

---

Volume 55  
Issue 4 *Dickinson Law Review - Volume 55,*  
*1950-1951*

---

6-1-1951

## Common Law Malicious Mischief in Pennsylvania

Pat McGrath Jr.

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Pat McGrath Jr., *Common Law Malicious Mischief in Pennsylvania*, 55 DICK. L. REV. 367 (1951).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol55/iss4/9>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

## COMMON LAW MALICIOUS MISCHIEF IN PENNSYLVANIA<sup>1</sup>

### A. INTRODUCTORY:

From the earliest days of the Commonwealth the courts of Pennsylvania, as those of other states and of England, have recognized the existence of a certain classification of minor common law misdemeanor which they have earmarked malicious mischief. But from the time of Blackstone to the present day the courts, and commentators on their decisions, have experienced singular difficulty in defining the elements of the crime.

Blackstone for example, defines malicious mischief as a "specie of injury to private property which the law considers a public crime. This is such as is done, not *animo furandi*, or with intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge."<sup>2</sup>

But *Corpus Juris* and other modern authorities define the crime as much more extensive. "Malicious Mischief includes all malicious physical injuries to the rights of another which impair utility or materially diminish value . . . The offense has been narrowly defined as the wilful destruction of some article of personal property from actual ill will or resentment toward its owner or possessor . . . It must be accompanied by a breach of the peace. While it is sometimes said that the act must amount to a violation of duties owing to the public and hence must evidence a degree of moral turpitude dangerous to society, the injury may be either to the rights of another or to those of the public in general. It may consist of the injury to, or disfigurement of, the person of an individual."<sup>3</sup>

And impressed, no doubt, with the futility of itself attempting further definition, *American Jurisprudence* simply catalogues the efforts of earlier authorities: "Malicious Mischief has been *variously* defined as the wilful and unlawful injury to or destruction of the property of another with the malicious intent to injure the owner; as any malicious physical injury to the rights of another, which impairs utility or materially diminishes value; and as any malicious or mischievous physical injury, either to the rights of another or to those of the public in general."<sup>4</sup>

---

<sup>1</sup> In *Comm. v. Cunningham*, 1 Dist. 573 (1892), and *Comm. v. Cramer*, 2 Pears. 441 (1884), it was said that the Pennsylvania courts have gone further than those of England or other states in holding acts of mischief indictable independently of statute. However, the more common types of mischief are now indictable under special statutes, so that today an indictment charging common law malicious mischief is the exception rather than the rule. For this reason, the best discussions of the subject are found in the older authorities, notably in 1 TRICKETT, *PENNSYLVANIA CRIMINAL LAW* 188 (1908) and 4 PEPPER AND LEWIS (1899) § 5618.

<sup>2</sup> 4 BL. COMM. 243.

<sup>3</sup> 38 CORPUS JURIS 357, § 1.

<sup>4</sup> 34 AMERICAN JURISPRUDENCE 668, § 2.

Apparently, then, while classic and modern authorities are agreed as to the distinctness of the crime of malicious mischief, they differ radically in stating the elements of the offense. There is comparative unanimity in defining the mental element of malicious mischief as an intent "motivated through a spirit of wanton cruelty or black and diabolical revenge," or, in terms not quite so Johnsonian, an intent which is "malicious." But legal conceptions as to the objects which may be the targets of such criminal intentions are worlds apart. Is malicious mischief a crime affecting only personal property? Or, as *Corpus Juris* implies, may it involve an injury to the person, his realty as well as his chattels, or the property of the public in general? Too many courts have too long labored under misapprehensions as to the nature of malicious mischief to make possible at this time any flat statement which might be complimented as an accurate reflection of the ruling case law in every common law jurisdiction. The writer of this Note seeks no more than a pragmatic definition of common law malicious mischief as its elements have been outlined in Pennsylvania cases. That task alone, as will appear shortly, is formidable enough.

