See: Minutes of Subcommittee No. 1
7/13/68, p. 1, Vol. X
Tapes # 8 and 9

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
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ARTICLE 16. ARSON AND RECKLESS BURNING

Preliminary Draft No. 1; July 1968

Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 16. ARSON AND RECKLESS BURNING

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Section 1. Arson and reckless burning; definitions. As used in __________, except as the context may require otherwise:

(1) "Building," in addition to its ordinary meaning, includes any vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) "Building of another" or "property of another" means a building or property in which anyone other than the actor has a possessory or proprietary interest.

(3) "Forest land" means any forested land, woodland, brushland, timberland, cutover land or clearing, which, during any time of the year, contains enough flammable forest growth, forest refuse, slashing or forest debris to constitute a fire hazard.

COMMENTARY - ARSON AND RECKLESS BURNING; DEFINITIONS

(1) "Building." This definition is identical to that contained in the Burglary and Criminal Trespass Article (P.D. #2). Its purpose is to include those structures and vehicles which typically contain human beings for extended periods of time, and is consistent with the primary rationale of the crime of arson: Protection of human life or safety. The definition is taken from Connecticut Penal Code (Proposed Draft) and is similar to those definitions found in the Model Penal Code and New York Penal Law.

"Separate Units." The second half of the paragraph defining "building" makes it clear that an apartment building is both a building in itself and a collection of buildings. This definition is similar to the definition of "occupied structure of another" found in Model Penal Code section 220.1.

(2) "Building of another" - "Property of another." These definitions are based on Model Penal Code section 220.1.

(3) "Forest land." This definition is the same as the one appearing in ORS 477.001.

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TEXT OF REVISIONS OF OTHER STATES

Text of Connecticut Penal Code (Proposed Draft)

Section ___. Definitions. For purposes of this article, "building," in addition to its ordinary meaning, includes any water-craft, air-craft, trailer, sleeping car, or other structure or vehicle, adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, such as, but not limited to, separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to being a part of such building, a separate building. A building is that of another if anyone other than the actor has a possessory or proprietary interest therein.

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Text of New York Revised Penal Law

Section 150.00. Arson; definition of term

As used in this article, "building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

# # #

Text of Model Penal Code

Section 220.1. Arson and Related Offenses.

(4) Definitions. "Occupied structure" includes a ship, trailer, sleeping car, airplane, or other vehicle, structure or place adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietory interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

# # #

Section 2. Reckless burning. A person commits the crime of reckless burning if he recklessly damages property of another by:

(1) Intentionally starting a fire or causing an explosion; or

(2) Permitting fire to escape from land in his custody or control.

Section 3. Arson in the second degree. A person commits the crime of arson in the second degree if, by starting a fire or causing an explosion, he intentionally damages:

(1) Forest land of another; or

(2) Any property, whether his own or another's, and such act recklessly places another person in danger of bodily injury or a building of another in danger of damage.

Section 4. Arson in the first degree. A person commits the crime of arson in the first degree if, by starting a fire or causing an explosion, he intentionally damages:

(1) A building of another; or

(2) Any property, whether his own or another's, to collect insurance for such loss, and such act recklessly causes bodily injury to another person or damage to a building of another.

COMMENTARY - ARSON AND RECKLESS BURNING

A. Summary

The primary rationale of this article is the protection of human life and safety. The secondary rationale is the protection of particularly cherished property. The draft provides for two ascending degrees of arson, graded according to the nature of the property that is damaged or the seriousness of the threat to human life; and for the lesser crime of reckless burning.

This article does not define the criminal intent elements of the crimes. As did the draft on Criminal Mischief, this proposal assumes that certain words of culpability will be defined by the Commission to apply throughout the revised criminal code and that those definitions will be patterned after Model Penal Code section 2.02. Based on these assumptions, the terms "intentionally" (MPC uses "purposely") and "recklessly" are employed. The MPC defines the terms as follows:

"(a) Purposely.

"A person acts purposely with respect to a material element of an offense when:

"(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

"(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist."

"(c) Recklessly.

"A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

Section 2. Reckless burning. The elements of this crime are: (1) Reckless (2) damage (3) to property (4) of another (5) by intentionally starting a fire or causing explosion or (6) permitting fire to escape from land. This section deals with the protection of property from damage caused recklessly and where there is no intent on the part of the actor to damage the property, but he "consciously disregards a substantial and unjustifiable risk" resulting from his conduct. Because there is no intent to damage property involved, the crime does not carry the onus of arson.

Section 3. Arson in the second degree. The elements are: (1) Intentional (2) damage (3) by fire or explosion (4) to forest land (5) of another or (6) any property (7) his own or another's and (8) recklessly (9) placing another person in danger of bodily injury or (10) a building of another in danger of damage. This section is concerned with the protection of human life and cherished property. Here there must be an intentional damaging of forest land or an intentional damaging of any property that threatens bodily injury to another person or damage to another's building.

Section 4. Arson in the first degree. The highest degree of arson consists of: (1) Intentional (2) damage (3) by fire or explosion (4) to a building (5) of another or (6) any property (7) to collect insurance and (8) recklessly (9) causing bodily injury to another or (10) damage to a building of another. The chief aim is to protect human life and cherished property. The crime could be committed by either intentionally damaging a building or other structure of another that typically contains human beings or by damaging any property in order to collect insurance and thereby recklessly causing bodily injury to another or actual damage to a building of another. The essential element, in either case, is danger to another person or another building.

B. Derivation

Section 2. Reckless burning. This section is based on Model Penal Code section 220.1 (2), but, contra to that proposal, requires actual damage to any property as opposed to threatened damage to a building. Subsection (2) is similar to provisions contained in ORS 164.070. It is submitted that the law should be broad enough in scope to protect all property from reckless damage by fire or explosion and, further, that this logically compliments the protection afforded by the criminal mischief provisions that deal with reckless damage to property of another, when it amounts to more than $100.

Section 3. Arson in the second degree. Subsection (1) is derived from ORS 477.715 and brings the intentional setting of forest fires within the prohibition of the basic arson provisions where such conduct would be treated as a serious felony. Subsection (2) deals with the intentional damage to any property which results in recklessly placing another person in danger of bodily injury or a building of another in danger of damage. The intentional burning of one's own property becomes arson if the reckless endangering

element occurs. As contrasted with Arson in the First Degree, there is no insurance element involved, nor is actual injury to another or damage to a building required. Subsection (2) is derived from Model Penal Code section 220.1 (2).

