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Arson Affected by the Act of April 25, 1929

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Finally, if one wrongdoer is entitled either to contribution or to indemnity, his proper remedy is an action of assumpsit on the theory that the duty of the other wrongdoer is quasi-contractual.[46] If contribution is sought from several persons, equity has jurisdiction on the ground of prevention of multiplicity of suits.[47]

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ARSON AS AFFECTED BY THE ACT OF APRIL 25, 1929, P. L. 767—The act of April 25th, 1929,[1] is entitled, in part, "An act to define arson": the first section of the act declares that any person who does certain things "shall be guilty of the felony of arson"; the sixth section of the act repeals section one hundred and thirty-seven of the act of March 31st, 1860,[2] by which arson was previously defined.

The act makes important changes in the law of arson. These changes may be exposited by considering: (1) The nature of the thing affected; (2) The ownership of the thing affected; (3) The act done to the thing affected; (4) The mental attitude of the actor.

Arson at common law was defined as the malicious and wilful (or voluntary) burning of the house of another.[3] The term "house" was interpreted as meaning dwelling house, and included buildings located within what was then known as the "curtilage."[4]

The act of March 31st, 1860, provided that the burning of any of the following three classes of buildings should constitute arson: (1) Any factory, mill, or dwelling

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two or more wrongdoers, as to whether plaintiff may sue them jointly or must sue them separately, as to effect of judgment against one, and similar questions, see Hill v. American Stores Co., 80 Pa. Super. 338 (1923); Betcher v. McChesney, 255 Pa. 394 (1917).

[46]Phila. v. Reading Co., 295 Pa. 183 (1929). Assumpsit was successfully used, without objection, in Armstrong County v. Clarion County, 66 Pa. 218 (1870); and in Horbach's Admr. v. Elder, 18 Pa. 33 (1851).

[47]Steigerwalt v. Smeych et al., 9 Pa. Super. 363 (1899). In Boyer v. Bolender, 129 Pa. 324 (1889), one wrongdoer sued in equity to recover contribution from nine other wrongdoers.

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[1]P. L. 767.

[2]P. L. 382.

[3]5 C. J. 539; Trickett's Crim. L. p. 164.

[4]5 C. J. 547.

house; (2) any kitchen, shop, barn, stable or other outhouse that is parcel of a dwelling house, or belonging or adjoining thereto; (3) any other building by the burning of which a dwelling house shall be burnt.

The provision that the burning of a mill or factory should constitute arson changed the definition of arson. At common law the burning of a mill or factory did not constitute arson.[5]

The words "any kitchen, shop, barn, stable or other outhouse that is parcel of such dwelling, or belonging or adjoining thereto," were probably intended to embrace buildings of a character similar to that of buildings embraced by the common law term "buildings within the curtilage." The change in phraseology was probably dictated by the entire change in conditions of life which rendered the phrase "'buildings within the curtilage" difficult of definition and application.[6] The words of the statute were intended to include "only such buildings the burning of which by reason of their proximity to a dwelling house would endanger the safety of the latter."[7] The burning of any such building was arson at common law.[8]

The provision of the statute that the "burning of any other building by means whereof a dwelling house shall be burnt" probably did not modify the common law. At common law if there was an intent to burn a building and a dwelling house was burnt, arson was committed, even though there was no intent to burn the dwelling house, at least if the burning of the latter was the natural and probable consequence of the burning of the former.[9] This provision is omitted from the act of 1929. Its omission probably does not change the law. In describing the buildings the burning of which shall constitute arson, the act of 1929 uses the same words as the act of 1860 except the words mentioned and the words "mill or factory." The burning of a mill or factory is no longer arson but is made a felony by section two of the act of 1929.

At common law the building burnt must be that "of another" but as arson was regarded as a crime against the security of the habitation and not against property, the house was regarded, so far as the crime of arson was concerned, as being the house of the occupant rather than that

[5] 5 C. J. 550. See Hill v. Comm., 98 Pa. 192.

[6] McLain's Crim. L. p. 475.

[7] Hill v. Comm., 98 Pa. 192.

