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THE HISTORICAL INTERTWINING OF MARYLAND'S BURGLARY AND LARCENY LAWS OR THE SINGULAR ADVENTURE OF THE MISUNDERSTOOD INDICTMENT CLERK

Charles E. Moylan, Jr.†

Maryland's burglary and larceny laws historically have been intertwined with little attention given to the independent effects of each. As a result of the overlap of laws, two apparently redundant indictments charging first, conspiracy to break a dwelling in the daytime with intent to steal goods worth \$100 or more, and second, conspiracy to break a dwelling in the daytime with intent to steal goods worth \$100 or less are reasonable in view of the history of the laws. The author traces the independent development of the various burglary and larceny laws to demonstrate the sources of overlap and confusion in their application.

INTRODUCTION

Very early in my career on the Court, I sat on a case¹ wherein the adequacy of an indictment was in perilous question. The charge was conspiracy. The object of the conspiracy was a daytime housebreaking. The heart of the problem was that the same charge was drawn redundantly in two counts. One charged conspiracy to break a dwelling in the daytime with intent to steal goods of the value of *\$100 or more*; the other charged conspiracy to break a dwelling in the daytime with intent to steal goods of the value of *less than \$100*. Daytime housebreaking, of course, requires simply an intent to steal goods of any value.² The distinction between “\$100 and upwards,” on the one hand, and “less than \$100,” on the other hand, was meaningless.

The appellants there claimed (disingenuously, we held) to have been confused by the alternative language relating to value. They argued that the language clearly indicated the object of the conspiracy to have been storehouse breaking,³ where the distinction as to value is of critical importance, and not daytime housebreaking, where it is of no moment.

The immediate problem was solved⁴ and justice again triumphed.

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1. *Johnson v. State*, 10 Md. App. 652, 272 A.2d 422 (1971).

2. MD. ANN. CODE art. 27, § 30(b) (1971).

3. *Id.* § 32.

4. There is an additional thrust to appellants' argument. It is not simply that the

The aftertaste, however, lingered. In the course of the defense attorney's effort to exploit confusion, the Assistant Attorney General's effort to attribute it to a blunder so transparent as to be incapable of confusing, and the judicial effort to patch up artfully the "inartful" job, hard words from all quarters were leveled at the absent state's attorney and his "benighted" indictment clerk. Why had the dolts averred a single offense in two separate counts? What strange obtuseness motivated them to inject a meaningless distinction? What inner darkness could ever account for making a daytime housebreaking read like a storehouse breaking? The exasperation with the office of the State's Attorney was general.

As a recent alumnus of the beleaguered fraternity, I was instinctively defensive for the breed. Though "neutral and detached" research would have to follow, atavistic loyalty at least framed the working hypothesis: the distinction was not meaningless; it was simply that we, ignorant mayhap of our history, were no longer privy to the meaning. The action of the indictment clerk in drawing redundant counts was not incomprehensible; we simply did not comprehend. The presence of the storehouse breaking language in a housebreaking indictment was not senseless; it simply made no sense to us. In the last analysis, "[t]he fault, dear Brutus, is not in our [indictment clerks and state's attorneys], but in ourselves."⁵

Emotionally, I enlisted immediately in the defense of the buffeted and maligned prosecutor's office. The brief, however, has germinated for four years. In Holmesian fashion, I set the problem: "Why did the indictment clerk draw a housebreaking charge in language which is

fourth count did not say enough to put them on the right track but that it affirmatively misdirected them onto a wrong track. Their thesis is that since the language "of the value of \$100 or upwards" and "of the value of less than \$100" appears nowhere in Sec. 30(b) but does appear in Secs. 32 and 342, the storehouse breaking offenses, the use of such language can have no conceivable explanation except in contemplation of charging an offense under Secs. 32 or 342. That thesis is guilty of a non-reading of history.

Daytime housebreaking (Sec. 30(b)) has led a statutory life of its own only since 1965. (Chap. 345, Acts of 1965). Before that date, daytime housebreaking and storehouse breaking with intent jointly occupied Sec. 32. The two offenses had a common origin in a series of English statutes enacted throughout the Sixteenth and Seventeenth Centuries. The two offenses appeared together in Maryland at least as early as 1793. (Chap. 57, Acts of 1793). They were codified together in 1809. (Chap. 138, Acts of 1809). The same intent provision served both classes of buildings from the common birth until as late as 1943. (Chap. 229, Acts of 1943). The present Sec. 342 shared this common destiny since it is an offshoot of the greater storehouse breaking with intent offense, branching off from it only in 1933. (Chap. 78, Acts of 1933 (Spec. Sess.)).

Unquestionably, from the centuries of sharing a common statutory provision, the habit arose of charging the offense with a common indictment form, using only a blank space or two to make the limited distinctions that were required. In view of a cohabitation so venerable and an estrangement so recent, the fact that each of the now distinct offenses has taken on a certain coloration and certain habitual language tracing from the long association between them is not remarkable.

Johnson v. State, 10 Md. App. 652, 658-59, 272 A.2d 422, 425-26 (1971).

5. W. SHAKESPEARE, JULIUS CAESAR, act 1, scene 2, lines 138-39 (6th Arden ed. 1958).

today peculiar to the distinct offense of storehouse breaking?" The detective, be he Sherlock or Oliver Wendell, must seek his clues in the backgrounds of his subjects. I hypothesized that to find the solution, one would have to walk again the ancient paths which the model indictment form had trod. We must, with Maitland, proceed from the known to the unknown. "We shall have to think away distinctions which seem to us clear as the sunshine; we must think ourselves back into a twilight."⁶ Lurking somewhere in the mists of time will be an explanation for every comma. He who would understand, must go back. Then, perhaps, "[t]his spirit, dumb to us, will speak to him."⁷

INTO THE LABYRINTH

There are at least eleven distinct offenses in the general areas of burglary law and larceny law whose pedigrees are so intertwined; whose paths have so often crossed, recrossed and then diverged; and whose provisions have at times complemented one another and at other times overlapped one another, that our present law makes little sense without some understanding of their genealogies.

The parent offense of common law burglary and six of its progeny have a related ancestry and have historically been grouped together in our successive criminal codes under the general subtitle of "Burglary: Breaking and Entering." The seven offenses now included therein are:

1. *Common Law Burglary*.⁸ The statute does not define burglary but does provide the penalty for it. Burglary was a common law felony⁹ brought into Maryland intact by the Maryland Declaration of Rights.¹⁰ It proscribes the breaking and entering of a dwelling house of another by night with the intent to commit a felony therein.¹¹

6. F. MAITLAND, *TOWNSHIP AND BOROUGH* (University Press ed. 1964).

7. W. SHAKESPEARE, *HAMLET*, act 1, scene 1, line 171 (2d Kittredge ed. 1967).

8. Every person convicted of the crime of burglary or accessory thereto before the fact shall restore the thing to the owner thereof, or shall pay him the full value thereof, and be sentenced to imprisonment in jail or in the Maryland House of Correction or in the Maryland Penitentiary for not more than Twenty years.

MD. ANN. CODE art. 27, § 29 (1971).

9. See 4 W. BLACKSTONE, *COMMENTARIES* *223-24 [hereinafter cited as BLACKSTONE]; 3 E. COKE, *INSTITUTES* *63 [hereinafter cited as COKE].

10. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Cecilius Calvert, Baron of Baltimore.

MD. CONST., *DECLARATION OF RIGHTS*, art. 5.

11. *Jennings v. State*, 8 Md. App. 312, 259 A.2d 543 (1969); *Reagan v. State*, 4 Md. App. 590, 244 A.2d 623 (1968).

2. *Statutory Burglary.*¹² The offense is precisely that of common law burglary in all respects except that the guilty intent need only be "to steal, take or carry away the personal goods of another of any value therefrom." Literally speaking, this section does not create a new crime but simply expands the definition of burglary by expanding its intent provision.¹³

3. *Daytime Housebreaking.*¹⁴ This offense encompasses the intent requirement of both common law burglary and statutory burglary "with intent to commit murder or felony therein, or with intent to steal, take or carry away the personal goods of another of any value therefrom." It parallels burglary in all other respects except that 1) it requires only a breaking rather than a breaking and entering and 2) the breaking need only be in the daytime¹⁵ rather than the nighttime.

4. *Breaking and Entering a Dwelling.*¹⁶ This late starter in the burglary field,¹⁷ simply makes it a misdemeanor to break and enter the dwelling of another. No felonious or larcenous intent is required.

5. *Storehouse Breaking with Felonious Intent.*¹⁸ This offense historically paralleled daytime housebreaking except that it protected storehouse and other outhouses rather than dwellings and that it could occur in the nighttime as well as the daytime. The penalty provisions and the requirement of only a breaking without an entering were the same for both offenses. Their intent provisions were historically the same until

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12. Every person, his aiders, abettors and counsellors, who shall break and enter any dwelling house in the nighttime with the intent to steal, take or carry away the personal goods of another of any value therefrom shall be deemed a felon, and shall be guilty of the crime of burglary.
MD. ANN. CODE art. 27, § 30(a) (1971).
13. See *Drouin v. State*, 222 Md. 271, 276-78, 160 A.2d 85, 87-88 (1960); *Melia v. State*, 5 Md. App. 354, 364 n.10, 247 A.2d 554, 56 n.10 (1968); *Reagan v. State*, 4 Md. App. 590, 594, 244 A.2d 623, 625 (1968).
14. Any person, his aiders, abettors and counsellors, who shall be convicted of the crime of breaking a dwelling house in the daytime with intent to commit murder or felony therein, or with intent to steal, take or carry away the personal goods of another of any value therefrom, shall be guilty of a felony, and upon conviction thereof, shall be sentenced to the penitentiary for not more than ten years.
MD. ANN. CODE art. 27, § 30(b) (1971).
15. Proof that the burglary occurred in the daytime or the nighttime will suffice to establish this element of the offense. *Henry v. State*, 20 Md. App. 296, 302-03, 315 A.2d 797, 801 (1974); *St. Clair v. State*, 1 Md. App. 605, 621-22, 232 A.2d 565, 574-75 (1967).
16. Any person who breaks and enters the dwelling house of another is guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to imprisonment for a term of not more than three (3) years or a fine of not more than five hundred dollars (\$500.00) or both.
MD. ANN. CODE art. 27, § 31A (Supp. 1973).
17. Law of May 24, 1973, ch. 661, § 1, [1974] Laws of Md. 1379.
18. Every person, his aiders, abettors and counsellors, who shall be convicted of the crime of breaking a storehouse, filling station, garage, trailer, cabin, diner, warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of one hundred dollars (\$100.00) or more therefrom, shall be guilty of a felony, and upon conviction sentenced to the penitentiary for not more than ten years.
MD. ANN. CODE art. 27, § 32 (1971).

