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EVIDENCE OF ARSON AND ITS LEGAL ASPECTS

Samuel L. Stevens

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It is the writer's considered opinion that an arson investigator should have a basic knowledge, or an understanding of evidence, what it means, and a knowledge of the basic legal aspects of arson. In other words the more an investigator knows about evidence and the law of evidence, the better qualified he is, and the more assistance he will be to a prosecuting attorney in bringing the guilty to justice.

To fully cover the evidential facts and their legal aspects would require volumes of textbooks and the codification of thousands of court decisions. Therefore, we will only refer to a few basic phases which pertain to the subject under discussion.

What is evidence? Evidence may be described as facts. Evidence when separated from all unrelated testimony becomes the truth described by a combination of statements or circumstances which logically arranged present the true facts. Therefore, the statements of true facts and the proving of the circumstances is what we must, under the ruling of the court, rely upon to establish or prove that a crime has been committed.

Ownership. Let us consider the basic testimony admissible in the prosecution of an arson case. Of course it is obvious that an arson case must be tried in the county or parish in which it occurred so that the jurisdiction of the court is not challenged. Next, there must be an ownership of a residence, a business building, a factory, a barn, a boat or plane, a forest, or some sort of personal property. This ownership must be proved by an individual, a partnership, a corporation, a city, a county or parish, a state, or a nation. Such ownership may be proved by testimony of the owner or owners themselves, or by legally recorded documents usually found in the public records of the county or parish in which the property is located. Ownership may also be proved by any person who has knowledge of it and occupation of the property. These methods have been consistently sustained by courts as being proper proof. In cases of ownership of personal property, unrecorded but authenticated bills of sale and contracts are admissible.

Proof of Burning. Next, there must be sufficient burning or damage

to constitute arson, and the burning must be proven to be unlawful. There has been a lot of discussion as to how much burning was necessary. In this respect, a house is not burned, within the meaning of the accusation of arson, when it is merely scorched or smoked or discolored by heat. Little more is required. The offense may be committed as arson if any part of the wood be charred, if the fibre of the wood is destroyed, or its identity changed. All that is required is the actual ignition of any part, although there be no blaze, and although the structure may not be seriously injured. The circumstances may present a question for the jury to decide as to whether the injury is sufficient to constitute burning or whether the acts of the accused constitute merely attempted arson.

To establish that a building was unlawfully burned, various types of facts or evidence may be introduced. First, the eye-witness may testify that he saw the building actually burning, or that part of the wood was consumed. An easy way to prove in court that property has been burned is to take a charred board from the building so it may be shown to the jury in order that they may determine whether or not it has been burned. The presentation of a photograph may be introduced as evidence, showing the whole building or any part of it which may have been burned. This shows to a jury more clearly than words can describe what has happened in the course of a fire. There can be no substantial objection to the introduction of a map of the building and the surrounding condition if proper preliminary evidence proving its accuracy be introduced.

With reference to the establishment of whether or not a fire is arson or attempted arson is described in a specific Connecticut case where it was said: "To constitute burning it is only necessary that some portion of the dwelling, however small, be burned—that is that the fibre or structure of the wood be wasted or destroyed in part, that it be charred, as distinguished from being smoked or discolored."

The distinction between the burning of and setting fire to a building is so shadowy that some courts have denied its existence. Other courts have recognized that it is possible to set fire to certain property and yet by reason of the prompt extinction of the fire there may not be burning within the meaning of the law of arson. The Statutes of the State of Florida provide that one who sets fire to property "with intent to burn or with intent to destroy" is in effect committing acts which are considered as an attempt to commit the crime and should be considered as consummated arson.

In decisions of a Virginia Court it is said: "That it is certainly

possible to set fire to some articles which by the sudden extinction of the fire may change, by charring, even the material to which it has been applied so that the defendant may have done the act imputed and yet not burned it within the meaning of the act."

Then it must necessarily follow that the burning of the building has not been sufficient, even with the burning of personal property contained in the building, if no part of the structure is damaged. For a building to be burned it is essential that the flames from its contents be communicated to the building itself. It should be noted here that the Model Arson Law defines several degrees of arson. One of the lesser degrees refers to the burning of personal property. It is necessary to follow the same trend in proving this degree as in the others. Part of the fibre of the merchandise damaged must be destroyed to constitute arson.

