

# University of Pennsylvania Law Review

FOUNDED 1852

Formerly  
American Law Register

---

---

VOL. 97

MAY, 1949

No. 6

---

---

## HISTORY OF THE PENNSYLVANIA STATUTE CREATING DEGREES OF MURDER

By EDWIN R. KEEDY †

### INTRODUCTION

Murder, as defined at common law, is the killing of a human being with "malice aforethought,"<sup>1</sup> which is a term of art, as the words are not given their normal meaning.<sup>2</sup> Intent to kill generally constitutes malice aforethought, although this state of mind is also

---

† A. B., 1899, Franklin and Marshall College; LL. B., 1906, Harvard University; LL. D., 1926, Franklin and Marshall College; Professor of Law, University of Pennsylvania; Dean, University of Pennsylvania Law School 1940-1945; author of *The Decline of Traditionalism and Individualism*, 65 U. OF PA. L. REV. 764 (1918); *The Third Degree and Legal Interrogation of Suspects*, 85 U. OF PA. L. REV. 761 (1937); *A Petition of Right: Archer-Shee v. the King*, 87 U. OF PA. L. REV. 895 (1939); *The Preliminary Investigation of Crime in France*, 88 U. OF PA. L. REV. 385, 692, 915 (1940), and other articles in legal periodicals.

1. 1 HALE, P. C. 425 (1736). The death must occur within a year and a day. 1 HAWK., P. C. 79 (1716).

"And first of Murder, which anciently signified only the private killing of a Man, for which by Force of a Law introduced by King *Camutus* for the Preservation of his *Danes*, the Town or Hundred where the Fact were done was to be amerced to the King, unless they could prove that the person slain were an *Englishman*, (which Proof was called *Engleschire*), or could produce the Offender, etc. And in those Days the open, wilful killing of a Man through Anger or Malice, etc., was not called Murder, but Voluntary Homicide.

"But the said Law concerning *Engleschire* having been abolished by 14 Ed. 3, c. 4, the Killing of any *Englishman* or Foreigner through Malice prepense, whether committed openly or secretly, was by Degrees called Murder." 1 HAWK., P. C. 78 (1716).

2. "When the Law maketh use of the Term *Malice aforethought* as descriptive of the Crime of Murder, it is not to be understood in that narrow restrained Sense to which the modern Use of the Word *Malice* is apt to lead one, a *Principle of Malevolence to Particulars*." FOSTER, CROWN LAW 256 (1767).

"The definition of murder is unlawful homicide with malice aforethought; and the words malice aforethought are technical. You must not, therefore construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed." Stephen, J., to Jury in *Regina v. Serné*, 16 Cox C. C. 311, 312 (1887).

said to be present when an unintentional killing occurs in the commission of a felony.<sup>3</sup> On the other hand malice aforethought is held to be absent when one intentionally kills as a result of "hot blood" produced by legal provocation.<sup>4</sup> The punishment for murder, according to the common law, was death.<sup>5</sup>

## I

The charter granted by Charles II to William Penn in 1681 provided *inter alia* "That the Lawes . . . as to felonies, shall be and continue the same as they shall bee for the time being, by the general course of the Law in our Kingdome of England, until the said Lawes shall be altered by the said William Penn, his heires or assignes, and by the freemen of the said Province, their Delegates or Deputies, or the greater part of them."<sup>6</sup> It was further provided that a transcript of all laws enacted in the Province must be transmitted, within five years after their enactment, to the Privy Council and that any laws disapproved by the Council, within six months after the receipt of the transcript, should be void.<sup>7</sup>

With little delay "William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid in Assembly met"<sup>8</sup> proceeded to exercise the privilege, granted in the Charter, to alter the laws as to felonies by passing statutes in 1682 and 1683 prescribing penalties less than death for all offenses except murder,<sup>8a</sup> but providing specifically "That if any person within this Province, or territories thereof, Shall

3. 1 EAST, P. C. 255 (1803); *Rex v. Plummer*, 12 Mod. 627, 632 (1701); *Regina v. Greenwood*, 7 Cox C. C. 404 (1857).

4. *Regina v. Mawgridge*, J. Kel. 119 (1706); *Regina v. Tooley*, 11 Mod. 242 (1709).

5. 4 BL. COMM. 201 (1769). The death penalty for murder is now prescribed by statute. 24 & 25 VICT., c. 100, § 1 (1861). This was modified by 23 & 24 Geo. V, c. 12, § 53 (1933), which provides that sentence of death shall not be pronounced against a person under the age of eighteen years.

6. CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEARS 1682 AND 1700 at 84 (Commonwealth of Pennsylvania, 1879).

7. *Id.* at 85. The following reason was stated for requiring a transcript of the laws: "And to the End the said William Penn or heires, or other, the Planters, Owners or Inhabitants of the said Province, may not att any time hereafter, by misconstrucion of the powers aforesaid, through inadvertiencie or designe, depart from that faith and due allegiance which by the Lawes of this our Realme of England, they and all our subjects, in our Dominions and Territories, always owe unto us, Our heires and successors, by colour of any extent or largnesse of powers hereby given, or pretended to bee given, or by force or colour of any lawes hereafter to bee made in the said Province, by vertue of any such powers." *Id.* at 84.

8. *Id.* at 107.

8a. It is probable that Penn was influenced by the views against capital punishment expressed by George Fox. See pamphlet by FOX, AN INSTRUCTION TO JUDGES AND LAWYERS 6, 9 (1661) and JORNS, THE QUAKERS AS PIONEERS IN SOCIAL WORK, 167 (1931).

wilfully or premeditatedly kill another person, . . . Such person Shall, according to the law of God Suffer Death.”<sup>9</sup> It is important to note that the words “wilfully or premeditatedly” were substituted for the words “malice aforethought” of the common law. It also seems clear that the substituted words were used advisedly.

