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ARSON—STATUTORY CHANGE OF COMMON LAW REQUISITES.—At common law, arson was a clearly defined felony, including only certain kinds of burnings. According to Lord Coke, it was the malicious and voluntary burning of the house of another by night or by day, 3 INST. 66. There were certain well-understood essentials constituting the crime. The structure must have been a house or an out-house; it must have been the house of another; it must have been inhabited, though not actually occupied, at the time of the burning. The structure must have been a completed one; there must have been an actual burning—at least to the extent of charring the wood. The burning must have been caused maliciously or with general criminal intent. CLARK, CRIMINAL LAW, 3d ed., pp. 287-290. The crime was regarded as being against the possession rather than against the property, and for purposes of indictment the occupant could be alleged as the owner, even though the house was actually owned by another. CLARK, *supra*, p. 290.

This conception of the crime of arson resulted in a number of rules peculiar to the common law. Thus, a tenant did not commit arson in burning the house he occupied, because the possession was in him even though the reversion was in another, *Rex v. Scoffield*, 2 East P. C. 1029. But if the owner burned his house while it was occupied by a tenant under a lease, he was guilty of arson, 4 BLACK. COM. 221. In *Kopczynski v. State*, 137 Wis. 358, 118 N. W. 836, the court declared that the common law rule was that neither the husband nor the wife could be guilty of arson in burning their habitation, regardless of the one in whom title rested; but where the husband lived apart from the wife and set fire to her habitation, he would be guilty of arson, and it was immaterial in whom the legal title rested. But a man living in adultery with a woman was held guilty of arson in burning the house which they jointly occupied, and which was owned by the woman, *Com. v. Brooks*, 164 Mass. 397, 41 N. E. 660. Probably the policy of the law is not to recognize any unity in the possession of two adulterers, as it does in the case of husband and wife. An owner could burn his own house if it was not in the possession of another, at common law. In *Rex v. Spalding*, 2 East P. C. 1025, Spalding had insured his house, and had even mortgaged it; he set fire to it, but as he had never admitted the mortgagee, it was held that he had not burned the house of another, and consequently was not guilty of arson. In *Rex v. Proberts*, 2 East P. C. 1030, where the defendant had set fire to his house for the express purpose of cheating the insurance company, he was only indicted for misdemeanor, the court declaring, however, that if by defendant's willful and malicious act any of the neighboring houses had been set on fire, it would have amounted to a capital felony, punishable with death. At common law, the burning must have been voluntary and malicious: negligence or mischance would not have amounted to arson unless the defendant accidentally set fire to the building while in the commission of another unlawful act with felonious intent, 2 East P. C. 1010. Arson was a felony and punishable with death, and for this reason, probably, the judges construed the law very strictly.

An examination of the legislation of the present day on arson seems to indicate an enlargement of the common law view that arson was a crime against habitation, to include the view that it is also a crime against property

interests. The Indiana statute, for example, includes as subjects of arson, dwelling houses or other buildings, finished or unfinished, occupied or unoccupied, boats, automobiles, railroad cars, street cars, reaping machines, or other agricultural machines, bridges, cord-wood in a pile, stacks of grain, or grain not severed from the ground, fences, building materials, trees, etc., such property being of the value of twenty dollars or upwards, and being the property of another, or being insured against loss, the burning being with intent to defraud or prejudice the insurer, Ind. St. (1926) vol. 1, sec. 2441. This statute expressly makes it immaterial whether the buildings were completed or occupied, abrogating the common law in these respects. The crime of arson, thus, is no longer a crime solely against habitation or possession. The statute imposes a penalty of imprisonment for from two to twenty years and a fine not to exceed double the value of the property destroyed; but should the life of any person be lost by the burning, the offender is deemed guilty of murder in the first degree, and is subject to death or imprisonment for life.