they diverged, seemingly by legislative accident, in 1943.¹⁹ It now appears to cover two intent situations: 1) the intent to commit murder or felony therein and 2) the intent to steal, take or carry away the personal goods of another of the value of one hundred dollars or more therefrom. This second intent provision is completely redundant, however, being subsumed within the felonious intent of the first provision. Its predecessor provision had vitality from 1937 to 1943, however.²⁰

This presently redundant provision has a non-redundant complementary provision in the larceny family, which proscribes, *inter alia*, the breaking of a storehouse, etc., with intent "to steal any money, goods or chattels under the value of one hundred dollars."²¹

6. *Breaking and Stealing Five Dollars or More.*²² This offense covers breaking of certain outbuildings *and* stealing therefrom rather than breaking the buildings *with intent* to steal. Although the litany of outbuildings covered is curiously different in this section from that of "Storehouse Breaking with Felonious Intent,"²³ it has been held that they are interchangeable and do protect the same structures.²⁴

This offense also has a complementary section in the larceny family which proscribes, *inter alia*, the breaking of storehouses and the stealing of less than five dollars therefrom.²⁵ Again the litany of outbuildings covered in the larceny offense goes off on yet a third roll call of its own, but has been restored to equivalency by judicial interpretation.²⁶

7. *Burglary with Explosives.*²⁷ This somewhat bizarre, ad hoc piece of legislation covers common law burglary, daytime housebreaking, and storehouse breaking alike. Its object is to proscribe the use of nitroglycerin or gunpowder to "blow a safe." It provides a penalty of up to

19. Law of March 29, 1943, ch. 229, § 1, [1943] Laws of Md. 241-42.

20. See Law of May 18, 1937, ch. 141, § 1, [1937] Laws of Md. 262.

21. MD. ANN. CODE art. 27, § 342 (Supp. 1973).

22. Every person convicted of the crime of breaking into any shop, storeroom, filling station, garage, trailer, boat, cabin, diner, tobacco house or warehouse, although the same be not contiguous to or used with any mansion house, and stealing from thence any money, goods or chattels to the value of five dollars or upwards, or as being accessory thereto, shall restore the thing taken to the owner thereof, or shall pay him the full value thereof, and shall be guilty of a felony and upon conviction be sentenced to the penitentiary for not more than ten years.

Id. § 33 (1971).

23. The term "storehouse" is used in MD. ANN. CODE art 27, § 32 (1971) whereas MD. ANN. CODE art. 27, § 33 (1971) uses "storeroom;" § 32 uses "other outhouse" which § 33 does not; § 33 uses "shop" and "tobacco house" which § 32 does not; both use "filling station, garage, trailer, cabin, diner and warehouse." See notes 18, 22 *supra*. In 1968, "boat" was added to both sections. Law of May 7, 1968, ch. 508, § 1, [1968] Laws of Md. 944.

24. *Hardison v. State*, 226 Md. 53, 58-59, 172 A.2d 407, 409-10 (1961).

25. MD. ANN. CODE art. 27, § 342 (Supp. 1973).

26. *Hackley v. State*, 237 Md. 566, 568-69, 207 A.2d 475, 476-77 (1965).

See also *Poff v. State*, 4 Md. App. 186, 188, 241 A.2d 898, 899 (1968).

27. Any person who breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe or other secure place by the use of nitroglycerine, gunpowder or other explosive, shall be deemed guilty of the felony of burglary with explosives.

MD. ANN. CODE art. 27, § 34 (1971).

forty years in the penitentiary.²⁸ As a general turn-of-the-century reaction to the more violent of the Jimmy Valentines, thirty-four states enacted somewhat similar provisions.²⁹ The Maryland provision became law in 1906.³⁰

The remaining four of the eleven offenses whose destinies historically have been intertwined are, generally speaking, of the larceny family. These offenses have a related ancestry and traditionally have been grouped together in our successive criminal codes under the general subtitle of "Larceny." They are:

8. *Grand Larceny*.³¹ This section does not describe the crime but merely prescribes the penalty. Larceny of appropriate personalty of any value was a common law felony,³² brought into Maryland by Maryland Declaration of Rights.³³ Grand larceny is still a felony in Maryland and applies to the larceny of goods of the value of one hundred dollars or more.

9. *Petty Larceny*.³⁴ Grand larceny and petty larceny were not at the common law separate offenses but simply two aspects of the same felony, distinguishable only for penalty purposes.³⁵ Actually, Maryland statutes have never explicitly recognized the adjectives "grand" and "petty" as formal labels to distinguish larceny of a greater amount from larceny of a lesser amount.³⁶ As highly serviceable indicators, however, the adjectives are universally recognized throughout the common law world and, unquestionably, have been engrafted onto our law. Petty larceny now applies to the larceny of goods of under the value of one hundred dollars. Since 1933,³⁷ it has been a misdemeanor and that change in its character has had profound reverberations throughout our larceny and burglary statutes.

28. *Id.* § 35.

29. Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 430 n.148 (1951).

30. Law of April 3, 1906, ch. 476, § 1, [1906] Laws of Md. 946.

31. Every person convicted of the crime of larceny to the value of one hundred dollars or upwards, or as accessory thereto before the fact shall be deemed guilty of a felony, and shall restore the money, goods or things, taken to the owner, or shall pay him the full value thereof, and shall be fined not more than one thousand dollars or be imprisoned in the penitentiary for not more than fifteen years, or in the house of correction or jail for not more than ten years, or be fined and imprisoned in the discretion of the court.

MD. ANN. CODE art. 27, § 340 (1971).

32. 4 BLACKSTONE *229-40; 3 COKE *106-10.

33. *Gazaille v. State*, 2 Md. App. 462, 464, 235 A.2d 306, 307 (1967); see note 8 *supra*.

34. If any person shall steal, take or carry away personal goods of another under the value of one hundred dollars and being thereof convicted he shall be deemed guilty of a misdemeanor, and shall restore the goods and chattels so stolen or pay the full value thereof to the owner thereof, and be fined not more than one hundred dollars or imprisoned for not more than eighteen months in the house of correction or jail, or both fined and imprisoned; provided that all actions or prosecutions hereunder shall be commenced within two years after the commission of said offense.

MD. ANN. CODE art. 27, § 341(a) (1971).

35. 4 BLACKSTONE *229-40; 3 COKE *106-10.

36. *Melia v. State*, 5 Md. App. 354, 360 n.5, 247 A.2d 554, 558 n.5 (1968).

37. Law of Dec. 15, 1933, ch. 78, § 1, [1933] Laws of Md. Spec. Sess. 249-50.

10. *Breaking a Storehouse with Intent to Commit Petty Larceny.*³⁸ This provision is a complementary one to "Storehouse Breaking with Felonious Intent."³⁹ All else is the same except for the measure of the larcenous intent.

11. *Breaking a Storehouse and Stealing Less than Five Dollars.*⁴⁰ This provision complements "Breaking a Storehouse and Stealing Five Dollars or More."⁴¹

DEMARCATION LINE BETWEEN GRAND AND PETTY LARCENY

Because of the continuing dependence of the burglary laws and of the larceny laws upon the shifting boundary between grand larceny and petty larceny, a mapping of that boundary historically may be helpful.

From the earliest days of the common law, two kinds of larceny were recognized: 1) compound larceny, when committed under circumstances of aggravation, *e.g.*, robbery, breaking and stealing; and 2) simple larceny, unaccompanied by any aggravating circumstances. Simple larceny, in turn, was subdivided into grand larceny and petty larceny for punishment purposes.⁴²

Larceny, though anciently proceeded against as a crime, was the last of the classic felonies to receive royal recognition as a Plea of the Crown.⁴³ Because larceny, particularly in its stealthier forms, did not

38. If any person shall break into any shop, storehouse, tobacco house, warehouse, or other building, although the same be not contiguous to or used with any mansion house with intent to steal any money, goods or chattels under the value of one hundred dollars. . . he, his aiders, abettors and counsellors shall be deemed guilty of a misdemeanor and shall be tried before any court of competent jurisdiction, and being thereof convicted, shall restore the goods and chattels so stolen, or pay the full value thereof to the owner thereof, and be further sentenced to the penitentiary or house of correction, or to the jail of the county in which the offense may have been committed, or of the City of Baltimore, if the offense be committed in said city, in the discretion of the court for not more than eighteen months.

MD. ANN. CODE art. 27, § 342 (Supp. 1973).

39. See note 18 *supra*.

40. [I]f any person shall break into any shop, storehouse, tobacco house, warehouse, or other building, although the same be not contiguous to or used with any mansion house, and steals from thence any money, goods or chattels under the value of five dollars, he, his aiders, abettors and counsellors shall be deemed guilty of a misdemeanor . . .

MD. ANN. CODE art. 27, § 342 (Supp. 1973).

41. See note 22 *supra*.

42. 4 BLACKSTONE *229; 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN *503 [hereinafter cited as HALE].

43. [T]heft of all kinds is excluded from the list [of the Pleas of the Crown] and given to the sheriff.

G. HALL, *Introduction* to R. GLANVILLE, TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND at xxi (1965).

Since the avowed aim of this present work is to consider only the king's court, it is not appropriate to deal here with thefts and other pleas belonging to the sheriff, which are heard and determined according to the varying customs of different county courts.

