

83. *What is petit treason\*?—203.*

*Parva proditio*, or petit treason, is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason.

84. *In what ways may petit treason happen?—203.*

In three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person his superior, to whom he or she owes faith and obedience.

85. *What crime is that of the servant who kills his master, whom he has left, upon a grudge conceived against him during his service?—203.*

Petit treason; for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention.

86. *If a wife be divorced a mensa et thoro, and she killed her divorced husband, what was her crime?—203.*

She was guilty of petit treason, as the *vinculum matrimonii* still subsisted.

## CHAPTER XV.

## OF OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

1. *Of what degrees of guilt are offenses affecting the security of the person of a private subject while living?—205.*

Of these, some are felonious, and in their nature capital; others are simple misdemeanors, and visited with a lighter punishment.

\* The distinction between petit treason and murder was abolished by 9 George IV., c. 31, s. 2.

2. *What are the felonies?—205–215.*

The felonious offenses more immediately against the personal security of the subject, are: 1. Mayhem. 2. Forcible abduction and marriage. 3. Rape. 4. The crime against nature.

3. *What is the crime of rape?—210.*

The carnal knowledge of a woman forcibly, and against her will.

4. *Who is presumed by law incapable to commit a rape?—212.*

A male infant under the age of fourteen years.

5. *May rape be committed upon a concubine or harlot?—212, 213.*

The law of England holds it to be felony to force even a concubine or harlot, because the woman may have forsaken that unlawful course of life.

6. *What is the punishment of the crime against nature?—216.*

It is capital.

7. *What are the inferior offenses or misdemeanors against the personal security of the subject?—216.*

They are: 1. Assault. 2. Battery. 3. Wounding. 4. False imprisonment. 5. Kidnapping.

8. *How are assaults, batteries, and wounding punishable?—216, 217.*

As private wrongs, or civil injuries, a satisfaction or remedy is given to the party aggrieved; but, as a breach of the king's peace, or affront to his government, and a damage done to his subjects, they are also indictable and punishable with fine and imprisonment; or with other ignominious corporeal penalties, where they are committed with any very atrocious design, as in case of an assault with intent to murder.

9. *What species of battery is there more atrocious and penal than the rest?—217.*

The beating of a clerk in orders, or clergyman.



10. *What are its penalties?*—217, 218.

It is subject to three kinds of prosecution, all of which may be pursued for one and the same offense: an indictment for the assault and battery; a civil action for the special damage sustained; and a suit in the ecclesiastical court.

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CHAPTER XVI.

OF OFFENSES AGAINST THE HABITATIONS OF INDIVIDUALS.

1. *What are the offenses that more immediately affect the habitations of individuals or private subjects?*—220.

Two: Arson and burglary.

2. *What is arson?*—220.

Arson is the malicious and wilful burning of the house or outhouse of another man.

3. *Why is arson much more pernicious to the public than simple theft?*—220.

Because, first, it is an offense against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed.

4. *Is not arson frequently more destructive than murder itself?*—220.

It is; since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.

5. *What, by the civil law, is the punishment of arson?*—220.

It punishes with death such as maliciously set fire to houses in towns, and contiguous to others, but is more merciful to such as only fire a cottage, or house, standing by itself.

6. *What kind of house may be the subject of arson?*—221.

Not only the bare dwelling-house, but all outhouses, that are parcels thereof, though not contiguous thereto, nor under the same roof, as barns and stables.

7. *When is willfully setting fire to one's own house arson?*—221.

It is arson, provided one's neighbor's house is thereby also burned; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's.

8. *What if a landlord or reversioner sets fire to his own house, of which another is in possession, under a lease from himself, or from those whose estate he hath?*—221.

It shall be accounted arson; for during the lease the house is the property of the tenant.

9. *What shall be said to be a burning, so as to amount to arson?*—222.

The burning and consuming of any part is sufficient, though the fire be afterward extinguished.

10. *How is arson punished?*—222.

With death, as a capital felony.

11. *How was arson punished in the reign of Edward the First?*—222.

With death; and this sentence was executed by a kind of *lex talionis*, for the incendiaries were burned to death.

12. *How was arson punished by the Gothic constitutions?*—222.

In like manner, with death by burning.

13. *Can outer doors be broken open to execute process, in criminal cases?*—223.

Yes; because the public safety supersedes the private.



14. *How is a burglar defined by Sir Edward Coke?*—224.

