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Paul Jr. Sadler

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THE CRIME OF ARSON

Paul Sadler, Jr.

The following article is from a thesis the author prepared while pursuing his studies in Social Relations at Harvard University, from which he received his A.B. degree in June, 1950. Mr. Sadler is currently employed as a fire investigator adjuster for the General Adjustment Bureau, Inc., Boston, Mass.—EDITOR.

I

The crime of arson is an extraordinarily complex one by its definition alone. Its complexity makes many difficulties to the student. It also gives the perpetrator some advantages. To begin with, arson, like murder and most admirality crimes, exists in several degrees of indictment. These degrees are wholly dependent upon the type and use of the structure or property burned, degree of involvement of participants, and often the time of day in which the crime is committed.[1] But what degrees now exist are only created by modern statutory definition over and above the original common law of England, which law, in comparison with 20th century statutes, seems very defective in scope. Yet the need for a wide and broad coverage in the protection from arson has only recently, in terms of the history of English and American law, been necessary at all. Why? The reason is that originally English common law defined and limited the crime of arson only to the malicious burning of the dwelling house of another. Note the restrictions of the words "dwelling" and "another." The common law clearly was aimed at, first, assuring the security of habitation, and secondly, at assuring the security of habitation of all the general public with the exception of the dwelling house of one's self.

Curtis writes, "Using the language of Sir William Blackstone, 'Arson, *ab ardendo,* is the malicious and willful burning of a house or outhouse of another man.' Sir Edward Coke had, before the time of Blackstone, expressed his conception of arson as 'the malicious and voluntary burning the house of another by night or by day.' The courts, when seeking a definition of common law arson, have generally adopted that of Blackstone, declining to include the redundancy 'by night or by day.' Other definitions make a slight variation in language, but no change in substance, has occurred. Thus the offense has been defined as 'the malicious burning of another's house'; or as the 'willful and malicious burning of the dwelling house of another'; or as 'the volun-

1. The Model Arson Law now adopted in its main substance omits reference to the time of day, it being considered now that the crime is as serious at one time as at another.

tary and malicious burning of the house or the barn of another.' Other language neither increasing nor decreasing the scope of the crime has been used in its description. For the purposes of common law arson the term 'house' is synonymous with 'dwelling house,' and such words are used interchangeably in the various definitions of the offense."[2]

And this was the entire law.[3] Restrictive or not, though, two factors not at once obvious to 20th century thinking show that the common law rule was actually of as wide scope *to its day* as model stautory laws are to our time. Recall, if you will, the environment of 16th Century England. Men and their families lived and they worked in but one building, the family dwelling. Factory, mercantile, and service type buildings simply did not exist. The culture which created them had not yet come. The only structures were, then, the simple frame dwellings, and, to be sure, barns in rural areas where a man could afford such. This being the environment, the seemingly restrictive term "dwelling" was not a restriction at all, for did it not encompass all the buildings there were? The reason, of course, that barns were included under "dwellings" was that when the former were within the curtilage, it was quite obvious that their burning would endanger the dwelling.[4]

The second restrictive term was that the crime was committed only if the dwelling of *another* was maliciously burned. To understand this, again recall the times of early England. It was then generally interpreted that one had the full legal right to destroy his own property in any manner chosen.[5]

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2. CURTIS, ARTHUR, THE LAW OF ARSON, Buffalo, Dennis & Co., Inc. 1936, p. 1 f. Inner quotations from BLACKSTONE'S COMMENTARIES, Book IV, Chap. XVI. The author of this paper is greatly indebted to Mr. Curtis' extraordinary text on the law of arson. Its completeness is unsurpassed.

3. Remember that the common law was only a codification of certain fundamental principles and never had to be as verbose as do laws today.

4. The word *curtilage* defines the part of an area completely surrounded by a fence and containing a man's home and outhouses, i.e., farm buildings, but see Note 6.

