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In all prosecutions for arson there are two elements of the alleged crime, which the prosecution must prove beyond a reasonable doubt: (1) That the fire was caused by the willful criminal act of some person; and (2) the identity of defendant as the one responsible for the fire. Both of these elements may be established by direct or positive evidence or by circumstantial evidence or both.

A conviction may be sustained although there is no direct evidence of the guilt of the accused. As in other criminal cases, one may be convicted of arson on circumstantial evidence. Whether the evidence is direct or circumstantial, the same broad rule applies, and that rule requires the proof to show the guilt of the accused beyond a reasonable doubt. Arson is one of those crimes which is peculiarly of secret preparation and commission. It is very seldom that the prosecution can furnish testimony of an eye witness who observed the setting of the fire. If it required positive testimony to convict in cases of arson, it would be next to impossible ever to procure a conviction, for it is a crime committed under cover of darkness, and when there is no human eye to see. To hold, therefore, that no man could be convicted unless the state is able to establish by an eye witness that he set the fire would make a dead letter of the statute.

The very nature of the crime is such that it becomes necessary for the state, in many, if not in most cases, to rely upon circumstantial evidence to establish the guilt of the accused. It is judicially recognized that a well directed train of circumstances may be as satisfactory as an array of direct evidence, and in some cases more so. Although many of the items of the evidence, when standing alone, are of little consequence, they may, when considered as a whole, point strongly to the guilt of the accused. The rule seems to be that when circumstantial evidence is relied on for conviction, the circumstances, when taken together, must be of a conclusive nature and tendency, leading on the

whole to a reasonable and moral certainty that the accused and no one else committed the offense.

Direct or positive evidence is evidence to the precise point in issue; as, in a prosecution for arson, that a witness saw the accused set the fire, or, in case of homicide, that a witness saw the accused inflict the blow which caused death, or, in case of an agreement, that a witness was present and witnessed it. Documents, which are genuine, are considered as direct evidence. Some courts hold that a confession obtained by police officers or other public authorities or private individuals is direct evidence, but other courts hold the contrary and say that a confession is rather a fact to be proved by evidence than evidence to prove a fact. All courts seem to be in agreement, however, that a confession or admission given in any judicial proceeding, such as a preliminary hearing, coroner's inquest, or where defendant pleads guilty in court, constitutes direct or positive evidence.

Circumstantial evidence is that which relates to a series of other facts than the fact in issue, which by experience have been found so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion. For example, when footprints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow since it fell; and from the form and number of the footprints it can be determined whether they are those of a man, a bird, or an animal. Such evidence, therefore, is founded on experience, observed facts, and coincidences establishing a connection between the known and proven facts and the facts sought to be proved. Other examples are: (1) Saturation of the premises with gasoline, kerosene, or other inflammable liquid, if not normally kept upon the premises; (2) two or more fires, each separate and distinct, having no connection with each other; (3) a person seen entering or leaving the premises just before the fire; (4) removal of furniture, fixtures, or stock from the premises prior to the fire; (5) a false alibi; and (6) flight of defendant after the crime was committed.

A code definition is as follows: Direct evidence is that which proves the fact in dispute directly without any inference or presumption, and which, if itself true, conclusively establishes the fact. Indirect or circumstantial evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. Direct evidence is that which immediately points at the question at issue. Indirect, or circumstantial, evidence is that which only tends to establish the issue in proof of various facts, sustaining,

by their consistency, the question at issue. Another definition has thus been formulated. Direct evidence differs from circumstantial, in this, that in the former witnesses testify directly of their own knowledge of the main facts to be proven, while the latter is the proof of certain facts and circumstances in a case from which the jury may infer other connected facts which usually and reasonably follow according to common experience.

Direct and circumstantial evidence are not different in their nature. For, as Wharton says, "All evidence consists of reason and fact cooperating as coordinate factors." Circumstantial evidence is merely direct evidence indirectly applied. Direct and circumstantial evidence are not, in any sense, opposed to each other. In fact, they are in practice found in the most intimate connection with each other. Each of these modes of proof has its advantages and disadvantages.