R. GLANVILLE, TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 177 (1965).

literally involve a breach of the King's peace, at least until that concept was significantly liberalized in the 12th century, it was frequently proceeded against in the hundred courts and in such seignorial courts as enjoyed the franchise of *infangthief*.⁴⁴ In 1166, however, Henry II included larceny within the net of the new indictment procedure which he introduced in the Assize of Clarendon. Larceny thus took "its place among the felonies that are prosecuted by appeal or by indictment."⁴⁵

Even before its elevation to a Plea of the Crown, larceny was subdivided into grand larceny and petty larceny for punishment purposes.⁴⁶ Sir Edward Coke asserts that at the common law, the larceny of personal goods "above the value of twelve pence" is grand larceny and the larceny of personal goods "under the value of twelve pence" is petty larceny. This demarcation line was set formally by the Statute of Westminster I, 3 Edw. 1, ch. 15 (1275). He asserts further, however, that "this was the ancient law before the Conquest."⁴⁷ Lord Coke does not tell us what the situation would be if the value of the stolen goods was precisely twelve pence. Sir Matthew Hale, however, writing sometime before 1676, tells us that larceny amounts to grand larceny when it is "above the value of twelve pence" and petty larceny when it is "only of the value of twelve pence or under."⁴⁸ Sir William Blackstone recognizes the same demarcation point of "above twelve pence" vs. "twelve pence or under." He traces the use of that sum as the penal escalation point back to the reign of King Athelstan (924-940 A.D.).⁴⁹ It may have been mere speculation as to why the figure "twelve pence" was arrived at or maintained, but Blackstone does observe that during the reign of King Henry I, twelve pence or one

44. "[A] medieval franchise of exercising jurisdiction over a thief caught within the limits to which the franchise was attached: the right of the lord of a manor to judge a thief taken within the seignory of such lord." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1157 (1966).

45. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 495 (Milsom ed. 1968) [hereinafter cited as POLLOCK & MAITLAND].

46. Since there is theft of a large thing and of a very small thing, account must therefore be taken of the property stolen, what and of what kind it is. No christian is to be put to death for petty theft or for a trifle, but let him be punished in another way, lest ease of pardon furnish others with the occasion for offending and lest wrongdoing remain unpunished. Thus if a thief has been convicted, depending upon the kind of thing stolen and its value let him either be put to death or abjure the realm or the *patria*, the county, city, borough or vill, or let him be flogged and after such flogging released.

H. BRACON, THE LAWS AND CUSTOMS OF ENGLAND 427-28 (rev. 1968).

47. 3 COKE *109.

48. Petit larceny is the felonious stealing of money or goods not above the value of twelve-pence without robbery, for altho that by some opinions the value of twelve-pence make grand larceny. . . yet the law is settled, that it must exceed twelve-pence to make grand larceny.

The judgment in case of petit larceny is not loss of life, but only to be whipt, or some such corporal punishment less than death, and yet it is felony, and upon the conviction thereof the offender loseth his goods, for the indictment runs *felonice*.

1 HALE *530.

49. 4 BLACKSTONE *237.

shilling was the stated value of "a pastured ox."⁵⁰ Pollock and Maitland also establish the cut-off point at "twelve pence" and trace it back both to "an old English and Frankish tradition."⁵¹ Thus, through the Normans into the Carolingian mists.

Both grand larceny and petty larceny were, by universal acknowledgment, integral parts of the same felony of larceny but with significantly different penalties. Grand larceny was a capital offense, at least in practice, from the ninth year of the reign of Henry I (1109). The earlier Saxon laws nominally had punished grand larceny with death, but the criminal was permitted to redeem his life by a pecuniary ransom of bot, as in the earlier Germanic tradition. It was in the reign of Henry I that this right of redemption was taken away.⁵² From the latter part of the 12th century, however, acts of simple larceny (as opposed to compound larceny) even when amounting to grand larceny, were increasingly subject to benefit of clergy. Thereafter the law, in its ameliorated form, frequently punished the thief (provided he could read and write and was therefore clerical, of course) simply with forfeiture of all goods, whipping, burning in the hand, or transportation for seven years.⁵³ The luckier individual guilty of mere petty larceny was punished sometimes by a whipping, sometimes by a turn in the pillory or tumbrel,⁵⁴ and sometimes by loss of an ear.⁵⁵ The distinction between grand and petty larceny was thus of real significance to the thief.⁵⁶

In any event, this "one shilling" distinction,⁵⁷ whether tracing back to Athelstan or Charlemagne or simply to Edward I, was already of ancient vintage when it arrived in the Maryland palatinate. In 1715, the

50. *Id.* at n.(u).

51. 2 POLLOCK & MAITLAND 495-96.

52. *Id.* at 496.

53. 1 HALE *517 n.1.

54. An instrument of punishment; specifically, a cucking stool. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2462 (1966). A cucking stool, in turn, is defined as "a chair in which such offenders as scolds, prostitutes, or dishonest tradesmen were formerly fastened for punishment by public exposure or ducking in water. *Id.* at 550.

55. This ancient penalty for petty larceny anticipated our latter-day subsequent offender statutes for: "One ear may be taken for a first, another for a second offense, while the gallows awaits those who have no more ears to lose." 2 POLLOCK & MAITLAND 497-98.

56. The common law may have brutalised into a single wrong what had, first in local jurisdictions and later before justices of the peace, been a more sensitive range.

Indeed in one respect even the common law did not produce a single wrong. In the thirteenth century a distinction becomes visible between grand larceny which was punishable by death, and petty larceny which was not. It depended upon a money value, twelve pence; and this in itself became an instrument by which some flexibility was introduced. The jury, by finding the value of the stolen goods, had a power to determine the possible penalty; and their exercise of this power became both more conspicuous and more necessary as the value of money fell. They might, for example, feel obliged to find that coin was of less than its face value. More striking was the contribution of the judges to the same merciful end. They could not undervalue things, but they could hold them to be without any value in law; and they tried this with jewels and succeeded with bank-notes. These anomalies were of course reflected by strange lists in remedial statutes.

S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 371-72 (1969).

57. Twelve pence was and is one shilling.

"twelve pence" distinction was recognized in Maryland.⁵⁸ That act, which recited in its preamble that "many acts of assembly have been heretofore made against thieving and stealing, which at this present are not sufficient to prevent the committing of these crimes, or to punish them when committed," was an act aimed at the speedy trial of such criminals by permitting them to be proceeded against in the county courts rather than the provincial court. It provided that "the several justices of the county courts of this province" should have jurisdiction to hear and dispose of all cases of grand or petty simple larceny (robbery, burglary and housebreaking excepted) for the first such offense, provided that the value of the stolen goods was not above the value of one thousand pounds of tobacco. It further provided that the justices could order fourfold restitution as well as the return of the stolen goods and could sentence the thief to the pillory or to be whipped, not exceeding forty stripes.⁵⁹ It further provided that if a man were presented for a second offense "above the value of twelve pence," he could only be proceeded against in the provincial court and that there he could be sentenced to be branded with a hot iron.⁶⁰ In England the demarcation line between petty larceny and grand larceny was never raised above "twelve pence" and remained at that figure until the statute 7 & 8 Geo. 4, ch. 29 (1827), abolished all distinction between grand and petty larceny.

In 1809, the General Assembly of Maryland effected the first major codification of the criminal law of this State.⁶¹ Our present article 27 is erected essentially on the skeleton then established.⁶² Section 6 of that law dealt with offenses "affecting private property" and raised the cut-off figure between petty and grand larceny from "above twelve pence" to "\$5.00 or upwards."⁶³ Section 6(1) set the maximum penalty for grand larceny at fifteen years in the penitentiary, a sentence which is still with us today.⁶⁴ Section 6(6) established the maximum penalty of one year for the stealing of personal goods of "under the value of \$5.00."⁶⁵

No legislative changes were made in the Maryland larceny laws until 1868 when the maximum penalty for petty larceny was raised from one year to eighteen months,⁶⁶ which it has remained to this day.

A special session of the Legislature in 1933 raised the demarcation line between petty and grand larceny from "\$5.00 or upwards" to "\$25.00 or upwards."⁶⁷ It also, most significantly, provided that

58. Law of April 1715, ch. 26, 1 [1811] Laws of Md. 88.

59. *Id.* § 2.

60. *Id.* § 4.

61. Law of Nov. 1809, ch. 138, 3 [1811] Laws of Md. 458.

62. An excellent discussion of the seminal significance of the law is contained in Brumbaugh, *A New Criminal Code for Maryland?*, 23 Md. L. Rev. 1, 2-12 (1963).

63. Law of Nov. 1808, ch. 138, § 6, 3 [1811] Laws of Md. 462.

64. *Id.* § 6(1).

65. *Id.* § 6(6).

66. Law of March 28, 1868, ch. 214, § 1, [1868] Laws of Md. 372.

67. Law of Dec. 15, 1933, ch. 78, § 1, [1933] Laws of Md. Spec. Sess. 249.

thenceforth petty larceny should be a misdemeanor. Until that time petty larceny had been a felony just as fully as grand larceny had been, with only a lesser penalty provision distinguishing it.^{6 8} In 1952 the cut-off figure was raised from "\$25.00 or upwards" to its present level of "\$100.00 or upwards."^{6 9}

It is now necessary to look at those other crimes on which, over the years, the fluctuations of the grand larceny-petty larceny boundary line and the changing status of petty larceny have had their effects.

BURGLARY, COMMON LAW AND STATUTORY

Common law burglary had settled into its present mold by the middle of the 16th century. It evolved out of the pre-Conquest crime of *hamsecken* or *hamsocn*—housebreaking—dating at least from the time of King Canute (1016-1035).^{7 0} Its history is dimly seen through such ancient commentators as Bracton and Britton, but it seemed to encompass over the early centuries a number of combinations of 1) robbery from the person in a house with or without an actual breach of the house; 2) consummated theft from a house where a breach has occurred and where the householders are present though they need not be awakened or placed in fear; 3) actual theft from a house of a value of five shillings or more where an actual breach of the house occurs, no householder being present and 4) a breaking of the house with intent to steal or commit felony, a householder being present and placed in fear. Any of these could occur in the day or the night.^{7 1}

By the 17th century, burglary had long since been refined into its present form.^{7 2} Hale distinguished burglary as we know it today as "that which in a strict and legal acceptation is so called" from these other manifestations which he refers to as "hamsacken, housebreaking or burglary in a vulgar and improper acceptation."^{7 3} Some of these

68. See *Danner v. State*, 89 Md. 220, 42 A. 962 (1899). See also *Whittington v. State*, 173 Md. 387, 196 A. 314 (1938).

69. Law of March 28, 1952, ch. 18, § 1, [1952] Laws of Md. 228.

70. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 369 (5th ed. 1942) [hereinafter cited as HOLDSWORTH]; 2 POLLOCK & MAITLAND 492-93.

71. 1 HALE *547-48; 2 POLLOCK & MAITLAND 493.