5. As it is today; however, the problem has perplexed jurists to no end. To be quite exact, it is today generally felt that if in no way does destroying one's own real property harm or abrogate the property or rights of another, one does have complete freedom in action. Such a condition is difficultly met. Curtis says on page 17: "It may be doubted whether the legislature can abrogate the common law rule, so as to impose a criminal penalty upon one who burns his own property in which no other person has an interest, and its burning will not affect or endanger the rights of another. . ." But then on page 50, he states ". . . The crime of arson may, without violation to any constitutional rights, be extended beyond the common law bounds, and hence a statute may define the crime of arson so as to include the burning of one's own property. This is particularly clear, when the rights of others may be hazarded by a fire, as where the property is insured, or one has a lien thereon or an interest therein, or if the property is situated in a populous community or where it will endanger the property of another. Society may demand that the right to destroy one's property, be limited to those circumstances when injury to another cannot ensue; and the statutes are thus construed."

The problem is increased when it is realized that "ownership within the rule meant the lawful occupancy rather than the legal title." (CURTIS, *op. cit.*, p. 53.) Curtis earlier, on

Such a principle seemed right and proper, but it presented certain difficulties when applied to cases of arson. See note 5. Briefly, as ownership was by possession and occupancy rather than in title holding, one could "safely" burn his rented house though the landlord might not, though he owned it, by our conception of the term. But remember, the common law was designed to protect not the property, but the habitation of the possessor. If a man wanted to burn his own habitation, he might, generally, but to threaten or even endanger the habitation of his neighbor was definitely arson, and being a crime against life rather than property the crime was considered an "infamous and aggravated" offense, subjecting the accused when guilty to capital punishment.

As has been mentioned, the crime was soon amended, or if you will, extended to include the malicious burning of barns, provided they be within the curtilage.[6] The extension was based on the theory that the burning of a nearby barn would endanger the main dwelling. The principle and intent of the law was still to protect only habitation, though, for the burning of a barn was not arson if it did not endanger inhabitable property, e.g., a barn lying outside the curtilage of a homestead.[7]

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pages 4 and 5 states, summarily: "The common law courts viewed the crime of arson, not as one against property itself, but as against the habitation—the possession—of another. The offense was against the security of the habitation rather than against the building as property. The extension of the offense to outhouses is upon the theory that the flame might spread to the dwelling and endanger the habitation. The gist of the offense is the danger to an inmate of the dwelling. This conception of the crime led to principles which rank among the oddities of the law. Thus the common law indictment laid the ownership in the person having the possession, rather than in the one having legal title. The occupier was the owner, and although he was merely a tenant, he could not commit the crime by burning the premises occupied by him; but the landlord, although the owner of the remainder, was indictable for burning a house in the possession of his tenant. An owner in possession was not guilty of arson although he burned his own property with the intent of defrauding an insurance company or some person having an interest in the property."

6. The use of the word "curtilage" caused no small difficulty in America. CURTIS says on pp. 29, 30: ". . . It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of enclosures and buildings, constituting the homestead of the inhabitants of this country, and particularly of farmers. In England, the dwellings and outhouses of all kinds, are usually surrounded by a fence or stone wall, enclosing a small piece of land embracing the yards and outbuildings near the house, constituting what is called the court. This wall is so constructed as to add greatly to the security of the property within it; but as such precautionary arrangements have not been considered necessary in this country, they have not been adopted."

7. CURTIS makes an interesting point here (p. 32): "In determining whether a building is within the curtilage, the court should not forget that the reason for the rule is the protection of the inhabitants of the dwelling house. A building may be so situated, if its burning will endanger the security of the inmates. Following this reasoning, a building located over two hundred and fifty yards from the dwelling house, cannot be within the curtilage of the dwelling. But a barn about sixty-seven feet from the house was thought to be parcel of the dwelling.

"In order that the burning of an outbuilding shall fall within the principle under discussion, it must have the required nearby location, and the main building to which it is subservient must be a dwelling house, that is, a dwelling inhabited by human beings.

"In some cases, it may be a question of fact for the jury to determine whether a given

The common law, it will be seen, did have ample inclusiveness for the purpose for which it was designed. But it did not protect all property of the possessor and none of the accused's own except where he was not an inmate thereof.