The laws enacted in 1682 and 1683 remained unchanged until 1692, when King William and Queen Mary deprived William Penn of the control of the Province of Pennsylvania. On October 20th of that year they granted a commission to Benjamin Fletcher, Governor of New York, to be also Governor of the Province of Pennsylvania.<sup>10</sup> The commission conferred upon Governor Fletcher “by and with the Consent of our said Councill and Assembly, or the major part of them, full power and authority to make, constitute and ordaine Lawes, Statutes and ordinances, . . . which said Lawes, Statutes and ordinances, are to be (as neare as may be) agreeable to the Laws and Statutes of this our kingdome of Englande.”<sup>11</sup> Shortly after Governor Fletcher’s arrival in Philadelphia on April 26, 1693, the members of the Assembly presented an address to him, which contained the following request: “Earnestlie beseeching that our procedure in Legislation may be according to the usuall method and Laws of this government, founded upon the Late king’s<sup>12</sup> Letters patents, Which we humble Conceive to be yet in force; And therefore, wee desire the same may be confirmed unto us as our rights and Liberties.”<sup>13</sup> To this petition Governor Fletcher tersely replied: “If there be anie Lawyers among you, they can informe you king Charles’ grant of these things might be good to you during his life, because he might maintain his own act; But since his death they are become utterlie void. I would have you advised of this point. *These Laws and that model of government is dissolved and at an end.*”<sup>14</sup> Accordingly the Assembly re-enacted some of the chapters of the statutes of 1682 and 1683 including the one providing “That if any person . . . Shall wilfully or premeditatedly kill another person, . . . Such person Shall, according to the Law of God Suffer Death.”<sup>15</sup> On November 27, 1700 this chapter was reenacted with the omission of the words “according to the Law of God” before the words “Suffer Death.”<sup>16</sup> This enactment was dis-

9. *Id.* at 144.

10. *Id.* at 539.

11. *Id.* at 540.

12. Charles II.

13. CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEARS 1682 AND 1700 at 547.

14. *Ibid.*

15. *Id.* at 210. After some delay the re-enacted laws were approved by Governor Fletcher. *Id.* at 551.

16. 2 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 [hereinafter STAT. AT LARGE] 14 (Commonwealth of Pennsylvania, 1897).

approved by the Queen<sup>17</sup> in Council on February 7, 1705,<sup>18</sup> by reason of the following report of the Attorney General:

"The Act *against murder*, whereby whoever shall wilfully or praemeditately kill another person . . . shall suffer death, I think it unreasonable, for that willfull killing may be in a sudden affray, therefore it should not be wilfully *or*<sup>19</sup> praemeditately, but wilfully *and*<sup>20</sup> praemeditately."<sup>21</sup> Accordingly the Assembly on January 12, 1706, re-enacted the statute on murder in the following form:

"That if any person within this province shall wilfully *and*<sup>22</sup> premeditately kill another person . . . such person guilty as aforesaid shall suffer death."<sup>23</sup> Murder as so defined remained the only crime in the Province punishable by death.

This state of the law, however, soon underwent a radical change due to a pressing political situation. As a result of the disapproval by the Queen in Council of two acts passed by the Provincial Assembly the Quakers were not permitted to qualify for judicial office or to testify in criminal cases by making an affirmation instead of taking an oath.<sup>24</sup> As they could not "for conscience' sake" take oaths they were "alarmed with the prospect of political annihilation."<sup>25</sup> In order to secure the privilege of affirmation the Assembly, having been "assured by the Governor that the best way to secure the favor of their Sovereign was to copy the laws of the Mother Country,"<sup>26</sup> passed an

17. Queen Anne.

18. ACTS OF ASSEMBLY OF THE PROVINCE OF PENNSYLVANIA 23 (Hall & Sellers ed. 1775).

19. Emphasis added.

20. Emphasis added.

21. CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1704-1705 at 278 (Headlam ed. 1916).

22. Emphasis added.

23. 2 STAT. AT LARGE 172. In accordance with the provision of Penn's Charter, this enactment became a law by lapse of time, having been considered by the Queen in Council, Oct. 24, 1709, and not acted upon. *Id.* at 172 n.

24. A Provincial statute, enacted January 12, 1706, provided that judicial officers, "who can not for conscience' sake," take or administer oaths might make or require solemn affirmation. *Id.* at 266. The Attorney General recommended approval of this statute since "the greatest part of the inhabitants of that province are Quakers . . . and Quakers by the laws there may have judicial places, I do not see but this law which is made with the spirit of the Quakers, may be allowed them." *Id.* at 513. Notwithstanding this recommendation the statute was disapproved by the Queen in Council on October 24, 1709. *Id.* at 525. On February 28, 1711 the Assembly passed another statute providing that a person "who for conscience' sake can neither take nor administer on oath" might affirm or administer an affirmation. *Id.* at 355. This statute was likewise disapproved by the Queen in Council on February 20, 1714. *Id.* at 543.

25. William Bradford, a Justice of the Pennsylvania Supreme Court, in a pamphlet entitled AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 17 (1793).

26. *Id.* at 18.

act in 1718<sup>27</sup> which after providing that judicial officers and witnesses might qualify by affirmation, repealed the "humane" laws instituted by William Penn,<sup>28</sup> and prescribed the death penalty for high treason, petty treason, misprision of treason, murder, manslaughter, sodomy, buggery, rape, robbery near a highway, concealing death of bastard child, mayhem, arson, conjuration, witchcraft, enchantment and sorcery.<sup>29</sup> The statute of 1718 was approved by the Queen in Council on May 26, 1719<sup>30</sup> and announcement of this fact was made by the Governor to the Assembly on October 15th of that year.<sup>31</sup> Subsequent acts prescribed the death penalty for counterfeiting bills of credit,<sup>32</sup> counterfeiting coins,<sup>33</sup> remaining on or settling on lands in the

27. 3 STAT. AT LARGE 199. The preamble of this statute was as follows:

"WHEREAS King Charles the Second, by his royal charter to William Penn, Esquire; for erecting this country into a province, did declare it to be his will and pleasure that the laws . . . as to felonies, should be and continue the same as they should be for the time being by the general course of the law in the kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies or the greater part of them.

"And whereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts.

"Now forasmuch as some persons have been encouraged to transgress certain statutes against capital crimes, and other enormities, because those statutes have not been hitherto fully extended to this province."

28. "Thus ended this humane experiment in legislation, and the same year, which saw it expire, put a period to the life of its benevolent Author." BRADFORD, *op. cit. supra* note 25, at 19.

