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If a deed bound land on a way upon one side, this is construed as a covenant by the grantor that there is such a way; and it is not regarded as mere description.[1] But a grant bounding land on "a thirty feet street," is not held to amount to a covenant that the street is of that width throughout. It is considered as description only.[2] Nor is a grant of land as abutting in the rear upon a street, which was merely laid down as such upon a map, but not actually opened, an implied grant of way in such supposed street, or a covenant to open a way there, the land being accessible by a street in front.[3] T. M.

Jackson *v.* Hathaway, 15 Johns. 454; Cortelyou *v.* Van Brundt, 2 Johns. 357; 3 Kent's Com. Lecture LI.

[1] Parker *v.* Smith, 17 Mass. 413.

[2] Clap *v.* M'Neil, 4 Mass. 589.

[3] Case of Mercer Street, 4 Cow. 542.

ART. II.—ON THE EFFECT OF DRUNKENNESS UPON CRIMINAL RESPONSIBILITY AND THE APPLICATION OF PUNISHMENT.

[Translated from an article by Professor C. J. A. MITTERMAIER, in the *New Archives of Criminal Law*, volume xii. pp. 1—52.]

§ I. *Doctrine of the Roman Law.*

AN examination of the doctrine of the legal effect of drunkenness will clearly show, how little we are able to find a basis for each particular principle of the common law, in some general decision; and how carefully we ought to guard against deriving general rules from isolated fragments of the jurists or from imperial rescripts, which refer to and are founded upon particular cases. In like manner, when we examine the doctrines of the legal systems of modern times, in regard to this matter, we shall easily convince ourselves, that very little is gained by the insertion of a

general principle or two on the subject in a code;—that the doctrine is first derived from the details of the practical administration of justice;—and, that, where the law is defective or inappropriate, a practical remedy is not unfrequently found in bold constructions and distortions. The whole course of the development of the subject will also show, that it would be just as erroneous to lay down the principle, that drunkenness does not relieve from criminal responsibility, as it would be to assert, that the highest degree of drunkenness is always a ground of exemption from responsibility. A nice discrimination between premeditated, intentional, culpable, and inculpable drunkenness, and between the state of body induced by habitual drunkenness, and the appetite for liquor merely, can alone furnish a safe practical guide in the application of the law to particular cases. Of the truth of the assertion, that criminal laws of excessive severity, and which are not in harmony with the sound feeling of the nation, are inexpedient, because they are liable to be circumvented in all possible ways, and, by disproportionately lessening punishments, lead to an injurious extreme, the law of France affords a striking example. The penal code of that country does not mention drunkenness at all; and, from the progress of the development of the French legislation, which will be more closely examined hereafter, it will appear beyond a doubt, that the legislator did not intend that drunkenness should in any case relieve from responsibility or free from punishment. But the reader will be convinced, when the doctrines of the existing French jurisprudence come to be noticed, in § IV, that the French courts have no scruple in acquitting a drunken person, even when guilty of the highest crimes, on the ground that drunkenness is a state of temporary insanity (*demence passagère*), and that article 6 of the penal code declares generally that insanity is a ground of exculpation.

If the inquiry be now made in what manner drunkenness was regarded in the Roman law, it will not surprise any one, who is acquainted with the spirit of the Roman criminal law, and who of course knows that it does not rest on any complete criminal code, to find that it contains no general legal provision on the subject. In the times of the old *leges*, or of the *judicia ordinaria*, the sources contain no intimation whatever of the effect of drunkenness in the application of punishment; since, according to the character of the proceedings in the *questionibus perpetuis*, the *judices* were only bound to try the truth of the complaint, and could merely acquit or condemn; and, consequently, it did not come within their functions to propose the application of any milder punishment than the *pœna legis*, or to take into consideration any ground of extenuation.[1] The apprehension, that, in consequence of this disregard of many conditions of mind, which exculpate from crime altogether, or at least diminish responsibility, unjust punishments might have been occasioned, will appear to be groundless, when it is recollected, that the *judices* in the *questionibus perpetuis* were in the situation of the English and French juries of the present day, and that, in those cases in which they regarded the legal punishment as disproportionately severe, they had it in their power to acquit altogether, as French juries not unfrequently do in cases of sacrilege and counterfeiting; and this could be done by the Roman *judices* the more readily, that they were not subject to be called to account for their sentences. It was not until the time when the *judicia extraordinaria* had been gradually introduced,—and it had thus become of no consequence even to apply the punishment determined by the old *lex*, since the judicial power had also extended

[1] On this question, see Feuerbach, in his Revision, i. p. 365; Besserer, Comm. de indole jur. crim. roman. Fasc. ii. p. 22—49; Rosshirt, Principles of Criminal Law (in German), p. 71.

itself to the invention of the punishment,—that we first find traces of any regard being paid, in the application of the law, to the effect of drunkenness. The principal distinction which the Roman jurists kept in view, namely, whether a crime was committed *dolo malo*, that is, with a malicious intention directed to the crime, or *ex animi impetu*,[1] was applied to the case of drunkenness; and it cannot be strange, therefore, that the jurist Marcian[2] should mention *ebrietas* as an example of *impetus*, thereby intimating, that a drunken person, when he commits a crime, should be equally punishable, but should not be put upon the same footing, with an offender acting in cold blood and calculating his act with clear consciousness. In other cases, where the offence was of such a nature, that, if committed without clear consciousness and a malicious intention, it would lose its injurious character and be no longer dangerous, as, for example, the offence of speaking against the government;[3] or, where, by reason of drunkenness, an act, which would otherwise be a gross dereliction of official duty, becomes only a *culpa*;[4] in these cases, drunkenness was taken into consideration. In reference to soldiers, who attempted to mutilate themselves or to commit suicide, drunkenness was regarded as a mitigating circumstance,[5] clearly on the ground, that the reason for subjecting the suicide of soldiers to punishment, according to the Roman law, was present in those cases only where the attempt

[1] Rossbirt, in the New Archives of C. L. viii. p. 381.

[2] In the law 11. D. de pœnis.

[3] L. un. Cod. Si quis imperatori maledixerit. The word *temulentia*, in this fragment, according to the use of the term by Roman authors, (Plinius: Hist. Nat. lib. xiv. chap. 13; Tacit: Hist. ii. chap. 63; Cicero, pro Sextio, chap. 19.) signifies drunkenness.

[4] According to the law 12. D. de custod. reor., the keeper of a prison is subjected to a milder punishment, where a prisoner escapes in consequence of the drunkenness of his guard.

[5] L. 6. § 7. D. de re milit.

was made with consciousness and in cold blood.[1] But the Justinianean collection contains no general principle declaring drunkennèss to be a ground of exculpation in regard to all offences.

§ II. *Doctrines of the Canon and Imperial Law.*

If we may not hope to find established in the canon law, any general principle, which furnishes a binding rule for our criminal law; it is yet well known, that even in that system there are many rules, which are derived as consequences from the principle that the degree of internal guilt is to be sought after and the act judged of according to the clearness of the actor's consciousness, though these rules were often established with less reference to the secular law, than to spiritual punishments; and the strange reasons given for them sound ridiculous to one who is not accustomed to distinguish the essence from the form. Thus, in the canon law,[2] drunkenness is expressly mentioned as a ground which deserves the indulgence of a reasonable judge; because whatever is done in that state is done without consciousness on the part of the actor; and, besides, as God had indulgence for the offence committed by Lot while in a state of drunkenness, the clemency of the judge seems justifiable also for a further reason.[3] In the imperial law, there is a single passage only,[4] from which it appears, that, at that time, drunkenness was already regarded in general as a ground of extenuation; and, in this passage, which treats of the crime of blasphemy, the law merely follows

[1] In regard to the reason of this provision, there is still much controversy among the jurists. See Wächter in the New Archives, vol. x. p. 102; and Abegg, Inquiries in the department of Criminal Jurisprudence (in German), p. 74. in note.

