

other soldiers, had a quarrel with Gray and others, at the rope-walks, a few days before the fifth of March, yet it is not certain that Killroy then knew Gray, or aimed at him in particular. But if Gray encouraged the assault by clapping the assailants on their backs, as Hinckley swears he did, and Killroy saw this, and knew him to be one of those that were concerned in the affray at the rope-walks, this very circumstance would have a natural tendency to raise Killroy's passions, and throw him off his guard, much more than if the same things had been done by another person. In the tumult of passion the voice of reason is not heard, and it is owing to the allowance the law makes for human frailty, that all unlawful voluntary homicide is not deemed murder. If there be "malice between A and B, and they meet casually, A assaults B, and drives him to the wall, B, in his own defense, kills A, this is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large, for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of A." So, upon the same principle, where the assault is such as would make the killing but manslaughter, if there had been no previous quarrel, the killing ought to be attributed to the assault, unless the evidence clearly shows the contrary; an assault being known and allowed by law to be a provocation to kill, that will free the party from the guilt of murder; whereas neither words of reproach, nor actions expressive of contempt, "are a provocation to use such violence," that is, the law doth not allow them to be, without an assault, such a provocation as will excuse the killing, or make it any thing less than murder. Upon the same principle, where the assault is such, as makes the killing manslaughter, the killing ought to be attributed to the assault, unless the evidence clearly shows the contrary.

This meeting of Killroy and Gray was casual upon the part of Killroy at least; he was lawfully ordered to the place where he was and had no right to quit his station without the leave of Capt. Preston, nor were any of the party obliged