[8] Hill v. Comm., 98 Pa. 192.

[9] 5 C. J. 541; Clark and Marshall on Crimes, p. 566.

of the owner.[10]

Accordingly it was held that the burning of an unoccupied house was not arson.[11] One was likewise not guilty of arson who burnt a house which he owned and occupied, or which he occupied but did not own.[12] But one was guilty of arson who burned a house which was occupied by another, even though the house was owned by the person burning it.[13]

The one hundred and thirty-seventh section of the act of March 31st, 1860, provided that to constitute arson the building burnt must be that "of another." Section one of the act of June 10, 1881,[14] provides: "No principle or policy of law shall, because the defendant shall have been in possession as tenant or otherwise at the time of the commission of the offense, exempt any person from conviction and punishment, who shall wilfully and maliciously burn or cause to be burned, or cause or attempt to set fire to, any building, but such person shall be liable to conviction and punishment in the same manner and to the same extent as if not in possession."

The act of 1860 did not change the common law rule that one was not guilty of arson who burned a house which he owned and occupied,[15] but the act of 1881 changed the common law by providing that one who burned a house which he occupied but did not own was guilty of arson.[16]

The act of 1929 does not expressly repeal the act of 1881, and it provides that one who burns one of the designated buildings is guilty of arson whether the building is the "property of himself or another." Is the burning of a dwelling house by one who occupies and owns it now arson? It was not arson at common law nor under the acts of 1860 and 1881.

At common law the crime of arson involved a burning. An attempt to burn was not arson.[17] The act of 1860 provided that one who attempted to set fire to, with intent to burn, one of the designated buildings should be guilty of arson. Under this statute one who attempted to burn one

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[10]5 C. J. 553.

[11]5 C. J. 545. But see Comm. v. Browne, 3 Rawle 207.

[12]5 C. J. 553. But see Comm. v. Levine, 82 Pa. Super. Ct. 105.

[13]5 C. J. 553, 554.

[14]P. L. 117.

[15]Comm. v. Herr, 19 Dist. Rep. 285; Comm. v. Williams, 14 Delaware Co. Rep. 101.

[16]Comm. v. Levine, 82 Pa. Super. Ct. 105.

[17]5 C. J. 543.

of the designated buildings was guilty of arson.[18] The act of 1929 omits the words "attempts to set fire to," and the fifth section of the act provides that any person who "attempts to set fire to or attempts to burn" one of the designated buildings shall be guilty of a misdemeanor. Under this act an attempt to burn one of the designated buildings would therefore seem not to be arson.

But the act of 1860 provided and the act of 1929 provides that setting fire to as well as burning shall constitute arson. It has been held that "setting fire to" does not constitute arson at common law.[19] It would seem therefore that the use of the words "set fire to" in the statute would enlarge the common law offense so that an actual burning was no longer necessary to constitute the crime. But the majority of cases in other jurisdictions hold that these words are equivalent to the word "burn" as used at common law, and are to be given no larger meaning,"[20] "except," it has been vaguely stated, "where it was the evident intent of the legislature to create a separate and distinct offense."[21] Was this the intention of the legislature of Pennsylvania? If so, how does the offense of "setting fire to" which by the act of 1929 is arson—a felony—differ from the offense of attempting to burn which is a misdemeanor?

The mental element of arson at common law was described by the words malicious and wilful (or voluntary). The act of 1860 used the words "malicious and voluntary," and the act of 1929 uses the words "wilful and malicious." Probably neither of these statutes was intended to change the mental element of the crime. Arson at common law required an intent to burn the building upon the burning of which the prosecution was predicated or to burn some other building from the burning of which the burning of the former resulted as a natural and probable consequence. An unintentional burning, even though due to negligence, save in the case just mentioned was not arson, unless according to some, but not all, of the authorities the burning resulted from an attempt to commit a felony.[22]

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[18]Comm. v. Werderhold, 112 Pa. 584.

[19]Cochrane v. State, 6 Md. 400.

[20]C. J. 544.

[21]5 C. J. 544.

[22]5 C. J. 542; Clark and Marshall on Crimes, p. 566.