been held that the required force may be "implied" or "constructive," and that "whenever there is carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently in the wrongful act itself all the force which the law demands as an element of the crime." 

It has therefore been asserted that the distinction between rape at common law and other acts of illicit carnal knowledge is the absence of consent. This absence of consent need not be shown by "the same kind of proof" in all cases. There is the requisite absence of consent where the carnal knowledge is accomplished:

(a) by overcoming resistance by force, or
(b) under conditions rendering conscious consent impossible, or
(c) with a person under ten years of age, or
(d) by threats of certain injuries of
(e) by certain kinds of fraud.

The common law crime of rape is incorporated into the statutory law of Pennsylvania by the Penal Code, which declares, "Whoever has unlawful carnal knowledge of a woman forcibly and against her will is guilty of rape, a felony." But the Penal Code also declares that "Whoever, being of the age of sixteen and upwards, unlawfully and carnally knows and abuses any woman child under

---

6 BAILEY v. COMMONWEALTH, 82 Va. 107. "Forcibly does not mean violently but with that description of force which must be exercised in order to accomplish the act." COMMONWEALTH v. STEPHENS, 143 Pa. Super. 394, 17 A2d. 919.
8 See opinion of Revelle, J., in STATE v. HELDERLE, —Mo.—, 186 S.W. 696, LRA 1916F 735.
9 COMMONWEALTH v. CHILDS, 2 Pitts. 391; COMMONWEALTH v. FEIST, 50 Pa. Super. 152; COMMONWEALTH v. MORAN, 97 Pa. Super. 120.
10 "The authorities agree that intercourse is against a woman's will when for any reason she is not in a position to exercise any judgment in the matter, as where she is unconscious from intoxication, drugs, or other causes, or asleep." COMMONWEALTH v. STEPHENS, 143 Pa. Super. 394, 17 A2d 919.
11 "A child under the age of ten is so young as to be incapable of any will in sexual matters." COMMONWEALTH v. SMITH, 134 Pa. Super. 183, 3 A2d 1007; See also COMMONWEALTH v. CAYUS, 88 Pa. Super. 227.
12 COMMONWEALTH v. CHILDS, 2 Pitts. 391; STEVICK v. COMMONWEALTH, 78 Pa. 460. Threats of great bodily harm are sufficient.
13 REG. v. FLATTERY, 13 Cox C. C. 538. This rule is of very limited application. The fraud must relate to the nature of the act. "No amount of deception, or even fraud, however villainous or outrageous will make illicit intercourse rape where the woman, induced or persuaded, consents to the act." COMMONWEALTH v. CHILDS, 2 Pitts. 391. See also COMMONWEALTH v. DUCHNITZ, 42 Pa. C. C. 651.
15 The term "abuse" means carnal knowledge and is not to be construed as requiring injury to the genital organs in addition to carnal knowledge. STATE v. SEBASTIAN, 81 Conn. 1, 69 A. 1054. But see COMMONWEALTH v. EXLER, 61 Pa. Super. 423.
the age of sixteen years, with or without her consent, is guilty of rape, a felony" provided that if the jury shall find that such woman child was not of good repute and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape." This makes consensual intercourse, without force, threats, or fraud, by a male sixteen years or more old with a female above the age of ten years but less than sixteen years old, and of good repute, rape.

The crime of rape in Pennsylvania therefore includes, (1) Common law rape, and (2) Consensual intercourse by a male sixteen or more years old with a female ten or more but less than sixteen years old and of good repute.

The law of Pennsylvania therefore differs from the common law with respect to consensual intercourse without force, threats or fraud. In Pennsylvania such intercourse is rape if

1. The male is
   (a) fourteen or more years old, or
   (b) sixteen or more years old if the female is ten or more years old.

2. The female is
   (a) less than 10 years old, or
   (b) less than sixteen years old if the male is sixteen or more years old.

3. The female is of good repute if she is ten or more years old.

The burden of proof as to the age of both the male and female is on the prosecution. The burden of proof as to the "repute" of the female is on the defense.

---


17Sec. 721, Act of June 24, 1939, P. L. 872.

18Consensual intercourse with a female less than ten years old was rape at common law. COMMONWEALTH v. SMITH, 134 Pa. Super. 183, 3 A2d 1007.


21See supra, Note 18.

22A boy under fourteen is incapable of committing rape according to the common law. COMMONWEALTH v. HUMMEL, 17 Dist. 713; COMMONWEALTH v. UNDERHILL, Lewes, Digest of Criminal Law. 102. A man is apparently never legally too old to commit rape. COMMONWEALTH v. RAMSTEED, 113 Pa. Super. 548, 17 A. 772.


