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Proof of the Corpus Delicti in Arson Cases

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PROOF OF THE CORPUS DELICTI IN ARSON CASES*

Because of the fear of convicting men for non-existent crimes,[1] the courts have long insisted on clear proof of the corpus delicti—the fact that a crime has been committed.[2] However, it is often very difficult to find evidence of the corpus delicti of arson, because the arsonist usually choses the time of perpetration that insures the greatest secrecy and much of the evidence of an intentional fire is destroyed by the flames. Besides the problems of discovering evidence, the prosecution may encounter substantial obstacles in the presentation of proof in court.[3] Several limitations upon the type of evidence and conduct of the trial, that would apply particularly to the proof of the corpus delicti, have been considered by the courts in addition to the usual rules of evidence. While the courts have recognized the practical problems in establishing the crime of arson, there is considerable doubt about the type of evidence that is legally competent proof of the corpus delicti, and the extent to which special restrictions are applied.

Definition of Corpus Delicti

Most courts define the corpus delicti in terms of the two elements necessary to show that there has been a crime: the "legal injury" and the "criminal agency."[4] Legal injury is the loss that the law seeks to prevent, such as death, appropriation of property, or burning of property; criminal agency is the fact that the loss was caused by the criminal acts of some person. A few courts limit their definition to the legal injury,[5] but this does not wholly

* In the preparation of this paper, valuable assistance was obtained from Mr. William C. Braun, Chief Special Agent of the National Board of Fire Underwriters, Chicago, Illinois, and from Dr. Richard C. Steinmetz, Chief Special Agent of the Mutual Investigation Bureau, Chicago.

[1] The first judicial expression of this fear is generally attributed to Lord Hale. 2 Hale, Pleas of the Crown 290 (1736).

[2] Presumably the accused need not offer evidence in defense until the corpus delicti is established. State v. Levesque, 146 Me. 351, 81 A.2d 665 (1951).

[3] For a general review of the technique of presenting an arson case, see Cohen, *Convicting the Arsonist*, 38 J. Crim. L. & Criminology 286 (1948).

[4] Wigmore, Evidence § 2072 n.3 (3d ed. 1940); 20 Am. Jur., Evidence § 151. In applying the concept of corpus delicti, three reasons for dismissal must be distinguished: (a) when the conduct charged would have been a crime, but the evidence is not sufficient to support the charge; (b) when the conduct charged and proved does not amount to a crime under the law; (c) when the charge was sufficient, but the evidence does not identify the accused as the perpetrator. While "dismissal for lack of the corpus delicti" might apply equally to the first two situations, the term corpus delicti is nearly always used to describe the former—failure of proof of action that would have fit within the definition of the crime. For the difficulty this creates when the crime is hard to define, see Note, *Corpus Delicti and Criminal Negligence*, 8 Ga. *B. J.* 326 (1946).

[5] State v. Wenger, 47 Wyo. 401, 38 P. 2d 339

fulfill the purpose of the corpus delicti concept since it does not protect men charged with crimes when actual losses occurred without criminal conduct. Some judges have suggested that the guilt of the accused is an element of the corpus delicti,[6] but this makes the definition too broad. It does not describe the particular failure of proof—lack of evidence of a crime.

The specific facts necessary to prove the corpus delicti vary with the definition of each crime.[7] At common law, the crime of arson was defined as the wilfull and malicious burning of the house of another,[8] but this has been expanded in all jurisdictions by statutes and decisions. Thus, in most states, to establish the corpus delicti of arson the proof must show:[9] (a) that there has been a burning of a structure or property protected by law, (b) and that the fire resulted from the criminal acts of some person.

