indictment charges murder in the second degree only."

In order to determine this question, we are led to an examination of the statutes of the Territory. On page 51 of the Laws of Utah, title *second*, section *four*, murder is defined to be "The killing of a human being with malice aforethought, either expressed or implied," which is merely declaratory of the common law; or, in other words, it is the common law definition of murder. This statute, in the opinion of the Court, does not alter the law of murder. What was murder before its passage, is murder now; what is murder now, was murder before the statutes was passed. Sections five and six of the same statute declares the penalty for murder in certain cases: Section five prescribing that when committed in certain specified modes or under certain circumstances therein mentioned, the punishment shall be death; while section six provides that, in all other kinds of murder the convict shall be punished by imprisonment for life, or a term of years. It is a well settled general rule, that in an indictment for an offence created by statutes, it is sufficient and usually necessary to describe the offence in the words of the statutes, or their equivalent. But when the statute is only declaratory of what was previously an offense at common law, it has been held in numerous cases by high authority, that, notwithstanding the statute, it is sufficient if the pleader define the offence by stating the common law ingredients necessary to its consummation. It necessarily follows, if these conclusions are correct that the averments necessary to make a good indictment at common law, would be sufficient under the statute. This, then, leads us to inquire what would be necessarily an indictment at common law. All lawyers will at once admit that the material averment of an indictment for murder is that the defendants feloniously and of their malice aforethought, did kill and murder the deceased. To determine, then, whether the indictment in the case at bar is good when tested by this rule, we have only to examine the first count of the same. (Here the Court read the first count in the indictment.

The Court is of the opinion that this indictment contains all the material averments necessary to its validity either at common law or under the statute. If a good indictment for murder, it must necessarily follow and be held to include all degrees from the highest to the lowest; also including manslaughter. The Court is fully satisfied that the pleader when drawing an indictment under the statute need not designate the degrees of murder, or use the words "Wilful, deliberate and premeditated," or either of them. But on hearing the evidence the jury have the right, and by the 7th section of the statute, it is made their duty, to enquire and determine whether it is murder in the first or second degree or manslaughter, and return their verdict accordingly. The indictment in this case being good the jury was authorized to find as it did. The Court entertaining these views must therefore hold that the first point is not well taken and it is accordingly overruled.

The second point contended for by defendants' counsel is "That the indictment against said defendants was found by a Grand Jury composed of only seventeen (17) persons, of whom six were talesmen summoned from the bystanders." Owing to the many imperfections of our statute, the Court has had no little trouble in arriving at a satisfactory solution of this question, and has been lead to a full examination of the statute as well as numerous other authorities. The fifth section of the thirty-fifth chapter of the statutes of Utah, page sixty-nine, provides "That when a District Court is to be held, a Grand Jury of twenty-four persons shall be summoned at least thirty days before the commencement of the term." The eleventh section of the same statute provides that after the Grand Jury have been empanneled, sworn, etc., they, or any twelve of them, may, upon what seems to them good and sufficient evidence, find an indictment. This statute, while it provides for the summoning of twenty-four persons, does not require that number to be sworn, but does provide that twelve may find an indictment. In the examination of this question the Court has had occasion to examine the statutes of many different States, in which similar provisions are found. In some of the States the law requires that not less than sixteen jurors shall be sworn; but there is no such requirement in our statute. We have, therefore, to seek some rule, outside of the statute, established by acknowledged authority, by which to be governed in the empanneling of a grand jury. It is contended by counsel for defendants, that twenty-four grand jurors must be empanneled and sworn, and that a less number is not a legal jury. If such be the literal reading or true construction of this statute, it is manifest that it would defeat the object of the statute itself, no provision having been made for drawing talesmen from the bystanders. In case of the absence of any one of the twenty-four summoned we would be compelled to dismiss those who did appear and thus deprive the Court of a grand jury and in effect do away with all criminal procedure in the courts. The Court is not prepared to establish so dangerous a rule, but prefers to adopt one more in consonance with reason and thus uphold, rather than nullify, the clear intention of the legislature, viz: that, notwithstanding the statute requires twenty-four persons to be summoned, no more than twenty-three should be sworn and empanneled; otherwise a complete jury of twelve might find a bill, when, at the same time, a complete jury of twelve might dissent and ignore it, thereby defeating the law. It appears from the weight of all authority examined by the Court that a grand jury composed of any number from twelve to twenty-three, is a legal grand jury. The Court, therefore, holds that the indictment in the case at the bar, was founed by a legal number of grand jurors.