As a result of this change of policy by the legislatures, many of the common law rules have been changed. It is now arson for a man to burn his own property to defraud an insurance company, Indiana Statutes, *supra.* The Georgia Penal Code, section 134, declares it arson to burn one's own house in a city, town or village. The New Jersey statute, Comp. St. Supplement, sec. 52-123, declares it arson for a man to burn a dwelling or any part thereof, whether it be his own, or another's. This would seem to involve both a desire to avoid economic waste and to prevent the endangering of the lives and property of others. A tenant may now be convicted of arson if he burns the house he occupies. *State v. Moore,* 61 Mo. 276. The various statutes affecting the rights of married women are responsible for some of the changes. Thus, in Indiana, where it is arson to burn the dwelling of another, a husband was convicted of arson when he set fire to his wife's house, though they were dwelling together in it at the time, *Garrett v. State,* 109 Ind. 527, 10 N. E. 570. Similarly, the Indiana court held that a wife could be charged with arson in burning the house in which she dwelt with her husband, *Emig v. Daum,* 1 Ind. App. 146, 27 N. E. 322. This would seem consistent with the modern conception of arson, insofar as the protection of property interests are concerned. The Michigan court, however, in *Snyder v. People,* 26 Mich. 106, asserted that the married women's acts in Michigan did not operate on marital unity and rights, and that the house of the wife is still the dwelling of the husband; adhering to the old view that arson was only an offence against the habitation, the court held that the husband who burned his wife's house, in which he was living with her, did not burn the house of another, as required by the statute, and therefore was not guilty of arson. A subsequent act of the Michigan legislature has made such a burning arson, Howell's Mich. St., sec. 14589.

In most states, the common law requirement that the burning be willful and malicious has not been altered. Under the Iowa Code, however, anyone who willfully or negligently burns any prairie or timbered land, and thereby injures the property of another, is guilty of arson, and punishable by fine and imprisonment, Code of Iowa, (1924) sec. 12992. Where at common law the burning must be evidenced by an actual consuming of the house or some part of it, the statute of one state declares that a building be deemed set on fire

whenever any part shall be scorched, charred or burned, Revised Laws of Nevada, (1912) vol. 2, sec. 6627. The word "burn" had a definite meaning at common law,—wood was not burned unless fibers were consumed or wasted, BISHOP, STATUTORY CRIMES, 2nd ed. sec. 310. But the word "scorch," which was not present in the common law definition of arson, does not mean "consume" but, according to WEBSTER'S DICTIONARY, rather involves the idea of a discoloring or shrivelling, and it may be that by the use of this word the Nevada legislature has enlarged the common law requirement on this point. However, this part of the statute has not yet come up for judicial interpretation in Nevada.

One very marked innovation of the legislation on the subject of arson is the division of the crime into two, three, or four degrees. The rather typical Alabama statute divides arson into three degrees, Code of Ala., (1923), sec. 3289, 3290, 3293. Arson in the first degree consists of the willful burning of a dwelling or structure in which there is at the time a human being, or any inhabited dwelling, and is punishable by death or imprisonment. Arson in the second degree includes the willful burning of a public building, manufactory, storage place, outhouse, vessel, or uninhabited dwelling, and is punishable by imprisonment for a term of two to twenty years. Third degree arson consists of the willful burning of a house or vessel, completed or not, bridge, gate, or causeway, and is punishable by fine and imprisonment for a year. Arson in the first degree is generally aimed against the endangering of human life, and more nearly approaches the common law theory of arson. Thus, the California court in *People v. Nagy,* (Cal. 1926) 248 Pac. 906, holds that to convict the defendant of arson in the first degree, it must be proved that a person was in the building at the time of the burning. The lesser degrees of arson are designed more for the protection of property, and on this account include those burnings which were not felonies at common law, but which, very often, were misdemeanors.

Perhaps the New Jersey statute, *supra,* is as advanced as any in its theory of arson. Under it, apparently, a man is guilty of arson in burning his own dwelling even though it is unoccupied, uninsured, and so isolated that the life or property of no one else is endangered. The indictment need only charge that he "willfully and maliciously burned a dwelling house," *State v. Morris,* (N. J. 1923) 121 Atl. 290. At a recent convention of fire marshals, a "model" arson law, patterned after the New Jersey law *supra,* was proposed, and it was justified on the ground that the state has a property interest in the real estate of the individual which forbids the economic waste of willful destruction. The "model" law, as does the New Jersey law, provides penalties for the burning of a dwelling house different from those for the burning of a public building, church, school-house, factory, etc., a maximum penalty of twenty years' imprisonment being provided in the case of the former, and a maximum penalty of ten years' imprisonment for the latter. The state's interest in preventing economic waste would not seem to justify the difference in penalties, for the value of the second class of property would generally seem to equal if not surpass the value of the first. The difference does not seem to rest on the policy of protection of human life, for the man is guilty of arson even if the dwelling-house is totally vacant. It is doubtful if the framers of the "model" law, or of the New Jersey law after which it was

patterned would go so far as to make it criminal for a man to destroy his realty in any manner at all, and if this be true, then it would seem to follow that what is really being objected to, here, is not so much the fact of destruction as the mode of destruction,—fire. Perhaps in this respect the law is quite expedient, but in any event, it is a far cry from the crime of arson as it was known to Coke and the other lawyers of his time. J. S.