There exists in the minds of many persons a strong prejudice against circumstantial evidence, and as evidence in arson cases is very frequently entirely of this character, it is important that a true understanding of the weight and value of circumstantial evidence be had.

The chief error with regard to the delusiveness of circumstantial evidence lies in considering it as a mode of reasoning or proving doubtful points peculiar to a court of justice. Whereas it is nothing else than the common course of settling all questions which can be settled by argument employed whether knowingly or unknowingly by all mankind. If men would stop to consider the fact that in the ordinary affairs of every day life they are continually forming judgment on circumstantial evidence alone and acting upon these judgments in all matters of the utmost concern to them, they would be less likely to decry this kind of evidence when acted upon in the administration of justice.

In a legal sense circumstantial evidence is not regarded as inferior to direct evidence. In many instances, reliance may be had on it more safely than on direct evidence, especially since proof by circumstantial evidence usually requires the use of a large number of witnesses, each testifying to some small link. Thus, a number of perjured witnesses would be necessary to cause an unjust conviction, whereas one perjured witness giving direct testimony might accomplish this wrongful act.

In one case the court in delivering a charge to the jury pointed out the advantages of circumstantial evidence as follows:

> "In most cases of conviction on circumstantial evidence, there are many different witnesses swearing to several distinct circumstances, all tending to the same result, each of which circumstances is a necessary link in the chain of evidence required to produce a conviction; and there is, therefore, the less danger of perjury in such cases because of the number of perjured witnesses which it would be

necessary for the prosecution to produce to effect an unjust conviction. For if one perjured witness should swear to a fact forming only one link in a chain of circumstances, the rest of the witnesses being honest, he will be in danger of detection from the discrepancy between his testimony and theirs. Whereas, if a person testified that he saw the crime committed, but in fact did not, there is a possibility that his false testimony may never be detected. For this reason, although from the imperfection and uncertainty which must ever exist in human tribunals, I have no doubt that there have been cases in which innocent persons have been convicted on circumstantial evidence, yet from my knowledge of criminal jurisprudence, both from reading and from observation, I have no hesitation in expressing the opinion that where there has been one unjust conviction upon circumstantial evidence alone, there have been three innocent persons condemned upon the positive testimony of perjured witnesses."

"Indeed, it has been many times observed that strong circumstantial evidence of arson, and other crimes committed in secret, is the most satisfactory of any to point to the guilt of the accused; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation, but it can scracely happen with many witnesses, especially if they be such over which the accused could have no control."

Circumstantial evidence is often used as an aid to, and frequently as a test of, direct evidence. If circumstantial evidence were to be excluded in criminal cases, the great majority of criminals would go unpunished.

Certain cases to be found in the books in which innocent persons were convicted on circumstantial evidence have at times been called to your attention. These, however, are few in number, and they occurred in a period of some hundreds of years. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is legal evidence to show the guilt of the accused to a moral certainty and beyond a reasonable doubt; and circumstantial evidence is legal evidence.

Frequently persons examined as to their qualifications to serve as jurors, particularly in capital cases, say that they could not conscientiously find the accused guilty on evidence that is wholly circumstantial. The existence of this feeling is no doubt due to a large extent to the prejudicial statements made by counsel for the accused, in almost every case where the proof of guilt depends upon circumstantial evidence, to throw discredit upon this kind of evidence. The courts have, however, very rarely shared in or encouraged this popular prejudice against circumstantial evidence.

In one instance the Supreme Court of the United States had this to say regarding circumstantial evidence:

"Great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances

the more correct their judgment is likely to be. The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts."

Circumstantial evidence may be divided into two groups. This evidence may be compared with a chain, which by the number and strength of its links may furnish adequate proof of guilt, but which is no stronger than its weakest link. Or it may be likened to a rope or cable composed of different strands; and then its vitality depends on the aggregate strength of the strands, which is only partially affected by a weak element. The chain is composed of interdependent links; the rope or cable is built up by independent strands which are bound together. If one essential link in the chain is missing, the evidence may be insufficient to justify a finding of guilt. A defective strand in the rope may weaken the case, but it may nevertheless, remain sufficiently strong to sustain a conviction. Each one of these strands, separated from the others, may be easily broken; but when all are united, woven together, and point in one direction, they form a cable sufficiently strong to convict.