72. T. Plucknett found burglary settling into its modern mold by the end of the fifteenth century. Before that it was simply one of the myriad forms of housebreaking or *hamsocn*: In the latest roll, that for Worcester of 1477, with Littleton himself present, cases of housebreaking and of close-breaking are described as felonies, with no reference to 'noctanter' nor to the word 'burgaria' nor to the verb 'burgare'. Only twenty-five years later however Marowe discusses burglary as a distinct crime; unlike Coke he includes close-breaking as well as house-breaking, but he is already insisting that unless it takes place by night it is not a felony. It looks therefore as if the more precise definition had shaped itself towards the very end of the fifteenth century; not until such a definition was generally accepted would the term 'burgaria' be universally used.

T. PLUCKNETT, *Introduction to B. PUTNAM, PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES: EDWARD III TO RICHARD III* at cxvi (1938).

73. 1 HALE *547-48.

other forms of housebreaking are of interest, however, for presaging such latter-day crimes as 1) daytime housebreaking and 2) breaking and stealing.

As to true burglary, Lord Coke asserts that the nighttime requirement had been part of the common law relating thereto at least since the fourth year of the reign of Edward VI (1551) when the word "noctanter" first appeared in a burglary indictment. He gave the definition as settled that a burglar was

a felon that in the night breaketh and entreth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.⁷⁴

In addition to the nighttime requirement, common law burglary is thus seen to be different from the other forms of early housebreaking in that no householder need be present where the breaking and entering is done with mere felonious intent without the felony being actually consummated.

The common law felony of burglary certainly crossed to Maryland with the *Ark* and the *Dove* and is referred to in 1715 as one of those crimes which cannot be tried in the county courts but only in the provincial court.⁷⁵ From 1809,⁷⁶ to the present,⁷⁷ burglary has never been defined or redefined but is simply referred to in the statutory provision setting the penalty therefor.

What is today section 30(a),⁷⁸ and is conveniently referred to as statutory burglary, has no ancient lineage and would indeed have been a tautology until 1933. Until the Maryland Legislature made petty larceny a misdemeanor,⁷⁹ all larcenous intent was, ipso facto, felonious intent. With the de-escalation of the character of petty larceny, however, the question arose as to whether the theretofore solid ediface of burglary had been eroded by having had inadvertently chipped away from it a substantial chunk of still larcenous, but no longer felonious, intent. As early as 1937, the question arose in *State v. Wiley*.⁸⁰ Because the larcenous intent in the burglary case before the Court of Appeals on that occasion was clearly above the then current grand larceny-petty larceny demarcation point of twenty-five dollars, the Court did not have to reach the question of whether "in amending section 319 of article 27, the Legislature thereby intended to change the definition of common law burglary."⁸¹ The Legislature had foreseen the problem, however, and in 1937 added a new section 35A to follow immediately

74. 3 COKE *63.

75. Law of April 1715, ch. 26, § 2, 1[1811] Laws of Md. 88.

76. Law of Nov. 1809, ch. 138, § 5, 3[1811] Laws of Md. 461.

77. MD. ANN. CODE art. 27, § 29 (1971).

78. *Id.* § 30(a).

79. Law of Dec. 15, 1933, ch. 78, § 1, [1933] Laws of Md. Spec. Sess. 249-50.

80. 173 Md. 119, 194 A. 629 (1937).

81. *Id.* at 123, 194 A. at 630.

after section 35, which provided the penalty for common law burglary. The new section provided:

Every person, his aiders, abettors and counsellors, who shall break and enter any dwelling house in the nighttime with the intent to steal, take or carry away the personal goods of another of any value therefrom shall be deemed a felon, and shall be guilty of the crime of burglary.^{8 2}

That statutory expansion of the definition of burglary has been carried over verbatim into the present section 39(a) and has served to liberate the burglary law from any dependence on the vagaries of the larceny law.^{8 3}

DAYTIME HOUSEBREAKING AND THE STOREHOUSE BREAKINGS

The remaining five crimes^{8 4} to be considered—1) daytime house-breaking,^{8 5} 2) storehouse breaking with intent to commit grand larceny,^{8 6} 3) storehouse breaking with intent to commit petty larceny,^{8 7} 4) breaking and stealing five dollars or more^{8 8} and 5) breaking and stealing less than five dollars^{8 9}—are those where the interaction between burglary law and larceny law is strongest. These crimes are all hybrids historically, having some of their origins in the offenses against habitation and some of their origins in the offenses against property. All five were originally, and two of the five—the breaking and stealing offenses—still are, compound larcenies. The compounding factor was the involvement of a dwelling house or, by extensions in the 16th and 17th centuries, other buildings. Let us consider initially the first three of these offenses.

THE BREAKING WITH INTENT OFFENSES

Housebreaking as an offense was absolutely protean in its manifestations. A 1715 statute,^{9 0} and its prototype in 1681,^{9 1} recognized it by

82. Law of May 18, 1937, ch. 141, § 1, [1937] Laws of Md. 262.

83. See *Drouin v. State*, 222 Md. 271, 160 A.2d 85 (1960). For a discussion of what happens generally when all larcenous intent is no longer co-extensive with felonious intent, see Annot., 113 A.L.R. 1269 (1938).

84. Neither Breaking and Entering a Dwelling nor Burglary with Explosives require further consideration. They are of recent origin and limited utility. They have not been involved in the historical interplay with the larceny laws. See MD. ANN. CODE art. 27, § 31A (Supp. 1973); *id.* § 34 (1971).

85. MD. ANN. CODE art. 27, § 30(b) (1971).

86. *Id.* § 32.

87. *Id.* § 342 (Supp. 1973).

88. *Id.* § 33 (1971).

89. *Id.* § 342 (Supp. 1973).

90. Law of April 3, 1715, ch. 26, § 2, 1 [1811] Laws of Md. 88.

91. Law of Aug. 1681, ch. 3, Laws of Md., in 7 ARCHIVES OF MARYLAND 202.

name—excepting “robbery, burglary and *housebreaking*” from those crimes which could be tried in the county courts rather than in the provincial court—but it did not define what it meant by “house-breaking.” In looking hopefully for the English referent, we find not one but half a dozen.

The restricted definition given to common law burglary by the end of the Middle Ages had left great gaps in the fabric of the criminal law. It also inspired a century and a half of statutory efforts to fill the gaps. In referring to these efforts, in aggregate, Radzinowicz quotes an earlier writer as saying:

Larceny from the house, whether privily committed without violence, or openly in the day time, and therefore in neither case amounting to burglary, is nevertheless by the laws of England made capitally penal in almost every instance; and this by a multiplicity of statutes, so complicated in their distinctions, that it would be painful on many accounts to attempt the detail of them. It is a melancholy truth, but it may without exaggeration be asserted, that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which on this point they are made liable.^{9 2}

In much of this Tudor and Stuart legislation, we may discern the germs of later Maryland provisions, inexplicable unto themselves alone. In 1531, the act of 23 Hen. 8, ch. 1, § 3, made it a nonclergyable capital offense to steal goods from any person in his dwelling house by day or night, the owner or dweller, his wife, children or servants then being in the same house and being put in fear. The statute applied, of course, only where the value of the thing stolen was above twelve pence. That prerequisite made it grand larceny and therefore capital in the first instance; the statute then came into play to deny benefit of clergy for this particular form of compound grand larceny whereas benefit of clergy was otherwise available for simple grand larceny.^{9 3} It required neither a breaking, as in burglary, nor the element of nighttime perpetration. In 1547, the statute was redrafted by 1 Edw. 6, ch. 12, § 10, to require a breaking but also to permit that only “any person” need be present and put in fear, rather than restricting the protection to the owner or his family. In earlier and later form, it required an actual taking and was thus simply the aggravating factor that raised a clergy-

92. W. EDEN, PRINCIPLES OF PENAL LAW 289 (2d ed. 1771), cited at 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 41 (1948) [hereinafter cited as RADZINOWICZ].

93. Benefit of clergy, as a commutation of the death penalty, also presaged, in a sense, our subsequent offender laws. In England and in early Maryland, it was available for the clergyable offenses only for the first such offense. Second offenders went to the gallows. Benefit of clergy was not abolished in Maryland until the Law of Nov. 1809, ch. 138, § 11, 3 [1811] Laws of Md. 468, nor in England until 7 & 8 Geo. 4, ch. 28 (1827).

able simple grand larceny to a non-clergyable compound grand larceny.⁹⁴

In 1552, the act of 5 & 6 Edw. 6, ch. 9, § 4, denied benefit of clergy⁹⁵ for compound grand larcenies from a dwelling house, in the daytime, under slightly different circumstances. It only required that the owner, his wife, children or servants, be present in some part of the house, waking or sleeping. It did not require that they be put in fear or even be alert to the misdeed. On the other hand, it was restricted to owners, families and servants being present (and therefore in jeopardy) rather than to "any person." In the same act, section 5 then took the criminal law (in terms of serious, i.e. non-clergyable, crime) for the first time out of a literal dwelling house and into a lesser structure. It took all of the provisions of section 4 and extended them to "any booth or tent in any fair or market"⁹⁶ and also returned to the concept that the offense could be in the daytime or the nighttime as to the tents or booths.⁹⁷

All of the preceding provisions had required that some person in the victim class be present in the dwelling house (or tent or booth) for the law of housebreaking to take serious recognition of the offense, i.e., make it non-clergyable. In 1597, the act of 39 Eliz., ch. 15, § § 1-2, took a giant step toward the present day. The first section recited that

divers' felonious Persons, understanding that the Penalty of the Robbing of Houses in the Daytime (no Person being in the House at the Time of the Robbery) is not so penal as to commit or do a Robbery in any House, any Person being therein at the Time of the Robbery; which hath and doth embolden divers

94. 2 E. EAST, PLEAS OF THE CROWN 624-25 (1803) [hereinafter cited as EAST]; 1 W. HAWKINS, PLEAS OF THE CROWN 206-07 (8th ed. 1824) [hereinafter cited as HAWKINS]; 1 RADZINOWICZ 41-44.

95. The gap between felony and misdemeanor was much too large, and by using the benefit of clergy Parliament was able to make some crimes capital for the first offense (non-clergyable) and others only for a second felony (clergyable). Thus a rough classification of crimes into more than the two medieval categories became possible. This process was carried further by developing the policy of the Act of 1576, and condemning persons convicted of clergyable larceny to transportation for seven years. Thus the survival of clergy greatly modified the harshness of the penal law and permitted the growth of a graduated scale of punishment.

Benefit of clergy was abolished in 1827, but its ghost continued to haunt the law until less than a hundred years ago.