Robbery

Robbery at common law is "the felonious taking of property from the person of another by force."\(^1\)

Originally the crime was confined to cases in which the taking was accomplished by actual violence to the person,\(^2\) but later it was held that the force may be actual or constructive.\(^3\) "Actual force" is applied to the body, "constructive force" is by threatening words or gestures and operates on the mind.\(^4\)

The crime was extended not only to cases where there is a threat of bodily violence to the person robbed but also to certain cases in which there was merely a threat of injury to property\(^5\) or reputation.\(^6\) The limits of the law of robbery in respect to the nature of the threat sufficient to constitute the crime became very vague\(^7\) and it became impossible, in any definition to comprehend all the cases which may arise.\(^8\)

At first robbery was regarded as an independent substantive crime and not merely as a species of aggravated larceny\(^9\) but later it came generally to be considered as a species of larceny aggravated by the circumstances that the taking of the property was from the person or presence of another and was accomplished by violence or putting in fear.\(^10\)

In reality the crime of robbery at common law has two aspects: (1) It is a species of larceny—larceny aggravated by the circumstances that the taking was by violence to the person, actual or threatened; (2) It was a species of extortion in which the property was obtained by threats other than those of bodily violence, and which included some cases which if not considered robbery, would not have been criminal at all.\(^11\)

The inclusion of these two classes of obtaining of property in the one crime of robbery was effected by a resort to the fiction of "constructive force"\(^12\) and it made the precise limits of the crime of robbery indistinct.\(^13\)

---

\(^1\)Commonwealth v. Snelling, 4 Binney 383.
\(^2\)Fourth Report of Commissioners on Criminal Law, p. 69.
\(^3\)Commonwealth v. Snelling, 4 Binney 383.
\(^4\)Commonwealth v. Snelling, 4 Binney 383. The crime is therefore sometimes defined as "the felonious and forcible taking of property of another from his person or in his presence, against his will by violence or putting him in fear." Commonwealth v. Shrope, 47 Pa. C. C. 134; Commonwealth v. Dantine, 261 Pa. 496, 104 A. 672.
\(^5\)East, II P. C. 732. (A threat to burn or destroy a dwelling house.)
\(^7\)Fourth Report of Commissioners on Criminal Law, p. 69.
\(^8\)Commonwealth v. Snelling, 4 Binney 383.
\(^9\)Perkins, Elements of Police Science.
\(^10\)"The crime of robbery at common law is larceny from the person accompanied by violence or putting in fear." Commonwealth v. Mills, 3 Pa. Super. 161.
\(^11\)Michael and Wechsler, Criminal Law and Its Administration, p. 383.
\(^12\)Commonwealth v. Snelling, 4 Binney 383.
The Penal Code does not define robbery or specifically declare that robbery shall constitute a crime. It does declare that "Whoever robs another, or steals property from the person of another, or assaults any person with intent to rob him, or by menaces or force demands any property of another, with intent, to steal the same, is guilty of a felony."

In construing a similar section of the Criminal Code of 1860, it was held that it embraced four distinct crimes and that though it did not define robbery, the declaration that anyone who "robs another" shall be guilty of a felony, incorporated the common law crime of robbery into the law of Pennsylvania.

It is true that the section of the Penal Code which makes the four acts criminal is entitled, enigmatically, "Robbery and Robbery by Assault and Force," but, whatever may be the implications of this title, it can hardly have been intended to designate all four of the crimes included as robbery. It follows, therefore, that the crime of robbery in Pennsylvania is the same as robbery at common law.

The Penal Code provides a more severe punishment "for the offense known as robbery with aggravating circumstances" than it does for simple robbery. It declares that "Whoever, being armed with a weapon or instrument, robs or assaults with intent to rob another; or together with one or more person or persons, robs or assaults with intent to rob; or robs any person and at the same time, or immediately before or after such robbery, beats, strikes or ill uses any person, or does violence to such person, is guilty of a felony."

Under this act three sets of circumstances constitute aggravated robbery. First, if the defendant be armed with a weapon; second, if the robbery be committed in company with one or more persons; third, if the defendant at the time of the robbery, or immediately before or after such robbery, shall beat, strike or ill use any person, or do violence to the person robbed. "Anyone of these three sets of circumstances will bring the crime of robbery within this section."

The Penal Code also provides a more severe punishment for what it designates as "Robbery of Bank Vaults" and "Train Robbery."
SODOMY

Sodomy, peccatum illud horrible, inter Christianos non nominandum, at common law was regarded as a crime of "deeper malignity" than rape, and was originally punished very severely, but because of a prudish refusal by the authorities to describe the crime with frankness the precise definition and scope of the crime are doubtful.

It is agreed that the crime involves unnatural carnal copulation, but there is a disagreement as to whether this copulation involved emission as well as penetration, whether it must be between two human beings, whether it could be between two women or between a human being and a beast, or animal or fowl, and as to the organs which must be involved in the copulation. There was also a doubt at one time whether the crime was a felony.

Many but not all of these doubts are resolved by the Penal Code of Pennsylvania, which provides: "Whoever carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus or by or with the mouth, or whoever voluntarily submits to such carnal knowledge is guilty of sodomy, a felony."

This statute also provides that any sexual penetration however slight shall be sufficient to complete the offense of sodomy.

