Blackstone's Commentaries on the Laws of England
Book the Fourth - Chapter the Sixteenth : Of Offenses Against the Habitations of Individuals

Blackstone Contents

CHAPTER THE SIXTEENTH.
OF OFFENCES AGAINST THE HABITATIONS
OF INDIVIDUALS.

THE only two offences, that more immediately affect the habitations of individuals or private fubjects, are thofe of arfon and burglay.

I. ARSON, ab ardendo, is the malicious and wilful burning of the houfe or outhoufes of another man. This is an offence of very great malignity, and much more pernicious to the public than fimple theft: ebcaufe, firft, it is an offence againft that right, of habitation, which is acquired by the law of nature as well as by the laws of fociety; next, becaufe of the terror and confufion that neceffarily attends it; and, laftly, becaufe in fimple theft the thing ftolen only changes it's mafter, but ftill remains in effe for the benefit of the public, whereas by burning the very fubtance is abfolutely deftroyed. It is alfo frequently more deftructive than murder itfelf, of which too it is often the caufe: fince murder, atrocious as it is, feldom extends beyond the felonious act defigned; whereas fire too frequently involves in the common calamity perfons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.
For

For which reafon the civil law[a] punifhes with death fuch as maliciofly fet fine to houfes in towns, and contiguous to others; but is more merciful to fuch as only fire a cottage, or houfe, ftanding by itfelf.

OUR Englifh law alfo diftinguifhes with much accuracy upon this crime. And therefore we will enquire, firft, what is fuch a houfe as may be the fubject of this offence; next, wherein the offence itfelf confifts, or what amounts to a burning of fuch houfe; and, laftly how the offence is punifhed.

1. NOT only the bare dwelling houfe, but all outhoufes that are parcel thereof, though not contiguous thereto, nor under the fame roof, as barns and ftables, may be the fubject of arfon[b]. And this by the common law: which alfo accounted it felony to burn a fingle barn in the field, if filled with hay or corn, though not parcel of the dwelling houfe[c]. The burning of a ftack of corn was antiently likewife accounted arfon[d]. And indeed all the niceties and diftinctions which we meet with in our books, concerning what fhall, or fhall not, amount to arfon, feem now to be taken away by a variety of ftatutes; which will be mentioned in the next chapter, and have made the punifhment of wilful burning equally extenfive as the mifchief. The offence of arfon (ftrictly fo called) may be committed by wilfully fetting fire to one's own houfe, provided one's neighbour's houfe is thereby alfo burnt; but if no mifchief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's[e]. For by the common law no intention to commit a felony amounts to the fame crime; though it does, in fome cafes, by particular ftatutes. However fuch wilful firing one's own houfe, in a town, is a high mifdemefnor, and punifhable by fine, imprifonment, pillory, and perpetual fureties for the good behaviour[f]. And if a landlord or reverfioner fets fire

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[a] Ff. 48. 19. 28. §. 12.
[b] 1 Hal. P. C. 567.
[c] 3 Inft. 69.
[d] 1 Hawk. P. C. 105.
[e] Cro. Car. 377.
[f] 1 Hal. P. C. 568. 1 Hawk. P. C. 106.
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to

to his houfe, of which another is in poffeffion under a leafe from himfelf or from thofe whofe eftate he hath, it fhall be accounted arfon; for, during the leafe, the houfe is the property of the tenant[g].

2. AS to what fhall be faid a burning, fo as to amount to arfon: a bare intent, or attempt to do it, by actually fetting fire to an houfe, unlefs it abfolutely burns, does not fall within the defcription of incendit et combuffit; which were words neceffary, in the days of law-latin, to all indictments of this fort. But the burning and confuming of any part is fufficient; though the fire be afterwards extinguifhed[h]. Alfo it muft be a malicious burning; otherwife it is only a trefpafs: and therefore no negligence or mifchance amounts to it. For which reafon, though an unqualified perfon, by fhooting with a gun, happens to fet fire to the thatch of a houfe, this fir Matthew Hale determines not to be felony, contrary to the opinion of former writers[i]. But by ftatute 6 Ann c. 31. any fervant, negligently fetting fire to a houfe or outhoufes, fhall forfeit 100l, or be fent to the houfe of correction for eighteen months: in the fame manner as the Roman law directed “cos, qui negligenter ignes apud fe “habuerint, fuftibus vel flagellis caedi[k].”