Section 4. Arson in the first degree. Subsection (1) is taken from the MPC; however, the basic definition of the crime provides that there must be "intentional damage" instead of a "purpose of destroying," and in that particular is akin to the New York Penal Law and the Michigan proposal. Subsection (2) also is based on MPC section 220.1.

C. Relationship to Existing Law

(1) Oregon Law

At common law the crime of arson was the "wilful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling house, of another person." 6 C.J.S. Arson, 718 sec. 1. It was an offense against the security of habitation and was considered an aggravated felony because it manifested a greater contempt of human life than the burning of a building in which no human being was presumed to be. Ex parte Bramble, 187 P.2d 411 (1947).

There had to be an intentional setting of fire which spread to a structure, but common law did not require an intent to damage or destroy. A general malice or intent to burn some structure was sufficient. The Oregon court, State v. Elwell, 105 Or 282, 209 P. 66 (1922), states that "it is incumbent on the state to establish: (1) the burning; (2) that it was done with criminal intent; and (3) that it was done by the defendant." Id. at 284.

The burning must be "wilful" and "malicious." The terms "wilful" and "malicious" denote distinct ideas, and the courts emphasize the necessity of the existence of "malice" in addition to "wilfulness." It is sufficient if it is shown that the accused was actuated by a malicious purpose and that he set fire to the building wilfully rather than negligently or accidentally. C.J.S., supra at 721-722 sec. 3.

Oregon follows this general statement of the requirement of "malice" and wilfulness." The word "malicious" is a necessary ingredient to charge arson. State v. Murphy, 134 Or 63, 290 P. 1096 (1930). State v. Paquin, 229 Or 555, 368 P.2d 85 (1962), also recognized the necessity that the act be "criminal" and not just "carelessness." The court said: "The only possible uncertainty as to the fire could be whether its origin was an act of carelessness or a criminal act." Id. at 566.

Motive is not an essential element of arson or related criminal burnings. C.J.S., supra at 722 sec. 3. State v. Elwell, supra, is the clearest statement on this point. In that prosecution for arson, the court said: ". . . the corpus delicti - that is, that the crime charged has been committed by someone - consists of two elements: (1) that the building in question burned; and (2) that it burned as the result of the wilful and criminal act of some person." Id. at 283; quoted with approval in State v. Schliegh, 310 P.2d 341, 210 Or 155, 165 (1957). Reiterating the necessity of showing a "wilful and criminal act" the Elwell court pointed out that when a house burns and nothing appears but that fact, the law implies that the fire was the result of accident or some providential cause rather than a criminal design. Supra at 284.

A "burning" of the building is an essential element of the crime of arson. State v. Elwell, supra. To constitute a burning there must be an ignition of some part of the building resulting in a perceptible change in its composition, at common law called a "charring." C.J.S., supra at 723, sec. 4. It is not necessary that the buildings should be consumed or materially injured. It is sufficient if fire is actually communicated to any part thereof, however small. Anno - Burning as Element of Arson, 1 ALR 1163, 1166.

In the absence of a statute enlarging the scope of the crime, the burning of personal property does not constitute arson, and the burning of personal property in a building will not constitute arson if no part of the building is burned. C.J.S., supra at 728, sec. 6.

At common law the burning must have been of a "dwelling or dwelling house." The annotation, "Arson, 'Dwelling' - Vacant Building" generally describes when a building is a "dwelling."

> "Speaking generally, an unfinished or incomplete building which has not yet been occupied will not be regarded as a 'dwelling' even though designed as a dwelling house and destined to be so used on completion. Conversely, where a building originally used as a dwelling house has been abandoned for such purposes or where such a building has been without a tenant or occupant for a prolonged period, it will not be regarded as a 'dwelling.'
>
> "On the other hand, the mere temporary absence of occupants, at the time of the fire, from a building in general use as a dwelling house will

> not, in the view of most states, alter the status of the structure as a 'dwelling' for purposes pertinent to arson prosecutions." 44 ALR 2d 1456, 1457, 1458.

" . . . the words 'dwelling' or 'dwelling house' have been construed to include not only the main but all of the cluster of buildings convenient for the occupants of the premises, generally described as within the curtilage. . . Generally speaking, the curtilage is the space of ground adjoining the dwelling house, used in connection therewith in the conduct of family affairs and for carrying on domestic purposes usually including the buildings occupied in connection with the dwelling house. It is the propinquity to a dwelling, and the use in connection with it for family purposes which is to be regarded: 17 C.J. 437, 438." State v. Lee, 253 P. 533, 120 Or 643, 648, 649 (1927).

Again, at common law, the dwelling burned had to be that of another person. Under previous Oregon law, section 1932 LOL, the indictment had to allege the owner as part of the description of the offense. State v. Moyer, 149 P. 84, 76 Or 396, 398 (1915). The allegation of ownership in an indictment charging arson was part of the description of the offense and was essential in order to show that the property burned did not belong to the defendant. State v. Director, 227 P. 298, 113 Or 74, 79 (1924). In this regard State v. Murphy, supra, commented that an owner of a building may destroy it by fire without being guilty of any crime.

At common law one could not be criminally liable for burning his own building and since an agent cannot be more liable than his principal would be if he did the act, an agent who burns a dwelling with the sanction of the owner at the time of the burning cannot be guilty of arson. The crime consists in the wilful and malicious burning of the dwelling house of another. It is a crime against the habitation of a person and includes an injury to the person. Under this construction an agent (defendant) could not have acted injuriously or maliciously toward the owner in carrying out his wishes in relation to his property by aiding his attempt to convert his dwelling into money. Therefore, where an owner procures an agent to burn his dwelling so that the owner may obtain money from insurance, the court held the agent was not guilty of arson, but was guilty of violating a statute condemning a burning with intent to defraud an insurance company. 54 ALR 1236-1237.

Oregon's first degree arson statute is ORS 164.020. The statute condemns "any person who wilfully and maliciously or wantonly sets fire to or burns" designated property. The

conjunctive requirement that the burning be both "wilful and malicious" is retained from common law. The use of the term "wantonly" as an alternative to the wilful and malicious elements is generally construed as implying, among other things, a criminal intent. ORS 161.010 states that "wantonly" implies that the act was done with "a purpose to injure or destroy without cause." The showing of this criminal intent may be alleged and proved alternatively by a showing that the accused was actuated by a malicious purpose and that he set fire to the structure wilfully.

The phrase "sets fire to" is generally construed as being synonymous with "burns" and the common law connotations of what necessitates a "burning" attach to the phrase. C.J.S., supra.

