the former; in complete republics the least of all, and under the same form of governments as in a limited monarchy, for example, the virtue and wisdom of the administrations may generally be measured by the peace and order that are seen among the people. However this may be, such is the imperfection of all things in this world, that no form of government, and perhaps no virtue or wisdom in the administration, can at all times avoid riots and disorders among the people.

Now, it is from this difficulty that the policy of the law has framed such strong discouragements to secure the people against tumults; because, when they once begin, there is danger of their running to such excesses as will overturn the whole system of government. There is the rule from the reverend sage of the law, so often quoted before:

1 H. H. P. C. 437: "All present, aiding and assisting, are equally principal with him that gave the stroke whereof the party died. For though one gave the stroke, yet in interpretation of law it is the stroke of every person that was present, aiding and assisting."

1 H. H. P. C. 440: "If divers come with one assent to do mischief, as to kill, to rob or beat, and one doeth it, they are all principals in the felony. If many be present and one only give the stroke whereof the party dies, they are all principal, if they came for that purpose."

Now, if the party at Dock Square came with an intention only to beat the soldiers, and began to affray with them, and any of them had been accidentally killed, it would have been murder, because it was an unlawful design they came upon. If but one does it they are all considered in the eyes of the law guilty; if any one gives the mortal stroke, they are all principals here, therefore there is a re-

versal of the scene. If you are satisfied that these soldiers were there on a lawful design, and it should be proved any of them shot without provocation, and killed anybody, he only is answerable for it.

First Hale's Pleas of the Crown, 1 H. H. P. C. 444: "Although if many come upon an unlawful design, and one of the company kill one of the adverse party in pursuance of that design, all are principals; yet if many be together upon a lawful account, and one of the company kill another of the adverse party, without any particular abetment of the rest to this fact of homicide, they are not all guilty that are of the company, but only those that gave the stroke or actually abetted him to do it."

1 H. H. P. C. 445: "In case of a riotous assembly to rob or steal deer, or to do any unlawful act of violence, there the offence of one is the offence of all the company."

In another place, 1 H. H. P. C. 439: "The Lord Dacre and divers others went to steal deer in the park of one Pellham. Raydon, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in the other part of the park. Yet it was adjudged murder in them all, and they died for it." And he quotes Crompton 25, Dalton 93, p. 241: "So that in so strong a case as this, where this nobleman set out to hunt deer in the ground of another, he was in one part of the park and his company in another part, and yet they were all guilty of murder."

The next is:

Hale's Pleas of the Crown, 1 H. H. P. C. 440: "The case of Drayton Bassit; divers persons doing an unlawful act, all are guilty of what is done by one."

Foster 353, 354: "A general resolution against all opposers, whether such resolution appears upon evidence to have been actually and implicitly entered into by the confederates, or may reasonably be collected from their number, arms or behavior, at or before the scene of action, such

resolutions so proved have always been considered as strong ingredients in cases of this kind. And in cases of homicide committed in consequence of them, every person present, in the sense of the law, when the homicide has been involved in the guilt of him that gave the mortal blow."

Foster: "The cases of Lord Dacre, mentioned by Hale, and of Pudsey, reported by Crompton and cited by Hale, turned upon this point. The offences they respectively stood charged with, as principals, were committed far out of their sight and hearing, and yet both were held to be present. It was sufficient that at the instant the facts were committed, they were of the same party and upon the same pursuit, and under the same engagements and expectations of mutual defence and support with those that did the facts."

Thus far I have proceeded, and I believe it will not be hereafter disputed by anybody, that this law ought to be known to every one who has any disposition to be concerned in an unlawful assembly, whatever mischief happens in the prosecution of the design they set out upon, all are answerable for it. It is necessary we should consider the definitions of some other crimes as well as murder; sometimes one crime gives occasion to another. An assault is sometimes the occasion of manslaughter, sometimes of excusable homicide. It is necessary to consider what is a riot. 1 Hawkins, ch. 65, Sec. 2: I shall give you the definition of it:

"Wheresoever more than three persons use force or violence, for the accomplishment of any design whatever, all concerned are rioters."

Were there not more than three persons in Dock Square? Did they not agree to go to King Street, and attack the main guard? Where, then, is the reason for

hesitation at calling it a riot? If we cannot speak the law as it is, where is our liberty? And this is law, that wherever more than three persons are gathered together to accomplish anything with force, it is a riot.

