as Dr. G. where the Thief Defends himself with arms d. l. 8. § ad L. Aquil. or when Goods stolen cannot be Recovered from an Unknown Thief flying with them without stopping them in his Career by Mr. Schol. Pleat. And where he Declares lawfull to kill a Night Thief whose life cannot be spared with safety d. l. 8 § ad L. Cornel. de sicar. that w[illegible] safety of ones person or goods. In the opinion of the Doctors a man may justify his killing a person found carrying off by stealth his goods under Night provided he could Recover the goods, nor if he knew the Thief, nor yet did know him, or had a witness present that knew him, and tried hard to the Thief before he killed him. But the Night Thief be very odious, for that it cannot be known whether he comes to steal or to kill; yet they think that the slaying any of the forfeited Regulators in the killing Night Thief, is a ground to subject the Killer to an arbitrary punishment, fil. Clar. lib. 5 § homicidium n. 47. Damhod. Crim. cap. 78 n. 2. Carpzov. Crim. part 2 qu. 32 n. 35. 39. All which Circumstances, Viz. that the thing stolen was of great Value, and could not be Recovered without killing the Thief, or that he Defended himself and Resisted his being apprehended, may be easily proved by the assertion of the Killer. Farinacius de homicidio qu. 125 n. 261. Mackenzie Crim. part 1 tit. 11 § 12 in fine. Sir George Mackenzie Crim. part 1 tit. 13 § 3) think that a Man who kills in Defence of his liberty, when unjustly put in fear of imprisonment, should not be liable to Capital punishment: because liberty is as dear as life, and no man unjustly imprisoned can be forced or bid to make a tumult upon pretence to rescue him, and kill him in the attempt, as he defends, because stolen? The Exception of self Defence is not composed to one who was Author Rixae. Prosp. Farin. de homicidio qu. 125 n. 118. And. Gail lib. 2 de pace publica cap. 16 n. 17. Berlich part 4 Concl. 13 n. 5. Carpzov Crim. part 1 qu. 29 n. 42. Junius Pic. Gerond. part 4 Conclu. 9 Def. 4. Thus it was found Rolovahl to infer the pain of death against one who had given some Rude words to allure Fulbiers, that upon their coming up after such provocation to him with their drawn Bayonets he received them with his sword drawn and Run one of them thro' the Body, of which wound he died within 24 hours. Albeit it was pleaded for the Prisoner that the person killed and his associates being the first aggressors with Deadly Weapons, it was lawfull for him in periculo vitae constitutus by them to kill rather as to be killed: being no injurious words by the Prisoner could justify their assaulting him with drawn Bayonets: nor is the Relation which and words there no proportion of Respect it was Replied for the pursuer that the prisoner having by his words provoked the fourteen to fight, and killed in the skirmish their first drawing upon him could not entitle him to the privilege of self Defence; because in Crimes the guilt is Thief by imputed to him who is Author Rixae and gives rise to the quarrel 20 November 1695 George Cumming. Nor is self Defence admitted to Excuse a Second who kills another in a duel, wherein the killer gave the challenge 17 June 1670 William Mackie, or had pleaded it: Because duelling is altogether Unlawfull.

The Doctors distinguish between Moderamen inculpatae tutelae when one kills in his own Defence who might have Repelled his adversary without giving him a Mortal Wound; and Moderamen inculpatae tutelae, when a Man cannot preserve himself without killing his adversary: holding, that homicide by Excess of Defence deserves the punishment of Death, and killing by the Excess of Blameless defence, only an Arbitrary punishment. Carpzov Crim. part 1 qu. 29 n. 35. In fol. lowing, he who Exceeding the Bounds of self Defence, either as to the cause, or Manner, or time, kills the Aggressor, is subject to an Arbitrary punishment as one is for Casual homicide, act 22 Parl. 1 Jos. 1 Ch. 2. 29 July 1674 William Mason. 16 June 1701 Ensign Hardie.