The statute likewise condemns anyone who "wilfully and maliciously or wantonly, aids, counsels or procures the burning of . . . designated property." This construction merely includes within the scope of the statute those persons who, if not included specifically, would under the rules of common law be charged. State v. Case, 61 Or 265, 122 P. 304 (1912), recognized the proposition that a person who is not within the class of those by whom the crime may be directly perpetrated may, by aiding and abetting a person who is within the scope of the definition, render himself criminally liable.

Similarly it is stated that such a person may be charged "provided (a) he was present actually or constructively, and aided or abetted another person in the commission of the crime; (b) or being absent, counseled or procured or caused that person to commit the crime . . ." United States v. Van Schiack, 134 Fed. 592 (1904).

In State v. Rosser, 162 Or 293, 91 P.2d 295 (1939), the court pointed out that the "words 'aid and abet' as used in section 13-724, O.C.L.A. (now ORS 161.220) abolishing the distinction between an accessory before the fact and a principal, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, manifestly have reference to some word or act of encouragement or assistance in the commission of the offense, and not to something done after the crime is complete . . . An 'aider and abettor' is one who advises, counsels, procures or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense: State v. Silverman, 148 Or 296, 36 P.2d 342." Id. at 344.

Thus, under the wording of the statute, if a person with the requisite criminal intent is either actually present aiding in the commission of the offense or being absent, counsels or procures the commission of the crime, he is subject to the condemnation of the statute the same as is the party actually committing the offense.

In a prosecution under that portion of ORS 164.020 condemning anyone who "counsels or procures" a burning of a dwelling, State v. Peden, 220 Or 205, 348 P.2d 451 (1960), found evidence sufficient for conviction where it was shown that the defendant made a "standing offer" of $500 to one Branscum for such a burning. The court stated that the jury could have found that a few weeks after the defendant's last offer to pay him $500 to burn the dwelling, he yielded to the temptation. State v. Peden, supra at 210.

Before 1947 the statutory crime of arson for burning a dwelling was defined substantially as it was defined at common law in section 23-501, O.C.L.A. It consisted of the wilful and malicious burning of the dwelling house "of another in the nighttime." However, the new law of 1947, which repealed section 23-501, O.C.L.A., defined the crime differently; viz., the wilful and malicious burning of a dwelling house, without regard to whether the dwelling house belongs to another or whether the act is committed in the nighttime or daytime. State v. Moliter, 289 P.2d 1090, 205 Or 698, 705 (1955).

The property designated by ORS 164.020 as the subjects of first degree arson are: (1) any dwelling house; (2) any building that is a part of, belongs to, adjoins or is adjacent to a dwelling house, the burning of which building would imperil such dwelling house, whether the dwelling house or building is his property or the property of another; (3) any public building as defined by ORS 479.010.

ORS 164.010 defines "dwelling house" as any structure usually "occupied by any person lodging therein." Subsection (2) encompasses the concept of a building within the curtilage as discussed by State v. Lee, supra, but enlarges that concept by allowing the building to be the "property of another."

A "public building" is a "building in which persons congregate for civic, political, educational, religious, social or recreational purposes." ORS 479.010 (i).

ORS 164.030, defining second degree arson, includes the same intent and parties described in ORS 164.020. The only difference is in the property designated as the subject of the offense. Second degree arson condemns the burning of

"any building or structure" of any class or character, except those set forth in ORS 164.020.

By including a "structure of any class or character" in the category of property designated as protected by the second degree arson statute, the legislature clearly encompasses burnings which would not involve a danger to the person. For example, a burning of a dilapidated shack in the middle of a country field could render the actor criminally liable and susceptible to imprisonment for up to ten years.

ORS 164.040 defines third degree arson. This statute similarly contains the elements necessary under ORS 164.020 and 164.030; i.e., it punishes any person who "wilfully and maliciously or wantonly" burns property, as well as any person, who with the same criminal intent "aids, counsels or procures" the burning of property. The lesser degree is based upon the type of property burned, i.e., property of any class or character. This statute would condemn the burning of personal property since buildings and dwellings are covered by the greater degrees of arson. The statute reinstates the requirement that the property burned be "another's," which requirement was eliminated in 1947 from the definition of first and second degree arson. The reason would seem to be that one may burn his own personal property without the threat to the security of a habitation or the possibility of personal injury which is present in the burning of a structure or dwelling. There are no reported cases under the statute.

ORS 164.900 similarly condemns the malicious injury or destruction of personal property of another. This statute provides for punishment, either as a felony demanding a maximum of three years imprisonment or as a misdemeanor, requiring either a fine or imprisonment in the county jail for not more than one year. It seems incongruous that a person who would throw another's new suit into an incinerator would be guilty of third degree arson demanding imprisonment as a felony, whereas if he had just torn it up, he would be able to get the benefit of the possibility of a fine or imprisonment as a misdemeanor.

ORS 477.090, civil liability in damages, provides that "the United States, state, political subdivision or private owners whose property is injured or destroyed by fires in violation of ORS 164.070 . . . or this chapter may recover in a civil action double the amount of damages suffered if the fires occurred through wilfulness, malice or negligence. Persons causing fires by violation of any of the provisions of the statutes enumerated in this section are liable in an

appropriate action for the full amount of all expenses incurred in fighting such fires."

ORS 164.050 and ORS 164.060, which were repealed in 1965, have been amended and are now found in ORS 477.715, "wilfully and maliciously setting fire to forest land," and ORS 477.720, "accidentally setting fire to forest land; failure to prevent spread." It should be noted that violation of ORS 477.715, 477.720 and 164.070 would require either wilfulness, malice or negligence and therefore would subject the offender to civil liability specified under ORS 477.090. A violation of any of the conduct prescribed by ORS 164.070 is punishable under that statute by fine or imprisonment. A violation of ORS 477.715 is punishable under ORS 477.933 (4) by imprisonment for not more than two years. A violation of ORS ORS 477.720 subjects the offender to civil liability and apparently would also subject the offender to the punishment prescribed for a misdemeanor under ORS 161.080.

ORS 476.715, throwing away burning material, punishable as a misdemeanor by fine, imprisonment or both under ORS 476.990 (5) easily encompasses ORS 164.070 (1) and (3), for it is recognized in an opinion of the attorney general, 23 Op. Att. Gen. (1946-48) p. 312, that any offense committed under that section, ORS 476.715, anywhere in the territorial limits of Oregon is in violation of the law. Recognizing the overlap of these two statutes, it is pertinent to note that the maximum term of imprisonment varies under their separate penalty provisions, the former allowing six months, the latter only 90 days. Also, the former allows for a combination of both fine and imprisonment, the latter does not so allow.