[2] Nesciunt quid loquantur, qui nimio vino indulgent, jacent sepulti, says c. 7. C. xv. qu. 1.

[3] c. 9. C. xv. qu. 1.

[4] Imperial decree of 1495 concerning blasphemy, § 1.

the doctrines of the old practitioners. This silence of the Carolina will not seem strange, when it is recollected, that Schwarzenberg did not intend his work to be a complete, systematic code; but, on the contrary, turned over the application of the law to three judges (*schöffen*), to be administered according to the already generally diffused jurisprudence, which constituted the source from which he had drawn his code, and which he relied upon as the best means of supplying the deficiences of the Carolina.

§ III. *Doctrines of the German Jurisprudence.*

It is impossible to obtain a firm foundation for the actual practice, and properly to understand the internal connection of the common German criminal law, unless we comprehend the doctrines of the Italian practitioners of the middle ages; and, in this respect, the works of Gandinus, Bonifacius, and Angelus Aretinus, are indispensable, in order to understand with what spirit particular passages of the Roman law, when that system was first applied in practice, were taken up and brought into connection with the wants and views of the people. The source of our modern criminal law is not to be found in the Roman law, as understood in its pure Roman sense, according to the results of historical investigations, but as comprehended by the practitioners of the middle ages. It is not difficult to prove, that, in general, where the Italian criminalists mention a particular principle of the law as founded in a general custom (*generalis consuetudo*), that principle is even now acknowledged in practice. Thus, in the earliest writings of the most ancient practitioners of the middle ages, we find it established as a principle, that drunkenness is a ground of extenuation. Some of these jurists announce the principle only in reference to the crime of blasphemy;[1] others of

[1] Bonifacius, tract. super malefic. p. 129 b.

them, on the contrary, as, for example, Angelus Aretinus,[1] consider this condition in a general point of view, and regard drunkenness, partly on the authority of the Roman law (l. 11. D. *de pœnis*) and partly on that of the canon law, as a ground of mitigated punishment. This doctrine remained strongly rooted in the later jurisprudence, in which a drunken person (*ebrius*) was likened to one under the influence of sleep, or drunkenness was regarded as equivalent to insanity.[2] It was not until the sixteenth century, that a mere general rule, in regard to drunkenness as a ground of extenuation, was felt to be insufficient; and, with the development of the scientific spirit, a more exact discrimination began to be made. Since the time of Clarus[3] especially, the opinion began to prevail, that the effect of the highest degree of drunkenness was, indeed, to exempt from the punishment of *dolus*, but that the offender was still subject to the punishment of *culpa*, except in two cases, namely: first, when he inebriated himself[4] intentionally, and with a consciousness that he might commit a crime while drunk; and, secondly, when he became intoxicated without any fault on his part, as, for example, in consequence of inebriating substances having been mingled with his wine by his comrades. In the first of these cases, the drunkenness was not allowed to be any ground of exculpation at all; while, in the other, it had the effect to relieve the offender even from the punishment of *culpa*. At this time, also, the different kinds of drunkenness began to be accurately distinguished from one another, and that only was permitted to have an influence, which deprived the subject of it of the use of reason.[5] These

[1] Angelus Aretinus, de maleficiis, p. 111.

[2] Gomez, var. resolut. res. iii. cap. i. nr. 73; Farinacius, prax. qu. 93, nr. 1; Decianus, tract. crim. l. ii. cap. 6; Tiraquell, de pœnis temp. caus. 6; Mascardus, de probat. concl. 94, lib. i, nr. 4.

[3] Clarus, prax. crim. quæst. 60. nr. 11.

[4] Folleri, prax. rer. crim. in Blanci practic. crim. p. 805.

[5] Majorani, Opopraxis Judic. crim. p. 158.

views gradually determined the German practice,[1] though with manifold distinctions, which, certainly, were sometimes more subtle than practically significant, as, for example, the distinction between *ebrius* and *ebriosus*.[2] In Germany, especially, these doctrines found a decided entrance; and the testimonies of Gail,[3] Carpzov,[4] and Böhmer,[5] who follow substantially the opinion of Clarus, leave no doubt whatever on the subject. The more indulgent opinion, in regard to the influence of drunkenness, prevailed also in the practice of Italy,[6] Spain,[7] Portugal,[8] Holland[9] and the Netherlands.[10] It seems the more striking, therefore, that, in three states of Germanic origin, namely, France, England, and Scotland, the doctrine in reference to this matter should have developed itself in a direction precisely the opposite of that sanctioned by the German practice. But this fact will seem less strange, when it is recollected, that, already in the midddle ages and even in the sixteenth century, some jurists,—setting out with the principle, that drunkenness is in itself a punishable offence, and, that those who commit offences while in a punishable state deserve no exculpation, and also that it would be attended with too great danger to society, to attribute a mitigating power to drunkenness, which can so easily be pretended as a cloak for crimes,—established the doctrine, that drunkenness in no case excul-

[1] Damhouder, prax. rer. crim. cap. 84; a Bavo, theorica criminal. Ultrajecti, 1696. p. 254.

[2] Matthæi, de crim. prolegom. cap. 2. p. 33.

[3] Gail, Observ. ii. obs. 110.

[4] Carpzov, prax. rer. crim. P. i. qu. 45. nr. 57. P. iii. qu. 146. nr. 30

[5] Böhmer, Med. ad C C C. ad art. 179. § 9. p. 869.

[6] Cremani, elem. jur. crim. i. p. 46; Renazzi, elem. jur. crim. i. p. 99; Carmignani, elem. jur. i. p. 56.

[7] Asso y Manuel, instituciones del derecho civil de Castilla, Pars. ii. p. 171.

[8] Mellie Freisii, inst. jur. crim. lusitan. p. 4.

[9] v. Linden, regtsgeleerd practical handboek, p. 203.

[10] Ghewiet, inst. du droit belgique, vol. ii. p. 330.

pated from the ordinary punishment.[1] These views, strengthened by the principle of intimidation, which, in former times, was allowed to prevail over that of justice, operated in France and England the more readily, by reason of the fact, that, in those countries, the manners of the people were far more opposed, than they were in Germany, to the practice of drunkenness. Thus, in France, an ordinance of Francis I. of Aug. 31, 1536, chap. 3. art. 1, declared, that drunkenness should not in any case absolve from the ordinary punishment; and, this principle was sanctioned and applied by the French jurisprudence.[2] Similar views prevailed in England, and the doctrine laid down by the classical Hale,[3] which regards drunkenness as a *dementia affectata*, determined the opinions of the later English jurists;[4] though the sound understanding of these writers compels them to admit, that drunkenness diminishes the responsibility, and produces an exemption from punishment, when intoxication takes place without the fault of the drinker, as when it results from the act of other persons, or when a real insanity is induced by habitual drunkenness. In England, as is well known, the Roman law found no entrance; and this fact explains the more readily why the indulgent doctrine founded in the law 11, D. *de pœnis*, which prevailed in the rest of Europe, could not extend itself there. In Scotland, where the Roman law obtained great influence, similar reasons to those advanced by the English jurists seem, notwithstanding, to have prevented the introduction of the milder principle.[5]

[1] See these views already in Baldus, ad l. 1. Cod. unde vi. See also Bajardus, additions to Clarus, nr. 39. ed. of Geneva, 1739. vol. ii. p. 469.

