probable tendency to produce ill Consequences, and procure the
death of some person, tho not intended by him while he is
Flangeable with a Gross fault: being Homicide committed
in lawful or lawfull, is Considered in law as a casual Flaugh
McLenzie Crim. part 1 Tit. 11 § 7 & 8 & 12. Hawkins P.C.
Br. lib. 1 Chap. 26 § 10. 11. & 12. For it is a Generall Rule, that
where ever a Man Intending to Commit one Felony, happens
to Commit Another, he is as much guilty as if he had In-
tended the Felony Committed by him

It is much Controverted whether Culpable Homicide
or killing in a heat of passion or in Rixa without Malice
=dent fore thought Malice, called Man Slaughter, be Pun-
=ly punishable with death or not. I am Clearly of opinion it is not
=bout by some laws, the offender in that case is Substituted to pay
=vilege was denyed to one who kills out of premeditate Malice
=ied. For the passion or provocation may Unfortunately
Determine the will to the Commission of a horrid Crime
d word of Dangerous Consequence, to Commit a Bloody
=flood under Colour of passion, which Man ought to Abhor
or of any Wicked turn of Mind or Drunkenness, which
they should avoid. 1° Killing in such Circumstances was
Capital by the Divine law of Moses, which says, whosoever
sheddeth Mans blood, by man shall his blood be shed Gen.
9. 6 i.e. by the Magistrate or person appointed or allowed
to be the Avenger of Blood, who Must not bear the sword
in Vain Rom. 13. 4. Whether the Blood to shed upon Sud-
den provocation or premeditated, for rash anger is heard
Murder, as Well as Malice prepense Matth. 5. 21. 22.
only Moses was Indulged to such a Man Slayer in a City
of Refuge if he got into it Deuter. 19. 4. Which doth not
argue, that the Crime was not Capital, but Rather
that it was so: seeing he might have been Justly Slain if
overtaken by the Avenger of Blood before he Reached the
City of Refuge, ibid. v. 6. or if he was found without the
precincts of it. 2° That Color Facundiæ doth not by the
Civil law altogether exempt from the punishment
of death for killing in the heat of passion, may

be inferred from the offenders being subjected to all if he
killed with a drawn sword, l. 1 § 3 ff. ad L. Cornel. de Sicar.
and the many Rules Anxiously Conceived concerning Mo-
deramen inculpatæ tutelæ, obliging the Man Slayer to
prove that he was in Periculo Vitæ Constitutus in order
to excuse or Extenuate himself, l. 2 C. Eod. l. 45 § 4. l. 52 § 1 ff. ad L.
aquil. l. 3 § 9. l. 17 ff. de Vi & Vi armata. Tho' indeed it must
be owned, that in the Generall opinion of the Doctors of
that law, Homicidium Casuale is not punishable
with death, but only Arbitrarily According as the Circum-
stances are More or less favourable Bal. ad Cod. de Sicar. Jordan l.
lib. 5 § Homicidium n. 3. Farin. de Homicidio quæst. 126
n. 42 Menoch. de Arbitr. Jud. Quæst. lib. 2 cas. 324. Gonsal.
3 Var. Resol. cap. 3 n. 16 Carpzov. Crim. part 1 Quæst. 27
n. 10. 3° By the law of England, a Man slayer, tho not guilty
of prepense Malice, is punishable with death, Unless he
claim and get the Benefit of 4 Hen. 4 by our old laws
of Scotland, Slaughter committed thro' Chaudmella or in
sudden falling out, is a Capital crime and Reckoned a Slicht
Slat. 1 Rob. 1 cap. 3. Slat. Rob. 3 cap. 43. Slat. Alexand. 2 cap. 2
§ 3. 4. 6. I know Boetius of Crimes fol. 2 cap. 6 pro. But it had
some Distinguishing privileges in the prosecution which
word denyed to Murder or killing by forethought Felony.
In so far as the priviledge of Refuge and the Clergy in the
Church or Sanctuary was allowed to the Committers of
Slaughter thro' Chaud Melle, and not to Murderers by
forethought Felony Bona Vacantia of Criminals Ibid. 82. Act
36 Parl. 5 J. 3. And the trial of Murder was Summary;
whereas those Charged with the guilt of Sudden Slaugh-
ter had a Competent time allowed them to Make their
lawfull Defences, Stat. Rob. 2 cap. 3. So that Sir Geo. Mc
Kenzie (Crim. part 1 Tit. 11 § 11) is in the wrong to say,
that by Act 51 Parl. 3 J. 1 Murder is to be Capitally pu-
nished, and Chaudmella or Sudden Slaughter punishable
only According to the old laws as if by those laws Slaughter
were not punishable as Murder. For what that Statute
Insinuates, is, if the Deed be found thought Felony, the life