

with regard to the assault made upon the party of soldiers at the custom-house, and if you thereupon believe they were before and at the time of their firing attacked by such numbers, and in such a violent manner as many of the witnesses have positively sworn, you will be able to assign a cause for their firing so near together as they did without supposing a previous agreement so to do. But it is said, that if their firing as they did does not prove a previous agreement to do it, yet it is good evidence of an actual abetment to fire, as one by firing encourages the others to do the like. As neither of the soldiers fired more than once, it is evident that he who fired last could not thereby in fact abet or encourage the firing of any of those who fired before him, and so it cannot be evidence of such abetment. And if he who fired first and killed can justify it, because it was lawful for him so to do, surely that same lawful act cannot be evidence of an unlawful abetment. And though he who first fired and killed may not be able to justify the doing it, yet if it appears he had such a cause for the killing as will reduce it to manslaughter, it would be strange indeed if that same act should be evidence of his abetting another who killed without provocation, so as to make him who fired first guilty of murder. The same may be said as to all the intermediate firings; and as the evidence stands, I do not think it necessary to say how it would be in case the first person fired with little or no provocation. If, therefore, this party of soldiers when at the custom-house were a lawful assembly and continued so until they fired, and their firing was not an actual unlawful abetment of each other to fire, nor evidence of it, they cannot be said in consideration of law to have killed those five persons or either of them, but it must rest on the evidence of the actual killing; and if so, neither of the prisoners can be found guilty thereof, unless it appears not only that he was of the party, but that he in particular did in fact kill one or more of the persons slain. That the five persons were killed by the party of soldiers or some of them, seems clear upon the evidence, and indeed is not disputed.

Some witnesses have been produced to prove that Mont-