THE COLUMBIA DEMOCRAT.

"I have sworn upon the Altar of God, eternal hostility to every form of Tyranny over the Mind of Man."—Thomas Jefferson.

PRINTED AND PUBLISHED BY JOHN S. INGRAM AND FRANKLIN S. MILLS.

Volume I. BLOOMSBURG, COLUMBIA COUNTY, PA. SATURDAY, FEBRUARY 10, 1838. Number 42.

CHARGE OF THE COURT
IN THE TRIAL OF
THOMAS T. POKE.

In the Oyer and Terminer for Columbia county, January Term, 1838, Judge LEWIS delivered the following charge to the Jury.

GENTLEMEN OF THE JURY:

Thomas T. Poke, the prisoner at the bar, is charged with the crime of murder. The indictment charges him with the murder of John Dornell by striking him upon the head with an axe on the 25th of November, 1837. To this indictment the prisoner has placed upon the record the plea of "not Guilty," and has put himself upon his country for trial. You are that country, and it is for you, after you have heard the necessary instructions from the court upon matters of law, to determine upon his guilt or innocence. If he should be found guiity of murder of the first degree his punishment is death. It is therefore of immense importance that we should give the case our most careful and solemn deliberation in order that we may arrive at a correct conclusion. We must guard against the commission of any errors which we may never have it in our power to recall or correct. It is said that an excitement prevails in regard to this trial. Where the life of a fellow being has been suddenly taken away and a charge of murder is made, the sympathies of the people become enlisted and an excitement is usually produced. But it is not known, nor is it proper to be known, whether this feeling is *for* or *against* the prisoner. It is to have no influence on your minds whatever. The solemn obligations you have severally taken require you to pay no regard to any other considerations than those arrising from the law and the evidence in the case. There is no reason to believe that there is any other feeling abroad than a natural desire to see justice administered according to law in a case so solemnly interesting to the prisoner and the public.

It has been stated in the opening that we are answerable at the bar of public opinion and at the bar of God for the manner in which we discharge our respective duties on this occasion. Public opinion, on a proper occasion, is deserving of a most respectful consideration. But it is to have no influence whatever in this investigation. We are to determine this case solely according to the evidence, and the laws of the country, holding ourselves answerable only at the bar of that Omniscient Judge who judges in righteousness as well as in mercy.

We have been aided in this trial by able and efficient counsel. Painfully as the prisoner's counsel may feel the responsibilities which have fallen upon them, they may rest satisfied with the reflection that, whatever may be the result, they have discharged their duty to the prisoner worthy of all praise. The learning and zeal which they displayed on the occasion in his behalf fully acquit them of every obligation which they owed to their client. The commonwealth's counsel have, in a like manner, discharge the duties which they owed to the community with a zeal and ablility deserving of equally high commendation.

When we owe an obligation it is proper to acknowledge it. It is all important, in considering this case, that there should be no doubt in reference to the cause of John Dornell's death. The *post mortem* examination, skillfully conducted and clearly detailed in evidence by Dr. Russel Park, Dr. J. C. Murray, and Dr. Wm. McMahan, leaves no doubt on this subject. They found upon examination a fracture in the scull extending from one side above the ear around the back part of the head to the other side, of the length of nine and a half inches, with a transverse fracture extending three quarters of an inch from the large fracture. They also found extravasated and coagulated blood, between the scull and the brain (I speak not of *membranes*, for they are not material) in a mass of 3 or 4 inches in diameter and one inch deep. There were other injuries apparent in the body of the brain itself—but the pressure of such a large mass of congulated blood was sufficient, in the opinion of these medical gentlemen, to produce death. On the correctness of this opinion there can be no doubt; and the court and jury as well as the community at large owe an obligation to these gentlemen for placing the facts in regard to this branch of the case, before them with so much clearness that there can be not danger of mistake. In proceeding to give the necessary instructions upon the law of the case it is proper to apprise the jury that they are by the constitution in a case of this kind the judges of the *law* as well as of the *facts*. It is the duty of the court to instruct upon questions of law, but this instruction, although entitled to respectful consideration, is not absolutely binding in a criminal case. The jury may *acquit* contrary to the opinion of the court, and there is no power to set the verdict aside for that cause. But if they *condemn* contrary to the opinion of the court, it is in our power to grant relief by setting the verdict aside. This authority was originally given to the jury in the country from which we derive our laws, as a wholesome check upon the power and influence of the crown, which was sometimes exerted in state prosecutions to the oppression of the subject. Although there is no danger at present to be apprehended from this sourle, still the power remains as already defined, with the jury, and we cheerfully recognise its existence without any wish to withdraw it or encroach upon your rights and responsibilities in this respect.