3. THE punifhment of afron was death by our antient Saxon laws[l]. And, in the reign of Edward the firft, this fentence was executed by a king of lex talionis; for the incendiaries were burnt to death[m]: as they were alfo by the gothic conftitutions[n]. The ftatute 8 Hen. VI. c. 6. made the wiful burning of houfes, under fome fpecial circumftances therein menfioned, amount to the crime of high treafon. But it was again reduced to felony by the general acts of Edward VI and queen

Mary: and now the punifhment of all capital felonies is uniform, namely, by fufpenfion. The offence of arfon was denied the benefit of clergy by ftatute

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[g] Foft. 115.
[h] 1 Hawk. P. C. 106.
[i] 1 Hal. P. C. 569.
[k] Ff. 1. 15. 4.
[l] LL. Inne. c. 7.
[m] Britt. c. 9.
[n] Stierh. de jure Goth. l. 3. c. 6.
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21 Hen. VIII.
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21 Hen. VIII. c. 1. but that ftatute was repealed by 1 Edw. VI. c. 12. and arfon was afterwards held to be oufted of clergy, with refpect to the principal offender, only by inference and deduction from the ftatute 4 & 5 P. & M. c. 4. which expreffly denied it to the acceffory[o] ; though now it is expreffly denied to the principal alfo, by ftatute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal houfebreaking, burgi latrocinium, which by our antient law was called hamefecken, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only becuafe of the abundant terror that it naturally carries with it, but alfo as it is a forcible invafion and difturbance of that right of habitation, which every individual might acquire even in a ftate of nature; an invafion, which in fuch a ftate, would be fure to be punifhed with death, unlefs the affailant were the ftronger. But in civil fociety, the laws alfo come in to the affiftance of the weaker party: and, befides that they leave him this natural right of killing the aggreffor, if he can, (as was fhewn in a former chapter[p]) they alfo protect and avenge him, in cafe the might of the affailant is too powerful. And the law of England has fo particular and tender a regard to the immunity of a man's houfe, that it ftiles it his caftle, and will never fuffer it to be violated with impunity: agreeing herein with the fentments of antient Rome, as expreffed in the words of Tully[q] ; “quid enim fanctius, quid omni religione munitius, quam domus uniufcujufque civium?” For this reafon no doors can in general be broken open to execute any civil procefs; though, in criminal caufes, the public fafety feperfedes the private. Hence alfo in part arifes the animadverfion of the law upon eaves-droppers, nufancers, and incendiaries: and to this principle it muft be affigned, that a man may affemble people together lawfully (at leaft if they do not exceed eleven) without danger of raifing a riot, rout, or unlawful affembly, in order to

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[o] 11 Rep. 35. 2 Hal. 346, 347. Fofter. 336.
[p] See pag. 180.
[q] Pro. domo, 41.
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protect
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protect and defend his houfe; which he is not permitted to do in any other cafe[r] .

THE definition of a burglar, as given us by fir Edward Coke[s] , is, “he that by night breaketh and entreth into a manfionhoufe, with intent to commit a felony.” In this definition there are hour things to be confiderd; the time, the place, the manner, and the intent.

1. THE time muft be by night, and not by day; for in the day time there is no burglary. We have feen[t] , in the cafe of juftifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the affailant with impunity. As to what is reckoned night, and what day, for this purpofe: at tiently the day was accounted to begin only at funrifing, and to end immediately upon funfet; but the better opinion feems to be, that if there be daylight or crepufculum enough, begun or left, to difcern a man's face withal, it is no burglary[u] . But this does not extend to moonlight; for then many midnight burglaries would go unpunifhed: and befides, the malignity of the offence does not fo properly arife from it's being done in the dark, as at the dead of night; when all the creation, except beafts of prey, are at reft; when fleep has difarmed the owner, and rendered his caftle defencelefs.

2. AS to the place. It muft be, according to fir Edward Coke's definition, in a manfion houfe; and therefore to account for the reafon why breaking open a church is burglary, as it undoubtedly is, he quaintly obferves that it is domus manfionalis Dei[w] . But it does not feem abfolutely neceffary, that it fhould in all cafes be a manfion-houfe; for it may alfo be committed by breaking the

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[r] 1 Hal. P. C. 547.
[s] 3 Inft. 63.
[t] See pag. 180, 181.
[u] 3 Inft. 63. 1 Hal. P. C. 1 Hawk.
[w] 3 Inft. 64.
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gates
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gates or walls of a town in the night[x] ; though that perhaps fir Edward Coke would have called the manfion-houfe of the garrifon or corporation. Selman defines burglary to be, “nocturna “diruptio alicujus habitaculi, vel ecclefiae, etiam murorum portarumve “burgi, ad feloniam perpetrandam.” And therefore we may fafely conclude, that the requifite of it's being domus manfionalis is only in the burglary of a private houfe; which is the moft frequent, and in which it is indifpenfably neceffary to form it's guilt, that it muft be in a manfion or dwelling houfe. For no diftant barn, warehoufe, or the like, are under the fame privileges, nor looked upon as a man's caftle of defence: nor is a breaking open of houfes wherein no man refides, and which therefore for the time being are not manfion-houfes, attended with the fame circumftances of midnight terror. A houfe however, wherein a man fometimes refides, and which the owner hath