"He that by night breaketh and entereth into a mansion-house, with intent to commit a felony."

15. *In this definition what things are to be considered?*—224.

Four things: the time, the place, the manner, and the intent.

16. *Can burglary be committed by day?*—224.

It cannot: the time must be by night, and not by day; for in the day time there is no burglary.

17. *In respect of burglary, what is reckoned night, and what day?*—224.

Anciently the day was accounted to begin only at sun-rising, and to end immediately upon sunset: but the better opinion seems to be, that if there be daylight, or *crepusculum*, enough, begun or left, to discern a man's face withal, it is no burglary.

18. *Does the same rule extend to moonlight?*—224.

It does not; for then many midnight burglaries would go unpunished; and, besides, the malignity of the offense does not so properly arise from its being done in the dark, as at 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 defenseless.

19. *May burglary be committed in a barn, stable, or warehouse?*—225.

It may not, if they are distant from the mansion or dwelling-house; but if they be parcel of the mansion-house, and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein.

20. *May burglary be committed in a college or an inn of court?*—225.

Yes; for a chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.

21. *Is the house of a corporation, inhabited in separate apartments by the officers of the body corporate, the mansion-house of the corporation, or of the respective officers?*—225.

It is the mansion-house of the corporation.

22. *If one hires a shop, parcel of another man's house, and work or trade in it, but never lie there, can burglary be committed therein?*—226.

No; it is no dwelling-house, for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part.

23. *Can burglary be committed in a tent or booth erected in a market or fair?*—226.

It cannot; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

24. *What is required to complete burglary?*—226.

There must be both a breaking and an entry to complete it.

25. *Need the breaking be done, and the entry made, at one time?*—226.

They need not; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars.

26. *What constitutes a breaking in case of burglary?*—226.

There must, in general, be an actual breaking; not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption; as, at least, by breaking or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided.



27. *If a person leaves his doors or windows open, and another enters therein, is it burglary?*—226.

It is not ; yet, if he afterward unlocks an inner or chamber door it is so.

28. *Is coming down the chimney a burglarious entry?*—226.

It is ; for that is as much closed as the nature of things will permit.

29. *What is sufficient to constitute burglarious entry?*—227.

Any the least degree of it with any part of the body, or with an instrument held in the hand, is sufficient ; as to step over the threshold, to put a hand or a hook in at the window to draw out goods, or a pistol to demand one's money.

30. *What as to the intent of burglary?*—227.

The breaking and entry must be with a felonious intent, otherwise it is only a trespass.

31. *How is burglary punished?*—228.

It is felony at common law, but within the benefit of clergy. The statutes, however, take away clergy from the principals, and from all abettors and accessaries before the fact.

## CHAPTER XVII.

### OF OFFENSES AGAINST PRIVATE PROPERTY.

1. *What are the offenses against private subjects which more immediately affect their property?*—229.

Three : 1. Larceny, or theft. 2. Malicious mischief. 3. Forgery. Of which, the two first are attended with a breach of the peace ; the latter, though equally injurious to the rights of property, is attended with no act of violence.

2. *Into what two sorts is larceny distinguished by the law?*—229

Into simple larceny, or plain theft unaccompanied with any

other atrocious circumstance, and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person.

3. *What is simple larceny?*—229.

The felonious taking and carrying away of the personal goods of another.

4. *When is simple larceny grand, and when petit larceny?*—229.

If the value of the thing stolen be above twelve pence, it is called grand larceny ; if of, or under, that value, it is called petit larceny.

5. *Does the taking, in larceny, imply the consent of the owner of the goods to be wanting?*—230.

It does.

6. *Can any delivery of the goods from the owner to the offender, in trust, ground a larceny?*—230.

It cannot.

7. *How may a carrier of goods commit the offense of larceny?*—230.

If he opens a bale or pack of goods, or pierces a vessel of wine, and takes part thereof away ; or if he carries it to the place appointed, and afterward takes away the whole.

8. *What is the offense of embezzling goods, of which the offender had not the possession, but only the care and oversight?*—231.

It is felony at the common law.

9. *Under what circumstances may a man be guilty of felony in taking his own goods?*—231.

By stealing them from a pawnbroker, or any one to whom he hath delivered and intrusted them, with the intent to charge such bailee with the value.

10. *What is a sufficient carrying away of goods to constitute a larceny?*—231.