Proof of the Corpus Delicti and the General Rules of Evidence

Burden of Proof. Proving the legal injury in arson cases ordinarily does not present many problems. The occurrence is frequently common knowledge in the neighborhood and receives notice in public records and newspapers. The great difficulty revolves around establishing that the fire was intentionally set—the criminal agency. The normal problem of obtaining evidence is complicated by the legal presumption that all fires start either by accident or by natural causes.[10] The prosecution must persuade the judge that there is sufficient evidence of an incendiary burning to overcome this presumption and to warrant submission to the jury.[11] While there has been a good deal of loose judicial language in this area, it is clear that the jury must be convinced of the corpus delicti beyond a reasonable doubt.[12]

Rebutting the Presumption. Unless the cause of the fire is particularly clear, the first step in proving the corpus delicti of arson should be to introduce evidence that eliminates the possibility of accidental origin.[13] For example, it must be shown that the fire did not start from faulty electrical wiring, furnaces, gas ranges or other appliances.[14] This can be established by the use of evidence concerning the condition of these appliances before the fire, the results of later examination, or by showing that the fire did not start near these danger spots. Strong evidence against an accidental burning may be developed by showing the precautions taken by the owner to avoid loss by fire.[15] The possibility of spontaneous com-

(1934). This is the "orthodox view" dating back to Captain Green's Trial, [1705] Howell St. Tr. 1199, 1246. Dean Wigmore preferred this rule. 7 Wigmore, *op. cit. supra* note 4, at 401.

[6] This view has been voiced only in Missouri. State v. Joy, 315 Mo. 19, 285 S.W. 489, 494 (1926). But repudiated there. State v. Hawkins, 165 S.W.2d 644 (Mo. 1942).

[7] See discussion, *supra* note 4.

[8] Curtiss, The Law of Arson § 1 (1936); Clark, Criminal Law § 88-90 (3d ed. 1915).

[9] Most jurisdictions include both the legal injury and criminal agency in the definition of the corpus delicti of arson. People v. Fitzpatrick, 359 Ill. 363, 194 N.E. 545 (1935); 7 Wigmore, Evidence § 2072 n.6 (3d ed. 1941); But some jurisdictions limit the corpus delicti to the legal injury, *supra* note 5.

[10] State v. Alward, 354 Ill. 357, 188 N.E. 425 (1933); Williams v. State, 90 Ind. App. 667, 169 N.E. 698 (1930); Curtiss, *op. cit. supra* note 8, § 282 n.5.

[11] There must be sufficient evidence to satisfy the trial judge that a jury, acting under proper instructions, could reasonably find that the defendant participated in the crime beyond a reasonable doubt.

[12] 1 Wharton, Criminal Law § 355 and 363 (12th ed. 1932). Occasionally courts announce that there need only be "clear and cogent" or "prima facia" proof of the corpus delicti. Comment, *The Corpus Delicti-Confession Problem*, 43 J. Crim. L. & Criminology 214, 215 (1952). An examination of these cases indicates that these are merely the standard for judicial review of the evidence, *supra* note 11, or the degree of corroboration necessary to support or admit confessions, *infra* notes 58 and 61.

[13] Reasonable doubt as to the incendiary origin of the fire may be created by establishing the presence of a faulty appliance. State v. Delaney, 92 Iowa 467, 61 N.W. 189 (1894).

[14] *Supra* note 13.

[15] State v. McMahon, 17 Nev. 365, 30 Pac. 1000 (1883).

bustion may be rebutted by establishing that inflammables were not kept in the building. It may even be necessary to prove that the building was not struck by lightning, if the fire occurred during a severe storm.[16]

Relevant Evidence. The prosecution must do more than show that the fire did not start in some of the ways in which accidental fires normally occur; it must prove that the fire was in fact intentionally set. The corpus delicti of arson may generally be established by any evidence that satisfies the standard of legal relevancy. Ordinarily this includes all facts that tend to demonstrate the fire was ignited by design. Sometimes, however, logically relevant proof is excluded because it is too prejudicial to the accused or unduly confuses the issues when compared with its probative value.[17] Thus testimony that the defendant made an unusual purchase of kerosene may indicate that he planned the fire, but this evidence may be excluded if he bought the kerosene long before the building burned.