29. The Act of 1718 provided that the statute of 1 James I, c. 12 should be "put in execution in this province." 3 STAT. AT LARGE 203. The statute of James I enacted "That if any pson or persons, after the saide Feaste of Saint Michael the Archangell next cominge, shall use practice or exercise any Invocation or Conjuration of any evill and wicked Spirit, or shall consult covenant with entertaine employ feede or rewarde any evill and wicked Spirit to or for any intent or purpose; or take up any dead man woman or child out of his her or their grave, or any other place where the dead bodie resteth, or the skin bone or any other part of any dead person, to be employed or used in any manner of Witchcrafte Sorcerie Charme or Inchantment; or shall use practise or exercise any Witchcrafte Inchantment Charme or Sorcerie, wherebie any pson shalbe killed destroyed wasted consumed pined or lamed in his or her bodie, or any parte thereof; that then everie such Offendor or Offendors, their Ayders Abettors and Counsellors, being of any of the saide Offences dulle and lawfullie convicted and attainted, shall suffer pains of death as a Felon or Felons, and shall loose the priviledge and benefit of Cleargie and Sanctuarie." 4 STATUTES OF THE REALM 1028 (published in 1819 from ORIGINAL RECORDS AND AUTHENTIC MANUSCRIPTS).

30. 3 STAT. AT LARGE 437.

31. "I must reflect on every occasion which I have had to meet the Assemblies of this Province with great satisfaction, and the present opportunity can not possibly leave a less agreeable Remembrance, since I have the Pleasure to present you with the Royal Assent to, and perpetual Confirmation of a Law which gives you the full Enjoyment of English Liberties, and therefore must doubtless be forever valued by yourselves and your Posterity as an inestimable Freedom and Birth Right. I mean the act which I passed in May, 1718, for the Advancement of Justice and more certain Administration thereof." 1 PENNSYLVANIA ARCHIVES 357 (4th ser. 1900). Justice Bradford, commenting on this announcement, made the following pertinent statement: "The royal approbation of this act was triumphantly announced by the Governor, and such was the satisfaction of seeing its privileges secured, that the province did not regret the price that it paid." BRADFORD, *op. cit. supra* note 25, at 19.

32. Act of May 19, 1739, § 17, 4 STAT. AT LARGE 344, 358.

33. Act of February 21, 1767, § 2, 7 STAT. AT LARGE 90, 91.

Province not purchased of the Indians,<sup>34</sup> larceny and certain other offenses committed by persons with their faces blacked.<sup>35</sup> These new offenses, as well as those enumerated in the statute of 1718, continued to be capital until near the end of the century.<sup>36</sup>

## II

Some months before the signing of the Declaration of Independence<sup>37</sup> a small group of Philadelphians, who held patriotic and liberal political views, formed "The Whig Society."<sup>38</sup> The leaders of this group were Charles Wilson Peale, the artist,<sup>39</sup> David Rittenhouse, the astronomer,<sup>40</sup> Thomas Paine, the author of "Common Sense,"<sup>41</sup> Col. Timothy Matlack, a "fighting Quaker,"<sup>42</sup> Dr. Thomas Young, later an army surgeon, and James Cannon, a professor in the College of Philadelphia,<sup>43</sup> which by a statute enacted in 1779 became the University of Pennsylvania.<sup>44</sup> Closely associated with this group, although it is not clear whether he was a member of the Society,<sup>45</sup> was Judge George Bryan, a judge of the Court of Common Pleas.<sup>46</sup> These men were influenced by the theories of the French philosophers<sup>47</sup> (Montesquieu,<sup>48</sup> Voltaire<sup>49</sup> and Rousseau<sup>50</sup>) and were called by their opponents "The Furious Whigs."<sup>51</sup>

34. Act of February 3, 1768, § 1, 7 STAT. AT LARGE 152, 153.

35. Act of February 24, 1770, § 1, 7 STAT. AT LARGE 350, 351.

36. See note 72 *infra*.

37. KONKLE, GEORGE BRYAN AND THE CONSTITUTION OF PENNSYLVANIA, 1731-1791 at 117 n. (1922).

38. I SCHARF & WESTCOTT, HISTORY OF PHILADELPHIA 338 (1884).

39. SELLERS, THE ARTIST OF THE REVOLUTION 157 (1939).

40. FORD, DAVID RITTENHOUSE 83 (1946). Rittenhouse was elected Professor of Astronomy in the University of Pennsylvania on December 16, 1779. *Id.* at 104.

41. SELLERS, *op. cit. supra* note 39, at 157. Paine was awarded the honorary degree of M. A. by the University of Pennsylvania in 1780. CHEYNEY, HISTORY OF THE UNIVERSITY OF PENNSYLVANIA 137 (1940).

42. SELLERS, *op. cit. supra* note 39, at 157. Col. Matlack was made a trustee of the University of Pennsylvania in 1779. CHEYNEY, *op. cit. supra* note 41, at 130.

43. I SCHARF & WESTCOTT, *op. cit. supra* note 38, at 338. Cannon, who was born in Edinburgh in 1740, entered the College of Philadelphia in 1764. KONKLE, *op. cit. supra* note 37, at 121. He graduated in 1767. He was elected Professor of English and the practical Branches of Mathematics on November 17, 1773. 2 MINUTES OF THE TRUSTEES OF THE COLLEGE OF PHILADELPHIA 69 (1773).

44. CHEYNEY, *op. cit. supra* note 41, at 124, 125.

45. Judge Bryan is said to have been a member of the Whig Society by SELLERS, *op. cit. supra* note 39, at 157. On the other hand it is stated that there is no evidence he was a member. KONKLE, *op. cit. supra* note 37, at 117 n.

46. Judge Bryan was a member of the first Board of Trustees of the University of Pennsylvania and was also its first treasurer. KONKLE, *op. cit. supra* note 37, at 201.

47. *Id.* at 117 n.

48. Charles Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755) published *The Spirit of the Laws* in 1748.

49. François Marie Arouet (1694-1778), who assumed the name of Voltaire, published his *Commentary on Beccaria's Crimes and Punishments* in 1766.

50. Jean Jacques Rousseau (1712-1778) published *The Social Compact* in 1762.

51. SELLERS, *op. cit. supra* note 39, at 155.

On May 10, 1776 the Continental Congress adopted a resolution recommending to the colonies that "where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular, and America in general."<sup>52</sup> The militant Whigs saw in this recommendation an opportunity to supplant the existing government with a more democratic one.<sup>53</sup> Accordingly a mass meeting of about four thousand citizens was held in Philadelphia on May 20th to consider the recommendation of Congress.<sup>54</sup> At this meeting a resolution was voted calling for a provincial convention, chosen by the people, to carry into effect the Congressional recommendation.<sup>55</sup> After several intermediate steps eight representatives to the convention were elected from each of the eleven counties and from the city of Philadelphia.<sup>56</sup>

The convention for the framing of a constitution for the state of Pennsylvania met in the State House in Philadelphia on July 15, 1776.<sup>57</sup> Benjamin Franklin, one of the representatives of the City of Philadelphia, was chosen president of the convention.<sup>58</sup> Three other members of the Philadelphia delegation were James Cannon, David Rittenhouse and Timothy Matlack,<sup>59</sup> who were leaders of the Whig Society. Most of the members of the convention were men with democratic views and it has been stated that "the people had elected their natural leaders, professors, school-masters, physicians and men

52. 2 J. CONGRESS 158 (1800).

53. SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776* at 116 (1936).

54. 9 STAT. AT LARGE 457.

55. *Ibid.*

56. *Id.* at 500. For a discussion of the events leading up to the convention see SELSAM, *op. cit. supra* note 53, at 116 *et seq.*; Ford, *The Adoption of the Pennsylvania Constitution of 1776*, 10 POL. SCI. Q. 426 *et seq.* (1895).

57. Proceedings of the First Constitutional Convention held at Philadelphia, July 15, 1776, reprinted in 9 STAT. AT LARGE 500.

58. *Id.* at 502.

59. *Ibid.* The following entry for July 3, 1776 in the diary of Christopher Marshall refers to a meeting at which the qualifications for delegates to the convention were discussed: "James Cannon, Timothy Matlack [and] Dr. Young flourished away on the necessity for choosing eight persons to be proposed to the people for their concurrence in electing them the next Second Day for our Representatives in Convention. The speakers expatiated greatly upon the qualifications they should be possessed of viz., great learning, knowledge in our history, law, mathematics, etc., and a perfect acquaintance with the laws, manners, trade, constitution and polity of all nations, men of independent fortunes, steady in their integrity, zeal and uprightness to the determination and result of Congress in their opposition to the tyranny of Great Britain. Sundry names were proposed, out of which eight were collected to lay before the meeting tomorrow evening." *PASSAGES FROM THE REMEMBRANCER OF CHRISTOPHER MARSHALL, 1774-1776* at 91 (Duane ed. 1839).

of learning and experience in other walks of life, but, on the whole, unappreciative of the higher commercial interests." <sup>60</sup>

James Cannon, David Rittenhouse and Timothy Matlack were appointed members of the committee to draft the constitution,<sup>61</sup> and it seems clear that Cannon with the advice and help of Judge Bryan, who was not a delegate to the convention, had the most important part in this work.<sup>62</sup> The convention voted on September 28, 1776 to adopt the constitution,<sup>63</sup> which was the most democratic of the early state constitutions.<sup>64</sup>

The provision of the constitution, with which this discussion is most concerned, was drafted by James Cannon <sup>65</sup> and reads as follows: "The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to

60. SELLERS, *op. cit. supra* note 39, at 156. "The teachers of Philadelphia appear to have been distinguished for their patriotism. We may add the name of Mr. Caruthers, about to spend the August holidays in camp, to those of Charles Thomson, James Cannon and James Davidson." *PASSAGES FROM THE REMEMBRANCER OF CHRISTOPHER MARSHALL, 1774-1776* at 99 n. (Duane ed. 1839).

61. Proceedings of Convention, July 25, 1776, reprinted in 9 *STAT. AT LARGE* 518.

62. "This (the Constitution) was understood to have been principally the work of Mr. George Bryan, in conjunction with a Mr. Cannon, a schoolmaster." *ALEXANDER GRAYDON, MEMOIRS OF A LIFE* 266 (1811).

"He [Cannon] had much to do with the text of the State Constitution of 1776." 1 *SCHARF & WESTCOTT, op. cit. supra* note 38, at 322 n. 1.

James Cannon "proved to be the best writer among the active leading members." *KONKLE, op. cit. supra* note 37, at 121.

Professor Cannon in consultation with Judge Bryan was most active in formulating the new Constitution. *Id.* at 124.

A writer, who used the name "Consideration," in defending the new Constitution in the Pennsylvania Gazette for Oct. 30, 1776 stated the following regarding its drafting: ". . . they perfected their work in such a masterly manner, that the idolators of power have sifted it as Satan did St. Peter, to find flaws in it to expose it to contempt and detestation; and at last their masterly penetration found out it must be a vile thing because a certain Schoolmaster had a principal hand in forming it." In a footnote it is stated that the "Schoolmaster" is "Mr. James Cannon, a learned, sensible and disinterested patriot." *Pa. Gazette*, Oct. 30, 1776. A portion of the above quotation is cited by SELSAM, *op. cit. supra* note 53, at 207.

James Cannon, using the name "Cassandra," carried on a debate with Dr. William Smith, the Provost of the College of Philadelphia, who, writing as "Cato" opposed independence. 1 *SCHARF & WESTCOTT, op. cit. supra* note 38, at 311.

63. Proceedings of Convention, Sept. 28, 1776, reprinted in 9 *STAT. AT LARGE* 585.

64. "The Constitution established the most democratic state government in America at the time." SELSAM, *op. cit. supra* note 53, at 183. "The Constitution was the product of the minds of the Radical Whigs, and was the most democratic of any adopted by the new states." FORTENBAUGH & TARMAN, *PENNSYLVANIA—THE STORY OF A COMMONWEALTH* 167 (1940).

A debate on the Constitution, approved by the Convention, was held in the State House Yard on Oct. 21, 1776. "Chief speakers, against [the] Convention, were Col. McKean and Col. Dickinson; for the Convention, James Cannon, Timothy Matlack, Dr. Young and Col. Smith of York County" *PASSAGES FROM THE REMEMBRANCER OF CHRISTOPHER MARSHALL, 1774-1776* at 111 (Duane ed. 1839).