There are various questions as to whether or not an explosion in or about a house can constitute arson. The law is very plain that when an explosion occurs and the house by reason of the explosion is charred, the fibre of the wood or other combustible materials being part of the building damaged, such explosion comes within the meaning of the Arson Statute. For example, if a person intends to unlawfully blow a building to pieces and from the explosion the building is charred or burned, it constitutes the crime of arson.

The Corpus Delicti. The burning of the building is not all that is required to prove the *corpus delicti*. You must go further to prove that the burning was caused by a criminal agency, or as the rule is sometimes expressed—the *corpus delicti* consists of two elements: (1) That the building in question burned; (2) That it burned as the result of the wilfull and criminal act of some person. Then, there must be some evidence from which the jury may conclude or feel sure beyond a reasonable doubt that the fire was of incendiary origin. This wilfull intent to burn may be proven in various ways. A case in point in Alabama stated "that every man is presumed to intend the natural, necessary, and even probable consequences of an act which he intentionally performs, hence an attempt may be proved from the attitude of the person". For instance, the courts say that "malice will be presumed from the deliberation of the act when it is proven that a fire is of incendiary origin." If combustible materials of any sort were carried into a building, which are not employed in the natural or usual course of use of the building, it naturally follows that the person who carried them into the building intended to use them for the unlawful purpose of setting the fire.

Intent may be proved by statements of the accused prior to the fire

or indeed after the fire. For instance he may have said "I am going to set the building on fire", or after the fire he may have said that he had set it.

The intent may be proved by establishing burglary or larceny as a motive for the crime, or it may be proved that excessive insurance had been placed on the building. In extreme cases it has been proven that a person set another fire to show a motive—therefore this motive may show an interest.

It may also be shown that a person has ill feeling or a grievance against another or that he has a grievance against two or more persons, and he commits crimes against them at substantially the same time. In using this sort of evidence to prove the intent, it is simply proving his entire course of conduct.

To show intent it is proper to introduce evidence that the purpose of a fire was to destroy evidence to cover up a previous crime committed by the accused.

It may also be shown that two persons were in a conspiracy to set the fire in question—or there may be the actual existence of a conspiracy among several persons.

Further, with reference to intent it may be shown on a specific arson case that the accused was the only person who had the opportunity to set the building on fire; that he was the only person who had a key or access to the burned building. Or, it may be proved that the accused is one of a limited few who had access to the building. Evidence may be brought in proving that others had no motive for setting the fire. Even some weight is properly attached to the fact that the accused was at the scene of the fire shortly before it was discovered and that no other persons were seen in the immediate vicinity.

The accused may have taken various steps in preparation for the crime. It may be proved that the only person who slept on the premises was put out or discharged shortly before the fire, or the owner may have served notice to a tenant to vacate the premises. In specific cases courts have held that the failure of an owner to give an explanation of his reason for evicting a tenant will give great weight to such evidence. The fact that he was not present when the crime was committed is no defense in some cases, as when the proof tends to show the perpetration of the crime through an accomplice.

It is often well to use negative proof to establish a condition. It might be proven that no other person could have set the fire; that it could not have been an accident because there was no lightning, no

electrical shortage, no debris or combustible matter, or many such other facts which disprove the accidental nature of the fire.

All preparations and acts of the accused within a reasonable time prior to the fire can be used to indicate the circumstances of guilt. This prior conduct and preparations must of course be relative to the fire. For instance, preparations made to cause or to spread the fire may be proved. Prior conduct indicating intention to defraud the insurers of the property is clearly relative as tending to show a motive for the crime. If openings have been made for the spread of the flames, it may be proved that the accused had the tools to make the openings. If cork stopples have been used to plug the sprinklers of a factory or building; it may be proved that the stopples were in a place which was accessible to the accused. If a fire was set by means of a trap or box peculiarly adapted for incendiary purposes, it may be shown that the accused had a workshop, or the facilities and ability to construct such a box.

The location of inflammable materials may be shown to indicate that the accused was in a position to have such materials prior to the fire. It may actually be shown that the accused has had inflammable materials which were used for setting the fire, that soon after the fire his clothing carried an odor of inflammable materials, or, that shortly before the fire he secured matches or other means of starting a fire. It may be shown at the time of his arrest that such matches or a piece of candle found on his person were identical with those found at the scene of the fire.