ORS 164.070 (2) (3) (4) are acutely interdependent in the areas of the requisite knowledge and negligence. Carter v. La Dee Logging, 142 Or 439, 18 P.2d 234, 20 P.2d 1086 (1933), states: "The duty imposed upon the defendant by law to use reasonable care and diligence in fighting and preventing fires would not arise until the defendant had knowledge of the existence of the fire." Id. at 468-69. Sullivan v. Mountain States Power Co., 139 Or 282, 9 P.2d 1038 (1932), indicates when a party is deemed to have knowledge. The court said: "A party is bound not only by what he knew but also by what he might have known had he exercised ordinary diligence. Notice or knowledge of a condition is almost universally inferred from the nature of the duty or the facts and circumstances of the case." Id. at 306-7. Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Or 126, 140 P.2d 703 (1935), impliedly imposes knowledge of ordinary and natural weather conditions on a person by stating that "usual and expected conditions of weather and the natural and ordinary action of the forces of wind and water operating

on a negligent act will not ordinarily constitute an independent, efficient intervening cause . . . " Id. at 206.

The court in Sullivan v. Mountain States Power Co., supra, stated: "It seems clear that the legislature by the use of the single word 'possible' did not intend to demand that those subject to the act should do things that were neither reasonable nor practicable . . . It is our opinion that the words 'every possible effort' exact everything that is practicable and reasonable, but no more." Id. at 308. State v. Gourley, 209 Or 363, 305 P.2d 306, 306 P.2d 1117 (1956), combines the statement of the rule. The court said: "As soon as the existence of the fire came to his . . . knowledge each was required to make every reasonable effort to extinguish the fire." Id. at 375.

ORS 164.070 imposes a duty upon the owner of land, or a person in lawful possession or control. However, as indicated in Carter v. La Dee Logging Co., supra, "It cannot be said that the duties imposed by section 42-410 (now ORS 164.070) are incumbent alike in all circumstances upon both the owner and the party in possession. It is more likely that the owner not in possession might show that it did not wilfully or negligently allow the fire to escape because it had no knowledge thereof, while the one in possession, being in possession of the land, might have had knowledge of the fire, and wilfully or negligently allowed it to escape from land in its possession." Id. at 468. A logging company engaged in logging on the owner's land is considered a person in possession. State v. Gourley, supra.

ORS 164.080, fires affecting land of another, provides that "any person who maliciously or wantonly sets on fire any prairie or other grounds, other than his own . . . or who wilfully or negligently permits a fire to pass from his own grounds . . . to the injury of another, shall be punished." The statute encompasses two distinct offenses. First, setting fire to land not his own with criminal intent or malice. Second, "wilfully or negligently" allowing it to spread to the land of another. These two distinct offenses seem to correspond almost exactly with subsections (1) and (2) of ORS 164.070. The only distinctions in the wordings between ORS 164.070 (1) and the first offense defined by ORS 164.080 is that the former condemns setting a fire "unlawfully" while the latter condemns setting a fire "maliciously or wantonly." Also, subsection (1) encompasses a fire on "any lands" while the first offense defined in ORS 164.080 limits the fire to one set on land not owned or lawfully possessed by the offender. The second offense defined by ORS 164.080 corresponds exactly with subsection (2) of ORS 164.070 except that the former requires injury to another's land while the latter requires only that it spread to another's land.

Although there is no reported Oregon case law on the statute, California in Gamier v. Porter, 27 P. 55 (1891), interpreted a similar statute in accordance with the above distinction. The court said: "If one set fire to the weed or brush on his own land, so as to prepare it for the plow, intending to limit and control the fire, and actually does so, he has not set fire to the prairies within the meaning of this statute. If under such circumstances the fire gets out of his control, he has set fire to the prairies, but not wilfully, although it may be negligently." Id. at 55.

ORS 164.090 defines an attempt to burn property. The statute declares that "any person who wilfully and maliciously or wantonly attempts to set fire to or burn" property; any person who with the same criminal intent aids, counsels or procures the burning of "any dwelling house, building, or property described in ORS 164.010 to 164.040," as well as any person "who commits any act preliminary" to such a burning or "in furtherance thereof" is guilty of arson.

State v. Taylor, 47 Or 455, 84 P. 82 (1906), defines what at common law was an indictable attempt. The court said: "An indictable attempt consists of two elements: (1) an intent to commit the crime; and (2) a direct ineffectual act done toward its commission . . . preparation for its commission is not sufficient. Some overt act must be done towards its commission, but which falls short of the completed crime." That overt act "need not be the last proximate act before the consummation of the offense . . ." Id. at 458. The statute clearly states what constitutes these two elements.

Subsection (2) of ORS 164.090 states: "The placing or distributing of any flammable, explosive or combustible material or substance . . . in any dwelling . . . or adjacent thereto, in any arrangement or preparation, with intent eventually to willfully and maliciously or wantonly set fire to or burn it . . . shall . . . constitute an attempt . . ." The statute's definition of what constitutes an overt act done towards the commission of the offense broadens the common law to include a preparation of a specified type in the placement and arrangement of flammable material in a position which would allow it to communicate a fire to the designated property. The criminal intent required by the statute is the same as the intent required by the common law. It should be noted that the evil intent which imparts criminality to the act must exist in the mind of the procurer. The fact that the party solicited does not share in the wicked intent does not exonerate the solicitor. State v. Taylor, supra at 462.

ORS 164.100 describes the offense of destroying property with the intent to defraud an insurer. In a prosecution under this statute for burning a dairy barn with the intent to injure and defraud, an indictment which followed the language of the statute was sufficient. State v. High, 151 Or 685, 51 P.2d 1044 (1935).

ORS 164.100 requires three elements in the offense. First, the intent to defraud an insurer. Second, a wilful burning or other injury to defendant's or another's property. Third, that the property was at the time insured against loss.

ORS 164.110 establishes the basis for prima facie proof that insurance existed when defendant is charged with defrauding an insurer. There are no reported cases interpreting this statute, but the statute itself states that "proof of a policy of insurance in force at the time of the alleged offense in which the defendant had a direct or indirect interest is prima facie evidence of the fact of such insurance and of the capacity of the company, to legally issue the policy."

The requirement of ORS 164.100 would change the earlier ruling in State v. High that there need be no allegation that an insurance policy was issued and delivered to the extent that such an allegation would be necessary to prove the property was insured against loss at the time of the fire.