It is a principle recognised in our law books that if the jury have reasonable doubts in regard to any question of law or fact arising in the cause, the prisoner is entitled to the benefit of these doubts, and those questions which the jury are not satisfied, beyond all rational grounds of doubt, to decide against the prisoner, are, in accordance with the humane doctrine of the common law, to be determined in his favour.

On this Indictment it will be the duty of the jury to determine and ascertain in their verdict. in case they find against the prisoner, whether the crime of which they find him, guilty is "*murder of the first degree*," "*murder of the second degree*," or "*voluntary manslaughter*." In case they should be of opinion that he is guilty of "*involuntary manslaughter*" only, it will then be their duty to acquit him on the present indictment, in order that he may be proceeded against for the latter offence.

MURDER, by the common law, is "the unlawful killing of another of *malice aforethought*." By our act of Assembly of the 22d of April, 1794, the crime is divided into two degrees. Murder of the first degree is where the offence is perpetrated by means of poison, or by lying in wait, or in perpetrating, or in attempting to perpetrate, any arson, rape, robbery, or burglary, or by any other *willful, deliberate*, and *premeditated* killing. This offence is punishable with death. By the same act of Assembly, murder of the second degree embraces "all other kinds of murder" to wit: all murder *where there is no intention to kill*, but which happens in perpetrating other FELONY than those enumerated in the act of 1794, or in the deliberate perpetration of acts of cruelty or mischief which manifestly endangers life, or in their consequence materially lead to bloodshed.* This offence is punishable by solitary confinement at labor in the penitentiary.

"*Manslaughter* is the unlawful killing of another *without malice*, either expressed or implied; which may be either *voluntary* upon a sudden heat, or *involuntary* but in the commission of some unlawful act" under the degree of felony. It is only with voluntary manslaughter that the jury have any thing to do in the present Indictment. With involuntary manslaughter they have nothing to do at present further than to acquit if the prisoner is guilty of no higher offence.

Before we proceed to inquire whether the prisoner is guilty of either of the offence charged in the indictment, it is proper to ascertain if he has any available ground of defence. After hearing the evidence in regard to the blow inflicted by the prisoner upon the head of the deceased, with an axe, and the evidence of the three gentlemen who conducted the *post mortem* examination, the prisoner's counsel very candidly and very properly admitted that the blow was given by the prisoner, and that it caused the death of the deceased. Is there any substantial grounds of defence resting upon the principles of self-protection? *Justifiable self-defence* is whem a man attempts by violence or surprise to commit a known felony upon the person, habitation or property of another. In that case the individual whose rights are thus assailed may, if he finds it necessary, to kill his assailant in his own defence, and the act is perfectly justifiable in him. But on a survey of the evidence in this case we find no indication of any felony having been attempted by the deceased upon the person, habitation or property of the prisoner. The court are unable to perceive any sufficient defence arising out of this branch of the case. But if the prisoner is not perperfectly justifiable is he *excusable*, upon grounds of self-defence? The law has made a slight distinction between acts which are *perfectly justifiable* and those only *excusable*. At the present day if the prisoner is *excused* it amounts to the same thing as being *justified* upon grounds of self-defence When there is an attack, under circumstances denoting an intention to take away life, or to do some enormous bodily harm, it is lawful for the party thus in danger to kill the assailant if all other means are used otherwise to prevent the injury or save the life of the party attacked. The means to be used in this case in order to avoid the alternative of taking the life of another in defence of your own, are such as retreating as far as possibly consistent with your own safety or disabling the adversary without killing him if it be in your power. When the attack upon an individual is so sudden, fierce or violent as that a retreat would not diminish but increase the danger, he may instantly kill his adversary without retreating at all. When from the nature of the attack *there is reasonable ground to believe* there is a design to destroy life, or commit any felony upon his person, killing the assailant will be excusable humicide, although it should afterwards appear that no felony was intended. It is for the jury to decide whether the attack upon the prisoner denoted an intention to take away life or to do him some enormous bodily harm. If so, and he had no other means of preventing the injury, or preserving himself, he is excusable, and ought in that case to be acquitted. In like manner, if the jury believe that the attack was made under circumstances which induced the prisoner to believe that there was a design to destroy his life or to commit any felony upon his person, the prisoner would be excusable, although in reality no such injury or felony was intended. It was for the jury to decide whether any circumstances existed which presents a case of excusable homicide according to the legal principles already laid down. Still the court will give the jury the benefit of their opinion on this question. The attack was made without any weapon, and without any attending circumstances denoting an intention to take life or do enormous bodily harm; and in the opinion of the court, did not excuse the prisoner in the use of a weapon so deadly as an axe.