It is also contended by counsel for defendants that a part of the grand jurors were talesmen, and as the statute makes no provision for supplying the panel by this mode, the jury in this case was not a legal grand jury. The answer to this objection is this: by the the Organize Act of the Territory, the constitution and laws of the United States are extended over this Territory and made a part of its law. The common law having become a part of the law of the United States, it is, so far as it is a part of that law, a part also of the law of this Territory. The statute of the Territory not having provided any method of filling up the panel by talesmen selected from the bystanders, we are compelled, as in other cases of statutory omissions, to resort to the ever-present rule of the common law which authorizes talesmen to be summoned and thus expedites and renders practicable the administration of the law. But whether this view be correct or not there is still another answer to the question which seems to be decisive. It is a well settled rule that mere irregularities in selecting and empanneling the grand jury can only be taken advantage of in one way, viz: by challenge to the array. But when the objection to the juror relates to his qualification for some reason which would render him incompetent, had he been regularly summoned and empanneled, in that case advantage can be taken of it, on demurrer, motion to quash or in arrest of judgement.

The array not having been challenged and the irregularities being simply in the empanneling of the jury it is too late, at this time, to take advantage of the irregularities complained of, if any exist. The second point is therefore overruled. The same answer will apply to the third point, which is also overruled. The fourth point contended for by the defendants is that the Court refused to allow them to file a plea in abatement but compelled them to plead to the merits. The record shows, that after the indictment was returned into court, the defendants filed a general demurrer to the same, which, after full argument, was overruled by the Court. It then appears that the defendants withdrew the demurrer and offered to plead in abatement, which offer was refused by the Court on the ground that by demurring generally to the indictment, they thereby waived their right to afterwards plead a dilatory plea. By all rules of pleading dilatory pleas must be pleaded at the earliest opportunity, or they are waived. The Court sees nothing in this case to change the general rule, and upon full investigation, is satisfied that no error was committed in refusing to allow the said plea to be filed. The fourth point must therefore be overruled.

The fifth point was not on the argument in arrest of judgment, very strenuously contended for, but the Court has noticed the same in its investigation and is fully satisfied it is untenable. The reasoning on the first point is applicable to this also and fully settles the same.

As these questions seemed to involve the life of three persons, the Court has devoted an unusual amount of time and labor to their examination, and after a full and careful consideration of the whole subject is convinced that no error has been committed which has done injustice to the defendants or for which the judgment should be arrested.

The motion in arrest of judgment is therefore overruled.

The three prisoners were then ordered to stand up, whereupon Judge Wilson pronounced the following

SENTENCE.

Having disposed of the legal questions involved in your case it now becomes the painful duty of the Court to pronounce upon you sentence of the law. Have you or either of you anything to say why it should not now be pronounced? (Each of the prisoners having made a brief statement, Judge Wilson proceeded.)

You were indicted by a grand jury of your countrymen for the murder of one Calvin F. Russell, upon which charge you have been tried and found guilty by an impartial jury. In view of the enormity of the crime charged against you, the Court would have been gratified if the facts elicited on your trial had warranted a different conclusion; but I am compelled to say that the evidence was clear, convincing and conclusive—showing the murder to have been cold, deliberate and premeditated, without one mitigating circumstance in your favor, and, in the opinion of the Court, fully warranted the verdict of the jury.