Between the day of the common law—and Mr. Blackstone—and our current Model Arson Law, much political, legal, and philosophical change has occurred. It is now interpreted that it is a chargeable and felonious offense to burn *any* structure or property which destroys, injures, or endangers any other person's rights, property, or interests. First the law was extended to cover non-inhabitable dwellings and then to include buildings irrespective of ownership. The fundamental objective of the common law rule was transcended, but not annulled, by placing protection on property *per se* and not exclusively on habitation.[8] The Model Arson Law as suggested by the National Board of Fire Underwriters. . . ". . . provides that a man may commit arson who burns a building, the property of himself or another. Second, it includes not only those who burn, but, in addition, those who cause to be burned or who aid, counsel or procure the burning of certain buildings. This enables the State to prosecute as principals those defendants who otherwise might be regarded as accessories before the fact. The third essential feature of this law is that it provides that the preparation of a building for a fire with intent to burn *shall constitute an attempt to commit arson*."[9]

Motivation Contrasted with Intent

With the modern law and its wide scope, still must the court establish that certain conditions were met by the defendant, that is, that the essential elements of the crime have occurred. First, there must have been an actual burning, or an attempt or conspiracy to burn, depending upon the degree of arson with which the accused is charged. "The mere scorching, smoking or discoloration of a building, without fire communicated thereto, is not sufficient. There must be actual burning or ignition of some part of the building to constitute the offense. . . . How-

building is within the curtilage. In other cases, the court may decide as a matter of law whether the structure is so situated. If the question is one for the jury, the presiding judge in his instructions should define the term curtilage; but, in the absence of a request to do so, the omission is not a reversible error."

8. The National Board of Fire Underwriters notes, though, that in some States the common law rules still exclusively applies. However, forty-one states have adopted the Model Arson Law in its most important provisions. *Suggestions for Arson Investigation*, N.B.F.U., Sept., 1948, p. 43.

9. *Ibid.*, pp. 42, 43.

ever, to render one guilty of arson, the fire need not have been applied by the accused with his own hand, nor need he have been present; if he procured, aided or abetted the commission of the crime, it is sufficient."[10] Secondly, the corpus delicti must be established. This is to affirm that the fire was of incendiary origin, done through malice and intent. These provisions of malice and intent have always been necessary, dating back to the common law, but statutory provisions may in some states require some specific intent, such as ". . . intent to destroy . . . however, . . . ordinarily no particular intent is needed. Intent can be inferred from the act itself, because every person is held responsible for the necessary and natural consequences of his acts, and is held to intend to produce such consequences."[11] Curtis, on pages 72 and 73 states, "Criminal intent is an essential element of the crime of arson." This may be expressed in a statute by the use of the word "intentionally," but ordinarily the statutes follow the usage of the common law and use the term "willfully." The word "willful," as used in a statute relating to arson, means "intentional." It implies that the act was done knowingly, —"purposely and intentionally." It means an intent to burn, but not necessarily an intent to destroy. Ordinarily, no particular intent is required other than is denoted by the term "willful."

This principle at once brings up the matter of negligence. Courts of law have always been extraordinarily lenient in punishing negligence when it concerns fire. Why this is so is difficult to understand.[12] The very obvious remedy would be impossible to enforce, because most fires do occur through accidental neglect of trivial things, e.g., cigarettes, matches, wiring, etc., and considering all such fires as originating from criminal negligence would be unburdenable and impractical—but in many cases justified. Yet where is the line?[13] The dilemma seems to be contained in the fact that arson does not have a subcharge, as

10. *Ibid.*, p. 17.

11. CURTIS, *op. cit.*, p. 74.

12. Take, for example, the case of a man who through no fault of his own strikes and kills a child while driving on the highway. He may be charged with manslaughter and sent to prison. If the same man had reached his destination, put himself up in a hotel, smoked in bed, setting fire to the hotel, perhaps killing a dozen people, he would go scot free.

13. The neglect of fire in forested areas and the neglect of smoking matter in hotel rooms has now been covered under specific statutes in a few states. The crime is not arson, but a specific offense created by the act. The statutes so developed were, however, enacted only after many years of failure by prosecutors attempting to include such negligence under the existing arson statutes. Unfortunately, not even the new enactments have much success because juries have been (and probably always will be) reluctant to fine or imprison campers or hotel guests whose negligence, though often tragic in result, has not been through any imaginable sort of criminal design. Yet look at the annual California forest fires and the Hotel Winecoff!

does murder (as manslaughter) which could apply to real property and life, although negligence unattended by malice or design was the cause of the fire. The law, having to have proven intent shown, is impossible to apply to even the greatest of holocausts in our fire records. What a paradox is presented, for a single fire caused by negligence (and most are by this cause) has many times killed more persons than the greatest wave of murder could ever approach! Of course, every state in some respects will take a particular and individual point of view towards the question of negligence, but unless some intent can be shown, seldom can a case of negligence be brought into felony court.