## B. THE PHYSICAL ELEMENT:

### 1. *As to the Type of Interest Invaded.*

Two points upon which the modern authorities cited *supra* agree are that malicious mischief involves a physical injury and that the injury must be inflicted upon another's person, or upon his property, or upon the rights of the public in general. To the extent that these definitions include injuries to another's person as distinguished from his property, and to the extent that they include injury to the rights of the public, they are broader than the definition of Blackstone. However, the Pennsylvania cases accord with the modern rather than classic authorities, and, as will be noted *infra*, in at least one respect they have denominated offenses malicious mischief which would seem beyond the broadest definitions of the modern encyclopedists.

Pennsylvania agrees that there can be no malicious mischief in the destruction of one's own property.<sup>5</sup> At least where the destruction is to inanimate property, the indictment must lay possession in another.<sup>6</sup> And most Pennsylvania cases involve the orthodox physical injuries to the person or property of another or to the property of the general public. Cited in Pennsylvania cases as indictable physical injuries to another's person are cutting the hair of a feeble-minded man in such a way as to disfigure him,<sup>7</sup> or putting cowitch on a towel so as to infect the person using it,<sup>8</sup> or discharging a gun for the purpose and with the result of dis-

<sup>5</sup> *Davis v. Comm.*, 30 Pa. 421 (1858). However, as will be noted *infra*, the court may well be construed as referring only to inanimate property, for at a later point in its opinion it stated, by way of *dictum*, that a wilful and unnecessary injury to animals might be indictable without regard to ownership.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Comm. v. Nusky*, 1 Pa. Dist. 561 (1892).

<sup>8</sup> *Comm. v. Cramer*, 2 Pears. 441 (1884).

turbing a sick person,<sup>9</sup> or casting a carcass into a well used for drinking by another,<sup>10</sup> or entering a house at night and making such disturbance as to produce the miscarriage, two weeks later,<sup>11</sup> of the owner's wife. Malicious mischiefs physically inflicted to the realty of another have included cutting his timber,<sup>12</sup> tearing down his party wall,<sup>13</sup> tearing up his water pipes,<sup>14</sup> breaking his plate glass window,<sup>16</sup> destroying the gates and bars in his fences,<sup>16</sup> upending his telephone poles and the lines attached,<sup>17</sup> and taking his stoves and window shades and closing his doors and windows to prevent religious meetings in his house.<sup>18</sup> In *Comm. v. Eckert*<sup>19</sup> the physical mischief punished was to the land of the general public, namely the cutting and deadening of a walnut tree in the public square. But probably the commonest type of malicious mischief involves a physical injury or destruction to another's chattels, be they animate—horses,<sup>20</sup> steers,<sup>21</sup> dogs,<sup>22</sup> or chickens<sup>23</sup>—or inanimate—carriage and sleigh,<sup>24</sup> sweater and cap,<sup>25</sup> saw logs,<sup>26</sup> boats,<sup>27</sup> patterns for clothing,<sup>28</sup> or tires on a heavily loaded truck.<sup>29</sup> And even this list can not be regarded as exclusive for, as Dr. Trickett has noted, the courts make liberal use of induction to justify including some new act within the category of malicious mischief "by enumerating acts previously held to be such and vaguely asserting a sufficient similarity between them and the act before the court, without indicating a common quality supposed to be discoverable in them."<sup>30</sup>

But the important distinction now to be drawn in comparing Pennsylvania's cases with the standard definitions is that not all of them involve the supposed

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Comm. v. Taylor*, 5 Binn. 277 (1812).

<sup>12</sup> *Comm. v. Wagner*, 21 D. & C. 187 (1934). But here prosecution was unsuccessful, since the defendant acted under claim of right.

<sup>13</sup> *Comm. v. Strode*, 27 W. N. C. 437 (1890).

<sup>14</sup> *Comm. v. Burton*, 5 Kulp 329 (1878).