[2] Despeisses, arrets ii. tit. 12. p. 1. nr. 4; Jousse, justice criminelle, part. ii. p. 618; Lois et institut. coutum. part. ii. p. 352.

[3] Hale, History of the Pleas of the Crown, book i. chap. 4. vol. i. p. 32, London, 1778.

[4] Blackstone, Commentaries, vol. iv. p. 25; Russell, Crimes and Misdemeanors, i. p. 7.

[5] Hume, Comm. on the law of Scotland respecting crimes, vol. i. p. 44. He

An example of the more severe legislation occurs also in an ordinance of Charles V. for the Netherlands, according to which drunkenness was never allowed to release from the ordinary punishment;[1] and, in Germany, too, there are not wanting severe ordinances, in the enactment of which the law-givers have suffered themselves to be guided more by their indignation and a desire to deter from crime than by the principle of justice. To this class, belong a Hanoverian law of Dec. 5, 1736, and a Bavarian law of July 6, 1756,[2] which provide that drunkenness shall be no ground of exculpation. But the fate of all disproportionately severe penal laws has also followed these ordinances; the Netherland ordinance soon came to be very little followed in practice;[3] and, in Germany, the better practitioners soon came to the conclusion, that the ordinance ought not to apply to that highest degree of drunkenness, which deprives the individual of all use of understanding.[4]

§ IV. *Modern Legislation.*

The doctrines of the modern legal systems of Germany remain true, essentially, to the old German practice; but the manner, in which these doctrines are expressed, depends upon the character of each particular code. In the Prussian Landrecht, which does not profess to give a complete enumeration of all the grounds for the removal of accountabil-

remarks, that the passages in the Roman law, relating to this subject, refer only to particular cases, and, consequently, admit of no extension.

[1] Damhouder, prax. rer. crimin. p. 322.

[2] According to the Cod. Maxim. Bavar. of 1751, part i. chap. i. § 10, a distinction is to be made between cases, in which the drunkenness is without fault, and wholly deprives of the use of reason, and those, in which the fault is great, or the intoxication only moderate. In the first, no punishment at all is incurred.

[3] Ghewiet, Droit Belgique, ii. p. 330.

[4] In reference to the Hanoverian law, see Spangenberg, in the late edition of Struben's Juridical Reflections, (in German), iii. p. 53.

ity, it is not strange, that we find nothing more than a general intimation concerning drunkenness,[1] from which, however, so much may be concluded, that where it has its origin in gross fault, the punishment of fault only is to be inflicted for a crime committed therein;[2] and, in the annals of Prussian criminal justice, we find that even where a father in a drunken fit killed his child, the offender was only punished by one year's imprisonment.[3] The Bavarian code also contains no general rule in regard to the punishment of an offence committed by a drunken person, though, in articles 120 and 121, it undertakes to enumerate all the grounds which exempt from responsibility. But this omission is only a seeming one, inasmuch as the general expression, "inculpable disorder of the senses or of the understanding," in article 121,[4] includes drunkenness.[5] The code does not expressly provide that inculpable drunkenness shall be punishable as *culpa*, but this results from the principles established in relation to *culpa* generally. When, however, the drunkenness is intentional, and the offender has put himself in that condition for the purpose of committing the crime, the code declares expressly that it shall be no ground of exculpation.[6] On the other hand, drunkenness in a less degree is conceived of in too narrow a manner, when the law[7] speaks of it as a ground of extenuation only in reference to homicide, and thereby seems

[1] Prussian Landrecht, part ii. tit. 20. § 22.

[2] See Hitzig's Journal for Prussian Criminal Law, (in German) no. 22. p. 599.

[3] Hitzig's Journal, no. 5. p. 60.

[4] This article declares, that "the act is unpunishable, when it is committed in inculpable disorder of the senses or of the understanding, in which the actor is not conscious of his act, or of its punishableness."

[5] According to the remarks on the criminal code, i. p. 304, there can be doubt upon this point. See also Feuerbach, Account of remarkable criminal cases, ii. p. 697.

[6] Bavarian Code, art. 40.

[7] Bavarian Code, art. 152.

to exclude the judge from allowing it to avail in other crimes. The Austrian code,[1] without distinguishing between culpable and inculpable drunkenness, considers complete intoxication, when not brought upon one's self with a view to the crime, as a ground of exculpation from responsibility.

Wholly different from this view is that of the French legislation. In the present penal code of France, drunkenness is not mentioned at all; and, as article 66 declares expressly, that no crime can be excused but upon some ground of exculpation acknowledged and provided in the law, it would seem, that, by the French law, drunkenness is not in any case a ground of relief from the ordinary punishment; which is not difficult to understand, when it is recollected, that, as has already been observed, the earlier doctrines of the French jurisprudence in regard to drunkenness did not allow it to have any mitigating effect.[2] For the first years after the publication of the code,[3] this severity of doctrine, in consequence of a servile adherence to the letter of the law, combined with the operation of the principle of intimidation, which reprobated all exculpation on account of drunkenness, was rigidly maintained in the French courts.[4] But by degrees, the milder view prevailed also in France; the severity of the French legislation was

[1] Of 1803, § 2. lit. c. See Jenull, Austrian Criminal Law, part i. p. 138; also, Albertini, Penal law in force in the Lombardo-Venitian Provinces, Venice, 1824, p. 26.

[2] See Merlin, Reportory, vol. iv. p. 910.

[3] According to the law of the 27th Germinal, year iv, a question was to be put to the jury, at the request of the accused, precisely in the same manner as in reference to other mitigating grounds, whether the offence was committed in a state of drunkenness, and drunkenness was allowed to avail as a ground of mitigation. Dalloz, Jurisprudence of the nineteenth century, vol. xiv. p. 315.

[4] On this ground, the decisions of October 15, 1807, and May 18, 1815, are to be explained. Sirey, Collection, vol. viii. p. 24; vol. xv. p. i. p. 398.

found fault with; greater freedom was demanded for the judge, to enable him to consider drunkenness as a ground for moderating punishment;[1] and the writers on the subject soon went further, and undertook to show, that, according to the existing law, an offence committed in a state of real drunkenness, which was not intentional, ought not to be punishable in the same degree as a premeditated crime.[2] These opinions[3] sometimes found their way into the courts themselves; and the admission of drunkenness as a ground of extenuation was justified by the penal code, on the ground, it was asserted, that drunkenness produces a temporary insanity, and that according to article 64 of the penal code, every kind of insanity, without distinction, is a ground of exculpation.[4] It cannot be strange,[5] therefore, that for some years juries in France have admitted drunkenness as a ground of exculpation, and have accordingly pronounced verdicts of acquittal.[6] Inasmuch as juries[7] are not liable to be called to account for their ver-

[1] See Bavoux, Preliminary Lectures on the Penal Code, p. 567; Robillard, Considerations on the institution of the public ministry, Paris, 1821, p. 189—195.

[2] Dufour, in an article in the Themis, vol. i. p. 108.

[3] Dalloz, also, in his jurisprudence of the 19th century, vol. xiv, p. 314, laments the deficiencies of the code, in reference to drunkenness. He distinguishes drunkenness into habitual, premeditated, and accidental, and is of opinion that the last ought to be a ground of extenuation.

[4] Collmann, Theory of Criminal Law, p. 103; Ardesch, ad articulum 64 Codicis pœnalis, Lugd. 1824, p. 33—37.

[5] Among the French writers, the most correct views on the influence of drunkenness are to be found in Rossi, Treatise on Penal Law, vol. ii. p. 188.

