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Crimes--Malicious Mischief--Rule of Commonwealth v. Wing

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From the foregoing, it seems clear that the principal case was correctly decided from the standpoint of this state, as well as from that of the majority of other jurisdictions.

*William Mellor.*

CRIMES—MALICIOUS MISCHIEF—RULE OF COMMONWEALTH v. WING.—
The defendant discharged a gun at a wild fowl, with knowledge and warning that such would injuriously affect the health of a sick person in the neighborhood. Such effect was produced by the discharge of the gun. The defendant was found guilty at common law and punished for the commission of the crime of malicious mischief. *Commonwealth v. Wing*, 9 Pick. (Mass.) 1, 19 Am. Dec. 347 (1829).

Parker C. J. in his opinion stated, "The facts proved in the case, namely, the defendant’s previous knowledge that the woman was so affected by the report of the gun as to be thrown into fits, the knowledge he had that she was within hearing distance, the earnest request made to him not to discharge his gun; show such a disregard of the safety and even the life of the afflicted party as to make the firing a wanton and deliberate act of mischief."

Malicious mischief is defined as "any willful physical injury to the property of another, from ill will or resentment toward the owner, or as held by some courts from wantonness, and not *animo furandi*, as in case of larceny." Clark’s Criminal Law, 3rd Ed., Sec. 110.

A multitude of penal enactments, the special purpose of which was to provide against malicious mischief, were from the time of Henry VIII until within the present century made the subject of legislative action in England. Our common law includes not only these early English statutes, but the ancient customs, traditions and usages comprising the English common law prior to statutory enactments.

It may, therefore, with certainty be concluded, that malicious mischief as a public offense and misdemeanor existed in the United States anterior to any legislative enactment. *People v. Smith*, 5 Cow. (N. Y.) 258 (1825); *State v. Watts*, 48 Ark. 55, 2 S. W. 242 (1886).

Conceding malicious mischief is punishable at common law, if accompanied by circumstances making it a breach of the public peace, the acts must be directed against and cause injury to property. *Henderson v. Commonwealth*, 8 Grat. (Va.) 708, (1852). *Injury to property* and *malice* are the necessary elements at common law as well as under statutory provisions. The offense of malicious mischief is based upon *malicious injury to property*. *State v. Robinson*, 3 Dev. & B. (N. C.) 130, 32 Am. Dec. 661 (1838); *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419 (1837).

Under some of the statutes, and at common law, it has been held that malice must be directed against the owner of the property, and that mere cruelty or general malice and wantonness are not enough.
Northcot v. State, 43 Ala. 330. The contrary, however, has been held in some jurisdictions. Brown v. State, 28 Ohio St. 176 (1875) and Mosely v. State, 28 Ga. 190 (1859) hold that it is not necessary to show that the offense was committed from motives of personal malice or ill-will toward the owner.

Though malice may have been proved in the case of Commonwealth v. Wing, injury to property was not proved. Therefore, it is submitted that under present statutory provisions, and it is believed at common law, this case should undoubtedly be decided contra to the decision rendered.

The case of Rogers v. Elliot, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316 (1888), a more recent decision than Commonwealth v. Wing, states what the writer believes to be the present law in such cases. This case held that a person, who by reason of a sunstroke, was peculiarly susceptible to the noise of a church bell, situated directly opposite his home, could not maintain an action for malicious mischief against the custodian of such church, for suffering caused by the ringing of said bell, in the absence of express malice or proof that the bell was objectionable to persons of ordinary health and strength.

The inclination of recent decisions, at least so far as the common law is concerned, is to restrict the injured party to his civil redress, except in cases where the offense is accompanied by excessive wantonness and cruelty, or where the offense is committed with secrecy, or where it is productive of a breach of the peace. 2 Wharton, Criminal Law, 8th Ed., p. 1068.

In conclusion it is submitted that the crime malicious mischief at an early date was reduced to statutory form in England and is defined in America by statute in almost all the states. Some of the statutes are of such early dates, that the common law limits are indistinct. The question whether malicious mischief could be committed at common law without property destruction is perhaps an academic one. It is believed that the early statutes requiring property destruction were a mere codification of the common law.

Apparently, it is conceded by text writers that malicious mischief at common law is limited to property destruction. Bishop's Criminal Law, Vol. I, 9th Ed., sec. 568-569.

"Malicious mischief, at common law, was confined to injuries to personal property." May's Criminal Law, 3rd Ed., sec. 321.

"The statutes of malicious mischief have practically so far superseded the common law, that we have no cases enabling us to discern with precision the line where common law mischief begins. It must however be a serious damage to the property, worthy of the law's notice." Bishop's Criminal Law, 9th Ed., Vol. II, sec. 992.

It is submitted that the crime of malicious mischief at common law is based upon the two elements of malice and injury to property. Without the presence of both elements one should not be convicted of this crime. Malice must be such that the injury must have been done "either out of a spirit of wanton cruelty or wicked revenge" and the
mere willful infliction of injury is not enough without further proof of express malice. Therefore, in the absence of property destruction, though malice may have been proved, the correctness of the decision of Commonwealth v. Wing is doubtful. Apparently, there is no precedent for the decision. Certainly, it is believed that a contra decision should be rendered today, either under the common law or prevailing statutes.

MARTHA T. MANNING.

**Specific Performance of Contracts for the Conveyance of Real Estate.**—"Where a party to a sale of real estate has an adequate legal remedy for breach of the contract by the other party, a court of equity will not grant specific enforcement of the contract, unless it be necessary for justice." Cox v. Sharpe, 1 Ky. Opinions, 358 (1866). In the case from which the above extract is taken the court refused to grant specific performance of the contract, upon the ground that the plaintiff could be adequately compensated by damages.

The general rule in this country, in regard to contracts for the conveyance of real estate may be stated as follows: Where land, or any estate or interest in land is the subject matter of an agreement, the jurisdiction of equity to specifically enforce this agreement is undisputed. This prevailing rule is well expressed in the case of Belanswsky v. Gallaher, 105 N. Y. Supp. 77 (1907). In this case the plaintiff was seeking specific performance of a contract to convey land, the defendant demurred to the complaint, and urged in support of his demurrer that the plaintiff had failed to specifically allege that there was no adequate remedy at law. The court, in overruling his demurrer said, "Such an allegation is not necessary in an action to compel specific performance of a contract to convey real estate. The courts will specifically enforce such an agreement even when the vendor is financially responsible and the vendee has an adequate remedy at law for damages."

The crystallization of this rule is probably due historically to the peculiar respect and consideration which has been accorded to land in the English law. Since the latter part of the 16th century, English courts have consistently granted specific performance of contracts for the sale of land, usually upon the ground that damages for breach of the contract are always considered inadequate. The reason upon which this historic rule is based has been well stated by Judge Pearson in the case of Kitchen v. Herring, 42 N. C. 191 (1851), in which he says, "The principle in regard to land was adopted, not because it was fertile or rich in minerals, or valuable for timber, but simply because it was land—a favorite and favored subject in England and every country of Anglo-Saxon origin."

This historic English rule, as regarding the inadequacy of damages for breach of a contract to convey land, has seemingly been taken over intact, by the courts of this country. There has, however, been a re-