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Arson is a peculiar crime. It is committed covertly and in secrecy, and consequently, the admissibility and sufficiency of evidence are problems to be solved. A conviction, if possible, is generally the result of an accumulation of numerous bits of circumstantial evidence. The prosecuting attorney, of necessity, is impelled to offer evidence bordering on the imaginary line which separates the admissible from the inadmissible.

Now for a moment let us consider the old common law crime of arson which consisted of the wilful and malicious burning of the house or outhouse of another man. It could not be committed by burning an unoccupied dwelling. While the house had to be occupied, it was not necessary that the occupant be in the building at the time of the fire. The crime also included setting fire to any outhouses which were used in connection with the dwelling and which were located close enough so that the flames would endanger the occupants of the dwelling. The crime was against the security of the home and not against property and, therefore, the occupant could not commit the crime by burning the house in which he lived. It is easy to see that arson at common law was confined to very narrow limits. Other burnings were punishable, not as arson, but as high misdemeanors.

To remedy the inadequacies of the common law, the legislatures of the various states gradually began to extend and broaden the definition of the crime, until today it covers all kinds of buildings and structures, even including personal property. Now the crime of arson includes the burning of the one's own property, whereas, at common law, it was limited to the burning of the dwelling house occupied by another person.

While the legislative enactments in some states were adequate, in others they fell short. The Model Arson Law was designed not only to bring about uniformity but to correct the deficiencies of the common law and the statutory laws. As will be seen later, the Model Law covers practically any intentional burning that can occur and makes it much easier than before to convict the arsonist. At the present time, all states are operating under this law, with the exception of Maine, Minnesota, New York, Oklahoma, Tennessee, Texas and Washington.

The first section of the Model Arson Law covers the intentional burning of any dwelling house or outhouse regardless of whether it is occupied, unoccupied or vacant. It is immaterial whether it is his own property or the property of another person.

The second section of the Model Arson Law covers the intentional burning of any building or structure, of any class or character, except those covered by the first section. Here again it is immaterial whether it is his own property or the property of another.

The third section covers the intentional burning of personal property, of any class or character, provided the value of the property is twenty-five dollars or more and is the property of another person. You will note that this section is limited to the burning of personal property of another person. For instance, if I wished to burn some old clothing or furniture, I could do so without committing arson, provided I did not do it with the intention of defrauding an insurance company. However, if I burned the clothing or furniture of some other person of the value of twenty-five dollars or more, I would be committing arson.

The fourth section covers an attempt to burn any of the buildings, structures or personal property referred to in the preceding sections. It also defines what shall constitute attempted arson by declaring that the placing or distributing of any flammable explosive or combustible material or substance or any device in any building or property that I have mentioned, in an arrangement or preparation with the intent to wilfully and maliciously burn same, or to procure the burning, shall constitute an attempt. At common law, and under the statutes of the various states, it was no crime to prepare a building for a fire. An overt act, such as striking a match, was necessary. Under the Model Arson Law, however, no overt act is necessary, mere preparation is sufficient. This makes it possible to prosecute in many instances where formerly a prosecution was impossible. For instance, suppose A, B, and C, enter the basement of a store building during the night, bringing with them several cans containing gasoline and varnish. After mixing them, they spray the mixture on the ceiling and walls of the basement and place a candle, but before they can light it police officers rush in and arrest them. They can be convicted, under the Model Arson Law, of attempted arson.

The final section covers the intentional burning of any property mentioned in the other sections, which is insured against loss or damage by fire, and with the intent to injure or defraud the insurer.

The crime committed under this section is not termed arson but is a felony. In a prosecution under this section it is not only necessary to prove that the fire was intentionally set, but also that the specific intent to injure or defraud the insurer was present.

Under the Model Arson Law, any person who aids, counsels or procures is equally guilty with the person who actually starts the fire. Principals and accessories are included, and therefore, we need not concern ourselves with the definition of principals or accessories or their implication as such. Let us take this case for example: The owner of a restaurant and confectionery store finds his business dropping off and before long he is facing a financial crisis. He is unable to borrow sufficient money to see him through. A member of an arson ring hears about his plight and sells him on the idea of having a fire. Later, another member of the ring collects five hundred dollars from the owner as a down payment and to cover the cost of materials needed to set the fire. Two days before the fire, two members of the ring conceal the materials with which the fire is to be set in the basement of the restaurant.

Members of the ring hold a meeting where plans as to how and when the fire is to be set are discussed and decided upon. The owner is then informed that the fire is to be set on a certain night and that he is to be out of town on business when the fire occurs. Under the Model Arson Law, they would all be guilty of arson even though it was impossible to prove who actually lit the match.

