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Criminal Law--Malicious Mischief--Felony or Misdemeanor?

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murder rule to a situation similar to the facts in *Taylor*. The West Virginia Code defines only the degrees of murder.\(^{27}\) Whether a murder has in fact occurred must be decided by reference to the common law, and once established, the statute operates only to determine the degree.\(^{28}\) Accordingly, before the statutory felony-murder rule can be applied, the corpus delicti of murder must be established. The corpus delicti is shown by proving (a) a death, and (b) the existence of a criminal agency.\(^{29}\) Where the victim of a robbery kills one of the robbers, it is justifiable homicide.\(^{30}\) Therefore, the criminal agency necessary to establish the corpus delicti is lacking. It necessarily follows that since no murder was committed, the surviving robber cannot be convicted of a crime which never occurred.\(^{31}\)

*Taylor v. Superior Court* represents a revival of the felony-murder rule in California and is contrary to a recent judicial movement toward limiting application of that rule. Moreover, the decision could become a foundation for repudiation of previous decisions in California which restricted application of the rule.

*Ronald B. Johnson*

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**Criminal Law—Malicious Mischief—Felony or Misdemeanor?**

Charles A. Cogar was indicted by the Webster County Circuit Court for damaging and destroying approximately $890 worth of realty belonging to a local resident. The indictment followed the language of West Virginia's malicious mischief statute,\(^1\) except that it contained the word "feloniously" instead of the phrase "but not feloniously" as set forth in the statute. Cogar pleaded guilty and was

\(^{27}\) W. VA. Code ch 61, art. 2, § 1 (Michie 1966):
"Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree."

\(^{28}\) 63 Cal. 2d at 705, 408 P.2d at 374, 47 Cal Rptr. at 918; 105 U. Pa. L. Rev. at 59.


\(^{31}\) A contrary result may prove inherently contradictory. See supra note 20.

\(^1\) W. VA. Code ch. 61, art. 3, § 30 (Michie Supp. 1971).
sentenced by the trial court to the state penitentiary. The defense made a motion to set aside the sentence on the grounds that the indictment did not charge any offense in West Virginia, that the indictment was couched in the language of West Virginia's malicious mischief statute specifying only a misdemeanor, and that there is no felony in West Virginia for the crime charged in the indictment. The trial court took the motion under advisement, suspended execution of the sentence and released the petitioner on bond. Approximately one year later the trial court, having learned the petitioner had been convicted by a justice of the peace of several misdemeanors, ordered the sentence reproounced and sentenced petitioner to one to ten years in the state penitentiary. Cogar petitioned the West Virginia Supreme Court of Appeals for a writ of habeas corpus alleging that the indictment against him did not state a felony and therefore could not support a sentence to the state penitentiary. Held, sentence void; remanded for imposition of a valid sentence with credit to petitioner for the time spent in prison. An indictment that states that a defendant committed a crime "feloniously" does not have the legal effect of creating a felony if there is no state law that provides the crime is a felony. Since there is no felony of malicious mischief in West Virginia, petitioner's sentence to the state penitentiary was void.\textsuperscript{2} \textit{State ex rel. Cogar v. Haynes}, 180 S.E.2d 492 (W. Va. 1971).

The court in Cogar was confronted with the significance of the phrase "but not feloniously" as set forth in West Virginia's malicious mischief statute.\textsuperscript{3} This statute provides a fine and a jail term. Such a penalty by West Virginia law is classified as a misdemeanor.\textsuperscript{4} The West Virginia Supreme Court of Appeals held in \textit{State v. Harr} that the punishment prescribed in a statute is what determines whether the offense is a felony or a misdemeanor and that in West

\textsuperscript{2} Judge Haymond dissented because he believed the majority should not have directed the trial court on remand to impose a valid sentence upon the petitioner with credit for time served, but that the court should have ordered petitioner's immediate release.

\textsuperscript{3} If any person unlawfully, \textit{but not feloniously}, take and carry away, or destroy, injure or deface any property, real or personal, not his own, he shall be guilty of a \textit{misdemeanor}, and, upon conviction, shall be sentenced to a fine in an amount not to exceed five hundred dollars, or confinement in the county jail for a period not to exceed one year, or both such fine and confinement, in the discretion of the court. \textit{W. Va. Code} ch. 61, art. 3, § 30 (Michie Supp. 1971) (emphasis added).

\textsuperscript{4} \textit{W. Va. Code} ch. 61, art. 11, § 1 (Michie 1966) provides: "Offenses are either felonies or misdemeanors. Such offenses as are punishable by confinement in the penitentiary are felonies; all other offenses are misdemeanors."
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Virginia there are no felonies except those which are specifically designated as such by statute. Judge Calhoun stated in Cogar that the court would not speculate as to why the Legislature included the phrase "but not feloniously" in the malicious mischief statute.

