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Premeditation and Deliberation

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PREMEDITATION AND DELIBERATION

Can They Occur in an Instant?

In the case of *State* v. *Cates*[1] which was followed by *State* v. *Palen*,[2] the Supreme Court of Montana held, in effect, that premeditation and deliberation, as requisites of first degree murder, could be formed in the instant before the fatal act was consummated. It would appear that the purport of this decision is to eliminate the distinction between murder in the first degree and murder in the second degree.

The Montana legislature defined murder as: "the unlawful killing of a human being with malice aforethought."[3] This is a restatement of the common law definition.[4] But, whereas, at the common law there was only one degree of murder the legislature has provided two:

> "Degrees of Murder: All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or the attempt to perpetrate arson, rape, robbery, burglary, or mayhem, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, is murder of the first degree; and all other kinds of murder are of the second degree."[5]

Our statute is patterned after that of the Pennsylvania statute of 1794 which was the first of this type enacted in the United States.[6] The weight of authority in states having a similar statute hold that premeditation and deliberation can come into being in the instant or moment before the act is consummated.[7] The trend, however, is away from this view to-

[1](1934) 97 Mont. 173, 33 P. (2d) 578.
[2](1947) 119 Mont. 600, 178 P. (2d) 862.
[3]R.C.M., 1947, § 94-2501 (10953).
[4]BLACK. COM. IV, 195.
[5]R.C.M., 1947, § 94-2503 (10955).
[6]The Montana statute has the word "torture" added, following "lying in wait." This is not included in the Pennsylvania statute. The historical development of the Pennsylvania statute is thoroughly covered in: Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).
[7]18 Am. Dec. 782 ff. In interpreting this type of statute the courts immediately became involved in difficulties when they were faced with the problem of determining precisely how much actual time premeditation and deliberation required. As it was obviously impossible to lay down a hard and fast rule which would require the passage of a given number of minutes, the courts adopted the view that a very short time

wards that of the minority which holds that the terms, "deliberate and premeditated" must be given a judicial meaning which is consistent with the actual meaning of these words: that defining deliberate and premeditated in terms of "instant" or "quick as successive thoughts"[8] (a description frequently used) suggests the absence rather than the presence of deliberateness and premeditation. This trend is clearly enunciated by the strong, definitive position taken by the Ninth Federal Circuit Court of Appeals in the case of *U.S.* v. *Jones*,[9] [10] in which it was stated:

> "The words 'deliberate' and 'premeditated' are not such words of art as to be without meaning to jurors. Left to their own devices, with nothing but the language of the statute to guide them, the jury might be able to appreciate the essential difference between first and second degree murder. But when the court, which might properly advise the jury that no particular time is necessary, proceeds in terms which lay emphasis upon no appreciable time, and 'instantaneous,' the statutory distinctions are rendered meaningless. Deliberation and premeditation were here defined in terms which suggest their absence."

would suffice and that the time could be as short as a moment or an instant. Many of these decisions reveal inherent inconsistencies and contradictions resulting from their attempts to give some meaning to deliberate and premeditated in terms which denied the presence of any deliberation and premeditation.

This is illustrated by the early Montana case of Territory v. Johnson (1889) 9 Mont. 21, 27, 22 P. 346 in which the judge said:

> ". . . deliberation and premeditation need not be of any considerable length of time previous to the assault. It is enough . . . even though the act follow immediately upon the decision."

Use of the phrase "of any *considerable* length of time" implies the passage of some appreciable length of time, albeit no great amount. Whereas the use of "immediately" suggests instant, moment or of no time. For a discussion of the earlier cases refer to 18 Am. Dec. 772 ff.

[8] People v. Sanchez (1864) 24 Cal. 17. This case has often been cited and the above phrase often quoted, but later California cases have repudiated it, e.g., People v. Hashaway (1945) 27 Cal. App. (2d) 554, 155 P. (2d) 823 and especially People v. Bender, (1945) 27 Cal. (2d) 164, 163 P. (2d) 8. The latter case expressly disapproves of the view that the act of killing may follow the intention to kill as quickly as successive thoughts of the mind, etc.

[9] (1949) 175 F. (2d) 544 at p. 551. This decision was very ably presented by Judge Pope, resident of Missoula, Montana and former Montana practitioner.