The Court feels that you have had an impartial trial. You were defended by the ablest and most diligent attorneys at the bar, by whom your rights were well guarded, and every point and question that could possibly avail you, preserved. The Court and jury gave you the benefit of every possible doubt and after a fair and careful hearing before a patient, honest and humane jury you have been pronounced guilty of murder in the first degree, the punishment for which the law declares to be death by hanging, shooting, or beheading; either of which modes the Court will now give you an opportunity to choose as provided in the statutes. (The prisoners here each chose to be shot.)

The Court is fully impressed with the fact that the words it is about to utter will limit your earthly career, but sad and solemn as that duty is it must be performed. Whatever may be my convictions as a private individual, or whatever may be the sentiment of the people on the subject of the death penalty, it is not my province now to consider. The law says the penalty of your crime shall be death and the Court, sitting simply to administer the law as found in the statute book, has no power, if it had the disposition, to make, change, or modify it. It is an old and true maxim "That he who presumes to be wiser than the law is a dangerous citizen." How much more true when applied to a Judge sitting as a Court, sworn to administer the law as it is prescribed by those whose sole province it is to enact it! It therefore has no alternative and can adopt but one course and it is that which the law prescribed.

The Court feels it to be its duty to state that it has examined with great care the evidence as well as the law in your case, and with that candor and fairness with which it would speak to dying men it says to you there can be no escape from the awful doom about to be pronounced. In the spirit with which the Court would address a dear friend under the most solemn of all circumstances it entreats you all not to waste the little precious time still left you, indulging in vain hopes that can never be realized, but studiously devote it to preparation for the last great trial in that High Court above from which there is no appeal and where mistakes are never made. There you will meet your murdered victim sent into the presence of his Maker by your hands without one moment's warning or preparation, and to whom you refused mercy, although with his dying breath he appealed to you in behalf of his wife and children, hoping thereby to awake if possible one spark of humanity in your souls. You heeded not his dying voice, but by one more fatal shot ushered his unprepared soul into eternity. But, notwithstanding you hearkened not to the cries for pity uttered by your poor bleeding victim, still you may yet hope that the Great Ruler of the Universe will have mercy on your dying souls, if with prayer and true repentance you even now approach the Throne of Grace. I exhort you, then, as dying men, to endeavor to prepare yourselves to meet your God and earnestly seek for that benign mercy which can alone mitigate your great crime and meliorate your sad doom. I beseech you as men standing on the verge of the grave, with but a narrow span between time and eternity, that you devote every moment of the few days now left you on earth to earnest preparation to meet Him who alone can temper eternal justice with infinite mercy. Hear now the sentence of the law.

It is ordered and adjudged by the Court that you Thomas Brannigan and you Jack Lavelle and you Charles Howard, having been convicted by a jury of your country of the crime of murder in the first degree, be taken hence by the Territorial Marshal to some safe and secure place and there kept in solitary confinement until Monday the 26th day of July, A.D. 1869, and that on that day between the hours of 9 a.m. and 4 p.m. you be taken by the Territorial Marshal to some suitable place and there executed by being shot until you are dead, and may God have mercy on your souls.

REMARKS.

By President BRIGHAM YOUNG, delivered in the New Tabernacle, Salt Lake City, April 8, 1869.

[REPORTED BY DAVID W. EVANS.]