1 Hawkins, ch. 65, § 2: "Wherever more than three persons use force and violence, all who are concerned therein are rioters. But in some cases wherein the law authorizes force, it is lawful and commendable to use it. As for a sheriff [2 And. 67 Poph. 121], or constable [3 H. 7, 10, 6], or perhaps even for a private person [Poph. 121, Moore 656], to assemble a competent number of people, in order with force to oppose rebels or enemies or rioters, and afterward, with such force actually to suppress them."

I do not mean to apply the word rebel on this occasion; I have no reason to suppose that ever there was one in Boston, at least among the natives of the country; but rioters are in the same situation, as far as my argument is concerned, and proper officers may suppress rioters, and so may even private persons.

If we strip ourselves free from all military laws, mutiny acts, articles of war and soldiers' oaths, and consider these prisoners as neighbors, if any of their neighbors were attacked in King Street, they had a right to collect together to suppress this riot and combination. If any number of persons meet together at a fair or market, and happen to fall together by the ears, they are not guilty of a riot, but of a sudden affray. Here is another paragraph, which I must read to you:

1 Hawkins, ch. 65, § 3: "If a number of persons being met together at a fair or market, or on any other lawful or innocent occasion, happen, on a sudden quarrel, to fall together by the ears, they are not guilty of a riot, but of a

sudden affray only, of which none are guilty but those who actually began it," etc.

It would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly or actually had a previous knowledge of the design thereof. I have endeavored to produce the best authorities, and to give you the rules of law in their words, for I desire not to advance anything of my own. I choose to lay down the rules of law from authorities which cannot be disputed. Another point is this, whether and how far a private person may aid another in distress? Suppose a press-gang should come on shore in this town and assault any sailor or householder in King Street, in order to carry him on board one of his Majesty's ships, and impress him without any warrant as a seaman in his Majesty's service; how far do you suppose the inhabitants would think themselves warranted by law to interpose against that lawless press-gang? I agree that such a press-gang would be as unlawful an assembly as that was in King Street. If they were to press an inhabitant and carry him off for a sailor, would not the inhabitants think themselves warranted by law to interpose in behalf of their fellow-citizen? Now, gentlemen, if the soldiers had no right to interpose in the relief of the sentry, the inhabitants would have no right to interpose with regard to the citizen, for whatever is law for a soldier is law for a sailor and for a citizen. They all stand upon an equal footing in this respect. I believe we shall not have it disputed that it would be lawful to go into King Street and help an honest man there against the press-master. We have many instances in the books which authorize it.

Now, suppose you should have a jealousy in your minds

that the people who made this attack upon the sentry had nothing in their intention more than to take him off his post, and that was threatened by some. Suppose they intended to go a little further, and tar and feather him, or to ride him (as the phrase is in Hudibras), he would have had a good right to have stood upon his defence—the defence of his liberty; and if he could not preserve that without the hazard of his own life, he would have been warranted in depriving those of life who were endeavoring to deprive him of his. That is a point I would not give up for my right hand—nay, for my life.

Well, I say, if the people did this, or if this was only their intention, surely the officers and soldiers had a right to go to his relief; and therefore they set out upon a lawful errand. They were, therefore, a lawful assembly, if we only consider them as private subjects and fellow citizens, without regard to mutiny acts, articles of war, or soldiers' oaths. A private person, or any number of private persons, has a right to go to the assistance of a fellow subject in distress or danger of his life, when assaulted and in danger from a few or a multitude.

Keyl. 136: "If a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain or call for aid or assistance, and others, out of compassion, shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter."

Keyl.: "A and others without any warrant impress B to serve the king at sea. B quietly submitted, and went off with the press-master. Hugett and the others pursued them, and required a sight of their warrant; but they showing a piece of paper that was not a sufficient warrant, thereupon Hugett with the others drew their swords, and the press-

masters theirs, and so there was a combat, and those who endeavored to rescue the pressed man killed one of the pretended press-masters. This was but manslaughter; for when the liberty of one subject is invaded, it affects all the rest. It is a provocation to all people, as being of ill example and pernicious consequences."