[6] See, for example, a case of March 18, 1826, in Georget's dissertation in the General Archives of Medicine, for April 1826, vol. x, p. 519; also a case in the Gazette of the Tribunals, for 1828, nr. 839, in which the jury declared of a drunken man: "he is guilty, but he has acted without discernment and without will." See also Esquirol, in the translation of Hoffbauer, Legal medicine, &c. p. 240.

[7] In the German provinces, in which the French criminal law is still in force, the juries are more severe than they are in France; and the old opin-

dicts, and the question put to them, "is the accused guilty," requires them to decide upon the guilt of the accused, it becomes still easier to understand these acquittals. It is only to be lamented, that the idea of the so-called omnipotence of juries not seldom leads them into error; and that their desire to divert the ordinary punishment of the law from an offender induces them to pronounce a verdict of not guilty; so that one who has committed an offence in the highest drunkenness is wholly freed from punishment, when he has well deserved the punishment of *culpa*.

In the most recent publications of a legislative character, there is also a great diversity of opinion in regard to drunkenness. The Netherlands project of a criminal code, of 1827, article 33, declares, that where the drunkenness is accidental or involuntary, it is, but where it is premeditated or voluntary, it is not a ground for moderating or exempting from punishment. In the revised project of Bavaria, of 1827, article 67, the words of article 121 of the criminal code of 1813 are retained, with the exception of the word "inculpable;" while, on the other hand, the project of Baron von Strombeck[1] does not mention drunkenness expressly, but yet speaks of a transitory, inculpable condition, arising from an entire disorder of the senses, or from a defective activity of the reason. The Hanover project, article 99, retains the words of the Bavarian criminal code, but adds thereto expressly, "namely, in cases of the highest degree of inculpable drunkenness;" and, then, in article 109, number 6, it mentions drunkenness generally among the grounds for moderating punishment.[2] The Zurich pro-

ion, which allows no influence to drunkenness as a ground of mitigated punishment, seems to continue. See the Annals of Justice in Rhine-Bavaria, by Hildgard, Deux Ponts, 1830, no. 4. p. 274.

[1] Project of a Criminal Code for a North German State, by Von Strombeck, article 120.

[2] Bauer, Remarks on the Bavarian project, i. p. 540.

ject of 1829,[1] declares that one who intentionally commits a legal injury, while in a state of inculpable drunkenness of the highest degree, is punishable in the same manner as if he were under age. The criminal code of Luzerne[2] mentions inculpable drunkenness as a ground of exemption from responsibility.

§ V. *Principles for the Determination of the Imputability in cases of Drunkenness.*

It cannot in any degree correspond with the demands of science, to analyze all the possible cases of the existence of drunkenness, in the commission of crimes, and to assign to each its proper rule; and, if we seek for a principle, which shall be easily applicable to all possible cases, we shall find, that the principle of imputability in general is the only one, which can properly be applied in cases of drunkenness. The conviction is gradually becoming more and more prevalent, that the principle of freedom is an insufficient foundation for criminal responsibility.[3] It is quite true, indeed, that freedom, as the fundamental power of the mind, must be supposed in every degree of imputability, because, without it, imputability is impossible; but, yet, no guiding principle is thereby given to the judge, which will enable him to decide upon the condition, in reference to which imputability may be asserted; for every offender has freedom, and by his own fault and choice is brought into that state of mind, in which he chooses the crime as a means of gratifying his passions; and the drunken man, even, becomes so through the exercise of his own freedom, since, by a proper presence of mind and a strong will, it is in his power to avoid intoxication.

[1] Article 159. [2] Of 1827, § 3.

[3] See the modern discussions of this subject in Weber's Anthropology, p. 294; Clarus, Contributions to the knowledge and judgment of doubtful conditions of the mind, (Leipsic, 1828) pp. 8—19; Jarcke, in Hitzsig's Journal of the administration of criminal law, no. 21. p. 129 and following.

It is equally unsatisfactory, to inquire whether the actor has the use of his understanding, or, according to another view, the use of his reason; for, independent of the vagueness and uncertainty resulting from the different senses in which these expressions are used, we do not obtain a strong and clearly cognizable test, by determining whether the drunken man has the use of understanding or of reason.[1]

In reference to imputability, the only proper inquiry is, whether the actor, at the time of the act, (and, as it were, of himself,) possessed a consciousness of his act and its consequences, and its relation to the law; and where this consciousness is wanting, imputability ceases. The law considers every one responsible, when he knows what he wills to do according to its effect, and is in a condition to subsume the act under the law; because, when these conditions exist, the actor may then be withheld from the act, by his inward sense of its not being permissible, and by the legal prohibition to commit it, of which he has full knowledge; and, if he, notwithstanding, commits the act, it shows that he wills to do that which is known to him to be forbidden. But this consciousness, which is the condition of imputability, is obliterated in one who is in a state of complete drunkenness. In consequence of the physiological operation of drunkenness on the bodily organization, and the consequent increased circulation of the blood, the ordinary nervous activity is disturbed; the accustomed series of ideas is interrupted; the consciousness of the external world is darkened; images and phantasies, which arise in the soul after the manner of dreams, and which the calm consideration of the external world, in a sober state, would teach to be unreal, become overpowering; and the unbridled imagination gives to the flow of these images a strength, which hinders the operation of the accustomed

[1] Jarcke, as above cited, p. 152.

ideas,—creates a disorder of the soul,—and, in the excitement of the nervous system, effects a delusion of the drunken man, while, at the same time, it lends a power to the appetites arising from these eccentric images, which the deterring representations of reason are unable to surmount. The drunken man loses the consciousness of the external world; the friend, whom in his sober mind he loves, is now regarded as an enemy, in whose every even the most innocent look, he imagines he reads a threat; it is no longer in his power to refer what he wills to do to the law, for the voice of reason is silent for him; he no longer knows what he does; and he consequently acts without responsibility, because he acts without consciousness.

If it be maintained, on the contrary, that, in every case of drunkenness, the individual has brought himself into that state with his own free will and through his own fault; that even whilst in that condition there is some though a dim degree of consciousness still remaining; that drunkenness is itself a punishable condition, and, consequently, that when it leads to crime, it ought not to be made the ground of exculpation;—the answer is, that this reasoning rests upon a manifold confusion of ideas; and, above all, the question, whether drunkenness is itself punishable, is confounded with the question, whether an act committed in this state should be subjected to punishment. The first may be decided in the affirmative, in so far as police punishment is in question, which may be provided in the case of drunkenness, when it manifests itself to the public scandal;[1] but the second question, on the contrary, can only be answered in the affirmative, with several dis-

[1] There is a very great difference between one, who gets drunk every day in his chamber, and sleeps off the fit in his own house, and one, who staggers about the public streets in a drunken state,—exhibits a disgusting spectacle,—and insults the passengers.