A bare removal from the place in which he found the goods.



though the thief does not quite make off with them, is a sufficient asportation.

11. *As to the taking and carrying away, what must be established to constitute larceny?*—232.

That it was done *animo furandi*; or, as the civil law expresses it, *lucri causâ*.

12. *Whom does this requisite excuse, and whom indemnify?*—232.

Besides excusing those who labor under incapacities of mind or will, it indemnifies mere trespassers, and other petty offenders.

13. *What is the ordinary criterion of a felonious intent?*—232.

Where the party doth it clandestinely; or, being charged with the fact, denies it.

14. *Is this the only criterion of criminality?*—232.

By no means; for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi*; wherefore, they must be left to the due and attentive consideration of the court and jury.

15. *Of what kind of goods only may larceny be committed?*—232.

Of the personal goods of another.

16. *Could larceny, at common law, be committed of things that adhere to the freehold?*—232.

No larceny could be committed of things that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and comes again at another time and takes them away, it is larceny. And so it is, if the owner, or any one else, has severed them.

17. *Could larceny, at common law, be committed of bills, bonds, and notes?*—234.

These, which concern mere choses in action, being goods of

no intrinsic value, and not importing any property in possession of the person from whom they are taken, were held not to be such goods whereof larceny might be committed; but, by statute, they are now put upon the same footing with respect to larcenies, as the money they were meant to secure.

18. *Can larceny be committed as to goods of which the owner is unknown?*—236.

If there be a property in them it may; and an indictment will lie for stealing the goods of a person unknown.

19. *Might a prosecution for theft be carried on without the intervention of the owner?*—236.

It might.

20. *Is it felony to steal a shroud out of a grave?*—236.

Yes; it is the property of those who buried the deceased.

21. *Is it felony to steal the corpse itself?*—236.

It is not, for it has no owner, unless some of the grave-clothes be stolen with it.

22. *What was the law of the Franks in this respect?*—236.

It directed, that a person who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission.

23. *How was theft punished by the Jewish law?*—236.

Only with a pecuniary fine, and satisfaction to the party injured.

24. *How by the civil law?*—236.

Till some very late constitutions, we never find the punishment capital.

25. *How by the laws of Draco?*—236.

With death; but Solon afterward changed the penalty to a pecuniary mulct, which remained the Attic law, in general, except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the



informers against the offense, grew so odious, that from them all malicious informers were styled sycophants.

26. *What seems to be the natural punishment for injuries to property?*—236, 237.

The loss of the offender's own property; which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporeal punishment; yet how far this corporeal punishment ought to extend is what has occasioned the doubt. Sir Thomas More and the Marquis Beccaria, at the distance of more than two centuries from each other, have proposed that kind of corporeal punishment which approaches the nearest to a pecuniary satisfaction, *viz.*, a temporary imprisonment, with an obligation to labor, first for the party robbed, and afterward for the public, in works of the most slavish kind; in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But, notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital; and Puffendorf, together with Sir Matthew Hale, are of opinion that this must always be referred to the prudence of the legislature, who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions. Yet both of these writers agree that such punishment should be cautiously inflicted, and never without the utmost necessity.

27. *How was theft punished by the ancient Saxon laws?*—237.

With death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle. But, in the ninth year of Henry the First, this power of redemption was taken away, and all persons guilty of larceny, above the value of twelve pence, were directed to be hanged.

28. *What is mixed, or compound, larceny?*—240.

It is such as has all the properties of simple larceny, but is

accompanied with either one or both of the aggravations of a taking from one's house or person.

29. *Is larceny from one's house distinguished from simple larceny, at common law?*—241.

It is not, unless where it is accompanied with the circumstance of breaking the house by night; and then it is burglary.

30. *Of what sorts is larceny from the person?*—242.

It is either by privately stealing, or by open and violent assault, which is usually called robbery.

31. *How is robbery defined?*—243.

Open or violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods, or money, to any value, by violence or putting him in fear.

32. *What are the requisites of robbery?*—243.

1. There must be a taking, otherwise it is no robbery. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber, by menaces and violence, puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is; a penny as well as a pound, thus forcibly extorted, makes a robbery. 3. The taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing.

33. *What is the criterion that distinguishes robbery from other larceny?*—243.

Previous violence, or putting in fear.

34. *What is the malicious mischief which the law considers as a public crime?*—243.