In the case of the *Commonwealth* v. *Flagg* Chief Justice Morton, citing numerous authorities, said: "It is an indictable offense at common law for one to consel and solicit another to commit a felony or other aggravated offense, although the solicitation is of no effect, and the crime counselled is not in fact committed."[1]

In this case Flagg had endeavored to persuade an acquaintance to burn a barn belonging to a third person, urging him to do so on two or three occasions, promising him money for doing so and, in fact, advancing a small sum on account. The person solicited, however, apparently took no action looking to the burning of the barn, but the conviction of Flagg was sustained.

The mere burning of a building does not constitute the body of the crime. There is no presumption that a building that has burned has been intentionally set on fire; on the contrary, the presumption is that the fire was accidental or of providential origin. In order, therefore,

1. 135 Mass. 545. 549 (1883).

to prove the body of the crime (corpus delicti) it is necessary to show first, that the building in question burned; and second, that it burned as the result of the intentional criminal act of some person.

To constitute a burning there must be some burning or charring, that is, the fiber of the wood must be destroyed, its identity changed. A mere smoking, scorching or discoloration of the wood is not sufficient. It is not necessary that the building be seriously damaged. All that is required is the actual ignition of the smallest part, although there is no blaze. For instance, if a person deliberately causes a short circuit in the wiring, and there is only a smouldering, but no flame, and there is a charring of the wood, however slight, the offense will have been consummated.

Criminal intent involves two mental elements, i.e. wilfulness and malice. Wilful means intentional and implies that the act was done purposely and intentionally.

While malice is a necessary ingredient of the crime, it need not be specifically proved. It may be implied if the act was done intentionally. Malice in its broad sense denotes hatred or ill will or a desire for revenge, whereas malice, in a legal sense, has a much more narrow meaning. As the court pointed out in one case, "If a man in his right mind intentionally burns the property belonging to another, the jury ought to infer malice from the act itself."

Motive and intent are in no sense the same. They mean two different things. Motive is the moving cause which induces the commission of a crime. Intent is the purpose or design with which the act is done, and involves the will. Intent is an essential element of a crime; motive is not.

For example: A woman employed in a cleaning establishment suddenly quit her job and shortly thereafter a fire occurred in her former place of employment causing heavy damage. She confessed that she had stolen some money from her employer and that she set the fire to cover up the theft. The motive was her desire to cover up the theft which induced her to form the intent to set the fire.

In that case, it was absolutely necessary for the prosecution to prove the intent but not the motive. While the law does not require the State to prove a motive, it is always well for the State to be able to prove one, otherwise the jury may not convict.

When building his case, the investigator often asks himself what the arsonist's defense will be. Therefore, it would be well to consider some of the defenses which the accused might plead. The defense most frequently used is "the alibi." This is where the defendant offers

evidence that he was in another place at the time of the fire and, therefore, could not have committed the crime. This is termed "setting up an alibi."

In some states, the law is that when the accused offers evidence of an alibi, the burden of proof is on him to show, in support of his alibi, facts and circumstances sufficient, when considered with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him.

In other states, evidence offered by the defendant tending to show he was elsewhere at the time of the fire, does not change the burden of proof and the prosecution must show the guilt of the defendant beyond a reasonable doubt, the alibi evidence to be considered with all the other evidence in the case. This is the prevailing rule and is in accordance with one of the fundamental principles of American criminal jurisprudence, that is, that the burden of proof rests with the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

In a Michigan case, the defendant was convicted of burning an unoccupied dwelling house, a barn and a frame building, for the purpose of defrauding the insurer. She stated on the evening of the fire that she went to a certain town to visit some friends but found no one at home. She offered no evidence in support of her alibi. The State introduced evidence showing that she boarded an electric train; that she asked the conductor if the train stopped at a certain place, which was the nearest stop to where the fire occurred, and that she got off the train at that place about a half hour before the fire was discovered.

In affirming her conviction, the Michigan State Supreme Court said, "In the absence of any affirmative testimony on the part of the defense to explain the whereabouts of the defendant at the time of the fire, the record fully sustains the verdict. Her connection with the crime was not established by direct testimony as to her participation, but by the converging forces of numerous circumstances which point quite clearly to her guilt."[2]

A person cannot be convicted of a crime until it has been shown that he is criminally responsible, that is, he must have sufficient mental capacity to form the necessary criminal intent. One may have a weak or impaired mind without being insane in the legal sense. Legal insanity simply means that the person accused of the crime must have insufficient mental capacity to distinguish between right and wrong. The law does not permit the conviction of the insane, and if evidence is produced indicating mental unsoundness at the time of the fire that issue must be

2. People v. Stewart, 163 Mich. 1, 127 N.W. 816.

presented to the jury. The test was stated in McNaughten's Case as follows: "There is no criminal responsibility where, at the time of the committing of the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong." This is the prevailing rule.