If the prisoner is neither *justified* nor *excused* in destroying the life of the deceased, of what offence is he guilty? It cannot be said to be INVOLUNTARY *manslaughter* where the use of deadly weapon, as well as the manner of using it, strongly indicate an intention to kill. For the same reason, in the opinion of the court, the prisoner cannot be convicted of *murder in the second degree*, which, we have already seen, is where there is *no intention to kill*. —Still if the jury believe that there was a deliberate design to inflict a grievous and dangerous wound, without *justification* or *excuse*, and *without any design to kill*, they may find the prisoner guilty of murder in the 2d degree. On this point, the court have already intimated their opinion that the use of the axe and the manner of using it, sufficiently indicates an intention to kill, and if so, under the evidence in the cause, it is not a case of murder in the *second degree*.

If this view of the case be correct the prisoner is guilty of either "*murder in the first degree*" or "*voluntary manslaughter*"—the time depending, for its name and character, upon the finding of the jury, on the question whether the act was perpetrated with *malice aforethought* or without it, or in other words with *deliberation* or *without it*. If with *deliberation*, or with *malice aforethought*, it is *murder in the first degree*. If *without deliberation* or with *malice aforethought* it is *voluntary manslaughter*.—It is alleged that this act was committed in pursuance of an old grudge of several years standing, and that the prisoner, at the time he killed the deceased, was moved by that ancient hatred, and not by the sudden provocation which was given. If this be so, the crime is murder in the first degree. In support of this allegation we have the testimony of John Armstrong, James Campbell, and James McCarn, showing that a quarrel took place between the prisoner and the deceased in 1834, and that threats were afterwards made by the prisoner against the deceased "provided the latter came through his enclosure," or "insulted him again." But it is also in evidence. by the testimony of Freeman Poke, Wm. Sproul, David Eves, Sarah Ann Sproul, and Wm. Welliver, that there was a reconciliation between the parties; that they were afterwards seen togethchatting upon friendly terms—and that this good understanding continued between them even to the middle of the very day on which this melancholy event took place. With this evidence to show it counterfeit, the act must not be presumed to have been done upon the malice or threats expressed several years before.

