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> 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

up to a court of law rather than a court of equity to determine and adjust titles to disputed property; (2) A party should not be deprived of a trial by jury on such matter;[1] and, (3) The court of equity was unwilling to use the injunction to take property out of the possession of one party and put it into the hands of another whose rights had not been established at law.[2]

However, the mere existence of doubt as to the title does not in itself constitute a sufficient ground for denying an injunction,[3] and, where title is admitted or established at law, its owner will, in a proper case, be entitled to an injunction against trespasses upon the property to which it relates.

The first case involving the question of disputed title in relation to the issuance of an injunction is the 1920 decision of *Blinn* v. *Hutterische Society of Wolf Creek*.[4] Plaintiffs were purchasers of land under a contract of sale and the defendants were the vendors. A lease was also embodied in the contract allowing vendors to remain in possession of a part of the land but nothing was said as to which party was entitled to the growing crops. An injunction was issued to the plaintiffs restraining the defendants, their agents and employees from entering upon the lands described in their complaint, and from harvesting, threshing, or removing crops of fall wheat and rye, and from interfering in any manner with the plaintiffs in their use and occupation of the lands. Immediately upon the service of the injunction the defendants appeared specially and moved that the court dissolve the injunction. A hearing was had at which documentary evidence and oral testimony was introduced by the respective parties, and, at the conclusion, an order was entered by the court dissolving the injunction. On appeal the Montana Supreme Court said: "... The society, the vendor, was in actual and exclusive possession when it planted the crops in controversy and continued in possession of the land upon which those crops were growing until the injunction was issued and served. The practical effect of the injunction as issued was to oust the society from its possession and install the plaintiffs in possession, and for such a purpose an injunction is not an available remedy." The court quoted with approval United States Supreme Court cases[5] which adhered to the theory that it was up to a court of

[1]Atkinson v. J. R. Crowe Coal & Min. Co. (1909) 80 Kan. 161, 102 P. 50, 39 L.R.A. (NS) 31.
[2]Lacassagne v. Chapuis (1892) 144 U.S. 119.
[3](1933) 94 Mont. 79, 21 P. (2d) 53, 92 A.L.R. 571.
[4](1920) 58 Mont. 542, 194 P. 140.
[5]Lacassagne v. Chapuis (1892) 144 U.S. 119; Black v. Jackson (1900) 177 U.S. 349.

law rather than a court of equity to determine and adjust titles to disputed property.

In *National Bank of Montana* v. *Bingham*[6] a suit was brought for the foreclosure of a mortgage on real estate. The appeal is from an order of the district court refusing to grant an injunction *pendente lite* in favor of Minnie H. Bingham, a defendant, and against the plaintiff and Richard Manger and Clara Manger, the other defendants. In this case the mortgagee held a mortgage that covered two adjoining tracts of land separately owned by husband and wife. He proceeded to foreclose as to the land owned by the latter only, having purchased the husband's land at bankruptcy sale. The court denied defendant an injunction *pendente lite* to restrain plaintiff from interfering with the wife's possession of land formerly owned by the husband saying: "Minnie H. Bingham claims now to have some interest in the Frank R. Bingham land and claims the bankruptcy sale thereof was void. Those claims can be tested in a suit by her to quiet title. Title to or right of possession of real estate is not triable by injunction, (Blinn v. Hutterishe Society, 58 Mont. 542, 194 Pac. 140), and injunction is not a proper remedy for trespass on real estate unless the trespass be accompanied by injury which is irreparable or is in the nature of waste and goes to the destruction of the estate."[7]

The case of *Union Central Life Insurance Co.* v. *Audit*[8] was an action by the vendor of farm lands seeking *inter alia* an injunction to restrain interference with his possession of the premises by the vendee. The contract of sale had provided that upon default in any particular by the vendee, possession should be surrendered to the vendor. The court held that a purchaser of lands who stipulates in his contract that on default of payments due the vendor may retake possession, is no longer rightfully in possession after such default and demand therefore by the vendor, but occupies the position of a trespasser. The question then arose when will a court sitting in equity grant an injunction to a vendor against repeated trespasses by vendee in default under a land contract? The court issued the injunction and speaking through Chief Justice Callaway, said: "The general rule is that a court of equity will not exert its power to enjoin a trespass when there is an adequate remedy at law. . . . It will not enjoin a mere trespass. . . ."

"It is the rule also that 'title to or right of possession of

[6](1928) 83 Mont. 21, 269 P. 162.
[7]King v. Mullins (1903) 27 Mont. 364, 71 P. 155.
[8]*Supra*, note 3.

real estate is not triable by injunction.' (Lacassagne v. Chapuis, 44 U.S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368; Blinn v. Hutterische Society of Wolf Creek, 58 Mont. 542, 194 Pac. 140.) Nevertheless relief will be granted by injunction to protect the owner of land whose right to possession is unquestioned 'against a repetition of wanton trespasses for which adequate compensation cannot be given by way of damages.' The mere existence of doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction.'[9]

By way of dictum, the language used would lead one to believe that the court was swinging around to the more enlightened view, that is, although a court of equity may withhold its injunctive relief to prevent trespasses where the title or property right is in dispute, it is not bound by an invariable and absolute rule in the matter, but, as in other cases of injunction, should exercise a sound judicial discretion with respect thereto.[10] In fact, the rule should be one of discretion rather than one of jurisdiction.

The Montana court as yet, has not seen its way clear to swing over to this view which seems to be the better on principle. There is no good reason for equity courts not taking jurisdiction and settling the property rights along with other problems.