(2) Comparison of Model Penal Code, New York Penal Law, Michigan Revised Criminal Code and Oregon Law

(a) Model Penal Code

The Model Penal Code in its general commentary divides arson legislation present today into three main categories. The first and most common arson statutes divide arson into three degrees according to the type of property burned. Special concern for dwellings continues to manifest itself in classification of arson of dwellings and related structures as first degree arson. Second degree arson commonly embraces the burning of other buildings and structures and sometimes vehicles. Third degree arson covers burning of any other property. Oregon has basically followed this division, while including burnings of public buildings in first degree arson. As noted, burning of property of any character to defraud insurers is made punishable by a separate section, applicable to one's own property.

The MPC notes that this scheme is subject to grave criticism. The destruction of a large dam, factory or public

service facility is regarded less seriously than destruction of a private garage on the grounds of a suburban home. Likewise, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers, as a special category of crime apart from risks associated with burnings.

A second type of arson legislation classifies the offense in relation to the types of property involved but introduces additional criteria designed to discriminate between burnings which are more or less likely to endanger life.

A third type of legislation makes danger the explicit criterion in grading arson. It is especially common to use the criterion of danger to others in defining an offense involving the burning of one's own property. The Swiss and other foreign codes grade property offenses according to whether the offender "knowingly endangered life, or bodily integrity or the property of another."

The MPC takes a middle view, grading the offense partly according to the kind of property destroyed or imperiled and partly according to danger to the person. It was reluctant to rest entirely on danger to the person in view of the fact that almost any illegal or careless burning endangers life to some extent, as fire fighters and onlookers are drawn to the scene. Furthermore, to make any dangerous burning a second degree felony would be inconsistent with the Model Penal Code's proposals reserving felony sanctions for "reckless" behavior that results in actual serious bodily injury.

MPC section 220.1 makes a person guilty of second degree arson "if he starts a fire or causes an explosion with the purpose of:".

By including explosions as well as burnings the MPC follows the example of recent codes which have similarly broadened their scope. The reason for the inclusion as stated by the MPC is that the criminologic considerations are quite similar; i.e., "likelihood of extensive property damage accompanied by danger to life." Also, explosions frequently lead to fires, just as fires sometimes cause explosions. MPC section 220.1 similarly follows the general formulation of arson law in terms of "setting fire to" or burning another's property. Thus by "starting a fire or causing an explosion" the actor is guilty of arson even though the fire is extinguished before any significant damage is done. To this extent the MPC would not alter existing law.

But the Model Penal Code goes much beyond common law in dealing with preparation and attempt to destroy by fire. At common law most elaborate and dangerous preparation for arson short of the final effort to set fire would not have been punishable at all. Oregon, as many other states, has partially corrected this situation by extending the definition of attempt, in relation to arson, to include assembling of combustibles near property intended to be burned, but they preserve an extraordinary disparity of sentences between preparation and the completed offense signalized by the first tiny flame. In Oregon attempted arson is punishable by three years imprisonment, while first or second degree arson is punishable by 20 or 10 years imprisonment respectively.

The attempt provisions of the Model Penal Code, sections 5.01 and 5.05, solve the problem by broad coverage of dangerous preparatory behavior and by penalizing attempts equally with completed offenses. Thus the words "starts a fire or causes an explosion" merely serve to identify the kind of behavior which is the subject of this section, not the point at which criminal liability begins.

MPC section 220.1 (a), "with the purpose of: (a) destroying a building or occupied structure of another" makes it clear that there must be a purpose to destroy. This purpose was not required at common law, an intentional setting of a fire which spread to a building or structure being the minimum requirement. Oregon law requiring a criminal intent denoted in the statutes by the terms "maliciously" or "wantonly" indicate that there must be an intent to "injure or destroy." Thus the MPC construction would not alter present law. Therefore, the mere employment of fire with more limited purposes, e.g., use of an acetylene torch to detach metal fixtures from a structure, or to gain entry to a building or safe, does not fall within the condemnation of Oregon's arson statutes defining the three degrees of felony in arson. Similarly, such conduct would not fall within the second degree felony defined by subsection (1) of the MPC, although it may very well lead to liability for reckless burning under subsection (2). Oregon law has no comparable condemnation of "reckless" burning in the arson section.

The language "building or occupied structure" is intended to confine the second degree felony to cherished property the burning of which would typically endanger life. This single class of more serious burnings does not attempt to define additional criteria for distinguishing the seriousness of the "burning." The drafters of the MPC believed that treatment agencies could do a better job than the legislature in proportioning punishment to the actor's demonstrated indifference to human life and other variables in his personality and behavior.

Conceivably, proof of occupancy should be required in the case of buildings as well as other structures. But the probability that a "building" is used by human beings in ways that make it dangerous to burn or explode is so high that it seems pointless to require the prosecution to charge and prove occupancy in every case.

Occupancy is to be distinguished from "presence" of a person. The drafters of the MPC did not wish to make the unknown and capricious presence of some person a criterion for making the arsonist subject to a stiffer penalty. It was believed that the offender is ordinarily well able to judge whether the structure is a dwelling, store, factory, warehouse or other place for the conduct of human affairs. It was believed to be unnecessary to prescribe that "buildings" be "occupied" since buildings are generally employed by human beings in ways that amount to occupancy. In the case of structures other than buildings, e.g., a mine or a ship, the prosecution would have to allege and prove occupancy as part of its case in chief.

The traditional law of arson makes exception for burning one's own property and for other lawful burnings by specifying that the property be that "of another" or that the burning be "malicious." In 1947 Oregon deleted the requirement that the property be that of "another," but retained the requirement that the burning be "malicious."

The MPC avoids the word "malicious" because it has acquired an artificial and uncertain meaning, ranging from criminal intent to injure or destroy to conduct which is reckless or grossly negligent. Instead the MPC requires a "purpose to destroy." The drafters of the MPC felt it was necessary to retain the restriction of arson to property "of another" except where the culpability of the behavior rested on other factors, e.g., an intent to defraud in (b) of subsection (1), or recklessness of the safety of others in (a) of subsection (2).

In the law of arson, property is that of "another" if someone other than the actor is the lawful occupant, notwithstanding that the actor may have title. Subsection (4) states "Property is that of another . . . if any other than the actor has a possessory or proprietary interest therein."