Lord Raymond, 1,301. The Queen *versus* Tooley *et al.* Lord Chief-Justice Holt says: "The prisoner (*i. e.* Tooley) in this had sufficient provocation; for if one be impressed upon an unlawful authority, it is a sufficient provocation to all people out of compassion; and where the liberty of the subjects is invaded, it is a provocation to all the subjects of England, etc.; and surely a man ought to be concerned for Magna Charta and the laws; and if any one, against the law, imprisons a man, he is an offender against Magna Charta."

I am not insensible to Sir Michael Foster's observations on these cases, but apprehend they do not invalidate the authority of them as far as I now apply them to the purposes of my argument. If a stranger, a mere fellow-subject, may interpose to defend the liberty, he may, too, defend the life of another individual. But, according to the evidence, some imprudent people, before the sentry, proposed to take him off his post; others threatened his life; and intelligence of this was carried to the main guard before any of the prisoners turned out. They were then ordered out to relieve the sentry; and any of our fellow-citizens might lawfully have gone upon the same errand. They were, therefore, a lawful assembly.

I have but one point of law more to consider, and that is this: In the case before you I do not pretend to prove that every one of the unhappy persons slain was concerned in the riot. The authorities read to you just now say it would be endless to prove whether every person that was

present and in a riot was concerned in planning the first enterprise or not. Nay, I believe it but justice to say some were perfectly innocent of the occasion. I have reason to suppose that one of them was—Mr. Maverick. He was a very worthy young man, as he has been represented to me, and had no concern in the rioters' proceedings of that night; and I believe the same may be said in favor of one more at least, Mr. Caldwell, who was slain; and, therefore, many people may think that as he and perhaps another was innocent, therefore innocent blood having been shed, that must be expiated by the death of somebody or other. I take notice of this, because one gentleman was nominated by the sheriff for a juryman upon this trial, because he had said he believed Captain Preston was innocent, but innocent blood had been shed, and therefore somebody ought to be hanged for it, which he thought was indirectly giving his opinion in this cause. I am afraid many other persons have formed such an opinion. I do not take it to be a rule, that where innocent blood is shed the person must die. In the instance of the Frenchman on the plains of Abraham, they were innocent, fighting for their king and country; their blood is as innocent as any. There may be multitudes killed, when innocent blood is shed on all sides; so that it is not an invariable rule. I will put a case in which, I dare say, all will agree with me. Here are two persons, the father and the son, go out a-hunting. They take different roads. The father hears a rushing among the bushes, takes it to be game, fires, and kills his son, through a mistake. Here is innocent blood shed, but yet nobody will say the father ought to die for it. So that the general rule of law is, that whenever one person has a right to do an act, and that act, by any accident, takes away the

life of another, it is excusable. It bears the same regard to the innocent as to the guilty. If two men are together, and attack me, and I have a right to kill them, I strike at them, and by mistake strike a third and kill him, as I had a right to kill the first, my killing the other will be excusable, as it happened by accident. If I, in the heat of passion, aim a blow at the person who has assaulted me, and aiming at him I kill another person, it is but manslaughter.

Foster, 261, § 3: "If an action unlawful in itself is done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensues, against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and inconsiderately, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

Suppose, in this case, the mulatto man was the person who made the assault; suppose he was concerned in the unlawful assembly, and this party of soldiers, endeavoring to defend themselves against him, happened to kill another person, who was innocent—though the soldiers had no reason, that we know of, to think any person there, at least of that number who were crowding about them, innocent, they might, naturally enough, presume all to be guilty of the riot and assault, and to come with the same design—I say, if on firing on those who were guilty, they accidentally killed an innocent person, it was not their fault. They were obliged to defend themselves against those who were pressing upon them. They are not answerable for it with their lives, for on supposition it was justifiable or excusable to

kill Attucks, or any other person, it will be equally justifiable or excusable if in firing at him they killed another, who was innocent, or if the provocation was such as to mitigate the guilt of manslaughter, it will equally mitigate the guilt, if they killed an innocent man undesignedly, in aiming at him who gave the provocation, according to Judge Foster; and as this point is of such consequence, I must produce some more authorities for it.