tinctions: (*a*) there are cases in which an offence committed in drunkenness is unpunishable, because no imputability exists; (*b*) there are other cases in which an offence committed in this condition can only be imputed as *culpa*; (*c*) and other cases, in which the circumstance of drunkenness does not hinder the application of the full punishment of the crime intended. In how far these distinctions are well founded, will be more closely considered in the course of this discussion. Drunkenness is not in every case a culpable condition, and on that account to be visited with the ordinary punishment; for, as will easily be shown hereafter, there are very many cases, in which it may be regarded as wholly inculpable; and, even in those cases, in which it is the result of the drunken man's own fault, it cannot be said that he foresaw and desired the crime therein committed; we cannot, indeed, in such a case, absolve him from the reproach of *culpa*, but it does not therefore follow, that he is to be looked on in the light of a voluntary offender, committing an offence with a bad intention; for, in the fit of drunkenness itself, the subject of it possesses no consciousness of what he is doing, and, before it commences, he does not in general know the consequences that will result from it,—he does not know, that the enjoyment of intoxicating drink will put him into such a state of excitement as to incline him to crime,—he may trust the discretion which has hitherto approved itself sufficient through his whole life,—and, even at the moment, when drunkenness commences, we cannot charge him with an imputable intention, on the ground, that as soon as he feels the approach of intoxication, he ought to stop drinking; for, as we learn from experience, there is no such certain, perceptible step, which marks the transition from sobriety to drunkenness; a single glass more changes the ordinary temper of the drinker from the calm to the passionate; and this change takes place so suddenly and so unper-

ceived by him, that he cannot be said to be thrown into such a state of passion with his own free will and consent.[1] The opinion of Escher,[2] therefore, who asserts that where the drunken person is not impotent to commit the crime in question, the idea of punishment may operate upon him through his habitual association of ideas; and, consequently, that an offence committed in a fit of drunkenness ought to be punished in the same manner as a *dolous* crime, is not just: for, if we consider the nature of drunkenness, we shall find that it consists, either, *first*, in an entire disorder of the senses; or, *second*, in a bodily condition, in which a morbid excitement of the nervous and muscular systems irresistibly impels the drunken man to violent acts; or, *thirdly*, the effect of drunkenness takes the character and is similar to that of delirium, in which phantasies of the imagination obtrude themselves with such liveliness, as to overpower the understanding of the drunken man, who, being thereby prevented from seeing into the deception, holds the images and fantasies in his mind as true, and conducts himself accordingly. But in neither of these conditions, can it be said that the idea of punishment continues to operate; for, in the first, there is no clear idea of any thing; in the second, the reason is too feeble to control the morbid excitement, which is also complicated, in a greater or less degree, with disorder of the senses; and, in the third, responsibility ceases altogether, precisely as in regard to the acts of the insane. From the fact, therefore, that a drunken man has power notwithstanding to commit crime, no conclusion can be drawn as to his responsibility, for he acts in the same manner as a madman, or insane person.

It is equally erroneous to assert, as is often done, that an

[1] Rossi, Treatise on Penal Law, vol. ii. p. 188.

[2] Escher, Dissertation, p. 220.

offence committed in a state of drunkenness is similar to one committed in a passion; for, if we compare these two conditions, we shall soon observe, that passion has an internal and drunkenness an external cause.[1] One, who is subject to the influence of passion, has yielded to his strong feelings, and allowed them a dominion over his life, which denies or weakens the deterring representations of the law; it is through his own fault, that the angry man becomes inflamed with rage, since he might have withstood the first movements of his passion; and, besides, every fit of passion has its root more or less in a previously existing appetite or passion, and a crime committed therein is always in a greater or less degree the product of premeditated selfish motives. When an angry man kills his enemy who has injured him, in this case, there are circumstances preceding the passion, which excite to crime, and which are conflicting, in the soul of the actor, with the idea of the wickedness of the act, and of the punishment provided by the law; while a drunken man, on the contrary, commonly acts without reference to the relations which precede his drunkenness, and kills perhaps his best friend, who merely endeavors to withstand the outbreak of his fury.

He who acts in a passion is always obnoxious to the reproach of fault, since the passion excited in the particular case is only the product of an already existing disposition of soul, in consequence of the actor's having too frequently yielded to his passion, and lost command over himself. He is justly liable to the reproach of fault, too, for the further reason, that he is not only acquainted with his own propensity to get in a passion, but he also knows what are the consequences of anger, which, in its very nature, leads to the doing of evil to those by whom we have been injured; whereas drunkenness may be wholly inculpable, as, for ex-

[1] Rossi, Treatise, vol. ii, p. 189.

ample, when one does not know the intoxicating quality of the liquor by which he is made drunk; neither is drunkenness in itself a condition, which makes every drunken man inclined to commit crimes, for it frequently induces a remarkable serenity of temper; and it may be, that the drunken man, from his former experience of himself, knows that he is perfectly harmless and peaceable when drunk, and is therefore inclined to look upon the condition of drunkenness with feelings of indifference. It cannot be said, either, that the drinker ought not to have drunken; for drinking in itself is not forbidden, and is frequently occasioned by some sudden change or extraordinary circumstance, of which the drinker himself is not conscious; and drunkenness may even arise from a condition of calmness and social enjoyment, which is far from blameable. If we compare an offence committed in a fit of passion with one committed in a state of drunkenness, the distinction cannot escape observation, that in passion there is always some degree of consciousness remaining, and that the actor knows what he is doing, and its consequences, and hears the deterring voice of the law; whilst drunkenness renders the subject of it unconscious of his actions, and, in so far, constitutes a condition analogous to that kind and degree of mental disorder, which excludes imputability. From the foregoing considerations, it is easy to conclude, that the opinion of those, who would make an offender responsible in the same degree and punishable in the same manner for a crime committed in drunkenness as for one committed in a sober condition, is wholly groundless.

§ VI. *On the different Forms of Drunkenness.*

In order to the formation of a correct judgment in the particular cases, in which the drunkenness of the offender is alleged as a ground of exculpation, it is necessary to con-

sider: (1) the different degrees of drunkenness; (2) the manner in which it originated; (3) the kind of offence therein committed; and (4) the individuality of the actor.

I. In reference to the different degrees of drunkenness, it has been attempted in modern times to delineate the different periods of intoxication,[1] and to designate its several gradations, according to the distinctions presented by the ordinary use of language.[2] But, life, in the never ending fulness of its combinations, mocks every attempt to bring all possible cases within certain sharply defined classes; the different degrees flow into one another; it will always be discretionary whether a given case shall be placed in the first or second degree. It is not to be denied, too, that the temperament of the drinker will have an influence upon the determination of the degree.[3] A passionate man, who is inclined to anger, will perhaps have his passions aroused by the lowest degree of drunkenness, which, in a man of a mild and peaceful temper, only has the effect to compose the feelings, so that other persons, who do not know him intimately, merely perceive a change in him; and, in this case, the drunkenness must be adjudged to be of the highest degree, though if the subject of it were a person of an ordinary temperament, it could only belong to the second.[4]

[1] Hoffbauer, Psychology, in its application to the administration of justice, p. 276.

[2] Henke, Dissertations, vol. iv. p. 243; Heinroth, Manual of the disorders of the spiritual life, vol. ii p. 272; Clarus, as above cited, p. 111; Weber's Anthropology, p. 451; Feuerbach, Reports of remarkable criminal cases, vol. ii. p. 691.

[3] Weber, as above cited, p. 454.

[4] Feuerbach (l. c. p. 688.) very properly warns against the adoption of any absolute principles in reference to the succession of the degrees of drunkenness. There are some individuals, who, when they are once excited by the use of intoxicating liquor, are very quickly reduced to a state of unconsciousness, by the enjoyment of a single additional glass, while there are others, who remain conscious of their acts, even when their physical powers already indicate the consequences of drunkenness.

