

the contrary appears by the testimony of Colonel Marshall and others.

It is with you to determine this matter upon the whole of the evidence given you. In doing it you ought to reconcile the several testimonies, if by any reasonable construction of the words it may be done. Where some witnesses swear they saw such a thing done, and others swear they were present and did not see it; if the thing said to be done be such as it may reasonably be supposed some might see and others not, by reason of their want of observation, or particular attention to other matters there, as both may be true, you ought to suppose them to be so, rather than presume that any of the witnesses swear falsely. But if witnesses contradict each other, so that their testimonies cannot be reconciled, you must then consider the number of the witnesses on each side, their ability, integrity, indifference as to the point in question, and the probability or improbability arising from the nature of the thing in question, and, upon the whole, settle the fact as you verily believe it to be. If you find the sentry was attacked, the next thing to be considered is, whether the prisoners went to protect him, and if so, whether it was lawful for them so to do. There is a great difference between a common affray, and attacking the king's forces. I think the law in that regard ought to be more generally known here than it seems to be. If, upon a sudden quarrel from some affront given or taken, the neighborhood rise and drive the king's forces out of their quarters, it is a great misdemeanor, and if death ensues, it may be felony in the assailants, but it is not treason, because there was no intention against the king's person or government; but attacking the king's forces in opposition to his authority, upon a march or in quarters, is levying war against the king. And resisting the king's forces, if sent to keep the peace, may amount to an overt act of high treason. Though it may be attended with great inconveniences for private persons, without a peace officer, to make use of arms for suppressing an ordinary riot, yet if the riot be such an one as savors of rebellion, it doubtless may lawfully be done. You have heard what the witnesses