We will now look to the Bishops to collect the means in their several wards for gathering the Saints; and, when it shall be collected, they must forward it to my office. I feel disposed to say to the Latter-day Saints and to all people, that as far as we have collected means to bring home the Saints from the Old World to the land of Zion, we have never yet suffered any man to use one dollar of it, or to divert it in the least from the purpose for which it was intended. There is a large amount due the Perpetual Emigrating Fund Company; how much I do not know. The last report I had there were between nine and ten hundred thousand dollars due to this Fund, from parties who had been emigrated by it; but how much there is now I do not know. When the brethren and sisters put anything into that Fund, no matter how much or how little, they may put it down for a fact in their own minds, that this money is never diverted from the channel for which it is intended. It is spent to bring the people here; but after their arrival many of them neglect to pay it back, although we gather some little means; but had it not been for donations, the gathering of the poor from the nations would have stopped years ago. We attend to this business, buy and keep the books, and all who are engaged in doing this business are sustained without infringing upon this means. We should be glad if the feeling was more general among those who are indebted to the P. E. Fund to pay their indebtedness; it would be very satisfactory, as the money could then be returned directly to our friends in the old country to bring them here; but as this is not done we have to depend on donations. We want the Bishops to collect what they can, and as soon as they can, so that we may send for the Saints who are scattered abroad. There are a great many of them who can come part of the way with their own means, and with a little help they can come through. Some have to be brought all the way by the Fund, but most of the means donated goes to assist those who are able to help themselves a little. We wish the bishops to hearken to this, and when they reach their homes from this Conference pay attention to this business.

We are building up the kingdom of God, and we have something to do besides sitting and singing ourselves away to everlasting bliss. This Work entails upon the Saints manual labor and a variety of business transactions; it is a national affair; it is a kingdom, it is the kingdom of God. He has set up this kingdom; He has blessed those who sustain it. He has poured out His Spirit upon the people, so that many have received the truth and gathered within the pale of the church; and a percentage of those who have received the truth still cling to the faith. But I will say to the Latter-day Saints that not fifty per cent. of those who have received the truth are now in the church, and I suppose not over thirty per cent.; but a great many are still in the faith. It is a matter of wonder sometimes what has become of those who have bowed in obedience to the gospel. They are scattered all over the country. I doubt whether you can find a county or even a city on the continent of North America that does not contain apostate "Mormons." California and Oregon were started and built up by apostate "Mormons." What is now called Washington Territory received a percentage from this church in its early settlement and development. St. Louis was partly built up by apostate "Mormons," and it is still sustained by them; and in the whole western country foundations have been laid for settlements by the "Mormons" and those who have left the church. The "Mormons" started the first printing press west of the Mississippi river, with the exception of one at the seat of government in the State of Missouri. The first wheat sown in the western country was sown by the "Mormons;" they planted the first fruit trees, built the first mills, taught the first schools and made the first improvements, with very few exceptions. And on the Pacific slope who first brought civilization? I mean true civilization, not that we see following the railroad. Why, the "Mormons." Who brought the first library? The Latter-day Saints. Who made the first bricks, built the first houses and started the first city? The Latter-day Saints. It is marvellous but it is true. We have been the pioneers from the Mississippi to the Pacific ocean.

Do you think the devil will give us one inch of ground that we do not gain and retain by our own power, or rather by the strength which God bestows upon us? No, not an inch; neither will the inhabitants of the earth if they can help it. Would they let us live any more than they did in Missouri or Illinois if they had the power to remove us? I think not. But the Lord Almighty is a bulwark around this people, and will be as long as they trust in Him. Were it not for the fortresses of the Almighty, we should have been driven from our homes long before this. What will the world do for us? What will our Government do for us? Why, after settling this country for twenty years, they have at last deigned to extend to Utah the benefit of the land laws,—pre-emption rights, homestead advantages. Whom have they sent here as our officers. As a general thing, such men as Drake and his associates. How did they love the "Mormons?" They make me think of a man named Bell in the eastern country, who used to say if he did not love a man he would damn him, and would damn the man that would not walk ten miles over hetchell teeth to damn him. It was so with this man Drake; he would damn the "Mormons" and he would damn the man who would not get up at midnight and walk barefooted ten miles over hetchell teeth to damn them. I think hereafter that we will take such men up gently and carry them out of the Territory, and tell them not to come back again. But we have gentlemen here as officers, men whom