<sup>15</sup> *Comm. v. Gordy*, 44 Dauphin 335 (1938).

<sup>16</sup> *Comm. v. Taylor* 65 Pa. Super. 113 (1916).

<sup>17</sup> *Comm. v. Appel*, 28 Luz. L. R. 79 (1933).

<sup>18</sup> *Davis v. Comm.*, 30 Pa. 421 (1858).

<sup>19</sup> 2 Bro. 249 (1813).

<sup>20</sup> *Respublica v. Teischer*, 1 Dall. 335 (1795); *Comm. v. Cramer*, 2 Pears. 441 (1884); *Comm. v. Getz*, 18 Pa. Dist. 460 (1908).

<sup>21</sup> *Comm. v. Cramer*, cited *supra* at notes (8) and (20).

<sup>22</sup> Cited from LEWIS' CRIMINAL LAW in *Comm. v. Cramer*, *supra*.

<sup>23</sup> *Respublica v. Teischer*, 1 Dall. 335 (1795); *Comm. v. Taylor*, 5 Binn. 277 (1812); *Comm. v. Eckert*, 2 Bro. 249 (1813).

<sup>24</sup> *Comm. v. Cunningham*, 1 Pa. Dist. 573 (1892).

<sup>25</sup> *Comm. v. St. Clair*, 29 Pa. Dist. 49 (1919).

<sup>26</sup> *Comm. v. Towle*, 1 Lanc. Bar. No. 29 (1884).

<sup>27</sup> *Comm. v. Byrant*, 3 Kulp 290 (1884).

<sup>28</sup> *Comm. v. Lipshutz*, 13 Pa. Dist. 682 (1904).

<sup>29</sup> *Comm. v. Rothenberger*, 32 D. & C. 682 (1938). The indictment alleged that the defendant "with force and arms did wilfully, maliciously, and unlawfully let air out of the tires of a truck." "Letting air out of commercial trucks containing heavy loads cannot be regarded as a trivial matter," the court opined. "It was a direct physical blow at the integrity of the tubes, by depriving them of supporting air, therefore importing a criminal element not merely a prepass." But were the tires those of an ordinary automobile, the court indicated, one might reach a different conclusion.

<sup>30</sup> 1 TRICKETT, PENNSYLVANIA CRIMINAL LAW 193 (1908).

prerequisite of "physical injury." For example, in *Penn. v. Gillespie*<sup>31</sup> and *Comm. v. Johnson*,<sup>32</sup> the mischief consisted in tearing down advertising of a commissioner's and constable's sale, respectively, and the injury involved was not a physical one but rather an intangible attack upon the right of the public to collect its taxes or of an individual creditor to enforce his judgment claims. These cases, therefore, have led at least one Pennsylvania authority to eliminate from the definition of malicious mischief any element of physical injury; *Pepper and Lewis* defines malicious mischief as ". . . any act injurious to a private person in his property, right, or person, or to the property or rights of the general public."<sup>33</sup>

## 2. Nature of the Act as it Affects Society.

In the *Corpus Juris* section quoted, the encyclopedist further notes that, in order for an injury to be considered malicious mischief, "It is sometimes said that the act must amount to a violation of duties owing to the public, and hence must evidence a degree of moral turpitude dangerous to society . . ." <sup>34</sup> While not all Pennsylvania cases have applied this limitation strictly,<sup>35</sup> others used it properly when occasion arose. The test on this issue has been said to be "the tendency of the act to produce passion and revenge and a disturbance of the peace of those who are affected by it."<sup>36</sup> And if this tendency is not present, these courts have refused to indict no matter how malicious the act nor how apparent its injurious effect. Thus, in *Comm. v. Edwards*,<sup>37</sup> the court released on *habeas corpus* a defendant indicted for habitually approaching another's house and grossly abusing his family; the tendency of these acts, the court declared, was merely to render the other's life uncomfortable, and since it did not arouse terror in his family or evidence a degree of moral turpitude dangerous to society, it was not indictable as a crime. For similar reasons, it was held in *Comm. v. Gangloff*<sup>38</sup> that an indictment charging the defendant with throwing large stones against another's dwelling house was insufficient in law, in that it did not allege in addition that the public peace was disturbed or the terror of the prosecutor aroused by these acts. In still another case and for similar reasons,<sup>39</sup> a court refused to convict of malicious mischief a defendant who had broken a car door and damaged it to the extent of \$30.