Subsection (1) (b) makes it a felony of the second degree to burn one's property with the purpose to collect insurance. To this provision the MPC states that "It shall be an affirmative defense . . . that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury." The rationale for such a defense is that the heavy

penalties of arson are not intended for behavior which, while objectionable as part of a fraudulent scheme, has no element of general or personal danger. On the other hand, where the fraudulent burning of one's own property entails the dangers typical of other arson, it is properly graded in the most severely punished category of arson.

Subsection (2) makes reckless burning of special classes of property a felony in the third degree. Under the wording of the statute this special class of property would be property of any class or character whether "his own property or another's" which recklessly (a) placed "another person in danger of death or bodily injury; or" (b) placed "a building or occupied structure of another in danger of damage or destruction." Thus there is no necessity that the person, building, or occupied structure be actually injured or damaged; the crime is in recklessly placing it in danger of such damage. If an occupant of a building used the acetylene torch to cut into a safe in an office in a building owned by another and in so cutting recklessly ignited fixtures in the office which were his own personal property, which ignition recklessly endangered the building without actually damaging it, the tenant would be guilty of the third degree felony. Considering that recklessness of personal safety, unaccompanied by actual injury is punishable under MPC section 211.2, "Recklessly Endangering Another Person," as a misdemeanor, it seems hard to justify the severity of the third degree arson penalty provided for endangering of property without actual injury here. Similarly, if one started a fire on his own land for agricultural purposes, but recklessly endangered the person or building of another without actually damaging it, he would be subjected to the severity of penalties provided for third degree arson. Such a result seems questionable in view of the principles enunciated by the Model Penal Code.

The MPC distinguishes between "recklessness" and "negligence" when fire is involved. Section 220.3 (1) includes negligent burning in criminal mischief with minimal penalties where no substantial harm is done. Section 220.3 makes criminal mischief a felony of the third degree if the actor purposely causes loss in excess of $5,000. Criminal mischief recklessly causing damage between $25 and $100 is classed as a petty misdemeanor. All other types of criminal mischief, negligent or reckless, is only a violation. Thus even the lesser penalties for criminal mischief by reckless conduct require some actual injury. In view of this it appears that the MPC's third degree felony punishment for recklessly endangering the specified things is inconsistent with the other provisions of the MPC section.

Subsection (3) recognizes the need, as evidenced by legislation, e.g., ORS 164.070, providing penalties for failure to control a fire originating on a defendant's premises whether or not he had a culpable connection with the starting of the fire, for legislation requiring a person to control or report the fire. This subsection proposes a more comprehensive obligation. It would require that anyone who knows of a fire and fails to take reasonable measures to put out or control it, or alternatively fails to give a prompt fire alarm, would subject himself to misdemeanor penalties if: (a) he knew that he was "under an official, contractual, or other legal duty to prevent or combat the fire." This clause would subject the obligee, under a contract to provide the necessary fire fighting men and equipment, to the criminal penalties already applicable to the owner of the land contracting for such services. Likewise, any person who is under a "legal duty" to prevent or combat fire would be subject to the penalties provided if he failed to comply with the requirements of this section. Also, a person would be subject to the statute if "(b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control." This clause would include all those persons presently covered by ORS 164.070 (2) (3) (4) as well as those persons covered by ORS 164.080 who lawfully started fires on their own lands and through negligence allowed them to escape.

It should be noted that the offenses defined by ORS 164.070 (1) and the offense defined by ORS 164.080, condemning the malicious burning of any prairie other than his own, would be adequately forbidden by MPC section 220.3 (1) (a) as criminal mischief, and by section 2 of Preliminary Draft No. 3.

MPC section 220.2, causing or risking catastrophe, has no comparable section in Oregon law other than catastrophes caused by fire which fall under the available statutes on arson. The section is patterned on European legislation dealing with activity creating a "common danger." Modern legislation should put explosion, flood, poison gas, and avalanche in the category of forces which the ordinary man knows must be used with special caution because of the potential of wide devastation. The grading of the offense would depend upon whether it was done purposely, knowingly or recklessly, and whether it actually caused or only risked a catastrophe.

Section 220.2 (3) provides for misdemeanor penalties for persons who knowingly or recklessly fail to take reasonable measures to prevent or mitigate a catastrophe if the person is either under a "legal duty" to take such measures or "did or assented to the act causing or threatening the catastrophe." Although the MPC does not generally penalize

omissions, it should be considered that where the danger of widespread damage by fire or explosion is imminent, a person who is under a legal duty to act or a person who is responsible for the danger should be subject to criminal penalties for his failure to take reasonable measures to prevent the catastrophe.

(b) Michigan Revised Criminal Code

Arson in the third degree, section 2807 (1), states: "A person commits the crime of arson in the third degree if he recklessly damages a building by intentionally starting a fire or causing an explosion." The comments to this section point out that the basic activity is intentionally starting a fire or causing an explosion, but the resulting damage must be recklessly caused. This means that the defendant must realize that there is a substantial and unjustifiable risk that the damage will occur at the time he intentionally starts a fire or detonates an explosive.

At common law all that was required was that the fire be intentionally set. If it was intentionally set, only some slight damage to the structure was required; the property need not be totally destroyed. Carelessness or recklessness in disregarding a risk of damage was not an element of the offense at common law; if the fire was intentionally set and through no fault of the actor it spread to a dwelling, he was guilty of arson. The Michigan Code rejects this by requiring an intentional setting of a fire which through reckless disregard damages a building.

This twofold aspect of intentionally starting a fire and recklessly causing damage is similar to the MPC in that it requires a purposeful starting of fire which thereby recklessly endangers a person, building or occupied structure of another. However, Michigan requires an actual damage resulting to a building, whereas the MPC requires only that the person, building or occupied structure of another be in danger of injury, damage or destruction.

Present Oregon law does not have a similar twofold requirement for third degree arson. Oregon requires a malicious or wanton burning of any class or character of property. The Oregon Code's definition of "wanton" indicates that Oregon would presently require an intent to injure or destroy and therefore a reckless damaging of a building caused by an intentional fire not intended to injure or destroy would not be encompassed by present Oregon law.

Section 2807 (2) of the Michigan Revised Code states: "A person does not commit a crime under this section if no person other than himself has a possessory or proprietary

interest in the damaged building. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof."

This section restores the concept of common law by eliminating criminality if the actor is the sole owner of the property in question, though the burden is on him to inject the issue into the case. The commentary to the draft indicates that subsection (2) stresses the objective of the draft to protect other persons from destruction of property in which they have an interest.