65. *KONKLE, op. cit. supra* note 37, at 125, 127, 128.



the crimes.”<sup>66</sup> The requirement that punishments be made more proportionate to the crimes was based on a proposition of Montesquieu.<sup>67</sup>

Brissot de Warville, the French Revolutionary leader and writer on the criminal law, published between the years 1782 and 1785 an essay entitled “Reflections on the Constitution of Pennsylvania.” He stated *inter alia* that the friends of liberty and humanity would be pleased to read the article in the constitution which concerned the reform of the penal code. He continued as follows:

“For the Americans indeed guard themselves against consulting the incoherent and barbarous laws of Europe—this Roman law, an eternal source of litigation and calamities; they guard themselves against believing in our prejudices, in our lawyers, but they listen to the philosophers; they follow a second time the profound Locke; they read and correct Montesquieu and Rousseau; they are especially careful against following England too closely.”<sup>68</sup>

The section of the constitution providing for the reform of the penal laws did not have any effect until ten years later and in the meantime the following offenses punishable by death were added to the already large number of such offenses: treason against the state of Pennsylvania or the United States of America,<sup>69</sup> counterfeiting<sup>70</sup> and robbery committed at a distance from a highway.<sup>71</sup>

An act passed in 1786 abolished the death penalty for robbery, burglary, sodomy and buggery.<sup>72</sup> The preamble of this act stated that the reason for the enactment was the provision of the constitution of

66. PA. CONST. § 38 (1776), 9 STAT. AT LARGE 600. Section 39 of the Constitution was as follows: “To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary, houses ought to be provided for punishing by hard labor, those who may be convicted of crimes not capital, wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labor.” *Ibid.*

67. “It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser, and that which is more pernicious to society rather than that which is less. . . . It is a great abuse amongst us to subject to the same punishment a person who only robs on the highway, and another that robs and murders.” MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. 6, c. 16, pp. 130, 131 (Eng. ed. 1750).

68. Selsam, *Brissot de Warville on the Pennsylvania Constitution of 1776*, 72 PA. MAGAZINE OF HISTORY AND BIOGRAPHY 25, 40 (1948).

69. Act of Feb. 11, 1718, 9 STAT. AT LARGE 45.

70. Counterfeiting bills of credit for defense of state, Act of April 7, 1781, 10 STAT. AT LARGE 301; counterfeiting notes issued by the state, Act of March 21, 1783, 11 STAT. AT LARGE 81.

71. Act of March 8, 1780, 10 STAT. AT LARGE 110. The Act of 1718 prescribed the death penalty only for robbery committed near a highway. Act of May 31, 1718, § 4, 3 STAT. AT LARGE 202.

72. Act of Sept. 15, 1786, § 1, 12 STAT. AT LARGE 281. This section was re-enacted by the Act of April 5, 1790, § 1, 13 STAT. AT LARGE 511.

1776 that the penal laws should be reformed and the punishments made in some cases less sanguinary.<sup>73</sup>

In 1790 a reactionary constitution was adopted<sup>74</sup> which contained no provision corresponding to Section 38 of the constitution of 1776. Notwithstanding this fact the movement for the reform of the penal laws, particularly for the moderation of punishments, continued with increasing vigor. Two significant and important events in this connection were the lectures delivered in 1790 at the College of Philadelphia by James Wilson<sup>75</sup> and the publication in 1792 by Benjamin Rush, Professor of Clinical Medicine in the University of Pennsylvania, of an essay entitled "Considerations on the Injustice and Impolicy of Punishing Murder by Death."

In his lecture on "The Necessity and Proportion of Punishments," Wilson discussed the views of Montesquieu and Beccaria, who was inspired by Montesquieu,<sup>76</sup> and reached the following conclusions:

"The end of criminal jurisprudence is the *prevention* of crimes.

"Punishments ought unquestionably to be moderate and mild. I know the opinion advanced by some writers, that the number of crimes is diminished by the severity of punishments. I know, that if we inspect the greatest part of the Criminal Codes, their unwieldy size and their ensanguined hue will force us to acknowledge, that the opinion has been general and prevalent. On accurate and unbiassed examination, however, it will appear to be an opinion, unfounded and pernicious, inconsistent with the principles of our nature, and, by a necessary consequence, with those of wise and good government."<sup>77</sup>

73. § 38. The preamble also quoted § 39 of the constitution. See note 66 *supra*. The preamble also contained the following paragraph:

"And whereas it is the wish of every good government to reclaim rather than to destroy, and it being apprehended that *the cause of human corruptions proceed more from the impunity of crimes than from the moderation of punishments*, and it having been found by experience that the punishments directed by the laws now in force as well for capital as other inferior offences do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences, which is conceived may be better effected by continued hard labor, publicly and disgracefully imposed on persons convicted of them, not only the manner pointed out by the convention, but in streets of cities and towns, and upon the high-ways of the open country and other public works." (Emphasis added.) The portion italicized was taken from the following statement of Montesquieu: "If we inquire into the cause of all human corruptions; we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments." MONTESQUIEU, *op. cit. supra* note 67, at 122.

74. SELSAM, *op. cit. supra* note 53, at 259.

75. James Wilson was appointed Professor of Law in the University of Pennsylvania on April 3, 1792, but never delivered any lectures under this appointment.

76. Beccaria described Montesquieu as "immortal" and "great." BECCARIA, CRIMES AND PUNISHMENTS xiii, 17 (2d Am. ed. 1819).

77. 3 BIRD WILSON, WORKS OF JAMES WILSON, 3, 32 (1804). See Rosenberger, *James Wilson's Theories of Punishment*, 73 PA. MAGAZINE OF HISTORY AND BIOGRAPHY 45 (1949).

The principal conclusions announced by Rush in his essay were the following:

"The punishment of murder by death, is contrary to reason, and to the order and happiness of society."<sup>78</sup>

"The punishment of murder by death, checks the operations of universal justice, by preventing the punishment of every species of murder."<sup>79</sup>

"The punishment of murder by death, has been proved to be contrary to the order and happiness of society by the experiments of some of the wisest legislators in Europe."<sup>80</sup>

Shortly after the publication of this essay a criticism appeared over the signature "Philochoras." Rush in replying to this criticism referred to the views of Beccaria and Voltaire.<sup>81</sup>

During the year 1792 William Bradford, a justice of the Pennsylvania Supreme Court, prepared for Governor Mifflin at his request a memoir entitled "An Enquiry how far the Punishment of Death is Necessary in Pennsylvania."<sup>82</sup> In this memoir Justice Bradford, after referring to the views of Montesquieu and Beccaria<sup>83</sup> regarding the objects and effects of punishment for crime, reached the conclusion

78. RUSH, CONSIDERATIONS OF THE INJUSTICE AND IMPOLITY OF PUNISHING MURDER BY DEATH 3 (1792).

79. *Id.* at 4.

80. *Ibid.*

81. *Id.* at 13. Benjamin Franklin, in the early part of the year 1785, received from a friend in England, Benjamin Vaughan, a pamphlet entitled *Thoughts on Executive Justice with respect to our Criminal Laws*. The author of this pamphlet, who signed himself "A sincere Well-Wisher to the Public," was later identified as Dr. W. Madan. The thesis of this pamphlet was that all thieves should be hanged. About the same time Franklin received from France another pamphlet entitled *Observations concernant l'Exécution de l'Article II de la Déclaration sur le Vol*. The writer of this pamphlet contended that punishments should be proportioned to the offenses.