In graduating a scale of degrees of drunkenness, it is most proper to consider only the manner, in which the consciousness is thereby affected; and, in so far, it is not inappropriate, in the general, and as an aid in forming a judgment of the influence of drunkenness on criminal responsibility, to distinguish three degrees. The lowest degree, in which the liquor enjoyed only promotes a quicker circulation of the blood, and thereby increases the nervous activity, produces no change in the consciousness of the act, and of its being permitted or punishable by the law. The subject of drunkenness in this degree is only clearer and more excitable than common; but his intellectual powers remain in their normal equilibrium, and the use of his understanding is not diminished. His responsibility is in no respect changed or diminished, any more than is that of one, who, in a burst of joy on the receipt of some pleasing news, does a light-minded and wanton act. In drunkenness of the second degree, in consequence of the stronger pressure of the blood, and of the increased nervous irritability thereby produced, the feelings rise to the state of passion; the imagination has already gained the upper hand, and fills the mind with unreal images; and the increased excitability of the drunken man deceives the clearness of his consciousness, which, in the middle degree of drunkenness is not generally destroyed. This degree is characterized by striking expressions and actions, which we are not accustomed to observe when the subject of it is sober; whilst he is still master of his actions, and, by his whole deportment, shows that he is conscious of what he is doing. It is evident, therefore, that in drunkenness of this degree, we cannot consider responsibility as at an end; but, on account of the deceived and confused consciousness, it is just, that there should be a diminution of the punishment for crimes committed in this condition. Drunkenness in the highest degree, on the contrary, is characterized by such an entire loss or disorder of

the consciousness, that the drunken man is no longer conscious of what he is doing, or, at least, of the consequences of his actions, and their reference to the law. In the powerful excitement of the imagination, occasioned by this degree of drunkenness, there is the same flow of ideas as in dreaming; or, certain ideas, which take possession of the mind of the drunken man, become so strong, that he is unable to detect their want of reality; and, in consequence of the nervous excitement and diseased sensation occasioned by the vehement pressing of the blood to the brain, wild appetites arise, whose true character the drunken man is as little able to perceive, as his reason is to govern them. Hence, in reference to the particular crime committed by the drunken man, imputability ceases; because consciousness as the condition of imputability does not exist. It is proper to add, however, that the highest degree of drunkenness operates in many persons in such a manner, that the drunken man often manifests a coherence of expression, and a kind of systematic intention, in his violent or criminal act, which lead to the belief that he still retains the use of his understanding; while a more careful consideration shows, that even in such a case, there is no imputability, since, in many instances, the mind of the drunken man is possessed by a certain delusion, which it holds for real, and upon which his acts are predicated; and, in other cases, in which the individual is in the state of the highest drunkenness, a morbidly excited appetite impels him with such irresistible force, that though he acts systematically with a view to gratify his desire, he is still in such a state of disorder, that he does not perceive the guilt of what he is doing.

II. In reference to the manner in which the drunkenness has originated, the following distinctions may be made:— (1) It may be intentionally induced, in order to the commission of a crime while in that state; (2) it may result

from drinking without any intention to become drunk, and without any belief, on the part of the drinker, that drunkenness is likely to ensue; (3) it may arise without any intention to become drunk, and without reference to a crime to be committed therein, though the drinker might have easily foreseen, that under the existing circumstances he would have become drunken. The legal consequences of these distinctions will be more closely examined hereafter.

III. In regard to the nature of the offences[1] committed while in a state of drunkenness, three kinds are to be distinguished, namely:—(1) offences, which require a certain degree of preparation and an internal idea of systematic action, and which, being of a selfish character, can only be committed with consideration, such as theft and counterfeiting; (2) offences, which consist in certain expressions, indicating the dangerousness or internal corruption of the offender's mind, or a disposition to do wrong to others, as, for example, injuries, blasphemy, and seditious speeches; (3) offences, which consist in violent acts and are committed in a sudden ebullition of passion. In reference to offences of the first kind, the existence of drunkenness in the highest degree can scarcely be supposed, since the consideration which belongs to the crime is not compatible with that want of consciousness, which is essential to the highest degree of drunkenness. In such cases, therefore, drunkenness in the second degree more often comes in question; but it is necessary also to take into consideration the whole deportment of the offender. He, who takes a thing, which he knows does not belong to him, with an intention to steal it, is not exempt from punishment, even though his courage has been elevated, or his appetite inflamed, by drunkenness of the first or second degree, provided his subsequent conduct, after the drunkenness has passed away, as, for ex-

[1] Clarus, as above cited, p. 116.

ample, when he neglects to give back the thing, shows that the *animus lucri faciendi* was present at the time or was superadded afterwards; whilst, on the other hand, drunkenness comes into consideration, when a person in the highest degree of drunkenness takes the thing of another, without knowing that he does so, or without knowing that the thing is the property of another, as, for example, when he throws away the thing in a drunken fit, or, when, by giving it back after the intoxication is over, and he becomes conscious of his fault, he shows that he had no intention to appropriate it. In offences of the second kind, there is no responsibility whatever, since, without consciousness, no criminal direction of the will, as, for example, the *animus injuriandi*, is possible; and the verbal declarations of a drunken man not only occur as the products of a condition in which the will exercises no restraint, but, in the mouth of such a person, whose condition is visible to every body, cannot be the means of injury. Still, in this class of cases, also, the responsibility of the offender often depends upon preëxisting personal relations, as, for example, when a drunken man utters injuries against his enemy; or upon his subsequent conduct, as, for example, when, upon becoming sober and being informed of the injurious speeches and required to recall them, he refuses to do so. In crimes of the third kind, the highest degree of drunkenness comes chiefly into consideration in the case of an act, which, if committed by a sober man, would be punishable as murder or criminal wounding. In such a case, the drunkenness has the effect to do away with the character of premeditation, which would otherwise belong to the act, and, according to the circumstances, to reduce the punishment to that of an act committed under the impulse of passion, or even to render the offence punishable only as a fault (*culpa*).[1]

[1] In many offences, the nature of the act committed precludes the supposition of the existence of the highest degree of drunkenness in the offender,

IV. The individuality of the actor comes into consideration, (*a*) in so far as he is a man, who is in general inclined to crime, and gives himself up to it on the least occasion, or, on the other hand, is a thoroughly blameless and just person; (*b*) in so far as he is an habitual drunkard, and has sufficient knowledge of the consequences which result from that condition; (*c*) in so far, as, during his drunkenness, he gives proof of the continuance of consciousness, and, by the means which he makes use of, the adaptation of his acts to a definite purpose, and by the preparations already made for the crime in the first stages of his drunkenness, shows that he knows what he is doing, and is conscious of the motives by which he ought to be deterred; (*d*) in so far as the drunken man, while the offence is yet incomplete, receives timely warning, and is consequently in a situation to perceive the criminal character of his undertaking.

§ VII. *Culpable Drunkenness.*

From what has already been mentioned in § III, it is manifest, that the doctrine, according to which an offence committed in the highest degree of unintentional drunkenness is imputable as *culpa* only, (where there are no particular grounds also for relieving the offender from that imputation), may be considered to correspond to the doctrine of the German jurisprudence.[1] There are also internal grounds, derived from the essential nature of imputability, which speak in favor of the truth of the same doctrine. The drunken man is on the same footing with one, who, without any intention to commit an offence, im-

because a person intoxicated in that degree would not possess the physical power necessary to the commission of the offence, as, for example, rape.

[1] See the citations in the notes on p. 296, in § III, and also Theodorici colleg. theoret. pract. crim. Disp. 7. thes. 7; Quistorp, Principles, § 95; Meister, Principia, § 117; Martin, Criminal Law, § 39; Jarcke, Manual, part i. p. 175.

properly puts himself in a condition, which, as he cannot fail to know its danger, he might easily and ought to have avoided. In the same manner, that, when one goes with a burning light into a barn and sleeps there, or playfully shoots at another with a gun, of which he does not know whether it is loaded or not, we consider the criminal act which results from such carelessness as a *culpa;* and in the same manner, that, when a pregnant woman suffers the birth of her child to take place in secret, and thus puts herself in a helpless condition, we impute the death of the child to her as a *culpa;*—so, in the same manner, a drunken man is obnoxious to the reproach of *culpa*, when he commits an offence in that condition; since he might have avoided falling into it, and, according to common experience, he could not have been ignorant, that a drunken man is no longer master of himself, and is against his will impelled to acts, which in a sober state he would not have committed.