This section adopts the philosophy of the MPC which felt it necessary to retain the restriction of arson to property "of another" except where the culpability of the behavior rested on other specified factors. The MPC's definition of property of another in subsection (4) is substantively the same as the Michigan provision of subsection (2). The MPC states property is that of another "if any one other than the actor has a possessory or proprietary interest therein." Michigan uses the same wording except that it says "no person other than himself" instead of "anyone other than the actor."

In 1947 Oregon repealed the requirement that arson be restricted to property "of another." Prior to that time it was required that the indictment state and the state prove that the property was that of "another." To adopt such a provision again would therefore not be foreign to the Oregon jurisdiction, but under the Michigan draft it would not be essential to allege that the property was that of "another," since that draft places the burden of injecting the issue on the defendant at trial.

The Michigan draft, <u>section 2806 (1), arson in the second degree</u>, states: "A person commits the crime of arson in the second degree if he intentionally damages a building by starting a fire or causing an explosion." This section rests on intentional damage to a building, not merely reckless damage as in section 2807. Under subsection (2) (a) destruction of one's own property is not included if the requirements of subsections (2) (a) and (b) are satisfied. These requirements are: (1) if other persons had an interest in the property, all of them consented to the lawful burning done in a non-negligent manner; and (2) the actor's sole intent was to damage or destroy the building for a legitimate purpose. A burning motivated by a desire to defraud an insurer would of course not meet this requirement. It is for this reason that there is no special section in the Michigan draft penalizing one who commits arson to defraud an insurer.

The Model Penal Code section 220.1 makes the highest offense possible under that section a felony in the second degree. Similarly, it requires an intent to damage a building by starting a fire or causing an explosion with "the purpose of destroying a building . . . of another." However, destruction of one's own property under the MPC would be a second degree felony if it was done with the intent to defraud an insurer or a third degree felony if it recklessly endangered another person or building or occupied structure of another.

Michigan charges a felony in the second degree only for intentional damage to a building under circumstances not justifying excuse as laid out in subsection (2). Michigan reserves first degree status to those arsons where another person is present. Likewise, Oregon charges second degree arson only for the malicious or wanton injury of a building or structure not covered by first degree arson, that is, dwellings or public buildings, without special regard to the presence or absence of a person.

The MPC does not rely entirely on the presence of a person, but instead charges arson for the burning of a "building or occupied structure."

The Michigan draft, <u>section 2805 (1), arson in the first degree</u>, states: "A person commits the crime of arson in the first degree if he intentionally damages a building by starting a fire or causing an explosion when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable possibility."

This section reserves the most serious penalties for a person who intentionally damages a building by starting a fire or causing an explosion in it when another person is present in the building at the time. However, before the actor can be held, he must either know that the other person is present, or this must be a reasonable possibility.

The MPC does not make the presence of a person, known or unknown, a basis for a higher degree of arson; rather if the burning is of a "building or occupied structure" the offender may be convicted of second degree arson. The MPC defines building or occupied structures as places "adapted for overnight accommodation of persons or for carrying on business." Similarly, Michigan defines "building" as any structure "used for lodging of persons therein or for carrying on business." Under the MPC purposely setting fire to such a place is always and only second degree arson. Under the Michigan Code, if it was reasonable to believe that a

person was actually present at the time of the fire, the actor is subjected to prosecution for first degree arson.

Present Oregon law charges first degree arson only on the basis of the type of property burned. If it is a dwelling or public building, the offender is guilty of arson in the first degree regardless of the presence or absence of a person. The draft would not change existing law in that regard.

Personal property is not covered under the Michigan Code chapter dealing with arson unless it is a vehicle or watercraft used for overnight lodging or for the conduct of business. Burning of other personal property is one form of criminal mischief.

The Michigan draft, section 2810, criminal possession of explosives, directly penalizes the illicit manufacture, shipment, transportation or possession of explosives with intent to use them to commit an offense or with knowledge that someone else intends to use them for the same purpose. Oregon has no comparable statute. ORS 164.830, injury to person or property by explosive, condemns any person who maliciously and with intent to injure the person or property of another sets off or explodes any explosive. ORS 480.010 to 480.085 are regulatory sections designed to protect public safety in general. ORS 480.040 describes when a sale, exchange or possession of an explosive is unlawful. It sets forth only three situations. First, the sale, exchange or possession of explosives which do not have stamp or printed date of manufacture on their container. Second, the sale, exchange or possession of any explosive which is declared "bad" under ORS 480.020. Third, the sale, exchange or possession of any fuse declared to be unfit for use by ORS 480.030. Thus it is clear that Oregon has no statute which makes possession or shipment of explosives with the intent to use them to commit an offense a crime.

The MPC has only two sections comparable to Michigan's section 2810. MPC section 5.06 makes possession of "any instrument of crime with [the] purpose to employ it criminally" a misdemeanor. An instrument of crime is "anything specially made or specially adapted for criminal use; or anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose." MPC section 5.07 makes any person who "sells, or otherwise deals in, uses, or possesses any offensive weapon" subject to misdemeanor penalties. Offensive weapon is defined to include "any bomb . . . specially adapted for concealment or silent discharge." The latter section is more inclusive than Michigan's section 2810, since it would encompass any dealings in "offensive weapons" whereas Michigan

would denounce only the possession, manufacture, shipment or transportation of explosives intending to use them to commit an offense or knowing that another intends to use the explosive to commit an offense. The Michigan section does not prohibit the sale of explosives with knowledge that they will be used to commit the offense.

(c) New York Revised Penal Law

In New York, as in the Model Penal Code and Michigan, arson is enlarged to expressly include "causing an explosion" as well as starting a fire. Like Michigan, but unlike the MPC, New York restricts arson to damaging a building. The use of fire or explosives to destroy other tangible property is proscribed by the criminal mischief provisions, sections 145.00 to 145.10.

Arson in the third degree, section 150.05 (1), states: "A person is guilty of arson in the third degree when he recklessly damages a building by intentionally starting a fire or causing an explosion."

This subsection substantively corresponds to section 2807 of the Michigan Code, and therefore comments made under that section are applicable here. The section requires that the offender intentionally start a fire or cause an explosion, but the real essence of the crime is that the offender engage in that conduct under circumstances involving a conscious disregard of a substantial and unjustifiable risk that the actually ensuing damage to a building will occur. In other words, the offender must engage in that conduct recklessly.