On March 14, 1785 Franklin wrote a letter to Vaughan in which he discussed the two pamphlets. In this letter he stated that it is an "Eternal Principle of Justice and Equity, that Punishments should be proportion'd to Offences," and expressed his approval of the following propositions of Montesquieu:

*L'atrocité des loix en empêche l'exécution.*

*Lorsque la peine est sans mesure, on est souvent obligé de lui préférer l'impunité.*

*La cause de tous les relâchemens vient de l'impunité des crimes, et non de la modération des peines.*

9 SMYTH, THE WRITINGS OF BENJAMIN FRANKLIN 291, 295 (1907).

82. BRADFORD, *op. cit.* *supra* note 25.

83. "The general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the discussion, and the philosophy of all Europe, roused by the boldness of their march, has since been deeply engaged on this interesting topic." *Id.* at Introduction A. Caesar Bonesana, Marquis Beccaria, published his *Essay on Crimes and Punishments* in 1764. His conclusion was as follows: "I conclude with this reflection, that the severity of punishments ought to be in proportion to the state of the nation. Among a people hardly yet emerged from barbarity, they should be most severe, as strong impressions are required; but in

"That the source of all human corruption lies in the impunity of the criminal not in the moderation of Punishment."<sup>84</sup> Referring to the section (38) of the constitution of 1776 which provided for the reform of the penal laws, he says, "This was one of the first fruits of liberty and confirms the remark of Montesquieu, 'That, as freedom advances, the severity of the penal law decreases.'<sup>85</sup> After presenting a statistical study showing that imprisonment at hard labor, as provided by the Act of 1786, had proved no less efficacious than the death penalty in preventing the commission of robbery, burglary, sodomy and buggery, Justice Bradford announced his conclusion that the only crime which should be punished by death was "*deliberate assassination*."<sup>86</sup> In this connection he pointed out that under the law of William Penn only "wilful and<sup>87</sup> deliberate murder" was declared to be capital.<sup>88</sup>

Governor Mifflin, in his address to the Assembly on December 8, 1792, specifically referred to the memoir of Justice Bradford and expressed the opinion that it merited "particular regard." He then stated the following: "I am persuaded you will find, that, without affecting the just distribution of penalties, in respect to the respective transgression, a mitigation of punishment may be safely and even beneficially extended to many, if not to all, of the offenses, except High Treason and Murder, for which the law still denounces the forfeiture of life."<sup>89</sup> The memoir was communicated to the Assembly by Governor Mifflin and was inserted in the Journal of the Senate.<sup>90</sup>

As a result of the recommendation of the Governor, based on the memoir of Justice Bradford, the Senate on February 22, 1793, approved the following resolutions:

---

proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended that the necessary relation between the object and the sensation should be maintained." BECCARIA, *op. cit. supra* note 76, at 160. VOLTAIRE, COMMENTARY ON BECCARIA'S CRIMES AND PUNISHMENTS 205 (1766), stated the following: "All those laws, the result of a sanguinary policy, exist but for a time: we easily see that they are not founded on principle, when we observe them to be temporary. They remind us of the necessity which, in cases of extreme famine, obliges men to eat each other: they cease to devour men as soon as bread can be obtained."

84. BRADFORD, *op. cit. supra* note 25, at 10. Bradford's conclusion was based on the following statement by Montesquieu: "If we inquire into the cause of all human corruptions; we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments." MONTESQUIEU, *op. cit. supra* note 67, at 122.

85. BRADFORD, *op. cit. supra* note 25, at 20.

86. *Id.* at 35 (emphasis added).

87. It should be noted that in the Act of 1682 (Penn's law) the conjunction was "or" not "and."

88. "In the laws of William Penn, the technical phrase *malice aforethought*, was avoided; and 'wilful and *premeditated* murder' is the crime which was declared to be capital. Yet murder, in judicial construction, is a term so broad and comprehensive in its meaning as to embrace many acts of homicide, where the killing is neither wilful nor premeditated." BRADFORD, *op. cit. supra* note 25, at 37.

89. 3 JOURNAL OF THE SENATE 14 (Pa. 1793).

90. *Ibid.*

Resolved, that, for all offenses (except those of high treason and murder of the first degree) which are made capital by the existing laws of Pennsylvania, the punishment shall be changed to imprisonment at hard labor, varying in duration and severity according to the degree of the crime.

Resolved, that the crimes, at the present classed under the general denomination of murder, be divided into murder of the first and murder of the second degree; the latter punishable by imprisonment at hard labor, or in solitude, or in both, for any time not exceeding twenty-one years.

Resolved, that all murder perpetrated by poison or by lying in wait, or by any kind of wilful, premeditated and deliberate killing, shall be deemed murder in the first degree, and all other kinds of murder shall be murder in the second degree; and the jury before whom any person shall be indicted for murder, if they find the party guilty thereof, shall, in their verdict, ascertain whether it be murder in the first or second degree.<sup>91</sup>

As no legislative action, other than the above mentioned resolutions, resulted from the recommendation of the Governor he again called attention, in his address to the Assembly on December 6, 1793, to the matter of reforming the penal law.<sup>92</sup> Accordingly on December 16th a committee of the Senate was appointed to prepare a bill on this subject.<sup>93</sup> Eight days later the committee reported a bill, in the drafting of which Justice Bradford participated,<sup>94</sup> containing nineteen sections, entitled "An act for the better preventing of crimes and for abolishing the punishment of death in certain cases."<sup>95</sup> The first section of this bill provided that no crime except "murder of the first degree" shall be punished by death and the second section provided "that all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing shall be deemed murder in the first degree."

It seems clear that the words "wilful" and "premeditated" were taken from the Act of 1682 and the word "deliberate" from the memoir of Justice Bradford. It is equally clear, from all that has been presented above, that these words were used advisedly and that it was intended they should be given their literal meaning,<sup>96</sup> in sharp contrast

91. 3 *id.* at 114.

92. 4 *id.* at 12.

93. 4 *id.* at 30.

94. TYSON, *ESSAY ON THE PENAL LAW OF PENNSYLVANIA* 18 (1827); 2 PA. J. PRISON DISCIPLINE AND PHILANTHROPY 209 (1846).

95. 4 *JOURNAL OF THE SENATE* 38 (Pa. 1793).