The criminal agency of arson may be proved by direct, circumstantial or demonstrative evidence. While direct eyewitnesses to the crime of arson are rare, careful investigation may uncover physical, demonstrative proof such as parts of incendiary devices. While going through the building the investigator should be alert to spot fragments of such apparatus and preserve them for later inspection.[18] Wicks, candles, boxes that apparently burned from the inside, groups of string leading from a central place, and even out-of-place clocks may be the key to discovering that such a device was used.

When the fire is started without a mechanism—which is becoming more frequent—or the building is completely gutted, the only evidence of an intentionally set fire may be circumstantial. Notwithstanding attempts to disqualify circumstantial evidence or evidence that tends to show the guilt as proof of the corpus delicti (discussed later in greater detail), courts will look to all conditions surrounding the fire for evidence of a criminal design. Preparation by the accused, such as his purchase of inflammable materials[19] or his prior removal of furniture or inventory,[20] are indicative of a planned fire. Suspicious conduct during or after the fire, like attempted flight or false statements, has also been considered evidence of the crime.[21] Proof of threats showing a desire for revenge,[22] another crime that the defendent wishes to cover by burning the building,[23] or the opportunity to profit from the fire[24] are indications of motive that tends to prove the fire was intentional. Physical aspects of the fire may also point to an incendiary burning. Thus, testimony that there were simultaneous, independent fires in different parts of the building[25] or that furniture was arranged so as to impede the work of firemen, are circumstances which help to establish the corpus delicti.

One of the strongest circumstances indicating an incendiary fire is the presence of highly in-

[16] The records of the local weather bureau may help to establish this fact.

[17] WIGMORE, EVIDENCE (STUDENT TEXTBOOK) § 21 (1935).

[18] The admissibility of experiments made out of court with these devices is largely discretionary with the trial court. It is essential to the validity of the test that it be made under the same conditions that existed at the time of the fire. State v. Harris, 100 N.J.L. 184, 124 Atl. 602 (1924). Furthermore, evidence of the experiment will not be admitted without some other proof that the means used in the experiment were actually employed to start the fire. Hooker v. State, 98 Md. 145, 56 Atl. 390 (1903). Pieces of an unusual device found at the scene should satisfy the latter requirement.

[19] State v. O'Hagen, 124 Minn. 58, 144 N.W. 410 (1913).

[20] State v. Berkowitz, 325 Mo. 519, 29 S.W.2d 150 (1930).

[21] Commonwealth v. Lettrich, 346 Pa. 497, 31 A.2d 155 (1943) (homicide).

[22] State v. Ward, 61 Vt. 153, 17 Atl. 483 (1889).

[23] Although the prosecution may not introduce evidence of other crimes to establish the defendant's bad reputation, he may show a contemporaneous crime as proof of motive. State v. McCall, 131 N.C. 798, 42 S.E. 894 (1902).

[24] CURTISS, THE LAW OF ARSON § 486 at 532 (1936).

[25] State v. Cox, 264 Mo. 408, 175 S.W. 50 (1915); State v. Snyder, 146 Wash. 391, 263 Pac. 180 (1928).

flammable material where it is not usually kept.[26] This may be shown by physical, demonstrative evidence if tangible traces of the substance are discovered.[27] Highly combustible material is often found around the place of greatest burning or where the fire burned in streaks; a chemical analysis of the building material in these areas may reveal inflammable substances even if all outward signs are burned.[28] If all traces are consumed by the fire it may be possible to prove their use by circumstantial evidence. Inspection of the ruins may uncover considerable surface singeing or show that the fire radiated from a point that should not have burned more than the rest of the building. Testimony of people who observed the fire is frequently relied upon to establish that the fire burned in a manner peculiar to "boosted" fires or with various indications of the presence of inflammables.