For instance, a case occurred in which the defendant was convicted of arson and he appealed to the State Supreme Court on the ground that the evidence was insufficient to sustain the conviction. On the evening of the fire, which totally destroyed a barn, the owner herded his horses and cattle into the barn and because of an approaching storm, took particular care to see that the doors were closed. About 3:00 A.M. the owner and his wife were awakened by the glare from the burning barn, which was involved in flames, and nothing could be done to save the imprisoned animals. They did, however, notice that the large sliding door was slid back some two or three feet. At daylight the owner and his four sons and two neighbors started looking for tracks. They found tracks of smooth rubber shoes on the road near the barn; also kinks in the fence between the road and the barn indicating a person had stepped on it in going over. These tracks were traced to within six rods of defendant's dwelling. When the defendant noticed the tracking party he ran into the house and did not come out, but no one in the party went up to the house or made any attempt to speak to him.

About a year before the fire defendant lost a lawsuit he had brought against the owner for alleged damage done by the latter's cows. Soon after the decision of that case, in a casual conversation, defendant made the statement that he would "get even with the owner," and at another time that he would "lick hell out of him."

One of the tracking party traced one of the footprints upon a paper. When the constable arrested the defendant he found in the defendant's house one rubber shoe which seemed to fit the tracing.

In reversing defendant's conviction the State Supreme Court pointed out the rather weak and missing links in the evidence, as follows: (1) With reference to the large barn door, which had been closed the evening of the fire, and which was found at the time of the fire pushed back on its rollers about two feet, permitting the inference that someone had entered and set the fire, it is not impossible that the movement of the door might be ascribed to the draft created by the flames, or to the expansion of the roller rails from the heat as the fire had raged for some time before this condition was discovered. (2) It had rained during the night, but the evidence is silent as to the absence or presence of lightning during the storm. We do know that sometimes lightning does set fire to buildings. (3) The existence of a motive is extremely doubtful. Statements casually made while smarting under a recent adverse decision of a lawsuit are generally of no significance. There is no evidence that defendant ever again referred to the matter. (4) The only substantial evidence pointing to the defendant as the guilty party is the existence of footprints showing that some person passed both ways between the barn and defendant's residence. A paper tracing was made of one of these footprints. The constable testified that a rubber shoe was found in defendant's possession which seemed to fit the tracing. The fact is, however, that the rubber shoe was in possession of the state at the time of the trial, but was not produced. Its nonproduction almost compels the inference that it would not fit the tracing and leaves very little force to the evidence of footprints. Footprints may be convincing evidence, but to be such they must be shown to correspond with the foot or footwear of the accused.

There is no doubt that circumstantial evidence alone may sufficiently establish the Corpus Delicti and the guilt of the defendant in an arson conviction, but in this case, as the court pointed out, it was insufficient to sustain the conviction.[1]

In another case a large elevator and mill of brick and stone construction was totally destroyed by fire. The owner was convicted of arson, and in his appeal to the State Supreme Court alleged that the evidence was insufficient to sustain the verdict of the jury.

The fire was discovered by a railroad special agent about 12:30 at night. He noticed a small blaze, only about two feet high, on top of

1. State v. Jacobson, 130 Minn., 347; 153 N.W., 145.

the elevator. At the same time he saw the defendant walking across the railroad tracks coming from the direction of the burning elevator.

When the fire department arrived, the fire was confined to the roof of the elevator but was traveling very fast and in less than ten minutes the elevator and mill was entirely involved in flames. Some of the firemen, when entering the building, saw streamers of fire flashing with a bright flame up and down on the brick wall separating the elevator from the mill, and from the manner and speed with which the fire burned and spread it was, they said, a "boosted" fire, that is, some inflammable substance other than that of which the building was constructed or which it contained contributed to its burning and spreading.