The doctrine of Tittmann,[1] that drunkenness does not inculpate, but that when not intentionally induced, it is unimputable, because the crime committed does not stand in connection with the criminal intent, is inadmissible; because such a connection certainly does exist, at least, indirectly,[2] since the disposition of will to commit the offence is the consequence of the excitement produced by the drunkenness, and the drunken man cannot be ignorant that by drinking he will put himself in a condition in which he will be dangerous to other persons.[3] It is difficult to determine what drunkenness is to be considered as culpable. We often hear it asserted, that drunkenness, even when it is

[1] Tittmann, Manual of Criminal Jurisprudence, part i. § 87; Gans, also, in his critical exposition of the Hanoverian project, p. 229, considers it essential to inquire whether the drunkenness is culpable.

[2] Feuerbach, Compendium of Criminal Law, 10th edition, § 57.

[3] Moltzer, de causis a reo allegandis, quæ doli præsumt. elidunt, Lugdun. 1810, p. 86.

not induced with a view to the commission of an offence, is wilful, and consequently culpable, inasmuch as the drunken man wilfully resorts to the means by which he becomes drunk; and, as drunkenness arises only gradually and by degrees, the drunken man by a timely giving up of his liquor might escape all further danger; but, on the other hand, it must be taken into view, that in regard to the consequences of drinking, no absolute principle can be established; that there are persons who can drink thirty measures of liquor and still remain sober and discreet, whilst the majority of others are made drunk by the sixth part of that quantity; that persons in liquor conduct themselves very differently, and while one quietly sleeps off his intoxication, another diverts himself and others by his jokes, and a third gets into the greatest rage and destroys every thing within his reach; it must also be considered, that, in regard to the consequences of drunkenness, so much depends upon accidental contemporary circumstances, that it is only by means of morbid affections on certain days, or in consequence of raillery and contradiction, which the drunken man is subjected to by others, or from the circumstance that he comes immediately into the open air, that he becomes inclined to the commission of crimes, whilst on other days and under different circumstances, the same quantity of liquor would have no such effect upon him. For these reasons, it cannot be said, that every drunkenness is culpable, merely because the drinker must have known that he would become drunk. According to another opinion,[1] in order to decide whether the condition is a culpable one, it is only necessary to inquire whether the party, on the day on which he committed the offence, drank immoderately. This view may be admitted, provided the sense of it is that it is to be ascertained, whether the party, on that day, drank

[1] Feuerbach, Reports, &c., ii. p. 697.

more than he was accustomed to drink without becoming drunk. If one, who, for example, is accustomed every day to drink eight measures of beer, and to become thereby only somewhat brighter, without losing his consciousness, take only six measures on some particular day, and in consequence of certain accidental circumstances occurring on that day, he is thereby reduced to a degree of drunkenness, which, under other circumstances, would not have taken place; such drunkenness ought not to be considered as culpable. It is manifest, that the question of culpability must be decided according to the individuality of the person. He, who does only what he is regularly accustomed to do, provided it be a thing in itself permitted, is free from fault; for he cannot foresee that he will become drunk, and consequently in a situation in which he will be dangerous to others. But when one drinks more than he is accustomed to drink, as, for example, when one, who is accustomed to drink six measures daily and to remain sober, drinks seven or eight, and becomes drunk, an offence committed by him in that condition is imputable to him as *culpa;* for, since he does not restrain himself to his accustomed quantity, he has no ground of exculpation in his favor, but stands upon the same footing with every other drinker, who can and ought to know that drunkenness follows from a free indulgence in strong drink. On the other hand, those go too far, who consider the drunkenness inculpable, where the party is accustomed to the use of liquor and to become intoxicated, but, when drunk, remains peaceable and quiet and indisposed to quarrel; for such a person notwithstanding wilfully puts himself in a dangerous condition, in which he knows that he no longer retains his consciousness, and in which for that very reason he is no longer his own master; and his experience, that his drunkenness has not thus far been followed by any unhappy consequences, is just as little entitled to be considered a ground of exculpation, as

that of one, who, trusting in his often proved skill in shooting, shoots at a wild beast which happens to be very near a man, and, by his carelessness, kills the man.

In order, therefore, to decide properly upon the existence of culpability in the condition of drunkenness, a careful inquiry, with a view to the following particulars, is necessary: (1) how much is the party accustomed to drink without becoming drunk; (2) how does he behave himself when drunk,—is he of a nature which inclines him to quarrel, or does he remain peaceable; (3) whether, on the day when he committed the offence, he was operated upon by particular circumstances, as, for example, vehement anger, by which he was very much excited; (4) whether the disposition to commit the offence was not gradually induced, by the raillery or particular excitement of other persons, who, perhaps, desired the commission of the offence; (5) whether the offence is a consequence of those illusions of the senses or morbid fancies, which arise from drunkenness;[1] (6) or whether it is accompanied by morbid affections and an insane condition, in which there is a disorder of the senses; (7) whether the drinker had not previously had melancholy experience of the passionate disposition into which he is brought by the use of intoxicating drink; (8) whether, before he had become fully drunk, he had not been warned of his danger by others, and requested to abstain from further drinking. It is by a reference also to these particulars, that the degree of *culpa*, as well as its existence, must be determined.

§ VIII. *Intentional Drunkenness.*

The doctrine, that, where an offender has intentionally intoxicated himself, in order afterwards to have it in his

[1] This principle is established in the case mentioned by Feuerbach, (as above cited) vol. ii. No. xii.

power to call upon the condition of drunkenness as a ground of exculpation, a crime committed by him in that state should be punishable as *dolous*, must be admitted to be correct, when it is considered, that in such a case the criminal intention is immediately directed to the crime actually committed; that the crime seems so much the more to be committed wilfully, for the reason, that even during the drunkenness, the mind of the offender is constantly directed towards it; and that the condition upon which the offender's competency to responsibility depends exists, inasmuch as the drinker, who wills to commit the crime, still has consciousness enough, and is consequently in a situation, to recognize and be operated upon by the deterring motives of right and of law. In regard to the principle, which ought to regulate the punishment in these cases, opinions are still divided. The Bavarian criminal code, § 40, inflicts the ordinary punishment upon a crime committed in a state of intentional drunkenness.[1] Oersted[2] approves of this provision; while Kleinschrod[3] and Stelzer[4] are of opinion, that a less punishment ought to be applied, where one in the highest degree of drunkenness commits a crime upon which he had not previously resolved; because, at the time of the commission of the act, the drunken man was not competent to the use of reason. Stübel[5] thinks it important to inquire, whether the offender commits the precise crime which he had in view, or a different one. But, in order that a correct judgment, in regard to this matter, may be possible, it is necessary, in

[1] The revised project, § 60, retains this provision only where the intended crime is actually committed, but, in other cases, admits of a lesser degree of responsibility.

[2] Principles of Criminal Law, p. 247.

[3] Kleinschrod, Systematic Development, part i. p. 224.

[4] Stelzer, On the Will, p. 312.