only left for a fhort feafon, animo revertendi, is the object of burglary; though no one be in it, at the time of the fact committed[y] . And if the barn, ftable, or warehoufe be parcel of the manfionhoufe, though not under the fame roof or contiguous, a burglary may be committed therein; for the capital houfe protects and privileges all it's branches and appurtenants, if within the curtilage or homeftall[z] . A chamber in a college or an inn of court, where each inhabitant hath a diftinct property, is, to all other purpofes as well as this, the manfion-houfe of the owner[a] . So alfo is a room or lodging, in any private houfe, the manfion for the time being of the lodger. The houfe of a corporation, inhabited in feparate apartments by the officers of the body corporate, is the manfion-houfe of the corporation. And not of the refpective officers[b] . But if I hire a fhop, parcel of another man's houfe, and work or trade in it, but never lie there; it is no dwellinghoufe, nor can burglary be committed therein: for by the leafe it is fevered from the reft of the houfe, and therefore is not the dwellinghoufe of him who occupies the other part;

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[x] Spelm. Gloff. t. Burglary. 1. Hawk. P. C. 103.
[y] 1 Hal. P. C. Foft. 77.
[z] 1 Hal. P. C. 558. 1 Hawk. P. C. 104.
[a] 1 Hal. P. C. 556.
[b] Fofter. 38, 39.
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neither can I be faid to dwell therein, when I neves lie there[c] . Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein[d] : for the law regards thus highly nothing but permanent edifices; a houlfe or church, the wall, or gate of a twon; and it is the folly of the owener to lodge in fo fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the fame circumftancs.

3. AS to the manner of committing burglary: there muft be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the fame breakers enter the next night through the fame, they are burglars[e] . there muft be an actual breaking; not a mere legal claufum fregit, (by leaping over invifible ideal boundaries, which may conftitute a civil trefpafs) but a fubftantial and forcible irruption. As at leaft by breaking; not a mere legal claufum fregit, (by leaping over invifible ideal boundaries, which may conftitute a civil trefpafs) but a fubftantial and forcible irruption. As at leaft by breaking, or taking out the glafs of, or otherwife opening, a window; picking lock, or opening it with a key; nay, by lifting up the latch of a door, or unloofing any other faftening which the owner has provided. But if a perfon leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is fo[f] . But to come down a chimney is held a burglarious entry; for that is as much clofed, as the nature of things will permift[g] . So alfo to knock at a door, and upon opening it to rufh in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a conftable to gain admittance, in order to fearch for traitors, and then to bind the conftable and rob the houfe; all thefe entries have been adjudged burglarious, though there was no actual breaking: for the law will not fuffer itfelf to be trifled with by fuch evafions, efpecially under the cloke of legal procefs[h] . And fo, if a fervant

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[c] 1 Hal. P. C. 558.
[d] 1 Hawk. P. C. 104.
[e] 1 Hal. P. C. 551.
[f] Ibid. 553.
[g] 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
[h] Hawk. P. C. 102.
.{FE}

opens
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opens and enters his mafter's chamber door with a felonious defign; or if any other perfon lodging in the fame houfe, or in a public inn, opens and enters another's door, with fuch evil intent; it is burglary. Nay, if the fervant confpires with a robber, and lets him into the houfe by night, this is burglary in both[i] : for the fervant is doing an unlawful act, and the opportunity afforded him, of doing it with greater eafe, rather aggravates than extenuates the guilt. As for the entry, any the leaft degree of it, with any part of the body, or with an inftrument held in the hand, is fufficient: as, to ftep over the threfhold, to put a hand or a hook in at a window to draw out goods, or a piftol to demand one's money, are all of them burglarious entries[k] . The entry may be before the breaking, as well as after: for by ftatute 12 Ann. c. 7. if a perfon enters into or is within, the dwelling houlfe of another, without breaking in, either by day or by night, with intent to commit felony, and fhall in the night break out of the fame, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon[l] holding the affirmative, and fir Matthew Hale[m] the negative. But it is univerfally agreed, that there muft be both a breaking, either in fact or by implication, and alfo an entry, in order to complete the burglary.

4. AS to the intent; it is clear, that fuch breaking and entry muft be with a felonious intent, otherwife it is only a trefpafs. And it is the fame, whether fuch intention be actually carried into execution, or only demonftrated by fome attempt or overt act, of which the jury is to judge. And therefore fuch a breach and entry of a houlfe as has been before defcribed, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created fo by ftatute; fince

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[i] 1 Hal. P. C. 553. 1 Hal. P. C. 103.
[k] 1 Hal. P. C. 1 Hawk. P. C. 103.
[l] Elem. 65.
[m] 1 Hal. P. C. 554.
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that ftatute, which makes an offence felony, gives it incidentally all the properties of a felony at common law[n] .

THUS much for the nature of burglary; which is, as has been faid, a felony at common law, but within the benefit of clergy. The ftatute however of 18 Eliz. c. 7. takes away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all acceffories before the fact. And, in like manner, the laws of Athens, which punifhed no fimple theft with death, made burglary a capital cirme[o] .

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[n] 1 Hawk. P. C. 105.
[o] Pott. Antiq. b. 1. c. 26.
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