[10] For other instances of reversal of the majority rule refer to footnotes (8) *supra* and (24) *infra*. In the federal field, Bullock v. U.S. (1941) 74 App. D.C. 220, 122 F. (2d) 213, clearly repudiates the rule, formerly held by that court, that premeditation and deliberation can occur in an instant; refer also to Fisher v. U.S. (1945) 328 U.S. 463. In the state field refer to: McClendon v. State (1939) 197 Ark. 1135, 126 S.W. (2d) 928; Snipes v. State (1944) 154 Fla. 262, 17 So. (2d) 93; People v. Woodley (1948) 78 N.Y.S. (2d) 284, 77 N.Y.S. (2d) 130.

This case must be considered as establishing strong persuasive authority, especially for those states embraced by the Ninth Federal Circuit.

Under our statutes the maximum penalty for second degree murder (which is the same as the common law crime of murder) is life imprisonment;[11] whereas, the extreme penalty for the same crime at common law was commonly execution.[12] This mitigation of the long accepted penalty for murder was in keeping with the social trends of the nineteenth and twentieth centuries. The legislature did, however, see fit to provide the death sentence for murder of a particular type. Looking to that portion of the statute which is germane to this discussion we see that it is murder, ". . . perpetrated . . . by any other kind of wilful, deliberate and premeditated killing. . . ."[13] The death penalty may be given as punishment only for those murders which are thus differentiated from second degree murder.

We may properly infer that as the penalty is more severe, the crime must be more reprehensible and more to be deplored and prevented. Punishment is intended to act as a deterrent and preventive of crime, as well as a means of reformation.[14] It follows therefore, that as an infinitely harsher and more severe penalty is adopted, the crime to be prevented must be of a much greater magnitude. If the crime of murder in the first degree is of much greater magnitude than that of murder in the second degree, the distinction between the two should be readily discernible. This distinction between the two types of murder was noted by Plato about twenty-two centuries ago:

> "He who treasures up his anger, and avenges himself, not immediately and at the moment, but with insidious design, and after an interval, is like the voluntary; but he who does not treasure up his anger, and takes vengeance on the instant, and without malice prepense, approaches to the involuntary. . . . The best and truest view is to distinguish them accordingly as they are done with or without premeditation. And we should make the penalties heavier for those who commit homicide with angry premeditation, and lighter for those who do not premeditate, but smite upon the instant. . . ."[15]

[11]R.C.M. 1947, § 94-2505 (10957).
[12]BLACK. COM. IV, p. 194.
[13]R.C.M. 1947, § 94-2503 (10955).
[14]Mont. Const. Art III, § 25; HOLMES, THE COMMON LAW, p. 46 (1881).
[15]DIALOGUES OF PLATO, LAWS IX (867) JOWETT'S Translation. The apparent failure of this standard which was first established by Plato, caused the late Justice Cardozo to conclude that some criterion other than premeditation and deliberation must be established for distinguishing between first and second degree murder. In an essay, *What*

It will be necessary then, to examine carefully these elements which are under discussion. If we interpret the words of the statute: "wilful, deliberate, and premeditated" in their lay sense,[16] giving them the full import of their ordinary meaning we have a criterion for establishing and determining the difference between first and second degree murder. Deliberate is defined as:

> (a) "Done with deliberation; formed, arrived at, or determined upon as a result of careful thought . . . 3. Slow in action; unhurried." (b) "deliberate implies full awareness of the nature of what one says or does, and, in very precise use, a careful and unhurried calculation of the intended effect or of the probable consequences."[17]

Medicine Can Do For Law in LAW AND LITERATURE AND OTHER ESSAYS, 296 ff. (1931) he says:

> ". . . The difficulty arises when we try to discover what is meant by the words deliberate and premediated. . . . I think the distinction is much too vague to be continued in our law. . . . I think the students of the mind should make it clear to the law makers that the statute is framed along the lines of a defective and unreal psychology. . . . The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself. . . ."

