

to the benefit of that doubt, and it would operate to his acquittal.

I may further say that, being the exclusive judges of the testimony, as well as the credibility of the witnesses, if there be any conflict in the testimony, it is your duty to reconcile such conflict, so as to make the evidence which has gone to you a consistent whole; but if, after a calm review of the evidence, you are not able to reconcile the proof which may be conflicting, if any such there be, then it is your province to reject such as may seem to be inconsistent with the truth, and adopt such as may seem to be consistent with the truth.

Now, gentlemen, keeping these ideas and principles fairly in your mind, and applying them to all and every part of the charge which I shall hereafter give you, I will now proceed to give you the law, as I understand it, as applicable to the facts of this case. Whether I state the law correctly or not is not for you to say. You are to take the law as I shall give it to you, and follow it.

The statutes of the Territory, in force at the time this offense is said to have been committed are as follows:

"Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. All murder which is perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate or premeditated killing, or which is committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree. Murder committed otherwise than as set forth in the preceding section is murder in the second degree. Manslaughter is the unlawful killing of a human being without malice, and it is of two kinds: First, voluntary, upon a sudden quarrel or heat of passion; and, second, involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection."

That, gentlemen, is the law defining the offenses, as I understand it, charged in the indictment in this case, so far as I deem the law applicable to the facts of this case, and we will first inquire concerning the offense of murder in the first degree, because, as I say, this indictment includes murder in the first degree, second degree, voluntary and involuntary manslaughter; and it therefore becomes the duty of the court to charge you upon each and every of those four offenses.

The government, by its counsel, does not insist that this offense was committed by poison, nor in the attempt to perpetrate any arson, burglary, robbery, or any of those offenses mentioned in the statute; but it does insist that the facts show that the deceased was killed by the defendant under such circumstances as to make the killing wilful, deliberate, premeditated and with malice prepense.

I therefore charge you, gentlemen, in so many words, that if you

find from the facts that the defendant lay in wait for the deceased with a view to shoot and kill him, and that he did shoot and kill him while lying in wait, then the defendant is guilty of murder in the first degree. The law makes murder in the first degree in that kind of a case consist of the means whereby it is done, so that if it was done by lying in wait, then the law says that killing by that means is murder in the first degree. And if the facts shall satisfy you that the killing was done by the defendant while lying in wait, you need go no further in your interrogatories, but stop there, and return a verdict of murder in the first degree.

I further charge you that if the killing was done by the defendant wilfully, that is, of purpose, with an intent that the act by which the life of the party is taken shall have that effect, deliberately, that is, of cool purpose, maliciously, that is, with malice aforethought, and with premeditation, that is, a design must be formed to kill before the act by which the death is produced is performed—if you find from the facts that the killing was done under the circumstances just described to you, then it is murder in the first degree, and you need go no further in your inquiries, but stop there and pronounce a verdict of murder in the first degree. The premeditation need not have been of any long standing. It is sufficient if the design to kill was formed but a moment before the act was done by which the life of the deceased was taken. But, gentlemen, if, after a thorough and careful consideration of the facts, you come to the conclusion that the defendant did not kill the deceased by lying in wait, and that he did not kill him wilfully, deliberately, premeditatedly and with malice aforethought, as I have described, then it is your duty to acquit him of that crime, and next inquire whether he be guilty of the crime of murder in the second degree.

Murder in the second degree is the unlawful killing of another with malice aforethought. It is distinguished from the crime of murder in the first degree in this, that there is no premeditation nor deliberation requisite to make it the crime of murder in the second degree. But, if one wilfully kill another, that is, of purpose, knowing the act whereby a life is taken shall have that effect, maliciously, that is, of malice aforethought, it is murder in the second degree. I therefore instruct you that if you find from the facts that the defendant wilfully, that is, of purpose, in intending that the act, the firing of the pistol, should have the effect to take the life of Pike, maliciously, that is, with malice aforethought, then the defendant would be guilty of murder in the second degree, and you should so find. I may say to you that malice may be expressed or implied. It is implied where life is taken by the use of a deadly weapon, as a gun or a pistol. Therefore, if you find from the facts that the life of Pike was taken with a deadly weapon by the defendant, from that the law im-

plies malice, all other questions aside, concerning which I shall hereafter instruct you, and the killing would be murder in the second degree. But, gentlemen, after having carefully surveyed the facts in the case and considered them, if you find that the defendant is not guilty of murder in the second degree, then you shall acquit of that offense, and next proceed to inquire whether he be guilty of manslaughter.

Voluntary manslaughter is the unlawful killing of a human being without malice, upon a sudden heat of passion or quarrel. The distinguishing feature between murder in the second degree, or common law murder, and manslaughter, is that in the latter there is no malice. If one slays another upon a sudden heat of passion, or upon sufficient provocation, although he used a deadly weapon, the law does not imply malice, but the fact that it was done under the circumstances described negatives malice. I therefore instruct you, that if you find that the defendant slew the deceased with a pistol, but that he did it under passion, which was aroused, that, for the time being, deprived him of the power to reason and think and deliberate, then that would be voluntary manslaughter, and there would be no malice in the killing. But the law, in tenderness to human life and liberty, would attribute the killing to the sudden heat of passion rather than to malice; so that if you find that the defendant is guilty of voluntary manslaughter, as I have described, then you will return a verdict to that effect. But if the facts shall show that the defendant be not guilty of voluntary manslaughter, then you shall acquit him of that offense, and inquire whether he be guilty of involuntary manslaughter.

Involuntary manslaughter is the killing of a person in the commission of some unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due care and circumspection. I therefore charge you, that if you find that the killing was done under such circumstances as just predicated, it would be involuntary manslaughter, and you should convict of that offense. But if you should fail to find the facts sufficient to warrant conviction of that crime, you shall acquit of that offense.

Concerning the law of manslaughter, I am asked by the counsel for the defendant to instruct you as follows: That no precise time can be laid down by the court as a rule of law which can be held to be sufficient "cooling time." It may depend upon the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the fact whether the injury inflicted by the provocation is more or less permanent or irreparable. The question is one of reasonable time, depending on all the circumstances of the case, and must be determined by the jury.

I have some doubts, gentlemen of the jury, as to whether that is the law as applicable to the facts of this