Such as is done, not *animo furandi*, or with an intent of



gaining by another's loss ; but either out of a spirit of wanton cruelty, or black and diabolical revenge.

35. *What is forgery, at common law ?—247.*

Forgery, or the *crimen falsi*, is the fraudulent making or alteration of a writing, to the prejudice of another man's right.

36. *How was forgery punished by the civil law ?—247.*

With deportation or banishment, and sometimes with death.

37. *How is forgery punished by the laws of England ?—247.*

At common law, it was punished with fine, imprisonment, and the pillory. In many cases, it was punishable with death, by statute.

## CHAPTER XVIII.

### OF THE MEANS OF PREVENTING OFFENSES.

1. *Is preventive justice to be preferred to punishing justice ?—251.*

It is, upon every principle of reason, of humanity, and of sound policy.

2. *In what does this preventive justice consist ?—252.*

It consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with, and to give full assurance to, the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior.

3. *What is, generally, the form of this assurance to the public ?—252.*

A recognizance or obligation to the king, with one or more sureties, entered on record, and taken in some court, or by some judicial officer, to keep the peace, or for good behavior.

4. *In a large and extended view of human punishments, what is their object ?—252.*

We shall find them all rather calculated to prevent future crimes, than to expiate the past.

5. *Under what heads may all punishments inflicted by temporal laws be classed ?—352.*

Under three heads : Such as tend to the amendment of the offender himself ; or to deprive him of any power to do future mischief ; or to deter others by his example.

6. *In what four ways may a recognizance be discharged ?—254.*

Either by the demise of the king, to whom the recognizance is made ; or by the death of the principal party bound thereby, if not before forfeited ; or, by order of the court ; or by the applicant's release or default.

7. *How should femes covert and infants give security to keep the peace ?—254.*

By their friends only, for they are incapable of engaging themselves to answer any debt, which is the nature of these recognizances or acknowledgments.

8. *Is a justice of the peace bound to grant surety of the peace ?—255.*

He is, when he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so. This is called swearing the peace against another.

9. *What follows if the party complained of do not find such sureties as the justice in his discretion shall require ?—255.*

He may be immediately committed till he does.

10. *How may a recognizance for keeping the peace be forfeited ?—255.*

By any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance ; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace.



11. *Will a bare trespass upon the lands and goods of another, which is a ground for a civil action, forfeit a recognizance?*—256.

It will not, unless accompanied with a wilful breach of the peace.

12. *Will mere reproachful words forfeit a recognizance?*—256.

They will not, unless they amount to a challenge to fight; merely reproachful words, as calling a man knave or liar, being looked upon to be merely the effect of unmeaning heat and passion.

## CHAPTER XIX.

### OF COURTS OF A CRIMINAL JURISDICTION.

1. *What distinction obtains among the several courts of criminal jurisdiction?*—258.

They are either such as are of a public and general jurisdiction, or such as are of a private and special jurisdiction.

2. *Can a man be tried twice, in a criminal way, for the same offense?*—259.

No; especially if acquitted upon the first trial.

3. *What is the high court of parliament?*—259.

The supreme court in the kingdom, not only for the making, but also for the execution of the laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

4. *What are the courts of criminal jurisdiction, as designated according to their dignity, beginning with the highest?*—258-275.

They are: 1. The high court of parliament.

2. The court of the lord high steward of Great Britain, for the trial of peers, indicted for treason or felony, or for misprision of either.

3. The court of king's bench.

4. The court of chivalry.

5. The high court of admiralty.

6, 7. The courts of oyer and terminer, and general jail delivery.

8. The court of general quarter sessions.

9. The sheriff's tourn.

10. The court leet.

11. The court of the coroner.

12. The court of the clerk of the market.

Of the preceding courts, the five first named are of public and general jurisdiction; the others of local jurisdiction and confined to particular districts.

5. *In what degree are the criminal courts independent of each other?*—259.

At least, so far as that the sentence of the lowest of them can never be controlled, or reversed, by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial.

6. *What offenders are tried by the high court of parliament?*—259.

Great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

7. *What criminal cognizance has the court of admiralty?*—268.

It has cognizance of all crimes and offenses committed either upon the sea or on the coasts, out of the body or extent of any English county.

8. *Before whom are the courts of oyer and terminer and general jail delivery held?*—269.

Before the king's commissioners, among whom are usually two judges of the courts at Westminster.