Opinion Evidence. A limitation upon the use of testimonial evidence is the common law rule that the ordinary witness may testify only about the facts he observed, not the conclusions he drew from them. This rule is sometimes relaxed if the witness first relates enough facts upon which he could reasonably base an opinion and it is clear that he cannot describe the way things appeared to him at the time.[29] An expert witness, with special training and experience, may be permitted to express an opinion, if the court is satisfied that he is qualified to aid the jury to interpret data that they would have great difficulty understanding.[30]

Applying these principles to the corpus delicti of arson, the courts have rarely permitted any witness to give an opinion about the cause of the fire because they feel that the jury is capable of drawing its own conclusions.[31] However, witnesses have been allowed to express opinions about matters that indirectly indicate that the fire was intentionally set, such as the conclusion that several fires that were observed started independently.[32] Similarly people who saw the fire may testify that it burned with unusual intensity for that type of structure,[33] or that there was heavy smoke similar to what they had seen at other fires where there had been oil,[34] or that they noticed an odor that they identify as an inflammable material.[35] If technical investigations are conducted to discover facts such as the arrangement of materials to facilitate rapid burning, it would seem that the expert who made the examination should be permitted to state his opinion about these facts.[36]

Special Corpus Delicti Rules

Circumstantial Evidence. Frequently the courts have been impressed with the gravity of conviction when it is not certain that a crime was committed, and special rules governing the proof of the corpus delicti were suggested. The first of these was the requirement that the crime could only be shown by direct, eyewitness evidence, even if the surrounding circumstances were relevant. A few English authorities attempted to establish this rule but it was soon repudiated in that country.[37]

[26] State v. Goldman, 166 Minn. 292, 207 N.W. 627 (1926).

[27] People v. Gilyard, 134 Cal. App. 184, 25 P.2d 35 (1933).

[28] Courts will frequently take judicial notice of the inflammable qualities of matter so this need not be proved at trial. State v. Hayes, 78 Mo. 307 (1883).

[29] 7 Wigmore, Evidence § 1924 (3d ed. 1940).

[30] 7 *id.* § 1923.

[31] Beneks v. State, 208 Ind. 317, 196 N.E. 73 (1935).

[32] People v. Saunders, 13 Cal. App. 743, 110 Pac. 825 (1910).

[33] State v. Lytle, 214 Minn. 171, 7 N.W.2d 305 (1943); State v. Director, 113 Ore. 74, 231 Pac. 191 (1924).

[34] State v. McTague, 190 Minn. 449, 252 N.W. 446 (1934); Pozil v. State, 104 Tex. Crim. 244, 283 S.W. 846 (1926).

[35] Thomason v. State, 71 Tex. Crim. 439, 160 S.W. 359 (1913).

[36] State v. Gore, 152 Kan. 551, 106 P.2d 704 (1940). But the cases on expert opinions are in such conflict that the National Board of Fire Underwriters warn against their use. Suggestions for Arson Investigators 25 (1948).

[37] 7 Wigmore, Evidence § 2081 at 417–22 (3d ed. 1940).

All American jurisdictions allow circumstantial evidence as proof of the corpus delicti of arson.[38] At least one court has suggested that while it was not a strict legal requirement, direct evidence would be requested whenever it was possible to obtain it.[39] This is the practice that competent prosecutors should follow whether the courts demand it or not.[40]

Order of Proof and Separateness. Another rule that was urged upon early American courts was the requirement that the corpus delicti be proved before linking the crime to the defendant.[41] In connection with the order of proof, the courts considered the rule that there must be separate evidence of the corpus delicti and guilt. Under the latter limitation, evidence that tends to demonstrate the defendant's guilt could not be used to establish the corpus delicti.[42] It is difficult to evaluate the extent to which these rules were accepted but they were frequently suggested by counsel and appear in numerous dicta.[43]

Courts are now aware that it is often impossible to find evidence of a crime that does not also point to the guilt of the accused. Thus modern courts, while recognizing that there may be some danger of improper conviction when proof of guilt and the corpus delicti are intermingled, hold that these rules should not be strictly applied. Trial courts are given wide discretion in the use and order of evidence.[44] As a consequence, evidence that connects the defendant with the crime may now be admitted before the corpus delicti is firmly established.[45] Also, evidence that tends to show who committed the act may be considered as proof of the corpus delicti.[46] The historical rules, if they ever were widely accepted, have been effectively discarded.