96. "Willful—self-determined; voluntary; intentional, as willful murder."

"Deliberate—formed, arrived at, or determined upon as a result of careful thought and weighing of considerations."

"Premeditate—to think on, and revolve in the mind, beforehand; to contrive and design previously." WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1946).

with "malice aforethought." This conclusion is further supported by the connection of the words "wilful, deliberate and premeditated" with the preceding clause "perpetrated by means of poison or by lying in wait." As murder by poison or by lying in wait requires thought and planning in advance of the killing the words "deliberate and premeditated" should be construed to mean the same kind of killing.<sup>97</sup>

When the bill was being debated on second reading, Section 2 was amended, on motion from the floor, by inserting after the word "killing" the words "or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary."<sup>98</sup> On April 22, 1794 the Assembly approved the amended act, the preamble and first two sections of which were as follows :

WHEREAS the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety: Therefore,

Sect. I. Be it enacted by the SENATE and HOUSE OF REPRESENTATIVES of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That no crime whatsoever, hereafter committed (except murder of the first degree) shall be punished with death in the state of Pennsylvania.

Sect. II. And whereas the several offences, which are included under the general denomination of murder, differ so

---

97. "The rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases, of like kind to those designated by the particular words." Coffey, J., in *Nichols v. State*, 127 Ind. 406, 408 (1891).

"When the murder is not committed in the perpetration of, or attempt to perpetrate any of the felonies named in the act of 1829, Code sec. 4598, then in order to constitute murder in the first degree, it must be perpetrated by poison or lying in wait, or some *other kind* of wilful, deliberate, malicious and *premeditated* killing; that is to say, the deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait." *McFarland, J.*, in *Rader v. State*, 5 Lea 610, 619 (Tenn. 1880).

"A reading of our statute shows that the legislature, when it used the words 'deliberate' and 'premeditated,' meant that something more than the bare intent to kill should exist in order to constitute murder in the first degree, for it first specified two cases of homicide in which both deliberation and premeditation are present to a marked degree, viz., by the administration of poison and by lying in wait, and then declared that murder perpetrated by *any other kind* of willful, deliberate and premeditated killing should be murder in the first degree. The specification of these two cases is significant; it emphasizes the meaning which the legislature intended should be given to the words, 'deliberate' and 'premeditated.'" *Gummere, C. J.*, in *State v. Bonofiglio*, 67 N. J. L. 239, 244 (1901).

98. 4 JOURNAL OF THE SENATE 80 (Pa. 1794).

greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment: *Be it further enacted by the Authority aforesaid*, That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.<sup>99</sup>

The preamble of this statute, with the exception of the provision for the reform of offenders, was based on Montesquieu and Beccaria.<sup>100</sup> The proposition regarding reform was apparently taken from the preamble of the Act of 1786.

### III

Soon after the statute was enacted the judges began to nullify its requirements by refusing to give effect to the meaning of the words "deliberate" and "premeditated," and by announcing the proposition that killing with an intent to kill constitutes first degree murder. In the December term of 1794 the President of the Fayette County Court stated that "If the design of killing be formed previous to the act, I am inclined to believe it is the true meaning of the law, that it is murder in the first degree."<sup>101</sup>

---

99. *Id.* at 242. The enacting portion of this statute remains unchanged except that kidnapping has been added to the list of enumerated offenses. In place of section I of the original statute the following provision regarding the punishment of both degrees of murder has been added:

"Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. The clerk of the court wherein such conviction takes place shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

"Whoever is convicted of the crime of murder of the second degree is guilty of a felony, and shall, for the first offense, be sentenced to undergo imprisonment by separate or solitary confinement not exceeding twenty (20) years, or fined not exceeding ten thousand dollars, or both, and for the second offense, shall undergo imprisonment for the period of his natural life." Act of June 24, 1939, P. L. 872, § 701, PA. STAT. ANN., tit. 18, § 4701 (Purdon, 1945).

100. MONTESQUIEU, *op. cit. supra* note 67, at 118, 122; BECCARIA, *op. cit. supra* note 76, at 98-100.

101. *Pennsylvania v. M'Fall*, Add. 255, 257 (Pa. 1794).

In the case of *Respublica v. Mulatto Bob*,<sup>102</sup> decided in 1795, Chief Justice McKean of the Supreme Court instructed the jury as follows: "It has been objected, however, that the amendment of our penal code renders *premeditation* an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that *the intention* remains, as much as ever, the true criterion of crimes, in law, as well as in ethics. . . ." <sup>103</sup> In 1796 the President of the Washington County Court, in charging the jury, stated the following:

"If the death was occasioned by the violent acts of the prisoners, and if those acts were done, with a design to kill, it is murder in the first degree."<sup>104</sup>

A year later Chief Justice McKean told a jury that the legislature had given the words "deliberately" and "premeditatedly" a construction different from their ordinary meaning.<sup>105</sup>

President Rush of the Philadelphia County Court in 1807 instructed the jury as follows:

"It is alleged, that the act of Assembly of 1794, has produced a change in the law of murder, in Pennsylvania. It has so, to a certain extent. It has been decided, since the passing of that act, and I think very properly, that the *intention* is the essence of the crime, and that killing a person with circumstances that evidence a depravity of heart, is, in Pennsylvania, murder in the first degree."<sup>106</sup>

The Supreme Court in the case of *Keenan v. Commonwealth*,<sup>107</sup> decided in 1862, summarized the preceding opinions regarding the necessary state of mind for first degree murder by saying that "our reported jurisprudence is very uniform in holding that the true criterion of the first degree is the intent to take life."<sup>108</sup> In contrast with this view is the following opinion announced in 1858 by Justice Johnson of the Supreme Court:

"By the Act of 1794, murder by means of poison, or by lying in wait, or 'any other wilful, deliberate, and premeditated killing,' is murder in the first degree. Where the crime was not committed in the attempt to perpetrate either of the felonies mentioned, in which a specific intent is not an element, the legislative will is most carefully

102. 4 Dall. 145 (Pa. 1795).

103. *Id.* at 146.

104. *Pennsylvania v. Lewis*, Add. 279, 283 (Pa. 1796).

105. *Commonwealth v. O'Hara*, 7 SMITH, LAWS OF PA. 694, 695 (1797).

106. *Commonwealth v. Dougherty*, 7 SMITH, LAWS OF PA. 695 (1807).