A few minutes after the discovery of the fire, a man boarded a street car about three blocks from the scene of the fire. He was identified as the defendant by the motorman and two other passengers in the street car who knew him well.

A few days before the fire an employee of a construction company that was making some repairs to the elevator, purchased two five-gallon cans of kerosene for use in flares to warn traffic at night. He serviced the flares on the evening of the night of the fire and then placed the kerosene cans, which were almost full, in the elevator near the front door as was his custom.

The day after the fire a five-gallon "Martin Ware" can was found lodged against a log boom in the river a short distance from the elevator and which was identified as the same can that was used in the elevator to fill the water barrels for fire protection purposes. There was a small quantity of fluid in the can which a chemical analysis showed to be kerosene.

On the evening of the night of the fire, when the elevator was shut down for the night, the machinery was inspected to be sure there were no hot boxes, and the main switch which cuts off all electric current from the building, was shut off, and all doors and windows were locked. The building was very clean and free from dust, and there was absolutely nothing in the building to cause an accidental fire.

The defendant, according to his own admission, was in desperate financial circumstances when the fire occurred. He owed $7,000.00 back taxes on the property. There were a number of judgments and liens against the property for labor and material. He was also four or five months behind in his rent on his apartment, and he owed numerous other bills. He had not paid the premiums on his fire insurance. Some of the insurance companies had written him advising him that their policies would be cancelled upon the expiration of ten days from the

receipt of the written notice. The elevator, however, was destroyed by fire two days before the expiration of these notices.

The defendant claimed that he was not at the elevator after 4:30 on the afternoon of the day before the fire, but he was seen leaving there about 7:00 P.M., the night of the fire by a man employed at a nearby mill who knew him well. He saw the defendant come out of the side door, try the door to see if it was locked, and then walk rapidly away.

After the fire defendant made a statement to the fire marshal in which he denied that he had been in the vicinity of the building at or about the time that the fire occurred. His story under oath to the fire marshal was that he left the elevator at 4:30 P.M.; that he went directly home, had dinner with his family and then went to a wrestling match. After the wrestling match he went to a night club where he remained for about an hour and a half, and then he went home arriving about 12:30. He did not know anything about the fire until the next morning about 8:00 o'clock when he read it in the paper.

At his trial the defendant testified in his own behalf, and on the witness stand admitted that his previous statement to the fire marshal was a deliberate falsehood, and that he did board a certain street car near the elevator just about the time the fire was discovered. He also admitted that he had not been at a night club that evening. He claimed that after the wrestling match he went to two hotels to see if he could find someone who would give him a free ride to a nearby city and then boarded the street car. His explanation of why he lied to the fire marshal was that he did not want to let his wife know that he was so hard up he had to beg for an automobile ride to the city where he wanted to go, but he finally admitted that she knew all about his financial plight.

In sustaining defendant's conviction the State Supreme Court said, "The circumstantial evidence abundantly justified conviction. That both the corpus delicti and the guilt of defendant may be so proved is too well established in this state to justify citation of authorities."[2]

We all recognize that the evidence in this case was entirely circumstantial. Many of these circumstances, when standing alone, are inconclusive, but when each piece of evidence is placed in its proper position, with relation to the others, they form a chain—strong, convincing, conclusive.

It must be apparent to all by now that circumstantial evidence can be as strong and convincing as direct evidence, and in some cases, more

2. State v. Milford Burton Lytle; decision No. 192 rendered by Minnesota Supreme Court, Jan. 2, 1943.

so. The gathering together of circumstantial evidence may be compared to the piecing together of a picture puzzle which, after each part has been fitted into its proper place, forms a picture complete in every detail.

The arson investigator should not allow himself to be discouraged merely because the evidence he gathers in working up his case is mostly circumstantial, as the nature of the crime is such that it must necessarily be proved by this type of evidence. The investigator also should not allow himself to be prejudiced by any of the false and misconceived ideas that have sprung up regarding circumstantial evidence because, as we have seen the law is, and the courts have so held, that circumstantial evidence has just as much value in a legal sense as direct evidence.