

may, while soldiers are in the immediate service of the king, and the regular discharge of their duty, they rather come within the reason of civil officers and their assistants, and so are alike under the peculiar protection of the law.

If you are satisfied upon the evidence, that Killroy killed Gray, you will then inquire, whether it was justifiable, excusable, or felonious homicide, and if the latter, whether it was with or without malice. If the attack was upon the party of soldiers in general, and in the manner I have just mentioned, as some of the witnesses say it was, it is equally an assault upon all, whether all were in fact struck, or not, and makes no material difference, as to their respective right of firing; for a man is not obliged to wait until he is killed, or struck, before he makes use of the necessary means of self-defense. If the blows with clubs were, by an enraged multitude, aimed at the party in general, each one might reasonably think his own life in danger; for though he escaped the first blow, he might reasonably expect more would follow, and could have no assurance that he should be so fortunate as to escape all of them.

Therefore, I do not see but that Killroy is upon the same footing with Montgomery; and your verdict must be the same as to both, unless what Hemmingway swears Killroy said, or the affray at the rope-walks, or both, materially vary the case. Hemmingway swears, that he and Killroy were talking about the town's people and the soldiers, and that Killroy said, "He never would miss an opportunity, when he had one, to fire on the inhabitants; that he had wanted to have an opportunity, ever since he landed." But he says he cannot remember what words immediately preceded or followed, or at what particular time the words were uttered, nor does he know whether Killroy was jocular or not. If the witness is not mistaken as to the words, the speech was, at least, very imprudent and foolish. However, if Killroy, either in jest or in earnest, uttered those words, yet if the assault upon him was such, as would justify his firing and killing, or alleviate it so as to make it but manslaughter, that will not enhance the killing to murder. And though it has been sworn that Killroy, and