The law presumes the defendant to be sane, but if he offers evidence of his insanity, the burden rests upon the State to satisfy the jury beyond a reasonable doubt that he was sane at the time he committed the crime.

Pyromania may be defined as an irresistible impulse to start fires. While the pyromaniac is mentally ill he is not always insane in a legal sense, and therefore, is not necessarily protected by the rule relating to insanity as he may well be aware of the nature of the act he is committing and may know that it is wrong. He simply is laboring under such a mental disability that he is unable to resist the impulse to set fires. The general rule is that an irresistible impulse to commit a crime is not a defense. Regardless of the strict interpretation of the law the pyromaniac is usually held as a psychopathic case. He should, of course, be confined so that he can do no further harm, but there is no more reason for punishing him as a criminal than there is for imprisoning those who suffer from other forms of mental illness. Many cases respond to medical treatment and, therefore, it would seem the most intelligent and humane manner of dealing with these persons would be to confine them in institutions where they may receive proper medical care and treatment.

Intoxication is a defense that is often used. The general rule is that voluntary intoxication is no excuse or defense for the commission of the crime of arson. A person can refrain from drunkenness, but if by drinking he brings upon himself a madness which causes him to set a fire, it is held to be voluntary and he will not be excused for his wrongful act. While this is the general rule, it does not hold in all of the states. In some states it is recognized that excessive drinking may render one irresponsible if he was so intoxicated that he could not possibly have formed the necessary criminal intent, and this question may be submitted to the jury. Evidence of slight intoxication does not require the submission of this question to the jury.

At common law, a child under the age of seven years is conclusively presumed incapable of entertaining the necessary intent to commit a crime. In many states, however, the common law age has been raised

by statute. For instance, under Illinois law, a child from one to ten years is conclusively considered incapable. In the case of a child from ten to fourteen years, there is a rebuttable presumption that the child is incapable, but this presumption may be overcome by clear and convincing evidence that the child knew the difference between right and wrong.

Occasionally the defense of entrapment may arise. According to the prevailing rule, there is no entrapment if the crime originated in the mind of the defendant and the public officials are informed that the crime is to be committed and they keep themselves concealed and permit the accused to start the fire before they arrest him.

An interesting case where the defendants set up the defense of instigation and entrapment occurred in California. The facts briefly are: A., the owner of a dwelling, needed money and decided to burn his house so that he could collect the insurance. He talked about it to B. who suggested that he procure C., who made a profession of setting fires, to do the job. The owner thereafter discussed what had transpired with a friend who advised him that he had better report the matter to the authorities. The owner thereupon informed the local fire chief, who, in turn, took the matter up with the police officials and together they worked out a plan of action in which the owner was to play along with the police officers. The owner arranged to have B. meet him in the basement of a certain building where a dictaphone had been installed. While the owner and B. were discussing plans for the fire, the officers listened in on the conversation. C. was employed to do the burning for which A. agreed to pay him three hundred and fifty dollars. On the night of the fire, C. and his assistant went to the owner's home and the three of them prepared the place for burning by spreading gasoline over the premises and applying a lighted candle to it. By prearrangement, the officers had secreted themselves on the premises. They extinguished the fire and arrested the three defendants. The defendant B., who had advised the owner to employ C., was later arrested.

The defendants were convicted and appealed. In affirming their conviction, the Supreme Court of the State of California stated, "It conclusively appears that the crime was originally conceived by the owner and B., independent of any aid or suggestion from the officers. There is no question that when the scheme was thus formed the owner, for purposes of his own, betrayed B. and that the defendants were thereafter encouraged in the perpetration of their criminal design by the officers. There is a distinction, however, between inducing a person

to do an unlawful act and the setting of a trap to catch him in the execution of a criminal plan of his own conception."[3]

In another case the subject of entrapment was fully reviewed by the Supreme Court of California and the conclusion, in substance, is there reached, "that if the criminal design originated with the perpetrators of the act they cannot escape conviction merely by reason of the fact that a trap was laid for them, or that they were facilitated in the execution of their enterprise by officers of the law who acted for the purpose of detecting them in the perpetration of their unlawful act. The great weight of authority is in accordance with this view."[4]

From this it is understood that if the criminal plan is conceived in the minds of the perpetrators it is not entrapment; but if the criminal design was conceived in the minds of the police officers, and they induced someone to commit the crime, then it would be entrapment.