Criminal negligence, "failure to perceive a risk," does not suffice for liability under section 150.05. Similarly, the mere fact that the offender intentionally starts a fire in the course of and in the furtherance of some felony, and then negligently or accidentally damages the building, does not constitute arson. There is no such concept of criminal liability as "felony arson" -- comparable to the "felony murder" doctrine in homicide -- that imposes absolute liability because a "burning" negligently or inadvertently occurs in the course of some underlying felony. For example, when a burglar, while using an acetylene torch to gain entry to a safe, causes fire damage to a building, he is liable under this section only if it can be shown that he acted recklessly; i.e., that he was aware of the substantial risk of fire damage to the building and by his conscious disregard of that risk, the damage occurred.

As at common law, under Oregon law and the Michigan Code, New York requires that some damage to the building, however slight, must ensue. If such result occurs, it is

immaterial that the fire was extinguished before any substantial damage was done. If no damage is done, there can be no prosecution for an attempt to commit arson in the third degree.

When a person starts a fire or causes an explosion involving only the "reckless endangerment of the building of another," i.e., no actual damage occurs, the crime of reckless endangerment of property, section 145.25, may be applicable. This offense is committed when a person recklessly engages in conduct which creates a substantial risk of damage to the property of another in an amount exceeding $250. It is classed as a misdemeanor. It must be established that at the time the defendant engaged in his conduct he was aware of and consciously disregarded a substantial and unjustifiable risk that damage to property in excess of $250 would occur. It must be further established that the risk was of such a nature and degree that disregard thereof constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [See section 15.05 (3).]

Subsection (2) provides that it is an affirmative defense to a prosecution for arson in the third degree that no person other than the defendant had a possessory or proprietary interest in the building. Likewise this part of the subsection is substantively equal to the comparable provision found in the Michigan Code, section 2807 (2), and comments to that section are applicable here. The Michigan section states that "the burden of injecting the issue is on the defendant, but this does not shift the burden of proof."

The commentary to the New York draft places a greater responsibility upon the defendant by stating that the defendant has the burden of establishing the defense by a preponderance of the evidence. This statement would introduce a distinct quantum of proof separate from the state's responsibility to establish its case beyond a reasonable doubt and, unless given a contrary meaning by judicial construction, would shift the burden of proof. Such a result would seem undesirable as it is established hornbook law in Oregon that the burden of proof never shifts.

<u>Arson in the second degree, section 150.10 (1)</u>, is <u>substantively identical to Michigan's section 2806.</u> The crime consists of three elements: (1) the offender must intentionally start a fire or cause an explosion; (2) this conduct must be coupled with an intent to damage a building; and (3) some damage to such building in fact must result. Unlike arson in the third degree, conduct which tends to effect the commission of arson in the second degree may be prosecuted as an attempt.

"Intent to damage a building" is the chief element of arson in the second degree. This means that the offender's "conscious objective" must be to cause damage to the building. If the conscious objective is not present, the person may still be subject to third degree arson for "recklessly" causing damage to a building. "Damage to a building" is any injury that lowers the value of the building or that impairs its usefulness. The crime is complete as soon as there is some damage to the building.

Subsection (2) provides that in a prosecution for arson in the second degree it is an affirmative defense that: (a) the defendant alone had a proprietary interest in the building, or if others had such interests, all of them consented to defendant's conduct; and (b) the defendant demolished the building for a lawful purpose; and (c) the defendant had no reasonable ground to believe that his conduct might endanger another person or damage the building of another person. Subsections (a) and (b) are substantively identical with subsections (a) and (b) of the Michigan Code, section 2806 (2). Thus, as under the Michigan Code, the defense is unavilable to a defendant who damages his own building with intent to defraud an insurer or for some other unlawful or improper purpose.

The purpose of subsection (c), not present in the Michigan statute, is indicated in the commentary to the Michigan draft to require that the burning be lawfully done in a non-negligent manner before the actor is freed from criminal responsibility. Under subsection (c) of the New York Code the defense is unavailable if the defendant had "reasonable grounds to believe" that the fire would spread to the building of another. Thus, if such grounds are there, the defense is not available even if the fire does not spread to the building of another. This possibility is derived from the fact that as used in the arson article "building" does not mean "building of another." Thus a person may be convicted of arson if he damages his own building by fire or explosive unless he establishes the affirmative defense prescribed.

Finally, it should be noted that if a person other than one of the participants is present within the building at the time of the arsonous conduct, and the offender knows or should know that fact, such conduct may constitute arson in the first degree.

<u>Arson in the first degree, section 150.15 (1)</u> states: "A person is guilty of arson in the first degree when he intentionally damages a building by starting a fire or causing an explosion and when (a) another person who is not a

participant in the crime is present in such building at the time, and (b) the defendant knows the fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility."

The first part of this section is the same as the first part of the definition of arson in the second degree and therefore all the elements necessary to prove second degree arson must be established before the presence of aggravating factors constituting first degree arson can be allowed to justify a conviction for first degree arson. Likewise the entire statute is substantively identical with the Michigan Code, section 2805, defining first degree arson. Thus the comments to that section are applicable here and vice versa.

The aggravating elements distinguishing first degree arson from second degree arson and which must be established beyond a reasonable doubt are twofold: (1) another person -- not a participant in the crime -- must be present in the building at the time the offender starts the fire or causes the explosion; and (2) the offender must know that fact or circumstances must be such as to render the presence of another in such building a reasonable possibility. Thus absent actual knowledge, liability, will turn on whether or not there is a lack of diligence on the part of the offender in ascertaining the presence of a person under circumstances when he should have known of such presence.

While lack of knowledge will have greater application to non-dwellings, it may be referable to dwellings. For example, the owner of a summer colony decides to burn it in the winter. Unknown to him, a tramp is present therein. This would not constitute first degree arson. However, it would constitute second degree arson, and if the tramp were killed, the owner would be guilty of "felony murder." If the owner establishes the affirmative defense, he would not be guilty of second degree arson or of "felony murder."

While the arson provisions cover damage to buildings by explosives, they do not cover damage by explosive to other kinds of realty or to tangible property. For this reason section 145.10 (2), criminal mischief in the first degree, was enacted in New York. The statute forbids the damage of property belonging to another "by means of an explosive," provided that the necessary criminal intent is present.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 150.05. Arson in the third degree

1. A person is guilty of arson in the third degree when he recklessly damages a building by intentionally starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building.

Arson in the third degree is a class E felony.

Section 150.10. Arson in the second degree

1. A person is guilty of arson in the second degree when he intentionally damages a building by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building.

Arson in the second degree is a class C felony.

Section 150.15. Arson in the first degree

A person is guilty of arson in the first degree when he intentionally damages a building by starting a fire or causing an explosion, and when (a) another person who is not a participant in the crime is present in such building at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

Arson in the first degree is a class B felony.

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