It should be kept well in mind that intent and motive are not at all synonymous. Curtis makes an excellent point about this, stating, "The distinction between motive and intent is clearly marked in the law of arson. While intent is a material ingredient of the crime, motive is not an element."[14] "Motives for crime are so numerous, so hidden, and often so utterly unreasonable, that it is impracticable to require, that they should always be made manifest."[15] And, "One cannot escape conviction of the crime of arson because his motive for setting the fire cannot be ascertained and presented to the jury. If he willfully and maliciously (i.e., with intent) applied the torch, the crime is, as a general rule, complete, and the State is under no obligation to produce evidence of his motive."[16]

However, the State may . . . "always show that the accused had a motive for the commission of the crime. Such evidence tends to repel the presumption of innocence, and is based on the fundamental theory that a man will not commit a crime without reason, inducement, or temptation."[17]

Curtis then adds a supplementary thought concerning motivation which is interesting in that it shows how law and philosophy are bound together: "The psychology of the criminal is bewildering, as the fantastic causes which impel his acts are revealed. The trivial things in life occasionally motivate the most dastardly crimes. The prosecution receives and is entitled to receive a wide latitude in proving acts which tend to show a motive for the act, yet in the practical application of the law, there must remain collateral matters which the prosecution cannot prove under the guise of motive. There must, of necessity, be limits

14. CURTIS, *op. cit.*, p. 360.
15. *Ibid.*, p. 361.
16. *Ibid.*, p. 361.
17. *Ibid.*, *pp.* 362, 363.

beyond which the prosecution cannot trespass, yet these limits are not strictly definable. Much must depend upon the circumstances surrounding each particular case. The motive attributed to the accused in any case must have some legal or logical relation to the criminal act according to known rules and principles of human conduct. If it has not such relation, or if it points in one direction as well as in the other, it cannot be considered a legitimate part of the proof.

The value of the evidence is for the identification of the criminal rather than to show that the fire was incendiary. Hence, the motive should be peculiar and special to the person accused; if the motive is common to a large number of persons, it loses its power of selecting the guilty individual."[18]

II

Without further discussion of motivation three additional remarks are necessary that the reader may understand the fundamentals of the crime of arson. First, the case where negligence and intent become identical; secondly, some notes on evidence; and thirdly, some notes on defenses by the accused.

Mention was made in the above Section concerning negligence and its relation to motivation. There are additional cases where intent can be charged even though negligence was the original cause of the fire. Such occurs where an unintentional and insignificant fire is purposely allowed to extend, thereby causing a greater fire than would have occurred if the fire when first observed had been extinguished or had reasonable effort been made to reduce the fire's spread.[19] If it can be proven that a person so abetted the fire's spread or moved property into its path, the court may charge criminal intent and place the accused under the charge of arson even though the cause of the fire was unintended. Similarly, if upon discovery of a fire (which has started from some sort of negligence and unintentional) the discoverer shuts down the sprinkler system, his act can be considered as criminal intent and he may be then charged with arson.[20]

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18. *Ibid.*, p. 364.

19. Similar to this is the case where the property owner or other person delays sounding an alarm until the fire has had a chance to gain considerable extent or sends no alarm at all.

20. Although not arson, another common means of attempting fraud is done by setting off sprinkler heads in order to cause water damage. Most fire insurance policies cover water damage inasmuch as sprinkler heads often do fuse. It is, to be sure, very difficult to prove that the head was tampered with and did not go off by accident or breakdown.