Quare: Did not Cardozo's difficulty stem from the fact that he accepted, without question, the majority view as: (a) the correct interpretation of the meaning of premeditation and deliberation, or (b) sacrosanct, being the view of the majority and as such beyond correction or revision? In my opinion these considerations are untenable. As I have noted elsewhere in this article the majority interpretation is clearly erroneous. Furthermore, our system of law has achieved its fundamental vitality in part through its capacity to correct its own errors. Did Cardozo believe that Plato's standard of premeditation and deliberation reflects a "defective and unreal psychology" which could be rectified by the medical profession? It is highly debatable whether or not the "students of the mind" are qualified to define a wholly new standard. But if they were, and if such a new standard were accepted a new crime would be established. And, society would still have to cope with the planned murder which, for twenty-two hundred years, has been considered as particularly heinous.

If Cardozo had faced the problem head-on as Judge Pope did in People v. Jones (note 9 *supra*) the fundamental reason for the alleged failure of the standard would have been revealed, i.e., the defining injury instructions of premeditation and deliberation in terms which suggest their absence.

I submit that the real distinction between the two types of murder would be, to a large extent, clearly defined and the problem mitigated, even though not solved unequivocally, if the views expressed in this comment and in the cases cited in footnotes (9) and (10) *supra*, were religiously applied by all the courts.

[16]Note the quotation from Judge Pope's decision on p. 2 *supra*.

[17](a) WEBSTER'S COLLEGIATE DICTIONARY, 5th Ed. p. 265. (b) WEBSTER'S DICTIONARY OF SYNONYMS, p. 233.

Wilful is defined as:

> "adds to deliberate the implications of a refusal to be taught, counseled, or commanded, and of an obstinate determination to follow one's own will or choice in full consciousness of the influences or arguments opposed to the attitude adopted or the action or deed contemplated."[18]

And, premeditate is defined as:

> (a) "To consider or revolve in the mind beforehand; to contrive design, or deliberate in advance of acting, speaking, etc." and, (b) "Premeditated emphasizes forethought and planning but often falls far short of deliberate in implying careful calculation and awareness of consequences."[19]

Applying these definitions[20] to the words as used in the statute, there emerges the picture of the considered and planned homicide, the mental weighing, the choosing of ways and means; the prior conception followed by a consummation of the plan conceived—all of which would seem to delineate the type of murder embraced by the statute.

It is of importance to note how the court in the subject case dealt with this problem of distinguishing between first and second degree murder where the defendant had been sentenced to be hanged. On appeal the counsel for the defendant alleged that the state had failed to sustain the burden of proving deliberation and premeditation, that the record was barren of any proof of deliberation and premeditation. The court readily admitted the necessity of establishing these elements:

> "Therefore, in order to sustain conviction of murder in first degree, the burden rested upon the state to establish not only the killing by the defendant, but also the presence of deliberation and premeditation."[21]

The court disposed of the question in four steps:

> FIRST: "Counsel assumes that there should be evidence tending expressly to show the deliberate purpose; but this is not necessary . . . It is generally to be inferred from facts and circumstances attending the killing."[22]

[18] *Id.* (b) 877.
[19] *Id.* (a) 783; (b) 233.
[20] The court in People v. Bender, note 8 *supra*, specifically resorted to the dictionary for definiton of these terms.
[21] *Op. cit.* note 1, at p. 201.
[22] *Id.*

SECOND, quoting from the New Mexico case of *State* v. *Rodriguez*:[23] [24]

> "It is well settled that, if the intent to take life is executed after deliberation and premeditation, though but for a moment or an instant, the crime may be murder in the first degree."

At first glance this quotation may appear to be a clear statement to the effect that premeditation and deliberation can occur in an instant. However, on closer examination one may wonder whether the phrase, "though but for a moment or an instant" modifies the subordinating conjunction, "after" thereby describing how long after the deliberation and intent has been formed that the intent need be executed. This construction renders a meaning quite different from the one construed by our court. It is at least fair to say that this citation is not a clear judicial statement to the effect that premeditation and deliberation can come into being in the instant or moment before the act is executed.

