

It hath been much contrabanded whether culpable Homicide or killing in a heat of passion or in Rixa without antecedent forethought malice, called Manlaughter be justly punishable with death. 2. It is humbly conceived it is, albeit by some Laws the offence in that sort be intitled to privileges, denied to one who kills out of provoked malice. For the passion or provocation may inferentially determine the will to the commission of a heinous crime, it words of dangerous consequence to convoke a blood shed under colour of passion which men ought to forbear, or of any vicious turn of mind or drunkenness which they should avoid. 1. Killing in such circumstances was capital by the Divine Law of Moses which says who so ever shedd mans blood, by man shall his blood be shed Gen. 9. 6. 1. s. by the magistrates or person appointed or allowed to be the abonger of blood, who must not bear the sword in vain Rom. 13. 4. whether the blood be shed upon sudden provocation, or provoked, for rash anger is heere murder as well as malice propose Matt. 5. 21. 22. only shelter was intulged to such a manslayer 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: soomy he might have been justly slain if overtaken by the abonger 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 of provocation doth not by the civil Law altogether exempt from the punishment of death for killing in the heat of passion, may be infered from the offenders being subjected to it, if he killed with a drawn sword l. 1. ff. de L. corn. de sicariis, and the many Rules anxiously conceived concerning moderamine inculpata lilela obliging the manslayer to prove that he was in particulo bilis constitutus in ordine to exculpate himself l. 2. Cod. de l. 45. 94. l. 52. 91. ff. de L. Aquil. l. 3. 99. l. 17. ff. de bi. armatu. The indeed it must be owned that in the general opinion of the doctors of that Law, homicidium culpsum is not punishable with death, but only arbitrarily according as the circumstances are more or less favorable. Clar. font. lib. 5. §. Homicidium n. 3. Farin. de Homicidio Quest. 126. n. 42. Monach. de arbitr. Judic. Quest. lib. 2. cap. 324. Gomez. 3. bar. Resol. cap. 3. n. 16. Carpzov. Crim. part. 1. quest. 27. n. 10. 3. By the Law of England, a manslayer tho' not guilty of proposed malice is punishable unless he claim and get the benefit of clergy, ind. bol. 2. pag. 258. 259. 370.

By our old Laws of Scotland slaughter committed thro' chandmolla or a sudden falling out is a capital crime and reckoned as such Stat. Rob. cap. 3. Stat. Rob. 3. cap. 43. Stat. Alex. 2. cap. 2. §. 3. 7. 6. s. 2. Treatise of crimes Tit. 2. cap. 6. p. 2. But it had some distinguishing privileges in the prosecution, which were denied to murder or killing by forethought felony. In so far as the privilege of Refuge and shelter in the church or sanctuary was allowed to the committers of slaughter thro' chandmolla, and not to murderers by forethought felony s. 2. Treatise of crimes ibid. §. 2. act. 36. par. 5. §. 3. and the trial of the murder was summary, whereas those charged with the guilt of sudden slaughter had a competent time allowed them to make their lawful defences Stat. Rob. 2. cap. 3. so that for George Melkorne (Crime part. 2. Tit. 11. §. 11.) is in the wrong to say that by act 5. par. 3. §. 1. murder is to be capitally punished, and chandmolla 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 infirmates is, if the deed be forethought felony, the life and goods of the Transgressor shall be in the Kings will, and if done of sudden chandmolla the party shalld shall follow, and the Transgressor defend after the course of the old Laws, which words don't restore the punishment, but only the form of Trial of chandmolla to the old Laws. In which Respon. is hinted already, there was a difference between killing by forethought felony, & upon a sudden falling out, but none as to the punishment. After the Reformation when jus. Absi. formerly enjoyed by Churches and other privileged places was

abolished, the distinction aforesaid between Murder and Manlaughter could not be framed indifferently for murder and manlaughter in general without any mention of forethought felony, and where that was libelld, it was not required to be proved, it being impossible to prove a design to kill which is a secret act of the mind. But for preventing all doubts in pursuance of slaughter, it was expressly declared in the year 1661, that casual Homicide, Homicide in lawful defence, and Homicide committed upon Thieves &c. should not be punishable with death act 22. par. 1. §. 1. Ch. 2. so that Chaudmolla or Homicidium in Rixa committum as falling under none of those exceptions is undoubtedly punishable by death. For as the Inference of that Statute 1661 concerning the several degrees of casual Homicide is very improper and ridiculous, Homicide in defence and Homicide on thieves tho' in itself not falling under the denomination of casual Homicide, so it cannot be extended to slaughter in chandmolla, or committed de dicta opera, tho' without forethought, which is far more culpable than any of the excepted kinds of slaughter, unless it could be supposed, that the Legislator, intending to remove all doubt about the punishment of slaughter, would have enacted in his clearer case with a man of stands, and left the more difficult in the dark. By our Law chandmolla or Homicidium in Rixa committum is punishable by death, tho' the committer had no reasonable matter any time before against the person slain. In Respon. Malis invidialis, proceeding after the tract or thrust, tho' after conquestum the Receiver sufficeth to make Homicide capital, and all killing is punishable with death unless some of the Qualities of Chance, self defence, &c. are pleaded and proved by the criminal. See Respon. Crim. part. 1. Tit. 11. §. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. James Hart 9. July 1663 Douglas of Spal. & Al. v. William Douglas, 9. 10. November 1674 Andrew Kullerford 20. November 1695 George Manning, 1. August 1728 James C. 1729 of the same. A schoolmaster being indicted &c. as in bol. 2. pag. 445 & 446.