Whatever one might think of the propriety of some of the courts' conclusions as to the facts then before them, certainly he can have no reason to quarrel with

<sup>31</sup> Add. 267 (1795).

<sup>32</sup> 13 Pa. C. C. 543 (1893). It was not expressly decided here that such an act is indictable at common law, but there were indications that it is.

<sup>33</sup> 4 PEPPER AND LEWIS § 5618 (1899).

<sup>34</sup> 38 CORPUS JURIS 357, § 1.

<sup>35</sup> For example, in *Comm. v. St. Clair*, 29 Pa. Dist. 49 (1919), it was held to be malicious mischief to take and damage or destroy the sweater and cap of another; but it seems questionable whether such a trivial trespass ought to be made criminal.

<sup>36</sup> 1 TRICKETT, PENNSYLVANIA CRIMINAL LAW 194 (1908).

<sup>37</sup> 1 Ash. 46 (1823).

<sup>38</sup> 4 Kulp. 336 (1888).

<sup>39</sup> *Comm. v. Zaleski* 6 D. & C. 500 (1924).

the principle applied. Malicious mischief is but one of a group of crimes punishing acts "which have a direct tendency to shock the public sense of morality and decency"<sup>40</sup> and are therefore indictable at common law. If the act has no such tendency, then it is a mere civil trespass, and the public has no interest in prosecuting the defendant. On the other hand, if the act does possess a tendency to create public disorders, it is apparent that, contrary to the role quoted *supra* from *Corpus Juris*, it is indictable in Pennsylvania though committed in secrecy and involving no immediate breach of peace.<sup>41</sup>

### 3. *The Element of Secrecy; Night-time.*

In their generally admirable commentary to the Pennsylvania cases written about the turn of the century, Senator Pepper and Dean Lewis set forth as a requisite for prosecution as malicious mischief an act's having been "committed secretly and maliciously, surreptitiously or in the night time."<sup>42</sup> Their opinion in this respect was based upon language to this effect found in many of the then ruling Pennsylvania cases. In *Comm. v. Gangloff*<sup>43</sup> and *Comm. v. Caspersen*,<sup>44</sup> for example, the fact that the indictments there under consideration did not charge the defendants with acting in the night or secretly was given as one reason for their being quashed. In *Comm. v. Burton*<sup>45</sup> a conviction was conditioned on the jury's finding the act to have been done secretly or in the night, and the same factor was emphasized in upholding convictions in other decisions.<sup>46</sup> However, the great majority of cases made no mention of such a requirement, there was no reason for making it determinative, certainly Blackstone never heard of it, and in *Comm. v. Lipshutz*,<sup>47</sup> decided subsequent to all the cases cited, the court expressly repudiated such dicta, saying it was immaterial whether the defendant's act in the case, *viz.* malicious destruction of patterns of clothing, was done by day or night, secretly or in the presence of others. This last case, therefore, was cited in 1908 by Dr. Trickett as representing the true state of the law.<sup>48</sup> The requirement of secrecy has not been heard of since.

### 4. *The Physical Element finally Defined.*

The physical element of common law malicious mischief as it is defined by the Pennsylvania cases consists of any act which is, or is calculated to create, a breach of the peace and which directly or indirectly injures the person or property rights of another or the property rights of the public in general.

<sup>40</sup> Note, "Common Law Crimes—When Punishable," 6 UNIV. OF PGH. L. REV. (1940).