THIRD, amplifying the 'moment or instant' doctrine the court said:

> "The purpose to kill may be formed *the moment it is executed* as well as for an hour or a day, and still the act be premeditated."[25]

The case of *State* v. *Speyer*[26] is cited in support of this statement, which, although not in quotation marks, was apparently taken from the *Speyer* case. Contrast the tenor of this sentence with these remarks from the *Speyer* case which immediately follow the sentence quoted in the original opinion of that case:

> "In the absence of either constituent there can be no murder in the first degree. . . . Deliberation is but prolonged premeditation in a cool state of the blood. . . . Deliberation is also premeditation but it is something more. It is not only to think of beforehand, which may be but for an

[23] *Id.*

[24] (1917) 23 N.M. 156, 167 P. 426, L.R.A. 1918A 1016. It is significant to note that New Mexico has repudiated this view in the case of State v. Torres (1935) 39 N.M. 191, 43 P. (2d) 929, in which the court said:

> "The error in the Sanchez case was that the judge overlooked the difference between premeditation and deliberation . . . deliberation means thinking over with calm and reflective mind. . . ."

This latter view is also clearly expressed in State v. Hall (1936) 40 N.M. 128, 55 P. (2d) 740.

[25] *Op. cit.* note 21 *supra* (italics added).

[26] (1907) 207 Mo. 540, 106 S.W. 505, 14 L.R.A. (N. S.) 836.

> instant, but the inclination to do the act is considered, weighed, pondered upon for such a length of time after provocation is given as the jury may find was sufficient for the blood to cool . . . it must necessarily follow that all intentional homicides, committed with premeditation and malice, but without deliberation, must be murder in the second degree. The word 'deliberation' as used in the statute . . . is intended to characterize what are ordinarily termed 'cold blood murders' such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain.''[27]

The one sentence taken by our court obviously has a meaning quite different from the more complete reading.[28]

FOURTH, and finally, as proof that deliberation was clearly evident (and presumably premeditation) in the facts of the *Cates* case the Montana court said:

> ''. . . the defendant testified that, when he shot, he shot at the body of the deceased; that he knew where to hit him. From these facts it appears that the defendant was shooting with a *deliberate design and purpose;* namely, to kill.''[29]

This seems to be a rather cavalier manner of disposing of defendant's objection that the record was barren of any proof of deliberation. The court's ''deliberate design and purpose'' could be just as readily inferred from the fact that the defendant, while standing at point blank range, did shoot the deceased in the body. Here the court is identifying and confusing ''deliberate'' with intent to kill. The statement by the defendant that he ''knew where to hit him'' does not add to the implication arising from his acts. The intent to kill or the malice which may be implied by the circumstances of the case is not at all synonymous with deliberate, meaning unhurried and careful calculation of the intended effect or probable consequences; or with premeditate, meaning, ''forethought and planning.''[30]

To say that an act can be premeditated or deliberated in an

[27] *Id.* (L.R.A.) at p. 840.

[28] The court in the Speyer case reversed the trial court on another defective instruction and also on the grounds that the defendant was insane, hence the excerpt cited by our court is little more than dicta.

[29] *Op. cit.* note 21 (italics added).

[30] In People v. Bender (note 8 *supra*) the court in interpreting the California statute (which is the same as Montana') said:

> ''. . . such malice aforethought is not synonymous with the elements of deliberation and premeditation which must accompany a homicide to characterize it as murder of the first degree.''

"instant" is to belie the very meaning of these words whose fundamental connotation is quite the reverse. An *instant* is: "a point in duration; a moment; especially an infinitesimal portion of time."[21] To say that a person can premeditate and deliberate in an instant is to say that one can give careful thought and unhurried calculation (both of which imply several thoughts and calculations) in the least amount of time necessary to accommodate a single thought. It is to say that one can be unhurried with the speed of light. The only way that the thought process before acting could be reduced or shortened from an instant's duration would be to act without having so much as a single thought precede the act. And, it would be unreasonable to believe that any considerable amount of murders are committed which are unaccompanied by any mental processes at all. On the reasoning of this case, it would seem, therefore, that any act which is preceded by a single thought (and such thought could come into being in the split fraction of a second before the finger tightens on the trigger) is a premeditated act. Therefore, as premeditation and deliberation may be inferred from the facts and circumstances attending the killing, the difference between premeditation and deliberation, on the one hand, and malice aforethought and bare intent on the other is so negligible as to be, for all practical purposes, non-existent under the rule of the *Cates* case.