It may be shown that the defendant's children had borrowed matches from a neighbor which were similar to those found at the fire. This neighbor may have stated that she thought she may have furnished the matches which burned the building, and the defendant may have asked her not to say anything about it.

A container may be identified as having been in the possession of the accused and which container bore the odor of inflammable materials. It may be shown that a piece of paper rolled up as a stopper and bearing the odor of inflammable substance was found near the premises and that this piece of paper was torn from a magazine, book, or newspaper found on the accused's premises. The possession of those articles may be introduced, even if the members of the accused's family have possession of them.

It may be shown that the owner of the building secretly removed items of personal property just prior to the fire. The removal may have been done by an agent, but if it can be inferred from the circumstances

that the accused had knowledge of the placing of the goods, the acts of another may thus be shown.

A witness may testify as to rubbish found in the yard near the burned building, which rubbish did not accumulate from the building. The use of the building may be shown. A fire inspector may testify that on prior occasions when he inspected the defendant's place of business he had not found accumulations of rubbish or trash. It is clearly competent for a witness for the prosecution to show that the fire was started by some contrivance or fire trap.

The entire conduct of the accused immediately before or at the time of the fire, or within a reasonable time after the fire, is admissible as testimony. It might be shown that the accused was absent from his home immediately prior to the fire and that he returned home late at night. It may be proved that he was in the immediate vicinity. His general feelings at the scene of the fire may be described. It may be shown that he exhibited no surprise or concern or that he made no effort to extinguish the flames. It may be shown that he made no effort to save any of the contents of the burning building. In short, any specific conduct before, during or after the fire, if related to the fire, may be pertinent. Circumstances occurring after the commission of an offense, which are relative and which tend to show in some degree the circumstances of guilt may be placed in evidence. It may be shown that he made false statements, calculated to deceive police or other officers investigating the fire. The fact that the defendant made contradictory explanations is an incriminating circumstance.

It may be shown that the evidence given by the accused in his preliminary examination is inconsistent with his prior or subsequent statements. Evidence of flight is permissible to show fear of consequences. It is competent to show by finger prints or by tracks on the earth, or by tracks of an automobile or truck that there was an approach to the building which was burned.

We have discussed the admissibility of most of the facts generally encountered in proving that a fire is incendiary. Before a case of arson is complete, the "torch" must be identified either by an eye witness or strong circumstances.

Admissions and Confessions. Now let us consider admissions and confessions between which there has been drawn rather a clear distinction. If the accused admits his guilt of the crime with which he is charged, his statements amount to a confession. If, however, his statements do not of themselves show guilt but require proof of other facts in order to show guilt, they do not constitute a confession but are

classed as admission of facts. One is an acknowledgment of guilt—the other is in a sense a fact from which the jury may or may not infer guilt. Relevant statements made before, at the time of, or after the fire, are equally admissible if not too remote. For example, a threat made two years before the fire was admitted; in the contest as to the value of this evidence the court said: "When one threatens to do an injury to another and that or a similar injury afterwards happens, this furnishes grounds to presume that he who threatened the act was the perpetrator." (*State v. Anderson*, 193 N. Car. 253.)

The statements which have been made by the accused may be shown by the prosecution as evidence tending to prove any material fact. They may be used to show his whereabouts at the time of the fire, his opportunity to commit the crime, his preparation for starting the fire, the insurance carried by him on the property, the ownership of the burned building, his motive for the fire, his prior threats, his ill feeling toward the owner, his intent to burn the building, his employment of an accomplice, or the existence of a conspiracy to set the fire. They are received to show a consciousness of guilt on the part of the arsonist, his claim of alibi or the falsity of such claim, his interest in influencing the testimony of a witness, his theory of the origin of the fire, the untruthfulness of his testimony at the trial.

As a general rule, a confession is admissible only when it has been made with the free will of the accused. It cannot be one which has been induced by fear of harm or hope of benefit; "by the flattery of hope or the torture of fear" (*King v. State*, 155 Ga. 707). No doubt the court had in mind that great instrument by which all men are held free and equal—that instrument which allows freedom of movement, the pursuit of happiness — the freedom of speech, and protects an individual to the extent that he cannot be forced to testify against himself. The arson investigator must realize his job also includes the protection of the human rights of all witnesses as well as the accused, which are guaranteed to them by the Constitution of the United States.