Extra-Judicial Confessions

Most of the cases in which the proof of the corpus delicti is challenged involve the use of extra-judicial confessions. Although it is strong evidence that a crime has been committed, a confession violates all the suggested historical restrictions upon the proof of the corpus delicti: it necessarily indicates the guilty party while establishing the crime, and, in the narrow sense, is merely circumstantial evidence that there has been one. Furthermore, courts distrust extra-judicial confessions; they are suspicious of the accuracy with which confessions are reported and the circumstances under which they are procured. For these reasons more limitations have been placed upon the use of confessions than other types of evidence.

Requirement of Corroboration. Two methods have been developed to control the overzealous use of confessions. First, confessions obtained

[38] 7 *id.* at 422–3. Carlton v. People, 150 Ill. 181, 27 N.E. 244 (1894); Thompson v. State, 171 Tenn. 156, 101 S.W.2d 464 (1937).

[39] United States v. Williams, 1 Cliff. 5, 20 (U.S. 1858).

[40] Suggested by Dean Wigmore, 7 Wigmore, *op. cit. supra* note 37, at 422 n.8.

[41] This procedure has received some approval. 1 Wharton, Criminal Law § 356 at 461 (12th ed. 1932); Carlton v. People, 150 Ill. 181, 37 N.E. 244, 245 (1894); Gay v. State, 42 Tex. Crim. 450, 60 S.W. 771, 773 (1901).

[42] See discussions in State v. Millneier, 102 Iowa 692, 72 N.W. 275, 277 (1897); State v. Jacobs, 2 R.I. 259, 43 Atl. 31, 32 (1899).

[43] Apparently the rule that there must be entirely separate evidence of the corpus delicti was never accepted by the courts, and the order of proof was merely dicta. 68 *A. L. R.* 78–9 (1903).

[44] While the courts may intermingle the evidence, they may also decline to do so. Some cases have indicated that the courts may distinguish between the type of crimes in which the evidence of the corpus delicti is frequently interwoven from others in which the proof is normally separate. State v. Brink, 68 Vt. 659, 35 Atl. 492, 493 (1896). Other cases have indicated that it would be appropriate to adhere to a strict order of proof if the offered evidence has little relevancy to the corpus delicti but is highly inflammatory toward the accused. People v. Hall, 48 Mich. 53, 12 N.W. 665, 666 (1882).

[45] Holland v. State, 39 Fla. 178, 22 So. 298, 301 (1897); State v. Alcorn, 7 Idaho 599, 64 Pac. 1014, 1916–7 (1901); 1 Wharton, *op. cit. supra* note 41, § 356.

[46] People v. Fitzgerald, 359 Ill. 363, 194 N.E. 545, 549 (1935); State v. Jacobs, 2 R.I. 259, 43 Atl. 31 (1899); Pottman v. State, 259 Wisc. 234, 47 N.W.2d 884, 888 (1951); Curtiss, The Law of Arson § 486 n.48–9 (1936).

by undue coercion are inadmissible.[47] Second, even when they are not thus excluded, almost all courts follow the rigid rule that extra-judicial confessions, as a matter of law, do not sustain the burden of proving criminal charges unless corroborated by other independent evidence.[48] The latter rule is an additional safeguard against the improper use of confessions in all cases, and particularly protects defendants who cannot procure evidence that they confessed under pressure when such was actually the case; it may also prevent punishing willing confessors to non-existent crimes.[49]