<sup>41</sup> E.g., as were the offenses in *Comm. v. Towle*, *Comm. v. Bryant*, and *Comm. v. Lipshutz*—all noted *supra*.

<sup>42</sup> 4 PEPPER AND LEWIS § 5618 (1899).

<sup>43</sup> 4 Kulp 536 (1888).

<sup>44</sup> 14 W. N. C. 106 (1883).

<sup>45</sup> 5 Kulp 329 (1878).

<sup>46</sup> *Comm. v. Strode*, 27 W. N. C. 437 (1890); *Comm. v. Towle*, 1 Lanc. Bar. No. 29 (1884).

<sup>47</sup> 13 Pa. Dist. 682 (1904).

<sup>48</sup> 1 TRICKETT, PENNSYLVANIA CRIMINAL LAW 193 (1908).

## C. THE MENTAL ELEMENT

### 1. *In general.*

Blackstone, it will be remembered, heavily weighted his definition of malicious mischief with statements as to its mental element, concluding, finally, that that consisted of a "spirit of wanton cruelty or black and diabolical revenge." Pennsylvania judges have since wasted much breath in vain endeavors to improve upon this statement. They have declared, for example, that, "Malice forms the basis of guilt and evil design proceeds from a depraved and wicked heart."<sup>49</sup> Or, that there must be "a wilful and malicious purpose . . . as evidences a deliberate desire to do harm and injury, an absolutely wanton and reckless disregard of others."<sup>50</sup> However, for purposes of indictment at least, a district attorney may satisfy procedural requirements by such general, and comparatively innocuous accusations as, that the defendant acted, "with force and arms, unlawfully, wilfully, wantonly and with malice."<sup>51</sup>

Furthermore, despite the absolute moral depravity seemingly required by Blackstone and his imitators, in actual practice, Pennsylvania courts have been very liberal in construing various other motives besides malice to be malice enough. Dr. Trickett has so admirably summarized the holdings on this matter that not to quote him here, in part at least, would be to do the reader a distinct disservice.

*Vol. I, pp. 195, 196:*

"The mental state of the doer is described by Blackstone as a 'spirit of wanton cruelty or black and diabolical revenge.' The motive may be dislike of some individual, envy, revenge,<sup>52</sup> inducing an act of injury to his person or to his property, a deliberate desire to do harm.<sup>53</sup> It may be resentment, not towards a person, but towards an animal, e.g., a steer which has repeatedly trespassed on the defendant's corn-field, but toward whose owner he feels no malevolence.<sup>54</sup> It might not be any form of malevolence, any wish to produce injury, but an indifference to, or obliviousness of the injury which will incidentally result from the act, the motive for the act being saving one's own property or sparing one's self humiliation.<sup>55</sup> The motive for cutting saw logs loose might be the desire to injure the owner, or the desire to steal them, or the desire to see them afloat and to have the pleasure of capture. There, however, must be malice. If B, thinking a boat worthless and without an owner, saws it up, his act is not malicious mischief."<sup>56</sup>

<sup>49</sup> *Comm. v. Eckert*, 2 Bro. 249 (1813).

<sup>50</sup> *Comm. v. Lipshutz*, 13 Pa. Dist. 682 (1904).

<sup>51</sup> *Davis v. Comm.*, 30 Pa. 424 (1858).

<sup>52</sup> *Comm. v. Cunningham*, 1 Pa. Dist. 573 (1892); *Comm. v. Bryant*, 3 Kulp 290 (1884).

<sup>53</sup> *Comm. v. Lipshutz*, 13 Pa. Dist. 682 (1904).

<sup>54</sup> *Comm. v. Cramer*, 2 Pears. 441 (1884).

<sup>55</sup> See on this point *Penna. v. Gillespie*, Add. 267 (1795), where defendant tore down the notice of sale of his property.

<sup>56</sup> *Comm. v. Bryant*, 3 Kulp 290 (1884).