T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 441 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

96. Blackstone spoke disparagingly of tents or booths, observing that:

Neither can burglary be committed in a tent or booth erected in a market or fair, 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 be the choice of the owner to lodge in so 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 same circumstances.

4 BLACKSTONE *226. Blackstone was speaking, however, only in terms of common law burglary.

97. 2 EAST 626-27; 1 HAWKINS 207-08; 1 RADZINOWICZ 44-45.

lewd Persons to watch their Opportunity . . . to commit . . . many heinous Robberies, in breaking and entering divers honest Persons Houses, and especially of the poorer Sort of People, who . . . are not able to keep any Servant, or otherwise to leave any Body to look to their House. . . .⁹⁸

The second section then went on to deny benefit of clergy for any thefts perpetrated, in the daytime, in any dwelling house or any outhouse, no person being therein, but hedged a bit by requiring that the theft be of the value of five shillings or above.⁹⁹ A breaking was, of course, still required, but for the first time no victim need be at home. Unoccupied houses were protected during the day. For the first time also, the word "outhouse" appeared with its implication for the future section 32 of the Maryland law¹⁰⁰ although in 39 Eliz., ch. 15 (1597), "outhouse" was clearly still appurtenant to the dwelling house, whereas by the time the word reached Maryland it had severed that relationship. For the first time also, the figure of five shillings appeared as the critical aggravating factor for the compound larceny of breaking and stealing, with its clear implication for the future sections 33 and 342.¹⁰¹ The critical aggravating point for those sections is now five dollars; in their predecessor sections, it was one dollar prior to 1952;¹⁰² in the predecessor sections to those predecessor sections, it was five shillings prior to 1809.¹⁰³ The pedigree is unbroken and the line of descent is clear.

In 1691, the act of 3 W. & M., ch. 9 § 1-4 dealt with two allied situations. In dealing with the first, it proscribed (by denying clergy) stealing from a dwelling house in the daytime, "the owner or any other person being therein and put in fear." A live victim had to be present and put in fear, but neither a breaking nor a five shilling minimum for the consummated larceny was required. The very same section of the act (harbingering the later Maryland practice of joining distinct burglary-type offenses in the same section) went on to proscribe the breaking of any "dwelling house, shop or warehouse, thereunto belonging or therewith used" and stealing goods of the value of five shillings or upwards, although no person shall be within. In the latter portion, as opposed to the former, 1) a breaking was required, 2) a five shilling minimum was set on the consummated larceny 3) no victim need be present and 4) shops and warehouses were covered as well as dwelling houses, provided they were appurtenant.¹⁰⁴ "Shop" and "warehouse" both appear in the present law of Maryland,¹⁰⁵ although they have lost the formerly required characteristic of appurtenance.

98. See generally 1 RADZINOWICZ 45-46.

99. See generally 2 EAST 628; 1 HAWKINS 209-11; 1 RADZINOWICZ 46.

100. MD. ANN. CODE art. 27, § 32 (1971).

101. *Id.* § 33; *id.* § 342 (Supp. 1973).

102. See Law of March 28, 1952, ch. 18, § 1, [1952] Laws of Md. 229.

103. See Law of Nov. 1809, ch. 138, § 5, 3 [1811] Laws of Md. 462.

104. 1 HAWKINS 209; 1 RADZINOWICZ 46-47.

105. MD. ANN. CODE art. 27, § 33 (1971); *id.* § 342 (Supp. 1973).

This plethora of overlapping statutory provisions—not literally creating crimes but in effect creating them by recognizing these aggravated forms of grand larceny punishable by death—generated confusion and which was early noted. East comments that “the multiplicity of these provisions is apt to create some confusion.”¹⁰⁶ Sergeant Hawkins refers to “a variety of statutes . . . passed upon this subject, which are rather complicated.”¹⁰⁷ The common denominator of all the provisions is articulated by Hawkins:

The principal sanction is the dwelling-house, and it has been considered by the legislature as a great aggravation of the offense of larceny, that the sanctity of the dwelling-house should be violated, by committing the crime therein . . .¹⁰⁸

He makes it clear that the base crime is still larceny and that the violation of the dwelling house is the aggravating factor. Blackstone is to the same effect:

Larceny [*sic*] from the *house*, though it seems . . . to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law, unless where it is accompanied with the circumstance of breaking the house by night, and then we have seen that it falls under another description, *viz.*, that of burglary, . . . the benefit of clergy is taken from larcinies committed in a house in almost every instance . . .¹⁰⁹

When, therefore, the Maryland law of 1681 referred for the first ascertainable time to “Robery [*sic*], Burglary and house breakings,”¹¹⁰ it is far from clear what precise conduct was being proscribed by that hydra-headed concept of “house breakings.” It is significant that in the act only “house breakings” is non-capitalized and is in the plural.

It is immediately to be noted that none of the English forms of housebreaking proscribe the breaking of a dwelling house in the daytime with intent to commit felony therein, the direct daytime analogue to common law burglary. Such an offense may have existed in misdemeanor form, but at the early common law, to be a misdemeanor was virtually to be no crime at all. Misdemeanors carried no term of imprisonment but only small pecuniary ameracements (not even literally fines). Through the 13th century, misdemeanors were indistinguishable from civil actions involving trespass. Even when they acquired an identity of their own, they were tried simply in the local courts. As a result, they appeared but rarely in the Year Books and their existence

106. 2 EAST 623.

107. 1 HAWKINS 200.

108. *Id.* at 199.

109. 4 BLACKSTONE *239-40.

110. Law of Aug. 1681, ch. 3, Laws of Md., in 7 ARCHIVES OF MARYLAND 202.

was largely unknown until recent scholarship began to discover and print the records of justices of the peace.¹¹¹

Although problematic, it does seem that daytime housebreaking with intent to commit felony therein was probably a minor misdemeanor or trespass of some sort. It has been noted that "neither at common law, nor under any statute, is it felony simply to break a house in the daytime, but only when followed by theft . . ." ¹¹² After reciting the litany of English housebreaking statutes, Holdsworth concludes: "The result was that housebreaking in the daytime, unless it fell within some one of these statutes, sank to the level of a misdemeanor." ¹¹³

It was not until 1861 that the act of 24 & 25 Vict., ch. 96, § 57, raised to felony status in England the offenses of breaking and entering, *inter alia.*, a dwelling house, a shop or a warehouse with intent to commit a felony therein. Lord Russell commented: "This clause is new, and contains a very important improvement of the law. Formerly the offences here provided for were only misdemeanors at common law. Now it often happened that such an offence was very inadequately punished as a misdemeanor . . ." ¹¹⁴

When the crime was first recognized in Maryland is an unsolved mystery. It has been remarked by Semmes that:

In the printed records of early Maryland there are few references to burglary or to housebreaking. Burglary, at common law, was the breaking and entering the dwelling house of another, in the nighttime, with the intent of committing a felony therein. Housebreaking, on the other hand, was the act of breaking open and entering, with a felonious intent, the dwelling house of another, by day or night. ¹¹⁵

Since the only case found in the early records by Semmes to support this proposition is one where one Robert Dennis was indicted for breaking and entering on December 24, 1665, the dwelling house of Phillip Calvert, at Wolsey Manor, and stealing therefrom one Carbine of the value of 15 shillings and one shirt of the value of two shillings, ¹¹⁶ it is clear that the indictment was brought under 39 Eliz., ch. 15 (1597). ¹¹⁷ It is thus no authority for the existence of the crime of breaking a dwelling *with intent* to steal as opposed to breaking *and actually* stealing. Semmes apparently read the modern crime into the Elizabethan predecessor.

An act of the Assembly in 1654 required that fourfold restitution be made in all cases of larceny, ¹¹⁸ but then went on to allow a greater

111. PLUCKNETT 455-62; 2 POLLOCK & MAITLAND 511-22.

112. H. HAMMOND, CRIMINAL CODE 112 (1826); 1 RADZINOWICZ 43 n.8.

113. 3 HOLDSWORTH 369.

114. 3 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 96 (9th ed. 1877).

115. R. SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 56 (1938).

116. 49 ARCHIVES OF MARYLAND, PROCEEDINGS OF THE PROVINCIAL COURT 1663-66, at 542.

117. See pp. 42-43 *supra*.

118. The notion of fourfold restitution is a concept of damages carried over from its quasi-civil

discretionary punishment should the theft be accompanied by other action such as "breaking open the house."¹¹⁹ The reference was still to compound larceny.

The first clear reference that can be discovered in Maryland case or statutory law to housebreaking or storehouse breaking with intent (other than the cryptic and undefined reference to "housebreakings" in the 1681 law¹²⁰ and in the 1715 law)¹²¹ was post-Revolutionary. In 1793, the jurisdiction to try certain criminal cases in Baltimore County was transferred from the general county court to a newly created (by the act) Court of Oyer and Terminer. The list of affected crimes included:

[B]reaking a dwelling-house in the day time, with an intent to murder or commit a felony therein; or breaking a store-house, warehouse, or other out-house, in the day or night, with an intent to commit murder or felony therein . . .¹²²

The language as to intent was straight out of common law burglary. The catalogue of "storehouse, warehouse, or other outhouse" was straight out of 39 Eliz., ch. 15 (1597) and 3 W. & M., ch. 9 (1691).¹²³ The offenses were clearly misdemeanors and they were clearly not created by the law of 1793, which simply referred to them as pre-existing crimes. The two offenses of housebreaking with intent and storehouse breaking with intent were also already joined in that cohabitation within a common statutory provision that would not be severed until 1965.¹²⁴

It is curious that in this Maryland statute, and in all subsequent statutes, the only critical verb is "break." It is probable that historic accident accounts for the fact that the Maryland "breaking with intent" crimes¹²⁵ require only a breaking and not an entering. The accident unquestionably resulted from looking to the form and not the substance of the predecessor English statutes. All of those English statutes required a consummated crime inside the protected structure, and the entry which had to be spelled out as to burglary, was therefore implicit in the housebreaking and storehouse breaking situations. Once Maryland abandoned the requirement of a consummated crime "therein" and let a mere intent suffice as to storehouse and daytime dwelling house violations, the entry was no longer implicit. To follow then the mere explicit wording of English housebreaking statutes without providing for that which in England, but no longer in Maryland, could be implied was to diminish the character of the violation of the protected

past, when criminal misdemeanors and actions for trespass were virtually indistinguishable.