But it is alleged that the declarations of the prisoner, after the fact, sufficiently show that the act was not done in a sudden passion, but upon deliberation. Mr. Justice Foster has been cited to prove that hasty confessions made to persons having no authority to receive them, are the weakest and most suspicious of all evidence, often misunderstood and frequently misrepresented, through inattention; ignorance, or malice. It is certainly true that the hasty declarations of the prisoner should be examined with care. But what are the declarations in this case? By the testimony of John Kissner, it appears that the prisoner, speaking of this transaction, declared that he "was in as good a humour as he ever was." To Jacob W. Warner he said he was "not *angry* at Dornell." To Caleb Thomas that he was "not angry or mad," and to James Masters that he was not in a *passion—that he had nothing against the man*—that in a fright he sprang from under Dornell, grabbed for something—got the axe and struck without knowing what he had in his hand. It is the province of the jury to decide upon the meaning of these declarations, and it is submitted to the jury whether, when the whole of the prisoner's language is considered, it may not fairly be inferred that he meant he had no *malice* against the deceased, and that he struck him on the sudden spur of the occasion without any previous malice. It is the opinion of the court that this is the fair construction to be put upon the prisoner's language.

Again—Jacob Turner states that the prisoner told him that his wife had "dismissed him as a murderer," and the prisoner added—"I snppose I am a murderer." It would be exceedingly unjust if a hasty declaration of the prisoner should give a character to his offence at variance with the conclusion of law upon the actual facts of the transaction as proved by witnesses who were present. The injustice of this would be more glaring in a case of this kind where, as the jury have seen, the learning of all the counsel has been called into requisition in order to fix a name for this offence, and that they have not yet fully agreed upon its name and character. How then can an unlearned man, like the prisoner, be expected, in a moment, to give it the appropriate appellation. If the *facts* of the case do not show it to be *murder*, the *declarations* of the prisoner afterwards will not make it so. As an illustration of this I will mention a case to the jury: A young man was carrying a the night and stabbed his adversary with a sum of money was attacked by a robber in pen knife so that he fell to the gronnd but was not killed. Before the result of the injury was known, the individual who thus defended himself under circumstances not only commendable but justifiable, labored under the mistaken opinion that all killing was murder, and believed that this would be the legal view to be taken of the act, if death should ensue. I can vouch for the facts of this case as well as for the mistaken notions entertained in regard to its character, and the instance serves to show that we should judge of the character of every act, not from the *opinions* of those concerned, but from the *facts* as they are proved by witnesses who where present. What then are the facts of the case under consideration? It is material to inquire whether there was more than *one blow* given by the prisoner. If *several blows* were given, it would be evidence of less. Stephen Sproul, a small boy, is the only witness who testifies to several blows. He speaks of three. The jury will remember his extreme youth and that when he was first called he was unable to tell his own age or to give any information in regard to his knowledge of the obligation to speak the truth, or of the nature of an oath. He was therefore rejected. After an absence of some time, and after other witnesses had been examined, he was again called and inquiry was again made of him whether he knew the nature of an oath. To this he shook his head. He was then asked if he knew where he would go if he did not speak the truth. He answered that he would "go to the bad place," and on further inquiry said "that his father had taught him that long ago." He could give no reason, however, why he had not communicated this to the court when he was first called. Under these circumstances the court admitted him as a witness leaving his credibility to the jury. It is to be remarked farther, that before the *Coroner's Inquest*, he described the three blows as having been given upon the *back* of the deceased. Now he states that one of the three was upon the *head* In opposition to the testimony of this little boy we have two witnesses who were present at the occurrence, both of whom are of riper years. They say that there was but *one blow* given. It is true that there is a rule of law that where one witness speaks positively to a fact observed by him, his testimony ontweighs several witnesses who negative the fact so stated. But in this case there is a question upon the credibility of the positive witness, arising from his want of knowledge of his obligation to speak the truth, and there are also other considerations arising from the marks discovered upon the body. The physicians who made the examination. discovered no marks of any blow but one, and according to their opinion there was but one blow, or, if several, they must have been upon the same spot. Under these circumstances the statement of the boy that there were

* This rule must be understood with reference to the case under consideration, in which the provocation was sufficient to extenuate the crimes to manslaughter provided the party was thereby deprived of deliberation. A case may arise where there is a want of deliberation arising from a provocation insufficient in law to extenuate the offence to manslaughter, as in a case of a mere trespass upon lands or goods or provoking words without personal violence. When such a case arises its decision will not be affected by what is here given as the general rule embracing cases of murder in the second degree.