Arson may be proved either by direct or circumstantial evidence or both. The nature of the crime being what it is, the prosecution in most instances must rely upon circumstantial evidence for a conviction.

Direct evidence proves the fact directly without any inference or presumption such as where a witness sees the defendant set the fire. Circumstantial evidence, on the other hand, takes a more round-about route to prove the fact in issue by uncovering facts here and there; and all these facts and circumstances, when considered together, must point to only one conclusion—the guilt of the accused beyond a reasonable doubt. The courts have held that a strong set of circumstances are just as convincing as direct evidence, and in some cases even more so.

To build a case on circumstantial evidence requires many more witnesses than does a case based on direct evidence, and therein lies the great strength of circumstantial evidence. It is highly improbable that a number of witnesses in a circumstantial case could be induced to perjure themselves to unjustly convict a defendant, 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 which might result in the conviction of an innocent man. As the Court stated in one case, "I have no hesitation in expressing the opinion that where there has been one unjust conviction upon circumstantial evidence, there may have been three innocent persons condemned upon the direct testimony of perjured witnesses."

In the case of the *Commonwealth* v. *Braunfeldt,* the Court, when instructing the jury said: "It may be important here for me to direct

3. People v. Caiazza, et al. 61 Cal. App. 505, 215 Pacific 80.
4. People v. Rodriquez, 214 Pacific 452.

your attention to the character of the evidence that is offered before you. Evidence or proof in such cases may be either direct or positive or circumstantial. Let me illustrate. If a man knowing, as we all know by this time, that there is a clock on this building that strikes the hour, goes to its tower and there stands as the next hour approaches, and watches the hammer strike the bell, and then comes down and in a case in which that fact may be material, testifies that he saw the hammer strike, and as it is known to all men that bells vibrate and sound when they are thus struck, that he heard the bell ring, that at least, for the purpose of illustration in this case, may be cited as an illustration or example of direct or positive testimony. But, if you as Jurors, or others in this courtroom during these days you have sat here, and as the hour was reached heard that same bell strike, and should afterwards testify that, let me say, at one o'clock this afternoon the courthouse clock struck the hour of one, that would be circumstantial testimony. You have been here and heard the clock strike, hour by hour, you feel the building vibrate when the hammer strikes; you hear the sound coming from that direction at the appointed time, and you conclude that that bell struck. I hope that I have illustrated the difference between positive and circumstantial evidence."

In another case, the United States Supreme Court, speaking through one of its greatest Chief Justices, stated: "No witness has been produced who saw the act committed, and hence it is urged for the prisoner that the evidence is only circumstantial, and consequently entitled to a very inferior degree of credit, if to any credit at all; but that consequence does not necessarily follow."

"Indeed, I scarcely know whether there is such a thing as evidence purely positive. You see a man discharge a gun at another, you see the flash, you hear the report, you see the person fall a lifeless corpse, and you infer from all these circumstances that there was a ball discharged from the gun which entered his body and caused his death, because such is the usual and natural cause of such an effect. But, you did not see the ball leave the gun, pass through the air and enter the body of the slain; and your testimony to the fact of the killing is therefore inferential; in other words, circumstantial. It is possible that no ball was in the gun, and we infer that there was only because we cannot account for that death on any other supposition."

It is the duty of the investigator to gather the evidence and present it to the prosecuting attorney, whose duty it then becomes to institute whatever criminal prosecution the facts may warrant. Every investigator should familiarize himself with the laws of his state pertaining to

arson and related crimes. He should be able to distinguish between the various offenses and the ingredients of each so that he will know which law has been violated and what evidence to look for.

In some states there is a Fire Marshal's law and, when operating under that law, the investigator has more power and authority than any other peace officer. In order to effectively discharge his duties he should not only be familiar with the law itself, but also with any court decisions that may have been rendered.

The success or failure of an arson investigation depends, not only on how competent the arson investigator is, but also on the degree of cooperation that exists between him and the police and fire services, prosecuting attorneys and others with whom he is obliged to work. Unfortunately, in many instances, this cooperation is lacking, possibly due to envy, jealousy or other reasons; such a situation might result in losing a case. The investigation of an arson case is not an easy one by any means and the going it made more difficult when there is not the necessary cooperation. It is only when the spirit of friendliness and hearty cooperation prevails that we can make an honest, all-out effort to curb arson.