EVIDENCE

The law regarding evidence in arson cases is in some ways peculiar from other felonious offenses, for during any part of the trial, the prosecution is entitled to introduce most any evidence it can gather to show that the accused's actions before or after the fire were indicative of his guilt. For example, it may be shown that the accused removed certain uninsured or sentimentally valuable items from a building immediately before the fire began. This is not a proof of guilt, but it helps dispel feelings that he is innocent, and when added to similar evidences, it may serve as well as direct evidence when the latter is not available. Other admissible evidence such as fingerprints, horse or vehicle tracks, handwriting, footprints, and statements of witnesses may be introduced by the State. But where the laws of arson are unique is found in the fact that . . . "in arson cases both the State and the accused received marked indulgence in presenting their respective theories of the cause of the fire. In addition to direct evidence showing the elements of the offense, minor events and facts which would otherwise be trivial may be shown, as bearing on the principal issues."[21] What this means is that testimony "irrelevant at the stage of the case when it is tendered may be accepted, subject to be stricken out if it is later not adequately connected. . . . Rarely will this practice result in prejudicial error."[22]

The rules concerning circumstantial evidence are, as in most crimes, strictly set up to protect the accused, and this principle, of course, existed in the common law. Unfortunately "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. . . . In a legal sense circumstantial evidence is not regarded as inferior to direct evidence and 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, so that a number of perjured witnesses would be necessary to cause an unjust convic-

21. CURTIS, *op. cit.*, Section 286, p. 306.

22. *Ibid.*, Section 286-7. In the case between Gillard and the State of California (People v. Gillard, 134 Cal. App. 184, 25 Pac. 2nd 35), the prosecution asked the court to accept the fact the water known to have been boiling at 212° F. at nine o'clock one evening would have cooled to below 110° F. by six-thirty the following morning had not the fire in question occurred between those hours. The prosecution first introduced the fact of water's boiling point, then much later introduced the relevancy of the statement.

tion, whereas one perjured witness giving direct testimony might accomplish such a wrongful act."[23]

The rules concerning witnesses' speaking on the probable origin of the fire are strictly drawn, for "It is well to bear in mind at the outset that the admission of opinion evidence in prosecution for arson is governed by the same rules as are applicable in prosecution for other crimes. The general rule is, if a witness has acquired peculiar knowledge or skill, by experience, observation or practice on a subject with which the mass of mankind is not supposed to be acquainted, he may give his opinion on it."[24] A further reference states, "But the only true criterion is: On this subject can a jury from this person receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally."[25] Some states, on the other hand, do allow expert testimony as to the incendiary origin of the fire without qualificatory permission.

The State is permitted at any time to introduce real evidence (such as charred wood) to substantiate that a burning actually took place, devices and/or agencies by which the fire was set, photographs of the burned area, maps, and even experiments may be conducted to dispel the notion of the accused's innocence.

The prosecution maintained[26] that the accused used a horse to carry him to the building which he was charged with burning. It was maintained that the course of his travel was down a certain road, going straight, to a sharp turn right and off the main road, and then along this road to the building in question. The accused maintained his horse had never been on the road, before or after the fire; yet the court accepted testimony that in an experiment four days later, the same horse without a rider or guide, followed the same path to the building in question without having been instructed where to go.[27]

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23. *Suggestions for Arson Investigtors.* N.B.F.U., pp. 34, 35. An interesting note is also given on the question of circumstantial evidence on page 33 of this same pamphlet: "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 everyday life they are continually forming judgment on circumstantial evidence alone, and acting upon these judgments in 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."

24. *Ibid.*, p. 24.

25. 4 WIGMORE, EVIDENCE (2nd Ed.) 119.

26. State v. Ward, 61 Vt. 153, 17 Atl. 48.3.

27. This is a little extraordinary but is an actual case. The horse had many alternative choices.

The State may introduce (and under certain conditions—must introduce) evidence that the accused was the only person to have had access to the burned building. Such is called *opportunity,* and especially relevant and acceptable in the court, is the demonstration that a person created circumstances to enable him to have no other persons around as witnesses. Here he intentionally creates *sole* opportunity, to be sure, but the State still must demonstrate the fact quite as much as had he created circumstances to put others in equal access to the building. An example of this case is where an employer discharges or sends away a watchman immediately before he starts a fire in his factory or warehouse, or, where a tenant is evicted shortly before the landlord commits arson to his building.[28] On the other hand, a store owner may a week or two before committing arson, distribute keys to all his employees on some pretense that they need them. In this way he avoids having sole opportunity or access.

Of course, the defendant has the right to attempt to prove that he had no access or was not at or near the building at any reasonable time before it burned. Most alibis are so constructed, but to counter this the prosecution may charge that the defendant employed an agent, and if plausible facts warrant the court to accept such a contention, the accused then may be charged with being an accessory. It should be here noted that the agents of arson are classed as:

1. Principals in the 1st degree—one who sets the fire.
2. Principals in the 2nd degree—present and assisting.
3. Accessories—those not present at the performance, not the chief actor in the event, but in some way connected therein.

