See: Minutes of Commission
11/21-22/68, p. 11, Vol. VIII
Tapes #25, 26 & 27

Section 2, see:
Minutes of Subcommittee #1
12/18/68, p. 9, Vol, X, Tape #30

See also:
Minutes of Commission
2/22/69, p. 36, Vol. VIII, Tape #65

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 16. ARSON AND RELATED OFFENSES

Preliminary Draft No. 4; November 1968

Reporter: Donald L. Paillette Subcommittee No. 1

ARTICLE 16. ARSON AND RELATED OFFENSES

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Section 1. Arson and related offenses; definitions. As used in _____, except as the context may require otherwise:

(1) "Protected property" means any structure, place or thing customarily occupied by people, including "public buildings" as defined by ORS 479.010 and "forest land" as defined by ORS 477.001.

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

COMMENTARY - ARSON AND RELATED OFFENSES; DEFINITIONS

(1) "Protected property." This definition is similar to the definition of "building" contained in the Burglary and Criminal Trespass Article (T.D. #1) so far as it relates to structures customarily occupied by people. However, it also includes "public buildings" and "forest land", the intentional burning of which would constitute arson in the first degree under the provisions of section 5. The purpose of this definition is to protect those structures or things which typically are occupied by people, and is consistent with the primary rationale of the crime of arson: protection of human life or safety. The subcommittee believes that forest fires ordinarily present a high degree of risk to human safety as well as causing serious economic loss to the state; therefore, the intentional starting of such a fire should be considered as one of the most serious arson offenses. Arson of a public building, of course, would probably endanger human life, as well as causing irreparable damage to cherished property and public records and deserves to be treated as arson in the first degree.

(2) Property "of another." This definition is based on Model Penal Code section 220.1, and protects the person who may be the lawful occupant of property, notwithstanding that the actor might have title or vice versa. The definition is important throughout the rest of the Article.

# # #

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.

# # #

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. Unlawful use of fire. A person commits the crime of unlawful use of fire if he:

(1) Unlawfully sets on fire, or causes to be set on fire, any grass, grain, stubble or other material being or growing on any lands within the state; or

(2) Intentionally or negligently allows fire to escape from his own land, or land of which he is in possession or control; or

(3) Accidentally sets any fire on his own land or the land of another and allows it to escape from control without extinguishing it, or using every reasonable effort to do so; or

(4) Having knowledge of a fire burning on his own land, or land of which he is in possession or control, fails or neglects to make every reasonable effort to extinguish the same, regardless of whether or not he is responsible for the starting or existence thereof.

Section 3. Reckless burning. A person commits the crime of reckless burning if he recklessly damages property of another by fire or explosion.

Section 4. 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 any building of another that is not "protected property" as defined in section 1.

Section 5. 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) Protected property 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 protected property of another in danger of damage.

COMMENTARY - ARSON AND RELATED OFFENSES

A. Summary

The primary rationale of this Article is the protection of human life and safety. The secondary rationale is the protection of cherished property. The draft in its present version provides for two ascending degrees of arson, graded according to whether or not "protected property" is involved or whether or not there is danger to human life. Sections of the draft also provide for the less serious crimes of unlawful use of fire and reckless burning.

No special provision is made for an attempt to burn property inasmuch as such conduct will be covered generally in the Article on inchoate crimes. Neither is there a section dealing with destroying property with the intent to defraud an insurer. Such activity would amount to either attempted theft by deception or theft by deception if the property damaged belonged solely to the actor. However, if anyone other than the actor has a possessory or proprietary interest in the property, such an act could violate section 4 and be punishable as second degree arson, or even if the property damaged by fire were the exclusive property of the actor, it could amount to first degree arson if another person were recklessly placed in danger of bodily injury or protected property of another endangered as provided by subsection (2) of section 5. The relatively severe penalties for arson would not apply for behavior which, while objectionable as part of a fraudulent scheme, has no element of danger to another's person or property. On the other hand, where such dangers are present, it should be punished accordingly.

Section 2. Unlawful use of fire. This section deals with the problem of fires on land, their negligent use or failure to control. The language used is substantially the same as is now found in ORS 164.070, incorporated by reference in ORS 477.090, which provides for double damages for owners whose property is injured by violation of the former statute. Because the two statutes are so interdependent the subcommittee was reluctant to make any drastic change in the criminal statute. ORS 477.090 will need to be amended to reflect the new ORS section if and when it is enacted, but the duties imposed thereby upon individuals to use reasonable care in preventing and controlling fires would remain unchanged.

Section 3. Reckless burning. This section employs the culpability element of "recklessness." As did the drafts covering certain other crimes, this proposal assumes that certain words of culpability will be defined for application uniformly throughout the revised criminal code, and further, that those definitions will be patterned after Model Penal Code section 2.02 which defines "recklessly" as follows:

> "(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."

This section is concerned with the protection of property from damage caused recklessly, 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, the crime does not carry the label nor the onus of arson.

Section 4. Arson in the second degree. This section relates to intentional damage by fire or explosion to buildings that are not customarily occupied by people, but recognizes that burning a structure such as a barn ordinarily would not threaten human life and, consequently, should be considered less serious than the conduct proscribed in the next section.

Section 5. Arson in the first degree. The highest degree of arson consists of intentional damage by fire or explosion to "protected property" of another, as that term is defined in section 1 or to any property, even the actor's own, if such act recklessly places another person in danger of bodily injury or protected property of another in danger of damage.

B. Derivation

Section 2. Unlawful use of fire. This section is a restatement of ORS 164.070.

Section 3. Reckless burning. This section is based on Model Penal Code section 220.1 (2) and, in effect, is much like ORS 164.080, but, unlike the MPC proposal, requires actual damage to any property instead of threatened damage to a building.

Section 4. Arson in the second degree. Source of this section is ORS 164.020, second degree arson.

Section 5. Arson in the first degree. Subsection (1) is entirely new language proposed by the subcommittee, but its purpose is the same as that of the Model Penal Code; however, the section requires actual "intentional damage" instead of a "purpose of destroying" and in that particular is akin to New York Revised Penal Law section 150.15. Subsection (2) is based on Model Penal Code 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.

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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