1 Hawkins, 84. "Also, if a third person accidentally happen to be killed by one engaged in a combat, upon a sudden quarrel, it seems that he who killed him is guilty of manslaughter only, etc. H. H. P. C., 442, to the same point, and 1 H. H. P. C. 484, and 4 Black, 27.

I shall now consider one question more, and that is concerning provocation. We have hitherto been considering self defence, and how far persons may go in defending themselves against aggressors, even by taking away their lives, and now proceed to consider such provocations as the law allows to mitigate or extenuate the guilt of killing, where it is not justifiable or excusable. An assault and battery committed upon a man in such a manner as not to endanger his life is such a provocation as the law allows to reduce killing down to the crime of manslaughter. Now, the law has been made on more considerations than we are capable of making at present; the law considers a man as capable of bearing anything and everything but blows. I may reproach a man as much as I please; I may call him a thief, robber, traitor, scoundrel, coward, lobster, bloody back, etc., and if he kills me it will be murder, if nothing else but words precede; but if from giving him such kind of language I proceed to take him by the nose, or fillip him on the forehead, that is an assault; that is a blow. The

law will not oblige a man to stand still and bear it; there is the distinction. Hands off; touch me not. As soon as you touch me, if I run you through the heart, it is but manslaughter. The utility of this distinction, the more you think of it the more you will be satisfied with it. It is an assault whenever a blow is struck, let it be ever so slight, and sometimes even without a blow. The law considers man as frail and passionate. When his passions are touched, he will be thrown off his guard, and therefore the law makes allowance for this frailty—considers him as in a fit of passion, not having the possession of his intellectual faculties, and therefore does not oblige him to measure out his blows with a yardstick, or weigh them in a scale. Let him kill with a sword, gun, or hedge-stake, it is not murder, but only manslaughter.

Keyling's Report, 135. Regina *versus* Mawgrige. "Rules supported by authority and general consent, showing what are always allowed to be sufficient provocations. First, if one man upon any words shall make an assault upon another, either by pulling him by the nose or filliping him on the forehead, and he that is so assaulted shall draw his sword and immediately run the other through, that is but manslaughter, for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend that he that treated him in that manner might have some further design upon him."

So that here is the boundary, when a man is assaulted and kills in consequence of that assault, it is but manslaughter. I will just read as I go along the definition of assault:

1 Hawkins, ch. 62, § 1: "An assault is an attempt or offer, with force or violence, to do a corporal hurt to another, as by striking at him with or without a weapon, or presenting

a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him, or by any other such like act done in angry, threatening manner, etc.; but no words can amount to an assault."

Here is the definition of an assault, which is a sufficient provocation to soften killing down to manslaughter:

1 Hawkins, ch. 31, § 36: "Neither can he be thought guilty of a greater crime than manslaughter, who, finding a man in bed with his wife, or being actually struck by him, or pulled by the nose or filliped upon the forehead, immediately kills him, or in the defence of his person from an unlawful arrest, or in the defence of his house from those who, claiming a title to it, attempt forcibly to enter it, and to that purpose shoot at it," etc.

Every snowball, oyster shell, cake of ice, or bit of cinder, that was thrown that night at the sentinel, was an assault upon him; every one that was thrown at the party of soldiers was an assault upon them, whether it hit any of them or not. I am guilty of an assault if I present a gun at any person; and if I insult him in that manner and he shoots me, it is but manslaughter.

Foster, 295, 296: "To what I have offered with regard to sudden rencounters let me add, that the blood already too much heated, kindleth afresh at every pass or blow. And in the tumult of the passions, in which the mere instinct of self-preservation has no inconsiderable share, the voice of reason is not heard; and therefore the law, in condescension to the infirmities of flesh and blood, doth extenuate the offence."

Insolent, scurrilous, or slanderous language, when it precedes an assault, aggravates it.

Foster, 316: "We all know that words of reproach, how grating and offensive soever, are in the eye of the law no

provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knoweth that affronts of that kind pierce deeper and stimulate in the veins more effectually than a slight injury done to a third person, though under the color of justice, possibly can."

I produce this to show the assault in this case was aggravated by the scurrilous language which preceded it. Such words of reproach stimulate in the veins and exasperate the mind, and no doubt if an assault and battery succeeds them, killing under such provocation is softened to manslaughter, but killing without such provocation makes it murder.