Therefore, a person hired by another to commit the crime becomes the principal, the hirer the accessory, unless he (the hirer) was present, in which case he, too, becomes a principal.[29] But in any case, all those in any way involved are chargeable with the crime depending upon the degree of their involvement. Punishments are given proportionally.

The State may introduce as evidence the confession of the person charged, but "Even though a confession may be obtained, it will probably be necessary to introduce evidence of the corpus delicti before the confession of the accused can be introduced."[30] In American law it is

28. In the first instance to avoid detection and in the second to avoid manslaughter charges if he is caught.

29. "A person is not deemed to be an accomplice merely because he had knowledge of the intended commission of the crime unless he in some way aids or incites its commission." *Suggestions For Arson Investigators,* N.B.F.U., p. 31.

30. *Ibid.,* p. 18

generally accepted that, in the first place, one cannot be convicted solely on the basis of an extra-judicial confession;[31] and, secondly that corroborative evidence showing criminal agency must be offered by the State before the confession is competent. In other words, "A defendant in a criminal case cannot be convicted on his extra-judicial confession unless it is corroborated in a material and substantial manner by evidence aliunde as to the corpus delicti."[32] It was once thought that the corroborative evidence had to be evidence independent of the confession, but neither English nor American courts have accepted such a doctrine, as evidenced by notations to this effect in the N. B. F. U. instructions.

We have now seen to some extent of what the crime of arson consists and of what the accused may be charged, and thirdly of how the prosecution may conduct its presentation of the case. Naturally, not all the persons accused in criminal courts are found guilty, some due to adjudged and actual innocence and others due to their successful defense. It is well, then, to mention what some of the common defenses are.

Defenses

Modern statutory revision of the common law is, as we have seen above, that "the owner of a building in possession thereof may have the right to destroy it by fire where no injury will thereby accrue to another, as where there is no insurance or lien on it, and it is not located in a populous community or where its burning will not endanger the building of another."[33] This principle, when applicable, gives defense to an owner and to any person hired by him, but in a case where an owner gives "consent" after the fire to the person who set the fire, the latter has no recourse and has in the opinion of the law committed arson, for ". . . the criminal nature of the act is established at the time of the act, and a later condonation will not affect the gravity of the crime."[34]

31. "An extra-judicial confession is one made by the party elsewhere than before a magistrate or in open court, opposed to a judicial confession which is made before a magistrate or in court in the due process of legal proceedings," *A Guide For the Prosecution of Arson Cases in Oregon*, prepared by the Department of Justice; George Neuner, Attorney General, c. 1947.

32 *Suggestions For Arson Investigators*, N.B.F.U., 1948, New York, p. 19.

33. Curtis, *op. cit.*, p. 112. It should be noted that a person may burn his insured building where he has no intention of claiming insurance, and he may burn a building (providing insurance is not a factor) if the responsible civil authorities give him a permit to do so. But he is still responsible that it does not endanger any other structure.

34. *Ibid.*, p. 113.

INSANITY

Insanity, if proven, avoids a conviction due to the fact that through long precedent American courts forbid the insane to be convicted of felonies. The proof of insanity stands on the test of whether the accused knew the difference between right and wrong as applying to his act. In *Regina v. Davies*, I.F. and F. (Eng.) 69, however, "the fact that the accused was found attempting to extinguish the fire does not necessarily show that he did know the difference between right and wrong." Curtis makes two very interesting observations concerning insanity in arson:[35]

1. One may have a weak or impaired mind without being insane in the legal sense.
2. However horrid and unnatural the nature of the act, it is not to be inferred from the nature of the act that its commission was the result of insanity.

But why fire should appeal to "aberrant minds" is suggested as follows:

> There has always been a great deal of superstition in regard to fire. It has been used as a means of sacrifice and devotion, and the Bible is full of references to the destruction of the wicked by fire. It is within the bounds of possibility that our ancestors, generations ago, were fire worshippers or sun worshippers, and it is not at all strange that, playing so important a part in our sane existence, the phenomenon of fire should manifest itself to the aberrant mind. N.B.F.U.