119. SEMMES, *supra* note 115, at 55.

120. Law of Aug. 1681, ch. 3, Laws of Md., in 7 ARCHIVES OF MARYLAND 202.

121. Law of April 1715, ch. 26, § 11, 1 [1811] Laws of Md. 88.

122. Law of Nov. 1793, ch. 57, § 10, 2 [1811] Laws of Md. 215.

123. See p. 43 *supra*.

124. Law of April 8, 1965, ch. 345, § 1, [1965] Laws of Md. 505-06.

125. MD. ANN. CODE art. 27, §§ 30(b), 32 (1971); *id.* § 342 (Supp. 1973).

building. When "daytime housebreaking with felonious intent" was finally raised to felony status in the act of 24 & 25 Vict., ch. 96, § 57 (1861), it did not neglect to include the verb "enter" along with the verb "break." By slavishly following English phraseology without analyzing English substance, we may inadvertently have eliminated an element of the crime. We may also, however, have inadvertently provided a remedy for our initial inadvertence by so diluting the meaning of "enter" as to make every "breaking" tantamount to an "entry." Two wrongs may make a right after all.

Although now so time-honored as to be beyond remedy, a misreading or non-reading of the early history, it strongly appears, has accounted for the fact that our present section 32,¹²⁶ refers to other buildings generally and is not restricted to outbuildings either within the curtilage of a mansion house or appurtenant thereto. The original language of "storehouse, warehouse or other outhouse" was taken from the acts of 39 Eliz., ch. 15 (1597) and 3 W. & M., ch. 9 (1691), where appurtenance was clearly required. Indeed, those buildings which were non-appurtenant outbuildings were protected by a separate provision of Maryland colonial law.¹²⁷ That other provision (the direct ancestor of our "breaking and stealing" laws) required a consummated larceny. It further contained the explicit language "not contiguous to or used with any mansion house." The "breaking and stealing" provision would have been redundant if a different class of buildings was not being protected. Indeed, the whole course of development of English burglary law displayed a special solicitude for the personal safety of the homeowner in his outbuildings (whether literally surrounded by a fence or wall or not) and in his shop with its storehouse or warehouse generally beneath. In "a nation of small shopkeepers," the shop and the home were virtually one and the same. Indeed, later development of English law makes it a critical factor whether there is interior communication between the dwelling and the shop or storehouse, a factor which clearly implies appurtenance and highlights the consideration of the personal safety of the occupant.¹²⁸ Maryland took and retained the English language but somewhere along the way forgot the connotation that went with the language.

In any event, when Maryland undertook its first major organization of the criminal law in 1809, it carried into section 5(5) the language verbatim from the 1793 law with respect to breaking a dwelling house:

[B]reaking into any shop, storehouse, tobacco-house or commit murder or felony therein, or of breaking a storehouse, warehouse or other out-house, in the day or night, with an intent to commit murder or felony therein¹²⁹

126. *Id.* § 32 (1971).

127. Law of July 1729, ch. 4, § 3, 1 [1811] Laws of Md. 190.

128. 3 RUSSELL 93-97.

129. Law of Nov. 1809, ch. 138, § 5(5), 3 [1811] Laws of Md. 461; text cited note 121 *supra*. This section dealt with "the offense . . . affecting the habitation, houses or vessels of individuals . . ."

Immediately following this provision, section 5(6) went on to prescribe:

[B]reaking into any shop, storehouse, tobacco-house or warehouse, although the same be not contiguous to or used with any mansion-house, and stealing from thence any money, goods or chattels, to the value of one dollar, or upwards¹³⁰

The juxtaposition of these two subsections clearly implied that, in original intent, the "storehouse, warehouse or other out-house" of section 5(5) was not synonymous with the "shop, storehouse, tobacco-house or warehouse" of section 5(6). This conclusion is unavoidable when 1) section 5(6) contains the language of non-appurtenant qualification "although the same be not contiguous to or used with any mansion-house" which section 5(5) does not; 2) section 5(6) requires a consummated larceny subsequent to the breaking which section 5(5) does not; 3) section 5(6), if it had been intended to cover the same buildings as section 5(5), would have been virtually tautologous, with the conduct it proscribed being subsumed within the proscription of section 5(5).¹³¹

It is also far from clear whether the inclusion of the "breaking with intent" provisions in the law of 1809 was intended to preempt the housebreaking field and to consign the other forms of housebreaking to the dustbin of history. Writing in 1811, Chancellor Kilty makes clear that the various Tudor and Stuart housebreaking statutes—23 Hen. 8, ch. 1 (1531); 1 Edw. 6, ch. 12 (1547); 5 & 6 Edw. 6, ch. 9 (1552); 39 Eliz., ch. 15 (1597); and 3 W. & M., ch. 9 (1691)—extended to and were in use in the Maryland province. In commenting on 1 Edw. 6, ch. 12 (1597), Chancellor Kilty remarks:

As to the 2d class, there are in the provincial records some cases of prosecutions, which appear to have been under this statute, and still more under those of 39 Eliz., ch. 15 and 3 W. and M., ch. 9, both before and after our acts of assembly respecting housebreaking, in which the offenders were capitally convicted.¹³²

In commenting again on 3 W. & M., ch. 9 (1691), the Chancellor remarks:

130. Law of Nov. 1809, ch. 138, § 5(6), 3 [1811] Laws of Md. 462.

131. It cannot be conceived that § 5(6) was included in the act simply to provide for a law school examination-type hypothetical such as where the larcenous intent was not formed until after the breaking was complete. It was also clear that unless the two subsections and their successor sections contemplated different categories of buildings, the "breaking and stealing" provisions would never have had an adequate *raison d'être* until the Law of March 29, 1943, ch. 229, § 1, [1943] Laws of Md. 241-42, raised the minimum larcenous intent for the "breaking with intent" offense above the level of the minimum consummated larceny under the "breaking and stealing" offense.

132. W. KILTY, BRITISH STATUTES IN FORCE IN MARYLAND 164, 179 (1811) [hereinafter cited as KILTY].

This statute or a part of it, certainly extended to the province, with others respecting the benefit of clergy. It took away that benefit from persons robbing a dwelling house, wherein there was any or no person, and there are several cases of indictments for such offenses apparently under this statute.¹³³

Since the literal thrust of all the English statutes, however, was to deny the benefit of clergy to the offenders and since section 11 of the Maryland 1809 statute abolished the very concept of benefit of clergy,¹³⁴ Chancellor Kilty placed all of the statutes in question in the category "Statutes Found Applicable But Not Proper To Be Incorporated."¹³⁵

In holding the various English housebreaking statutes "not proper to be incorporated," Kilty did so only because those statutes dealt literally with punishment. The 1809 statute, section 11, did not abolish any of the clergyable or non-clergyable offenses. It rather provided explicitly that:

[E]very person who shall be convicted of any felony heretofore excluded from the benefit of clergy, and not herein specified, shall be sentenced to undergo a confinement in the penitentiary for a period of time not less than five nor more than twenty years¹³⁶

Kilty was very much in doubt as to whether the explicit provisions of section 5 of the law of 1809 had preempted the housebreaking field. In commenting on that statute he remarked:

[I]t does not take in all the kinds of larceny from the house, which were successively provided for by the English statutes. How far that act will go to the repeal of the former acts of assembly on the subject, it is not necessary to enquire; but considering the apparent intention of the legislature in passing the act of 1809, it is not deemed proper that this statute, or any other taking away the benefit of clergy from the offense of larceny from the house, or house breaking should be incorporated with our laws, even if it should appear that they are not all virtually repealed by that act.¹³⁷

Despite the absence of a clear-cut epitaph, however, the other forms of housebreaking never reappeared and the law of 1809, *de facto* at least, did preempt the field.¹³⁸

133. *Id.*

134. Law of Nov. 1809, ch. § 11, 3 [1811] Laws of Md. 468.

135. KILTY 160, 164-66, 179-80.

136. Law of Nov. 1809, ch. 138, § 11, 3 [1811] Laws of Md. 468.

137. KILTY 164-65.

138. For the myriad forms taken by the burglary, housebreaking and storehouse breaking laws in the other states, see Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009 (1951); Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411 (1951).

For the next 124 years, the "breaking with intent" offenses remained unchanged. To break a dwelling house in the daytime and to break a "storehouse, warehouse or other out-house" in the daytime or the nighttime "with intent to commit murder or felony therein" was proscribed in a single section of the article on "Crimes and Punishments," without so much as a penalty altered or a single building added to the catalog of "out-houses". Legislation in 1933, however, changed the character of petty larceny from felony to misdemeanor.¹³⁹ It had, inevitably, the same effect on the "breaking with intent" offenses that it did on common law burglary. The question arose, or should have arisen, as to whether there was carved out from the formerly all-inclusive felonious intent provision, a significant chunk of still larcenous, but no longer felonious, intent. The legislature met the problem in a strange way. In the same legislative act which changed the character of petty larceny, there was created a new section within the subtitle "Larceny." It followed immediately the section dealing with petty larceny, which proscribed the breaking into "any shop, storehouse, tobacco house or warehouse, although the same be not contiguous to or used with any mansion house, with intent to steal any money, goods or chattels under the value of twenty-five dollars . . ."¹⁴⁰ Although this new section was ultimately to be the complement to the "storehouse breaking with intent" provision found under the subtitle of "Burglary", its litany of protected structures and its explicit language of non-appurtenance paralleled the "breaking and stealing" offenses rather than the "breaking with intent" offense. The effort to insure against the erosion of some larcenous intent was apparently inadvertent, since no corresponding change was made in the complementary burglary provision¹⁴¹ nor was any effort made to protect against the erosion of some larcenous intent from either the "housebreaking with intent" provision¹⁴² or from common law burglary.¹⁴³

It was not until four years later, triggered perhaps by the fact that the case of *State v. Wiley*¹⁴⁴ was already in the appellate mill, that the thought seemed to occur that something might now be missing from the burglary and housebreaking laws. As a result, in 1937, a new statutory burglary provision was added¹⁴⁵ and the above mentioned complementary provision was amended by adding to the intent provisions of both daytime housebreaking and daytime or nighttime storehouse breaking the additional phrase "or with the intent to steal take or carry away the personal goods of another of any value therefrom."¹⁴⁶ The intent provisions of both housebreaking and storehouse breaking

139. Law of Dec. 15, 1933, ch. 78, § 1, [1933] Laws of Md. Spec. Sess. 249-50.

140. *Id.* at 251.