As the courts have been prone to reiterate that the span of time required for premeditation and deliberation need not be of any pre-determined or specified time, they have been led into construing this as meaning that the time may be reduced to an "instant" and therefore reduced to nothingness. Would it not be more in keeping with the letter and spirit of the statute to require that premeditation and deliberation exist apart from, and prior to, the immediate acts which cause death, and that they be construed as a desire to take life, conceived in advance of the act which is the fulfillment and expression of that desire? The primary distinction to be made is that premeditation and deliberation are elements distinct and apart from a mere legal intention (express or implied) to take life.

On reviewing Montana decisions prior to the *Cates* case which deal with this problem we find that the rule is not clearly defined. The first case is that of *Territory* v. *Johnson*.[22] In

[21] *Op. cit.* note 17 *supra*, (a) at p. 522, (b) at p. 464.
[22] Refer to note 7 *supra*.

State v. *Shafer*[33] the court in ruling on the trial court's instruction said:

> "It is unnecessary to say this error, standing alone, would be considered sufficient to authorize a reversal of this case. Nevertheless, we cannot but disapprove of the instruction. It is a dangerous instruction, and so well calculated to produce damage and prejudice, even when considered with all the instructions, that it is difficult to say that it is not fatally erroneous."

The instruction in question was criticized specifically, in part, for failure to mention malice aforethought in defining first degree murder. However, the instruction contained the following material on premeditation and deliberation which the Supreme Court did not directly refer to but which presumably comes within the broad scope of the criticism:

> "But there need be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind . . . no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

The next case was that of *State v. Spotted Hawk*[34] in which Justice Brantly held that the following instruction was a:

> "Substantially correct statement of the law: . . . premeditation is thought before hand for any length of time, however short. Deliberation does not mean brooded over, considered, reflected upon for a week, or day, or an hour, but it means the intent to kill, executed by the party not under the influence of a violent passion suddenly aroused . . . but in the furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other purpose; that is, it means in a cool state of blood, and is usually characterized by what are termed 'cold-blooded murders' such as proceed from deep malignity of heart, and are prompted by motives of revenge or gain."

The last case prior to the *Cates* case which dealt with this problem was that of *State* v. *LeDuc*,[35] in which the court said:

> "Complaint is made that the court erred in instructing the jury, in effect, that deliberation and premeditation may be formed in an instant. Since the defendant was

[33](1898) 22 Mont. 17, 55 P. 526.
[34](1898) 22 Mont. 67, 55 P. 1026.
[35](1931) 89 Mont. 545, 300 P. 919.

> convicted of second degree murder only, it follows that the jury must have concluded that there was no deliberation, and hence he was not prejudiced by the court's instruction even though it be assumed that it was erroneous."

It is to be noted that none of the Montana cases quoted above could be construed as supporting the proposition that premeditation and deliberation could be formed in the moment or instant before the act is executed even though *Territory* v. *Johnson* and *State* v. *Spotted Hawk* lean in that direction. *State* v. *Shafer* and *State* v. *LeDuc* reflect an attitude in opposition to the "moment or instant" doctrine.

In summation it may be said that the court in the *Cates* case enunciated a rule, in attempting to delimit premeditation and deliberation as elements in first degree murder, which is not in keeping with legislative intent or prior decisions nor with the trend of decisions in other jurisdictions. The inference which must be drawn from this decision is inconsistent and incompatible with the connotation of the words in question. Any attempt to define "deliberate and premeditated" in terms of "moment or instant" must of necessity be erroneous and more in keeping with the antonyms of these words and must inevitably obscure or eliminate the distinction between first and second degree murder.[36]

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[36]For persuasive authority in support of the view expressed herein, it is recommended that reference be made to Judge Pope's decision (note 9 *supra*) which is the leading and most recent case on this matter in the Ninth Circuit Court of Appeals. The opinion is very effectively presented and is supplemented with ample footnotes and citations. People v. Bender and People v. Hashaway (note 8 *supra*) are also effective.

INJUNCTIVE RELIEF IN TRESPASS ACTIONS WHEN TITLE IS IN DISPUTE

The purpose of this article is to state the position of the Montana Supreme Court on the question of whether or not a court of equity will grant injunctions to enjoin trespasses to land in cases of disputed title or right before determination of the title or right in an action at law.

Until very recently courts have refused to enjoin a trepass of any kind on real estate where it appeared from the pleadings that the title to the land was in controversy. Three of the reasons that appear most frequently in the decisions are: (1) It was