TREASON

At common law treason was punished by forfeiture and was therefore embraced in the common law definition of felony, but the differences in punishment and procedure in case of treason and those of other felonies became so numerous and important that treason came to be regarded as a class of crime distinct from that of felony and misdemeanor. It has been said that it is doubtful whether in the United States at the present time treason is regarded as a class of crime distinct from felony. Certainly it is commonly regarded as a felony, and most modern statutes classify crimes as felonies and misdemeanors only. The Penal Code declares that treason is a felony.

---

1 Blackstone, 4 Comm. 215.
2 At one time the punishment was burning to death or burying alive. Blackstone, 4 Comm. 215.
3 Blackstone, 4 Comm. 215.
4 Hawk P. C. 357.
5 May, Criminal Law, 4th ed. p. 244.
6 Bishop, Criminal Law, v. 1. sec. 503.
7 May two women commit the crime? In just what manner may the crime be committed by a human being with an animal or a fowl?
8 Sec. 501, Act of June 24, 1939, P. L. 872.

---

1 It was a felony and "something more." Holdsworth, History of English Law, v. 2, p. 360; Wilson, Works, v. 2. p. 348.
3 McClain, Criminal Law, v. 1. p. 20; BELL v. COMMONWEALTH, 167 Va. 526, 189 S. E. 441
4 BELL v. COMMONWEALTH, supra; Report, Pennsylvania Crimes Commission, p. 40.
5 PEOPLE v. WAR, 20 Cal 117; BELL v. COMMONWEALTH, supra.
At common law treason consisted of a breach of faith due to
(1) the King from his subjects, or
(2) a superior from his inferiors.\(^7\)

**PETIT TREASON**

The second kind of treason, which was called petit treason, could be committed only by the killing of the superior by his inferior. It comprised cases where a wife murdered her husband, an ecclesiastic his lord or ordinary, or a servant his master.\(^8\)

The Penal Code\(^9\) abolishes this crime by declaring that "the offense formerly known as petit treason is hereby declared to be murder and shall be indictable, triable and punishable only as such."

**HIGH TREASON**

The crime of high treason was in mediaeval times a powerful political weapon of the crown in its struggle against its two great rivals, the church and the baronage. An ecclesiastic who was accused of this crime could not claim "benefit of clergy," and the estate of one who was convicted of this crime was forfeited to the Crown and not to the immediate feudal superior of the convict.\(^10\)

The result was that the judges, attentive to the interests of the King, who appointed them, expanded the definition of treason until it became a most comprehensive crime, including any kind of injury to the King's rights.\(^11\)

This tendency to punish political enemies by a conviction of the elastic crime of treason finally provoked a reaction which led to the passage of the Treason Act of 1351.\(^12\) This statute, which is one of the few instances in which a statutory definition of an important crime superseded the common law in regard to it, limited high treason to seven forms. The interpretation of this statute by the English judges through the succeeding generations was so liberal as to alter substantially the conception of treason as defined by the statute. An offense of the political importance of treason cannot remain static while the relations of individuals to the state suffer a complete revolution. The wording of the statute was largely directed to the protection of a personal king. The construction placed upon the statute by the judges was designed to effect the security of the state.\(^13\)

---

\(^6\)Sec. 201, Act of June 24, 1939, P. L. 872.
\(^7\)Stephen, *Commentaries*, 18th ed. v. 4. p. 121.
\(^9\)Sec. 702, Act of June 24, 1939, P. L. 872.
\(^12\)25 Edw. III, st. 3, c. 2.
The fact that, in England there had been great uncertainty, not only before but after the act of 1351, as to the definition of treason, and that prosecutions for treason, had been used as instruments of political oppression, caused the framers of the United States Constitution to incorporate therein a definition of treason. The Constitution provides, in language taken from the act of 1351 but embodying only two of the seven forms of treason defined by that statute, that "Treason against the United States shall consist only of levying war against them, or adhering to their enemies, giving them aid and comfort."

The Penal Code, indicating the assumption that there may be treason against the state as well as against the federal government, declares that "Whoever, owing allegiance to the Commonwealth of Pennsylvania, levies war against the same, or adheres to the enemies thereof, giving them aid or comfort is guilty of treason against the Commonwealth of Pennsylvania, a felony."

The Constitution and the statute include the two forms of treason specified in the Act of 1351 which attack the nation or state itself, but do not include the five forms of treason specified in the Act of 1351 which are directed against the rulers or at the mere instruments of sovereignty. The definitions of treason against the United States and treason against the Commonwealth of Pennsylvania are in harmony with the general conception in this country that the nation and state are the organized political societies and not the individuals or agencies by whom, for the time being, their affairs are conducted.

---

14Art. 3, Sec. 3.
15The act of 1351 provided that it should also be treason to (1) compass the death of the king, of his queen or their eldest son and heir, (2) violate the Kings consort, his eldest unmarried daughter or the wife of his eldest son and heir, (3) kill the Chancellor or the Treasurer or the King's Justices, when in their places doing their offices, (4) counterfeit the King's Great Seal, and (5) counterfeit his privy seal or money.
16Sec. 201, Act of June 24, 1939, P. L. 872.