It is also a general rule that a confession must be corroborated. A confession identifies the criminal but other evidence must be presented to show that in fact a crime has been committed; that the fire did not just occur but was of an incendiary nature. Until the incendiary nature is shown the presumption of innocence remains with the accused. Hence, one cannot be convicted of the crime of arson, although he has freely made a complete confession admitting the act, unless there is presented

independent evidence indicating that the fire was of incendiary rather than of accidental or providential origin. The above rule of proving *corpus delicti* refers only the consummated crimes and not to attempts to commit arson.

Alibi. An alibi is the chief defense in many arson cases. In some states a defendant offering an alibi is required to show facts and circumstances to support his alibi, sufficient to create in the minds of a jury a reasonable doubt as to the truth of the charge against him. In other states evidence offered by the defendant to show his absence from the scene of the fire does not change the burden of proof and the prosecution must show the guilt of the accused beyond a reasonable doubt, the evidence of the alibi to be considered with the evidence in the case. Hence the arson investigator must be an alibi buster.

Circumstantial Evidence. Of course if in all cases an eye witness could be found, it would make easy conclusions in arson cases. In most cases the State must rely on circumstantial evidence. Circumstantial evidence may be divided into two groups. Such 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 the vitality of which 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 guilt; a defective strand in the rope may weaken the case, but it may nevertheless remain sufficiently strong to sustain a conviction.

Credit for this analysis of circumstantial evidence is found in a North Carolina case (*State v. Shines*, 125 NC 730). Arson is one of those crimes of secret preparation, most often committed at night, and it is very seldom an eye witness can be found who observed the setting of the fire. The very nature of the crime is such that it becomes necessary for the investigator to pick up the scattered links of chain and weld them together; or to gather up the strands of rope and weave them together so that a solid chain or the full length of rope would bind the accused.

Special Defenses. Perhaps this would be a proper climax for this paper; yet we find there are those who set fires who are legally insane, who do not know the difference between right and wrong. In establishing the prevailing rule on these mental cases the court states: "There is

no criminal responsibility where, at the time of committing of the act the accused was laboring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing was wrong." If testimony is offered by the accused that he is insane, the burden is on the State to satisfy the jury that he was sane at the time he committed the crime.

There are those called Pyromaniacs who have an irresistible impulse to start fires. They are mentally ill but not always insane. In a sense he knows right from wrong, but his irresistible impulse is not a defense. He may be prosecuted for arson.

There are a great many arson cases committed by children under fourteen years of age. The general rule is that children between the ages of seven and fourteen are presumed to be incapable of committing a crime of arson. However, there may be evidence showing that the child in a particular case had a mental capacity to distinguish good from evil and by doing so secure a conviction. The prosecution has the burden of showing his mental capacity beyond a reasonable doubt but not beyond "doubt and contradiction" (*Benbow v. State*, 128 Ala. 1).

Often the defense of intoxication is used. As a general rule voluntary intoxication is no excuse for the commission of the crime of arson. However, in some states courts have ruled that if a person has become so drunk that he does not know what he is doing, he is not capable of knowing that he set a property on fire, he becomes irresponsible. This question is usually submitted to a jury under some statutes where intent is an element of the offense; the intoxication of the accused may be considered in determining whether he had formed the statutory intent. Evidence of but slight intoxication does not require the submission of the question to a jury.

The defense of entrapment does not arise when public officials are informed that the crime is to be committed and they keep themselves concealed and permit the accused to start the blaze 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 officials. 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 house, and the three of them prepared the place for burning by spreading gasoline over the premises and applying a lighted candle to it. By pre-arrangement 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." (*People v. Caiazza, et al.*, 61 Ca. App. 505, 215 Pacific 80.)

In this discussion we have referred to the Evidence of Ownership; the Corpus Delicti; Confessions and Admissions; Alibis; Circumstantial Evidence; Mental Cases; Juvenile Cases; and Entrapment. These are the subjects most common to arson cases but of course do not cover the entire subject of arson.

Now, in conclusion it is suggested that an arson investigator has not finished his job in a given case until he has searched every avenue of information to the extent that he has learned all about the defense that may be used to circumvent the crime of arson, and further, not until he has completed the chain, putting each link together or weaving the strands of the rope to the end of the rope, and separating all the unrelated matters not pertinent to his case, and, finally, being sure that his prosecuting attorney is fully informed of every fact or circumstance which the investigator himself knows. The success or failure of the investigation depends upon the teamwork, the hard work, the knowledge of the law and of the prosecutors.