PYROMANIA

The relationship between pyromania and insanity is particularly interesting inasmuch as a great deal of misconception has arisen, assuming the two as being identical. Here are two views on pyromania, the first from the *Suggestions for Arson Investigators* and the second from *The Law of Arson.*

> Pyromania is that term applied to a monomaniac[36] whose obsession centers around fire. He is a firebug who starts fires without rhyme or reason." N.B.F.U.

> Pyromania may be defined as an insane disposition to incendiarism. It is now generally referred to as "pathological arson," and is defined as fire setting under an abnormally conditioned impulse by a person *not* determinably insane. The pyromaniac 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. Yet he is laboring under such a mental disability that he is unable to resist the impulse to set the fire. While in some states the rule is more lenient, it is generally held that an irresistible impulse to commit a crime is no defense . . . But pyromania should be distinguished from some forms of hysteria where one sets a fire purely to satisfy a craving for excitement.[37]

35. *Ibid.*, p. 114.
36. "The monomaniac is the person with a systematized delusion. When this delusion centers around fire, we have the pyromaniac, just as we have the kleptomaniac in the uncontrollable thief." N.B.F.U. P. 38.
37. CURTIS, *op. cit.*, §98.

Curtis goes further in his analysis and states that in his opinion pyromania is a form of defective inhibition:

> One acting on a morbid impulse of this type, not only *is* fully aware of what he is doing, but often derives great pleasure from its accomplishment.[38,39]

I think it should be quite clear now that pyromania is not to be interpreted as insanity. Many courts have felt so and consequently many persons have in this way avoided punishment, yet it is the opinion of most arson investigators that actually it is seldom that an incendiarist is insane. What happens is that sympathetic courts have simply let people off under the guise of insanity.

INTOXICATION

Another commonly heard defense is intoxication, but this plea is seldom successful for it is felt that intoxication being a voluntary matter does not constitute a legitimate excuse for aberrant behavior. There are some cases, to be sure, where one's *mania a potu* causes them to be of generally irresponsible character,[40] but Curtis states that in such cases the question may be submitted to the jury. It should be remembered, though, that in general, intoxication is not the whole reason for the commission of the act (i.e., the act of arson). It merely serves to break down certain inhibitions or fears which to that time had prevented the defendant in his sobriety from the doing the act. Under statutes where intent is an element of the offense, it must be very carefully determined whether intent was concomitant with the intoxication or existed prior to that time. Similarly, voluntary intoxication of the accused does not deem the act committed less criminal by reason of his having been in such condition, but may be taken into consideration by the jury in *determining the probable motive or intent* with which the act was committed.[41]

INFANCY

Infancy is a defense not often encountered, for the greatest amount of arson by juveniles involves youths above the age of infancy. However, children of all ages are employed, often unwittingly, as agents, and the court, faced with such cases, may be asked to satisfy itself that the child acted without malice to the property involved and solely

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38. *Ibid.*
39. And for this reason the pyromaniac is "often possessed of unusual craft and cunning, and is difficult to detect or apprehend."
40. The term *mania a potu* is most suggestive and means medical alcoholism.
41. *A Guide For the Prosecution of Arson Cases in Oregon.*

under instructions from an adult person.[42] An acquaintance of the writer was some years ago involved in such a case when he was about ten years old. He received only probation, but the fact of his conviction has since prevented him from obtaining employment in many applications for positions of any responsibility.

Entrapment

Entrapment is often claimed by the accused in his defense, but seldom accepted by the court. It occurs when the accused has been allowed to carry through all the steps in the commission of the crime, including setting the fire. At this point the police or other officials come from some place of concealment and seize the incendiarist in his witnessed act. Such is a common practice when public officials have been previously informed that the crime is to be committed. Entrapment occurring when the defendant has been abetted in the motivation of his acts by officials is the only time when that defense may be accepted.