141. Law of Nov. 1809, ch. 138, § 5(6), 3 [1811] Laws of Md. 462.

142. *Id.* § 5(5), 3 [1811] Laws of Md. 461.

143. *Id.* § 5(4).

144. 173 Md. 119, 194 A. 629 (1937).

145. Law of May 18, 1937, ch. 141, § 1, [1937] Laws of Md. 262.

146. *Id.*

thus remained both parallel to each other and parallel to the intent provision of burglary.

For the next six years, an apparent incongruity existed whereby an offender who would break a storehouse with the intent to steal goods therefrom of some value but of less than twenty-five dollars in value could be subject to a maximum of ten years in the penitentiary in the burglary subtitle¹⁴⁷ and for the very same offense be subjected to not more than eighteen months imprisonment in the larceny subtitle.¹⁴⁸ A 1943 statute was passed for the purpose of "altering and harmonizing certain provisions of the Criminal Law dealing with the breaking into certain buildings with the intent to steal."¹⁴⁹ The intent provision of the burglary statute was left intact as to dwelling houses, but as to "storehouses, warehouses or other outhouses," was changed to read "with the intent to steal take or carry away the personal goods of another of the value of twenty-five dollars (\$25.00) or more therefrom . . ."¹⁵⁰ Thus, for the first time since they appeared together in 1793,¹⁵¹ do housebreaking and storehouse breaking diverge in their intent provisions.

At least, however, between the venerable "storehouse breaking with intent" provision under the burglary subtitle and the bastard "storehouse breaking with intent" provision that appeared, seemingly by accident, in 1933 in the larceny subtitle, reconciliation was for the moment effected between the measures of larcenous intent. The legislative habit of dealing with the larceny subtitle in utter disregard of the complementary provisions in the burglary subtitle and vice versa, however, persisted. In 1937, the words "or other buildings" were added to the litany of protected structures in the new larceny provision enacted in 1933,¹⁵² without making any corresponding changes in the supposedly complementary provisions under the burglary subtitle.¹⁵³ Conversely, a 1947 act added to the list of protected structures under "storehouse breaking with intent" and under "breaking and stealing" the words "filling station, garage, trailer, cabin, diner" within the burglary subtitle¹⁵⁴ without making corresponding changes in the supposedly complementary provisions under the larceny subtitle.¹⁵⁵

In 1952, the intent provision again went awry. The cut-off point between petty larceny and grand larceny was raised from twenty to one hundred dollars.¹⁵⁶ With a weather eye out to attendant sections within the larceny subtitle, it also raised the intent provision under storehouse breaking to provide for anyone breaking a shop, etc. "with

147. *Id.*

148. *Id.*, ch. 305, § 1, [1937] Laws of Md. 578.

149. Law of March 29, 1943, ch. 229, [1943] Laws of Md. 241.

150. *Id.*, § 1, [1943] Laws of Md. 242.

151. Law of Nov. 1793, ch. 57, § 10, 2 [1811] Laws of Md. 215.

152. Law of May 18, 1937, ch. 305, § 1, [1937] Laws of Md. 578.

153. Law of Nov. 1809, ch. 138, §§ 5(5)-(6), 3 [1811] Laws of Md. 461-62.

154. Law of March 15, 1947, ch. 142, § 1, [1947] Laws of Md. 209.

155. Law of March 29, 1943, ch. 229, § 1, [1943] Laws of Md. 242.

156. Law of March 28, 1952, ch. 18, § 1, [1952] Laws of Md. 228.

intent to steal any money, goods or chattels under the value of One-Hundred Dollars"¹⁵⁷ No corresponding change was made, however, in its supposedly complementary section under the burglary subtitle.¹⁵⁸ Thus, for the next eight years an incongruity for yet a second time persisted whereby an offender who broke a storehouse with the intent to steal goods of the value of twenty-five dollars or upwards but of under the value of one hundred dollars could be subjected to ten years in the penitentiary under the burglary subtitle but for the very same offense could be subjected to imprisonment of not more than eighteen months under the larceny subtitle. In 1960, symmetry was restored to the storehouse breaking with intent situation by raising the intent provision in the burglary subtitle from "\$25 and upwards" to "\$100 and upwards".¹⁵⁹

The intent provisions are now reconciled, but the reconciliation is tenuous at best, since in 1968, "boat" was added to the list of protected structures under the present sections 32 and 33 under the burglary subtitle¹⁶⁰ and completely neglected to make the corresponding changes in the supposedly complementary provisions of section 342 under the larceny subtitle.¹⁶¹ The two subtitles somehow refuse to be viewed together.

In the welter of confusion in the wake of petty larceny's changed status (1933) and changing dimensions (1933 and 1952), "daytime housebreaking with intent" and "storehouse breaking with intent," which had been so completely compatible probably from birth and demonstrably from 1793, began to go their own ways. The estrangement which began in 1943, when their intent provisions diverged, was completed in 1965. In the latter year, daytime housebreaking was lifted out of its then current section¹⁶² and placed in with a new statutory burglary section.¹⁶³ By the same act, the status of daytime housebreaking was changed from misdemeanor to felony. "Storehouse breaking with intent," which now abided for the first time alone, remained a misdemeanor.

The tale was brought up to date a year later when the status of "storehouse breaking with intent" was changed from misdemeanor to felony.¹⁶⁴

BREAKING AND STEALING—THE COMPOUND LARCENIES

Maryland's storehouse breaking and stealing laws¹⁶⁵ are descended either from 3 W. & M., ch. 9 (1691), or from 10 & 11 Will. 3, ch. 23

157. *Id.* at 229.

158. Law of March 15, 1947, ch. 142, § 1, [1947] Laws of Md. 209.

159. Law of March 2, 1960, ch. 40, § 1, [1960] Laws of Md. 71.

160. MD. ANN. CODE art. 27, §§ 32-33 (1971).

161. *Id.* § 342 (Supp. 1973).

162. Law of March 2, 1960, ch. 40, § 1, [1960] Laws of Md. 71.

163. Law of April 8, 1965, § 1, [1965] Laws of Md. 505-06.

164. Law of May 6, 1966, ch. 628, § 1, [1966] Laws of Md. 1125.

165. MD. ANN. CODE art. 27, § 33 (1971); *id.* § 342 (Supp. 1973).

(1699), or from an intermixture of both.

The act of 3 W. & M., ch. 9, was discussed above¹⁶⁶ and proscribed, *inter alia.*, the breaking of any "shop or warehouse" belonging to a dwelling house and stealing therefrom goods of the value of five shillings or upwards. The act of 10 & 11 Will. 3, ch. 23, proscribed the private stealing, by night or by day, of goods of the value of five shillings or above from "shops, warehouses, coach houses or stables." For the first time in English statutes, the premises described were not required to be appurtenant to a dwelling house.¹⁶⁷ Unlike its possible Maryland descendant, the English statute did not require a breaking. The English cases interpreting the statute stressed the "privately stealing" aspect of the offense and actually precluded a "breaking" situation from its compass, because "any degree of force excluded the idea of privately stealing."¹⁶⁸ Spiritually, the offense seems to have been closer to latter-day shoplifting laws than to latter-day breaking and stealing from storehouse laws. Chancellor Kilty found 10 & 11 Will. 3, ch. 23, one of those statutes "not found applicable to the local and other circumstances nor introduced, used or practiced by the Courts of Law" of the Maryland Province. He felt that:

Notwithstanding the general extension of the statutes relating to house-breaking, or larceny from the house, there is reason to believe that this was not among them. It was applicable in part to a species of larceny called in England shop-lifting, which was not likely to be much practiced in the province, and no case has been found of a prosecution that appeared to be under this statute.¹⁶⁹

The case for 3 W. & M., ch. 9 as the lineal antecedent of Maryland's "breaking and stealing" laws seems much stronger, although the parentage may have been mixed.

In either event, within thirty-eight years of the enactment of 3 W. & M., ch. 9, and within thirty years of the enactment of 10 & 11 Will. 3, ch. 23, the Maryland Provincial Assembly was faced with the problem. In 1729, the legislature stated, by way of preamble:

[W]hereas several felons have feloniously broke and entered several shops, store-houses or warehouses, not contiguous to or used with any mansion-house, and stolen from thence several goods and merchandises, and that it hath been doubted whether such offenders are, by any law now on force, excluded the benefit of clergy¹⁷⁰

166. See p. 46 *supra*.

167. See 2 EAST 629; 1 HAWKINS 201-03; 1 RADZINOWICZ 47-48.

168. Cartwright's Case, Old Bailey (1776), cited at 1 HAWKINS 203.

169. KILTY 104. Ironically, Maryland did not enact a true shoplifting law until 1961. Law of April 24, 1961, ch. 269, [1961] Laws of Md. 325-28 (codified at MD. ANN. CODE art. 27, § 551A (1971)).

170. Law of July 1729, ch. 4, § 3, 1 [1811] Laws of Md. 190.

The act of 1729 then went on not to create the crime—for larceny was already a crime—but rather to recognize this particular form of aggravation of the crime for punishment purposes (the denial of clergy). It provided that:

[I]f any person or persons shall . . . break into any shop, store-house or ware house, although such shop, store-house or ware house, be not contiguous to or used with any mansion-house, and steal from thence any goods, to the value of five shillings, and be thereof convict, by confession, or verdict of a jury, such offender or offenders shall suffer death as felons, without benefit of clergy¹⁷¹

The requirement of a breaking had to come from 3 W. & M., ch. 9 rather than from 10 & 11 Will. 3, ch. 23. The application to “shops” and “warehouses” could have come from either English statute, although the Maryland act included “storehouse”, which neither of the English statutes included, and the Maryland act did not include “coach houses or stables”, which were a part of 10 & 11 Will. 3, ch. 23. The Maryland provision of non-appurtenance, however, was found in 10 & 11 Will. 3, ch. 23, but not in 3 W. & M., ch. 9. The five shilling requirement was found in both English statutes and, indeed, traced back to 39 Eliz., ch. 15 (1597).¹⁷²

Eight years later, the provision was faced with a crime wave zeroing in on tobacco houses. A 1737 statute recited in its preamble:

Forasmuch as all the laws heretofore made for the punishment of offenders, and for securing honest men in their just property, are found by experience to be insufficient for those purposes, and that the poorer sort of people, who are obliged, for want of better conveniences, to keep their goods in tobacco-houses, and other out-houses, are most exposed to be pillaged and robbed of their substance than persons of greater ability, and that considerable part of the property of people of all conditions, are kept in out-houses, not only remote from their dwelling-houses, but also very weak in themselves, and easily broken, which hath given frequent opportunities to offenders to break into such houses, and to steal from thence divers goods and chattels, to the utter undoing of some poor persons, and the prejudice of all sufferers¹⁷³

The act went on to provide:

That any person . . . who shall . . . break any tobacco-house, or other out-house whatsoever, and steal from thence any goods or

171. *Id.* at 190-91.