West Virginia's malicious mischief statute is a direct descendant of a similar statute adopted by Virginia in 1848. Probably the Virginia Legislature's inclusion of the phrase "but not feloniously" in the malicious mischief statute resulted from the Anglo-American usage of the word "felonious" in the eighteenth and nineteenth centuries to indicate an intent to steal which was not present in malicious mischief. Blackstone employed the word "felonious" in his definition of larceny. He explained that one acted feloniously if he acted with animus furandi—i.e., with the intent to steal. Also, Blackstone believed the crime of malicious mischief was an act committed without animus furandi, but instead was a crime committed with the spirit of wanton cruelty or revenge.

In the mid-nineteenth century, the Virginia Supreme Court used "felonious" in cases dealing with larceny to mean one's "intent to steal." In Blunt v. Commonwealth, an 1834 decision, the court

5 38 W. Va. 58, 17 S.E. 794 (1893).
6 180 S.E.2d at 496.
7 Any free person who shall knowingly and wilfully, without lawful authority, but not feloniously, take and carry away or destroy or injury any property, real or personal, not belonging to such person, shall be deemed guilty of a misdemeanor, and be prosecuted and punished as in other cases of misdemeanor.
9 W. Blackstone, Commentaries *229. Blackstone in discussing the difference between grand and petit larceny stated that "simple larceny...is the felonious taking and carrying away of the personal goods of another."
10 W. Blackstone, Commentaries *243.
differentiated between larceny and the carrying away under false pretenses by saying that the defendant must have felonious intent at the time of the taking. In an 1847 case, *Booth v. Commonwealth,* the court, concerned with the propriety of a larceny instruction, held that the jury was properly instructed that it could draw an inference from the facts that the defendant possessed "felonious" intent at the time of the taking. In *Tanner v. Commonwealth,* the court held that the defendant must "feloniously" take the property before there is larceny. Closely related to *Cogar,* the court in *Wolverton v. Commonwealth* indicated that "feloniously" was used in the indictment for larceny to characterize the intent with which the taking and carrying away were done and not to indicate whether the defendant's crime was a felony or misdemeanor. Clearly it may be concluded that the phrase "but not feloniously" was included in Virginia's malicious mischief statute to characterize the crime as one committed without the intent to steal.

The malicious mischief statutes in Virginia and West Virginia have remained substantially unchanged since their inception. The language of these statutes is a relic of the eighteenth and nineteenth centuries and no longer accords with the presently accepted meaning of the word "felonious."

In conclusion, it appears that a modernized malicious mischief statute should be enacted. Such a statute could be patterned after the criminal mischief section of the Model Penal Code proposed

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12 The trial court instructed the jury
[that it must be proved that the original taking was felonious: but that the jury had a right to infer from all the facts and circumstances of the case, the felonious intent in the original taking: and that not in one case in a hundred could it be proved directly, that the original taking was felonious.

Gratt. 526 at 526 (Va. 1847).

13 14 Gratt. 635 (Va. 1857).

14 75 Va. 909 (1881).

15 As the offense charged is a misdemeanor, under our statute, so is the finding, the word 'feloniously' in the indictment being used to characterize the intent with which the taking and carrying away were done—a felonious intent being an essential ingredient in the crime of larceny, whether grand or petit, distinguishing it from a mere trespass.

*Id.* at 911.

by the American Law Institute. A statute so patterned would accomplish a twofold purpose: first, it would replace the archaic language of the present statute which led to the confusion in this case, and second, it would, to an extent, relieve the present anomalous situation whereby a theft of property valued at fifty dollars is a felony carrying a penalty of one to ten years in the state penitentiary, while the crime of unlawful destruction of property is only a misdemeanor regardless of the value of the property destroyed. Although the Model Penal Code does provide that the crime of malicious mischief can be a felony, there is a disparity between the dollar value of the property taken which constitutes a felony for larceny (five hundred dollars) and the dollar value of the property destroyed which constitutes a felony for malicious mischief (five thousand dollars). Perhaps in considering the enactment of a modernized statute, the Legislature could consider the elimination of this disparity. The question remains open as to why the intentional destruction of property should be treated any differently than the intentional theft of it.

Michael Boyd Keller

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17 Model Penal Code § 220.3 (Proposed Official Draft, 1962), provides:

(1) Offense Defined. A person is guilty of criminal mischief if he:

(a) damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in Section 220.2(1); or
(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property; or
(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(2) Grading. Criminal mischief is a felony of the third degree if the actor purposely causes pecuniary loss in excess of $5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor if the actor purposely cause pecuniary loss in excess of $100, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25. Otherwise criminal mischief is a violation.


20 Model Penal Code § 223.1(2) (Proposed Official Draft, 1962) provides: “Theft constitutes a felony of the third degree if the amount involved exceeds $500 . . . .” It should be noted that larceny in the Model Penal Code is one of a number of offenses denominated as “theft.”