107. 44 Pa. 55 (1862).

108. *Id.* at 56.



expressed, to limit the capital offence to cases where it is the result of a wilful, deliberate, and wicked purpose. Poisoning and lying in wait are enumerated, and 'any *other* wilful and deliberate killing,' is placed side by side as equally heinous, because equally the result of a wicked settled purpose, and to be followed by precisely the same punishment." <sup>109</sup>

In this opinion effect is given to the meaning of the word "deliberate."

The most frequently cited statement regarding the requisite state of mind for first degree murder occurred in the charge of Justice Agnew to the jury in *Commonwealth v. Drum* <sup>110</sup> which was as follows:

"In this case we have to deal only with that kind of murder in the first degree described as 'wilful, deliberate, and premeditated.' Many cases have been decided under this clause, in all of which it has been held that the *intention* to kill is the essence of the offence. Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated." <sup>111</sup>

This statement standing alone would indicate that Justice Agnew was of the opinion that all that was required for first degree murder was a killing with the intent to kill. However, a reading of his entire charge, particularly the following statement, will negative this view:

"A learned judge (Judge Rush, in *Commonwealth v. Richard Smith*) has said: 'It is equally true both in fact and from experience, that *no* time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it.' But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought, that no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate." <sup>112</sup>

---

109. *Kelly v. Commonwealth*, 1 Grant 484, 491 (Pa. 1858).

110. 58 Pa. 9 (1868).

111. *Id.* at 16.

112. *Ibid.*

Agnew's considered view that substantial effect should be given to the words "deliberate" and "premeditated" was expressed by him when, as Chief Justice, he rendered the opinion of the Court in *Jones v. Commonwealth*,<sup>113</sup> decided in 1874. He stated the following:

"But ample time for reflection may exist, and a prisoner may seem to act in his right mind, and from a conscious purpose; and yet causes may affect his intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree. When the evidence convinces us of the inability of the prisoner to think, reflect and weigh the nature of his act, we must hesitate before we pronounce upon the degree of his offence. That reasonable doubt which intervenes to prevent a fair and honest mind from being satisfied that a deliberate and premeditated purpose to take life existed, should throw its weight into the scale to forbid the sentence of death. Intoxication is no excuse for crime; yet when it clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree."<sup>114</sup>

This opinion was followed in a number of subsequent cases, the last decided in 1944.<sup>115</sup> In contrast to the holdings in these cases it has been held in a number of other cases that intoxication will reduce the degree of murder only where it negatives the intent to kill.<sup>116</sup>

A difference of view is also found in the pronouncements of the Supreme Court with regard to the question whether mental disorder should be considered in determining if a killing may be reduced from first to second degree murder. An affirmative answer to this question was given by Chief Justice Agnew in the case of *Jones v. Common-*

113. 75 Pa. 403 (1874).

114. *Id.* at 406.

115. *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110 (1892); *Commonwealth v. Dudash*, 204 Pa. 124, 53 Atl. 756 (1902); *Commonwealth v. Eyer*, 217 Pa. 512, 66 Atl. 746 (1907); *Commonwealth v. McCausland*, 348 Pa. 275, 35 A. 2d 70 (1944). In the *McCausland* case Stearne, J., stated the following:

"Intoxication sufficient to deprive the mind of power to form a design with deliberation and premeditation, and to properly judge the legitimate consequences of an act, will reduce a killing from murder in the first degree to murder in the second degree." *Id.* at 277, 35 A. 2d at 71.

116. *Commonwealth v. Detweiler*, 229 Pa. 304, 78 Atl. 271 (1910); *Commonwealth v. Walker*, 283 Pa. 468, 129 Atl. 453 (1925); *Commonwealth v. Lehman*, 309 Pa. 486, 164 Atl. 526 (1932); *Commonwealth v. Iacobino*, 319 Pa. 65, 178 Atl. 823 (1935). In the *Detweiler* case Moschzisker, J., stated the following: "The law as settled in our state is, 'The mere intoxication of the defendant will not excuse or palliate his offense unless he was in such a state of intoxication as to be incapable of conceiving any intent. If he was, his grade of offense is reduced to murder in the second degree.'" 229 Pa. 304, 308, 78 Atl. 271, 272 (1910).

*wealth*,<sup>117</sup> to which reference has already been made. A contrary result was reached by the Court in three cases,<sup>118</sup> the latest of which was decided in 1931. In none of these cases was mention made of the opinion of Chief Justice Agnew.

It is probable that, when the opportunity arises, the courts will give further consideration to the meaning of the statute on first degree murder.

---

117. "Looking then at the state of Jones's mind from the 10th until the 19th of June, and down to the very moment he fired the pistol, and, also, at the suddenness of his quarrel with Mrs. Hughes, her call for the poker, and lifting the stool, it seems to us a matter of grave doubt whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a distorted mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents a case of the preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind was wanting, which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased, with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation and without necessity, and in a frame of mind evincing recklessness and that common-law malice, which distinguishes murder from manslaughter." Agnew, C. J., in *Jones v. Commonwealth*, 75 Pa. 403, 410 (1874).

In *Commonwealth v. Hillman*, 189 Pa. 548, 42 Atl. 196 (1899), and *Commonwealth v. Werling*, 164 Pa. 559, 30 Atl. 406 (1894), the trial judge in his charge to the jury stated the rule, laid down by Chief Justice Agnew in *Jones v. Commonwealth*, that mental disorder may reduce a murder from first to second degree.

118. *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899); *Commonwealth v. Hollinger*, 190 Pa. 155, 42 Atl. 548 (1899); *Commonwealth v. Szachewicz*, 303 Pa. 410, 154 Atl. 483 (1931). In *Commonwealth v. Hollinger* the Supreme Court approved the following statement by Simonton, P. J., of the Dauphin County Court of Oyer and Terminer in overruling a motion for a new trial:

"The courts do not ask the jury to undertake the impossible task of discriminating between degrees of insanity so as to find a prisoner incapable of forming a deliberate and premeditated intent to kill, while he has still so much sanity that he is a person of sound memory and discretion, as he must be to be guilty of murder even in the second degree. If he is not a person of sound memory and discretion, if he can not understand the nature of his acts and discern between right and wrong with relation thereto, he is entitled to be acquitted; if his memory is sound and he can so discern he is fully responsible." 190 Pa. 155, 160, 42 Atl. 548, 549 (1899).