172. The use of the five shilling figure as the touchstone of aggravation can be traced back as far as Chapter II of the Assize of Clarendon (1166), wherein the new grand juries were required to present anyone in the countryside who had stolen as much as five shillings in value since the beginning of King Henry II's reign (twelve years earlier).

173. Law of April 1737, ch. 2, § 1, 1 [1811] Laws of Md. 210.

chattels, to the value of five shillings sterling . . . shall suffer death as a felon . . . without benefit of clergy.¹⁷⁴

This act of 1737 added to the list of protected structures "tobacco-houses or other out-houses whatsoever."¹⁷⁵ The act was to continue in force for three years, but was extended from time to time on numerous occasions, and was enacted as a permanent law in 1798.¹⁷⁶

No further changes were made in the "breaking and stealing" law until 1809 when the provisions of the acts of 1729 and 1737 were incorporated into the new statute. It proscribed the

breaking into any shop, storehouse, tobacco-house or warehouse, although the same be not contiguous to or used with any mansion-house, and stealing from thence any money, goods or chattels, to the value of one dollar, or upwards . . .¹⁷⁷

The only slight modifications in translating the provisional acts into the act of 1809 were (1) that the "other out-house" provision from the act of 1737 was not retained and (2) that the critical monetary value placed on the consummated larceny was changed from five shillings to one dollar.¹⁷⁸

The 1809 statute then broke strange new ground. In section 6 dealing with offenses "affecting private property," the stealing of personal goods of under the value of five dollars was proscribed as "petty larceny" and then within the very same sentence, for the first time, a lower and complementary "breaking and stealing" offense was enacted. It was provided that:

If any person shall feloniously steal, take and carry away, the personal goods of another, under the value of five dollars, or if any person shall break into any shop, storehouse, tobacco-house or warehouse, although the same be not contiguous to, or used with, any mansion-house, and steal any money, goods or chattels, under the value of one dollar . . . shall be deemed guilty of petty larceny,¹⁷⁹ and shall . . . be . . . sentenced to undergo a similar confinement for a period not less than three months nor more than one year . . .¹⁸⁰

174. *Id.* § 2, 1 [1811] Laws of Md. 210-11.

175. It is doubtful whether a further provision consigning to the gallows anyone (1) who, upon being charged, "obstinately or of malice stood mute" or (2) who "peremptorily challenged above twenty" jurors would pass present day Constitutional muster.

176. Law of Nov. 1798, ch. 71, 2 [1800] Laws of Md. See generally Putnam v. State, 234 Md. 537, 542-43, 200 A.2d 59, 62 (1964).

177. Law of Nov. 1809, ch. 138, § 5(6), 3 [1811] Laws of Md. 462.

178. This change was actually somewhat deflationary. Since at the time, the pound sterling (or twenty shillings) was worth five dollars, the effect of the act of 1809 was to lower the critical aggravating point from five shillings to the equivalent of four shillings.

179. The use of "petty larceny" in this section is clearly an exception to the situation described in text at note 27 *supra* and in Melia v. State, 5 Md. App. 354, 360 n.5, 247 A.2d 554, 560 n.10 (1968).

180. Law of Nov. 1809, ch. 138, § 6(6), 3 [1811] Laws of Md. 463.

This provision is strange for two reasons. In the first place, except as a gesture to symmetry, it was completely unnecessary and its successor provisions have remained so to this day. To break and steal under one dollar (or today, under five dollars) is petty larceny in any event and subject to precisely the same penalty provisions as for simple petty larceny. To allege and prove the additional aggravating element of "breaking a shop, storehouse, tobacco-house or warehouse" is an exercise in futility. The petty larceny is aggravated or compounded to no avail.

In the second place, the geography of the provision is strange when viewed in conjunction with the setting of its complementary provision in section 5(6). Both offenses involve the breaking of similar structures and therefore represent the same threat against "habitation." The difference between them is in the degree of the threat against "private property." Ironically, the offense which is no more a threat to "habitation" than its complementary section but is more of a threat against "private property" joined the offenses affecting "habitations" in section 5 and has remained with the burglary subtitle to this day. The complementary offense which is just as great a threat to "habitation" but a lesser threat to "private property" joined the offenses affecting "private property" in section 6 and has remained with the larceny subtitle to this day. The thought as to whether these crimes are properly to be classified as crimes against property, against habitation or against persons has been schizophrenic at best.

The two storehouse breaking and stealing offenses that began as complements to one another in the act of 1809, then took off on destinies of their own. Breaking and stealing of the value of under one dollar remained closeted as an offense within the same statutory provision as petty larceny until 1933 when (1) the grand larceny-petty larceny demarcation line was raised from five to twenty-five dollars, (2) petty larceny was changed from a felony to a misdemeanor, (3) jurisdiction was conferred upon justices of the peace (outside of Baltimore City) to hear petty larceny cases and (4) the offense of breaking a storehouse with intent to steal goods of under the value of twenty-five dollars was created.¹⁸¹ It also created a new section wherein (1) the old storehouse breaking and stealing under one dollar and (2) the new storehouse breaking with intent to steal less than twenty-five dollars could be lodged together and separate from petty larceny which remained under a separate section.¹⁸² These two lesser storehouse offenses have remained together to this day.¹⁸³

In 1937, the lesser storehouse breaking and stealing offense added "other building" to its list of protected structures,¹⁸⁴ while its complementary section in the burglary subtitle did not. This was the only

181. Law of Dec. 15, 1933, ch. 78, § 1, [1933] Laws of Md. Spec. Sess. 249-51.

182. *Id.*

183. MD. ANN. CODE art. 27, § 342 (Supp. 1973).

184. Law of May 18, 1937, ch. 305, § 1, [1937] Laws of Md. 578.

addition to its list from 1809 to date. In 1947, the greater storehouse breaking and stealing offense, in tandem with the breaking with intent offense, added "filling station, garage, trailer, cabin and diner" to its list of protected structures,¹⁸⁵ and in 1968, again in tandem with the breaking with intent offense, added "boat" to the list,¹⁸⁶ while on neither occasion was a change made in the supposedly complementary section within the larceny subtitle.

The intent provisions, which were complementary in 1809, went askew in 1952, and were reconciled again in 1960. In 1952, the maximum figure for storehouse breaking and stealing was raised from one dollar to five dollars.¹⁸⁷ Nothing, however, was done to the theretofore corresponding minimum figure in the supposedly complementary section in the burglary subtitle.¹⁸⁸ For eight years, a person breaking a storehouse and stealing therefrom goods of the value of one dollar or over but under five dollars was subject to a maximum sentence of ten years in the penitentiary under the burglary subtitle but for the same offense could receive no more than eighteen months imprisonment under the larceny subtitle. In 1960, the reconciliation was effected by raising the minimum figure from one dollar to five dollars in the burglary provision.¹⁸⁹ The sections are again complementary and have, thus far, lived happily ever after.

To bring the tale completely to date, in 1966, the status of storehouse breaking and stealing five dollars or upwards was raised from misdemeanor to felony.¹⁹⁰

CONCLUSION

Thus have the compound larcenies been compounded. Thus, haltingly but inexorably, has Saxon *hamsoen* come to protect a department store in downtown Baltimore. Twelve pence has become one hundred dollars and even inflation has probably not kept pace with the price of "a pasture-fed ox." Benefit of clergy did not survive to be tested by the equal protection clause of the Fourteenth Amendment. Where, then, does all of this leave our maligned indictment clerk?

From the vantage point of a thousand years of history, a count charging housebreaking in language redolent of storehouse breaking is neither bizarre nor incomprehensible. From their common origin, from their centuries of cohabitation within a single statutory provision and from their sharing of the same intent proviso, one can picture these variations on a single theme being played on a common indictment

185. Law of March 15, 1947, ch. 142, § 1, [1947] Laws of Md. 209.

186. Law of May 7, 1968, ch. 508, § 1, [1968] Laws of Md. 944.

187. Law of March 28, 1952, ch. 18, § 1, [1952] Laws of Md. 229.

188. Law of March 15, 1947, ch. 142, § 1, [1947] Laws of Md. 209.

189. Law of March 23, 1960, ch. 68, § 1, [1960] Laws of Md. 192-93.

190. Law of May 6, 1966, ch. 628, § 1, [1966] Laws of Md. 1125.

form. There would have been required until 1943 but two blank spaces. Into the first would go either "dwelling house" or "storehouse". Into the second would go either "daytime" or "nighttime." The rest of the count would have held constant in either situation. When after 1943, the storehouse variation acquired two different monetary intent levels, the still common indictment form was broken down into two counts—one charging intent to steal twenty-five dollars or more (later one hundred dollars or more) and the other charging intent to steal less than twenty-five dollars (later less than one hundred dollars). Housebreaking, to accommodate its companion, simply assumed a superfluous intent distinction.

When in 1965, housebreaking was removed from the storehouse breaking section and placed in with the statutory burglary section, one cannot realistically picture indictment draftsmen poised and anxiously waiting the latest legislative revision. Indictment clerks as a breed, like Latinists and Egyptologists, are encrusted with the patina of old traditions. Ancient forms, with their baroque phraseologies and Teutonic word orders, die hard. The arrangement in the code may change but the model indictment forms in the dusty file drawers endureth forever. A count, therefore, drawn in language that seems to the surface glance bizarre, is readily understandable, like the appendix or the vestigial tailbone of Man, in terms of long evolution. On behalf of my Court and both the advocates who stood before it that day a quadrennium ago, I apologize to the misunderstood indictment clerk.¹⁹¹

191. Empathy for that clerk may subconsciously have been reinforced by the knowledge that most of the county state's attorneys' offices had copied the model indictment forms of Baltimore City and by the memory that the Baltimore forms had within the decade been extensively reviewed and revised by a triumvirate, consisting of a veteran indictment clerk, the unnamed State's Attorney who now sits on the Court of Appeals, and the unnamed Deputy State's Attorney who now sits on the Court of Special Appeals.