To illustrate further, let us examine the action to quiet title to property. It is accepted throughout the profession that an action to quiet title is a remedy or a form of proceeding originating in equity jurisprudence,[11] the purpose of which is an adjudication of a claim of title to, or an interest in, property adverse to that of the complainant as invalid, so that the complainant and those claiming under him may lie forever afterward free from any danger of the hostile claim. In many of the states, of which Montana is one, statutes have been enacted which greatly enlarge the jurisdiction of the courts of equity in actions to remove clouds or to quiet title, and generally permit an action to be brought to determine any adverse claim, interest, or estate in lands.[12] Such statutes are designed to afford an easy and expeditious mode of quieting title to real estate.

The earliest Montana case on the question of whether the equity court had jurisdiction to quiet title without first having the legal title tried at law was *Gallagher* v. *Basey*.[13] This was an

[9]Boud v. Desrozier (1898) 20 Mont. 444, 52 P. 53.
[10]Wheelock v. Noonan (1888) 108 N.Y. 179, 15 N.E. 67, 2 Am. St. Rep. 405.
[11]Bowen v. Chase (1876) 94 U.S. 184.
[12]R.C.M. 1947, § 93-6203 (9479).
[13](1868) 1 Mont. 457.

action for a perpetual injunction to restrain the diversion of water. The action was sustained though it did not appear that the legal title had ever been tried in an action at law. It was also held that the defendants were not entitled to a trial by jury. The court proceeded upon the theory that its equity jurisdiction having been invoked for injunctive relief, it could determine the question of title involved in the first instance, though it was directly put in issue and though it is the rule that a court of equity does not usually interfere in such cases until the title has been established by an action for damages. This case was affirmed by the United States Supreme Court which held that though the statute of the territory regulating civil proceedings declared "that an issue of fact shall be tried by a jury unless a jury trial be waived,"[14] a court sitting as a court of equity was not bound by the findings of a jury upon the issues submitted at the trial.[15]

Fabian v. *Collins*[16] was another case of the same character, and yet the territorial court expressly held that a trial by jury could not be demanded as a matter of right and cited *Gallagher* v. *Basey, supra,* with approval.

The case of *Wolverton* v. *Nichols*[17] was an action to determine an adverse claim to a mine in pursuance of the provisions of Section 2326 of the Revised Statutes of the United States.[18] The Supreme Court held that the action was one in equity to quiet title and should be so treated.

Milligan v. *Savery*[19] was a similar action and although the case went off upon a motion for nonsuit, as did also *Wolverton* v. *Nichols, supra,* the latter case was cited and the conclusions therein announced were approved.

The case of *Mantle* v. *Noyes*[20] was an action under the statute[21] to determine conflicting claims to real estate between the patentees of a placer mine and the locators of a quartz lode. The fundamental question at issue, as in the other cases cited, was the legal title to the property in controversy; and yet, it was expressly decided that the issue of fact presented was to be finally determined by the court, and that a jury could not, as a matter of right, be demanded by either of the parties, and the

[14]Laws of Montana—Codified Statutes 1871-1872, § 190.
[15]Basey v. Gallagher (1868) 87 U.S. 452.
[16](1877) 3 Mont. 215.
[17](1883) 5 Mont. 89, 2 P. 308.
[18]U.S. Comp. St., p. 1430 (1901).
[19](1886) 6 Mont. 129, 9 P. 894.
[20](1883) 5 Mont. 274, 5 P. 856.
[21]Rev. Stat. § 2333.

case of *Gallagher* v. *Basey, supra,* was considered at some length and expressly approved.

In all these cases the main issue involved was the question of legal title, and yet the court proceeded as in equity and not at law, and determined it without the aid of a jury, or, if a jury was called, its findings were regarded as advisory only.

This was the condition of the law on this subject at the time the State Constitution[22] was devised by the convention and adopted by the people of Montana. Since that time all of these cases have been repeatedly cited and approved.[23]

The Supreme Court of Montana has followed the rule laid down in the majority of jurisdictions whereby a court of equity will refuse to grant an injunction to restrain a trespass to real estate in all cases where the title or right to land is in dispute. The trial of an issue of legal title to land is in no essential respect different from the trial of any other issue as to the existence of legal rights to chattels, contracts, or assignments in which the existence or non-existence of such rights must be determined in order to decide the case. No apparent reason exists for the rule that questions of legal title to land must first be settled in a law court. It is interesting to note in quiet title actions that the reasons advanced for first trying the legal title in a law court were raised to try and prevent the equity court from assuming jurisdiction. These objections were met and disposed of by the court as pointed out in the cases cited. So from quiet title actions the court could borrow its reasoning by analogy and assume jurisdiction in the first instance in the issuance of injunctions even though the title to the land is in dispute. In Montana where law and equity are merged, there is no possible place for the rule the court follows as to injunctions in disputed title cases. This was the very thing the code sought to prevent. As the rule stands today, the plaintiff must bring two distinct and separate actions in trespass cases, one at law to settle the disputed title, and the other in equity for an injunction. The better rule would be for a single action to determine all the issues in controversy and the question of disputed title would be but another fact upon which the case would turn.

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[22]1889.

[23]Larson v. Peppard (1909) 38 Mont. 128, 99 P. 136; Northern Pacific Ry. Co. v. Hausworth (1914) 49 Mont. 135, 140 P. 516; Dipple v. Neville et al. (1928) 82 Mont. 280, 267 P. 214.