To this last example might be appended others where a defendant was excused as acting within his rights, or under a bona fide mistake with respect thereto. Thus, in *Comm. v. Drass*,<sup>57</sup> though actual illwill and deliberate destruction were present, the court refused to convict a defendant of malicious mischief in tearing down, in a noisy manner accompanied by threats of repeat performance should similar occasion arise in the future, a fence which a neighbor had innocently erected on his property. And in *Comm. v. Wagner*,<sup>58</sup> it was held that defendant was guilty of no more than a civil trespass in entering upon the land of another and felling his standing timber, when he acted in the reasonable belief that the land was his own.

A few cases, it would seem, have taken particularly extreme positions in their constructive findings of malice. Particularly does the decision in *Comm. v. Strode*<sup>59</sup> impress the writer as such a finding. There a defendant was convicted of malicious mischief in tearing down a party wall of his neighbor before its formal condemnation, even though, as defendant knew and the prosecution admitted, the wall was certain to have been condemned had actual appraisalment been made. While it is difficult to construe defendant's actions as motivated by "wanton cruelty or black and diabolical revenge," nevertheless the court found an equivalent thereto in his "wanton disregard of the property and legal rights of the prosecutor."

But by far the most interesting statement on the subject of malice is the *dictum* of Justice Woodward in *Davis et al. v. The Commonwealth*,<sup>60</sup> where the court gave vent to particularly pungent expressions on the subject of malicious mischiefs to animals. This particular type of act, the Justice concluded, was "indicative of a heart regardless of social duty and fatally bent on mischief and may therefore be punished by indictment without regard to ownership." If these statements be taken literally (and Dr. Trickett, for one, apparently thought they should be),<sup>61</sup> it would seem possible to indict for malicious mischief a defendant who unnecessarily inflicts pain upon his own beast. If this be so, of course, it represents an exception to the general common law rule that a defendant can commit no crime upon his own property. On the other hand, the exception would appear justified, if for no other reason than that the sight of an individual inflicting unnecessary punishment on *any* animal is apt to induce the objection of outraged bystanders, with the resultant criminal breach of the peace. But there have been no express holdings since on this matter, and whether the statements of Justice Woodward will ever be followed in the future remains problematical.

---

<sup>57</sup> 146 Pa. 55 (1891).

<sup>58</sup> 21 D. & C. 187 (1934).

<sup>59</sup> 27 W. N. C. 437 (1890).

<sup>60</sup> 30 Pa. 424 (1858).

<sup>61</sup> 1 TRICKETT, PENNSYLVANIA CRIMINAL LAW 196 (1908).

## 2. *The Mental Element Finally Defined.*

The mental element of common law malicious mischief as it is defined by the Pennsylvania cases consists of an intention to knowingly injure, directly or indirectly, the personal or property rights of another or the property rights of the public in general, or a wanton disregard of such rights, when the cause, if any, provoking such injury is legally insufficient to justify its infliction.

## D. CONCLUSION.

Summing up, then, all the Pennsylvania cases dealing with malicious mischief, and joining the definitions of the physical and mental elements derived from the study thereof, one arrives at the following definition of common law malicious mischief as it has been applied by the courts of this Commonwealth.

COMMON LAW MALICIOUS MISCHIEF CONSISTS OF ANY ACT WHICH IS, OR IS CALCULATED TO CREATE, A BREACH OF THE PEACE, WHICH IS DELIBERATELY AND KNOWINGLY CALCULATED TO INJURE, DIRECTLY OR INDIRECTLY, THE PERSON OR PROPERTY RIGHTS OF ANOTHER OR THE PROPERTY RIGHTS OF THE PUBLIC IN GENERAL, OR WHICH IS DONE WITH WANTON DISREGARD OF SUCH RIGHTS, WHEN THE CAUSE, IF ANY, PROVOKING SUCH ACT IS LEGALLY INADEQUATE TO JUSTIFY ITS COMMISSION.

Pat McGrath Jr.