There is some difference of opinion as to what matters must be shown by the corroborating evidence. Most jurisdictions demand that it go to the corpus delicti and are not satisfied with merely additional evidence of guilt.[50] While the reasoning behind this rule is not particularly compelling, most courts apparently fear that there may be many facts that throw suspicion upon the accused whether there has been a crime or not;[51] once an actual crime is shown they feel that a confession is a sufficiently reliable proof of guilt. A few courts hold that the requirement of corroboration may be satisfied by any evidence that tends to produce confidence in the confession.[52]

Regardless of which view is adopted as to what the corroborations must show, the crucial question is how much proof other than a confession is sufficient to warrant conviction.[53] Under the strictest rule there must be enough independent evidence so that the jury, without referring to the confession, could be convinced of the corpus delicti beyond a reasonable doubt.[54] Most courts hold that while there must be some corroboration it need not be conclusive.[55] The standard is variously stated as sufficient evidence to "create a probability of a crime", or "clear and cogent" or "prima facie" evidence of the corpus delicti.[56] These are merely the standards for judicial review, however, for the jury must ultimately be convinced beyond a reasonable doubt that a crime has been committed.[57]

Confessions and the Special Corpus Delicti Rules. While the common practice is to require

[47] Generally, state courts exclude confessions if they were involuntarily given under circumstances that cast doubt upon their trustworthiness. Comment, *Admissibility of Confessions Under State and Federal Standards*, 52 COLUM. L. REV. 423 (1952). But the federal courts have discarded the "trustworthiness" test and exclude confessions if certain "civilized standards" of arraignment and interrogation are not met. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

[48] 7 WIGMORE, EVIDENCE § 2071 (3d ed. 1940); 127 *A. L. R.* 1130 (1940). But the distinction between the defendant's admissions and independent evidence is not always clear. Note, *Corpus Delicti and Common Gambler's Statute*, 22 U. OF CIN. L. REV. 250 (1953). There is an indication that the strict requirement of corroboration is being worn away by lowering the standards of confirmation. Commonwealth v. Lettrich, 346 Pa. 497, 31 A.2d 155 (1943), Note, 29 VA. L. REV. 1070. A few jurisdictions require no corroboration. Commonwealth v. Kimball, 321 Mass. 290, 73 N.E.2d 468 (1947).

[49] On the whole Dean Wigmore believes that the willing confessor does not present a great danger. 7 WIGMORE, *op. cit. supra* note 48, at 395. *But see* WIGMORE, SCIENCE OF JUDICIAL PROOF § 273-7 (3d ed. 1937); BEST, PRINCIPLES OF LAW AND EVIDENCE § 560-73 (3d ed. 1908).

[50] Tabor v. United States, 152 F.2d 254 (4th Cir. 1945); Parker v. State, 228 Ind. 1, 88 N.E.2d 556 (1949); Vines v. State, 118 Ga. 320 (1903).

[51] For example, these courts are dubious of corroboration by showing that death occurred in the manner confessed, when this could have been learned by anyone prior to the confession. people v. Shanks, 201 N.Y.Misc. 511, 108 N.Y.S.2d 504 (1951); Note, 3 SYR. L. REV. 368 (1952).

[52] Anderson v. United States, 124 F.2d 58, 65-6 (6th Cir. 1941).

[53] For legal arguments that this is the crucial question see, Note, *Corpus Delicti—Extra-Judicial Confessions*, 11 U. OF PITT. L. REV. 501 (1950).

[54] Commonwealth v. Lettrich, 346 Pa. 497, 31 A.2d 155, 157 (1943).

[55] Forte v. United States, 94 F.2d 236 (D.C. Cir. 1937), 7 U. OF KAN. C. L. REV. 62 (1938).

[56] Hays v. State, 214 Miss. 83, 58 So. 2d 61 (1952); Hill v. State, 207 Ala. 444, 93 So. 460 (1922).

[57] 7 WIGMORE, EVIDENCE § 2073 (3d ed. 1940).