Alibi

Simple alibi is always a defense and is related to the section on occupancy and access discussed above. Most arson is, however, committed by means through which the agent can establish an alibi purporting to place him away from the scene when the fire breaks out. It then becomes the task of the prosecution to determine from the devices used in the fire setting how much time could have elapsed before its breaking out and the time device was set. Fuses, wicks, gasoline trailers, candles, etc., are the devices so used to give the agent time to stablish his alibi, but as their use is well known, the prosecution is usually prepared to present evidence of their effectiveness. In other words, the prosecution's chief interest is in determining when the device was set and not particularly when the fire broke out, although in some cases these times are identical. If the defendant's alibi is not sufficient to indicate his presence elsewhere than the scene of the fire when the device was started, the alibi can be well refused by the court. For example, X sets a fire by means of a delayed ignition fuse at 10:00 P.M. The fire breaks out at 11:30 P.M. He claims, and presents witnesses to say, that he was at some other place at 10:30 and on through the night. The prosecution then shows to the court that the device used so delayed the fire's outbreak

42. This still makes the child a principal agent and subject to charges of first degree, but the court usually waives prosecution and directs its attention on the accessory, who in this case, is the person who hired or enticed the child.

for at least sufficient time for the accused to reach his "alibi place" before the fire's outbreak at 11:30 A.M. In this way the defendant's alibi is broken.

In a case of which the writer was told by a civil investigator,[43] the defendant, on being informed by the court that the device he used was known to have given him quite enough time to establish his alibi, but not enough to "cover his actions" at the time the device was known to have been set, stood up and without hesitation said, "That's a lie. That thing was timed for at least *six* hours." While his attorney threw in the sponge, the accused still stood there, not quite realizing the incriminating character of his outburst.

Finally, a word or two should be made concerning court errors, particularly errors made in court by the prosecution. In arson cases as in most all felonious offenses, a defendant may not be put in double jeopardy by a second trial for the same offense.[44] This is a basic principle of U. S. law and is indicated in the Fifth Amendment of the Constitution.[45]

The implication of this rule is that if due to careless handling of any phase of the investigation and prosecution, the case may be thrown out by malindictment or variance, and the accused may not be tried again. There are some exceptions to this rule; for one—when variance in the allegation of ownership has caused a dismissal of the charge; but generally if a case is once dismissed the defendant is thenceforth under no obligations to the State.

With all the different agencies who customarily participate in arson investigations, it is very difficult to understand why a presentation should ever go wrong. In this city (Boston) any fire of suspicious origin is normally investigated and then presented in criminal court by at least three different agencies, and in the Middle West a fourth agency may enter into the case, but still cases go awry due to a hurried attempt at getting a conviction. Often, the mistake is made at trying to introduce a charge, *qua* charge, without waiting to select the proper one. For example, "One who has been convicted of arson in burning a house occupied by a human being cannot be later charged with murder arising

43. Arson Squad, Boston Fire Department.

44. CURTIS, *op. cit.*, p. 119: He continues: "Such a case must be distinguished from one where the accused first murdered the occupant and then set fire to the building, for under such facts a conviction of homicide would not preclude a later prosecution for arson."

45. The Fifth Amendment of the United States Constitution forbids that any person shall be subject for the same offense to be twice put in jeopardy of life or limb; and also the constitutions of the several American states provide in substance that no person shall be subjected to a second prosecution for a crime for which he has once been prosecuted and duly convicted or acquitted." This is taken from CURTIS, *op. cit.*, §104.

out of the death of the occupant by reason of the fire."[46] Where, by rushing into the case, the best the prosecution can hope for is a verdict of guilty of arson; yet by waiting a bit until all the facts are known, the charge could have been murder.

What decides former jeopardy is, however, so difficult to determine that only by abstracting particular issues in particular cases may a complete understanding be had; even the jurist has no hard and fast rule to guide him. The question is often submitted to the jury or the court may make the decision—providing the issue is not controverted. The fact remains that intensive and complete investigation *before* the trial will usually avoid decisions of variance and mistrial, thus permitting an arsonist to go free.

From the above it may now be yet more clear of what the crime of arson consists, and some of the problems facing the prosecution during the course of the trial. No mention has been made of the enormous amount of detection and police work that invariably accompanies each instance of arson, however trivial or small the fire may seem at the time. Many acts of arson are not spectacular because the attempt fails or rapid extinguishment occurs before the fire has a good start. But it will be remembered that modern statutory rules now make it a felony to *attempt* arson though no fire results, and for this reason the prevalence of arson is considerably more, numerically, than any statistics show, and the courts are yearly round busy with the prosecutions of arson, as are the investigators, who by law must investigate every fire of undetermined origin.

46. *Ibid.*, p. 119, but see Note 44 (this paper).