[5] Stübel, in the appendix to my tract on the most recent state of criminal legislation, p. 40.

the first place, to distinguish accurately the several cases that may occur. It is important to determine: (1) whether one has resolved to commit a particular crime, as, for example, to murder A, and in order to give himself courage, or to prepare himself before hand with the excuse of drunkenness, becomes intoxicated; or (2) whether being in a very excited state, but without as yet having formed an intention to commit a crime, he, in a fit of ill humor, as, for example, when he has been insulted by another, drinks excessively, and at last in his drunkenness commits a crime, to which he was already inclined by his previous excited state; (3) whether, during the gradual progress of the drunkenness, the commission of a crime already previously resolved upon has not been hastened by the intervention of causes, which, in general, have the effect to excite the party,—as, for example, where one, having resolved to kill his enemy in the evening, drinks excessively in order to give himself courage, but receiving new injuries in the afternoon by which he is very much excited, strikes down his adversary immediately; (4) it is important to ascertain, whether the offence committed is of a nature and kind different from that previously resolved upon,—as where one becomes intoxicated in order to commit a rape upon A, but, in his drunkenness, kills B; (5) or, whether the crime committed is only a higher degree of that intended, as, for example, where one intoxicates himself for the purpose of inflicting a severe wound upon A, and then in the fit of drunkenness kills him.

The application of the punishment must be governed by considering whether the crime actually committed in the fit of drunkenness stands in such a connection with that previously resolved upon, that the former can be regarded as wilful and intentional, and that the previously formed criminal intent can be referred to the crime committed. This is evidently true in the first of the above mentioned

cases, and we can have no hesitation whatever in inflicting the ordinary punishment for murder upon the offender. In the second, on the contrary, there is no particular criminal resolution; the inward storm is first raised to its highest pitch by the drunkenness; the crime cannot be considered as committed with fully continued consciousness, since there was no strong resolution existing, which could continue to operate; the passion is first excited to its highest degree by the liquor, and, consequently, the punishment must be reduced to that for an offence committed in a fit of passion, moderated still further by reason of drunkenness. In the third case, the same may be said; the excitement which takes place during the progress of the drunkenness, receives such an increase of power by reason of the exaltation of the physical state thereby induced, that it impels to the commission of the crime; in this case, we know, indeed, that the drinker willed to commit a crime, and that he actually committed one; but we do not know, whether he would actually have done so, had it not been for the violent excitement into which he was thrown; and, in doubt on this point, we cannot consider the crime to be committed with premeditation. In the next case, the crime committed must be judged of according to the principles established in § VII, and consequently be punishable as a *culpa*, since the previous consciousness refers to a wholly different offence, and the inclination to the crime actually committed is only the result of the excitement produced by the drunkenness. In the fifth case, on the contrary, the crime committed would be imputed to the offender as intentional; for, he who uses certain means in a certain manner, from which he cannot but know that the most grievous as well as the slightest consequences may result, and who intentionally puts himself, by means of drink, in a condition in which he is no longer master of himself, and is consequently unable to

judge of the effect of what he does, must be regarded as consenting to all the consequences of his acts.

§ IX. *Unpunishable Drunkenness.*

As a consequence of the principle, that a crime committed in a state of culpable but not intentional drunkenness is imputable only as a *culpa*, the liability to punishment ceases altogether when the drunkenness is inculpable. This is the case, (1) when one drinks only moderately, that is, does not exceed his common measure of liquor, the enjoyment of which is not usually followed by intoxication, but the highest drunkenness notwithstanding ensues, in consequence of the properties of the liquor being changed by other persons, against his will and without his knowledge, as, for example, by mingling therewith highly intoxicating ingredients; as the drinker cannot know of this change in the quality of his liquor, he cannot of course foresee that he will become intoxicated by the enjoyment of it, and must therefore be held free from fault. The same is the case,(2) when one drinks under circumstances, whose extraordinarily intoxicating operation he is ignorant of; as, for example, A is accustomed to drink two measures of wine without becoming intoxicated, but going into a wine cellar, where a great quantity of liquor is fermenting, and there drinking two measures, it may easily happen that he becomes intoxicated, without being able to foresee the influence of the place. So, (3) where one drinks immoderately, knowing that he will thereby become drunk, the drunkenness may notwithstanding be considered as inculpable, when the drinker takes measures beforehand to prevent all danger from it to other persons, though these measures prove fruitless, by reason of extraordinary accidents, which cannot well be foreseen;[1]

[1] Stelzer on the Will, p. 314.

as, for example, when one, who knows his own weakness, drinks excessively, but charges his servant beforehand, as soon as the drunkenness becomes manifest, to confine him immediately in a retired chamber; if, now, the servant by accident runs away and leaves his master in a state of drunkenness, and strangers come in and a quarrel ensues in which the drunken man kills one of them, the drunkenness must be considered as inculpable; because the drinker has taken every precaution to guard against a dangerous outbreak, and it is contrary to his expectation, and by the fault of another, that the accident takes place. Drunkenness may also (4) be regarded as inculpable, when it occurs under circumstances, in which it is only through a coöperation of many concurring relations, as morbid affections, particular excitements by other persons, jeering, &c., that a quantity of liquor, which, in the absence of these relations, would not give rise to the highest drunkenness, produces that effect upon the drinker. The characteristic of fault ceases, too, (5) when the drunkenness is the result of disease, as will be explained hereafter.

§ X. *Ebriosity.*

It is necessary, also, in this place, to say something of *ebriosity*,[1] by which we understand that condition which gradually results from the excessive use of intoxicating liquors, and is characterized by certain abiding effects. This condition, in reference to offences committed by inebriates, comes into consideration in a twofold respect: (1) in so far as they actually intoxicate themselves, and therein commit crimes; (2) in so far as they commit crimes, when not in the state of true drunkenness. The habitual use of intoxicating liquors produces by degrees certain permanent

[1] Clarus, as above cited, p. 118.

effects, in reference to the physical and mental powers; the inebriate becomes gradually insensible to moral impressions; his nervous system becomes morbidly affected; and thence results either a moral obtuseness, manifesting itself in a stupid brutality, and only relieved for the moment by the use of stimulating drink, or a condition of extraordinary irritability, which breaks out upon every even the slightest occasion, and frequently in the most brutal manner.[1] The inebriate; therefore, even when not under the immediate influence of liquor, seems to be in an abnormal condition, in which the mental powers are morbidly disturbed and changed; and witnesses called to testify to the condition of such persons, observing that they conduct themselves differently from others, frequently pronounce them to be insane, and thus the judge may easily be led into error. But even when the inebriate actually drinks and becomes intoxicated, it is important to understand, that he falls into the condition of entire drunkenness[2] far easier than other persons; that also the highest drunkenness far sooner makes its appearance, and frequently assumes a more violent and dangerous character, and is not seldom connected in the so called second period of intoxication with an entire extinction of consciousness.

If we now apply these observations to the question of responsibility for offences, the following principles result. (1) Mere ebriosity, without actual drunkenness, is not of itself any ground of exculpation or moderation. The judge must be governed, in reference to the responsibility of an offender, by the existence of consciousness on his part; and neither the stupidity of an inebriate, nor his increased irritability, destroys his selfconsciousness as an actor, or his consciousness of the act and its illegality; because even the moral

[1] Frotter, on Drunkenness and its Influence upon the human body. Translated with remarks by Hoffbauer. Lemgo, 1821.

[2] Clarus, as above cited, p. 127.

perversion and the increased excitability to crimes, which result from ebriosity, are only the selfculpable consequences of the immoderate enjoyment of spirituous liquors, and are not entitled to any greater influence upon the question of responsibility, than the general condition of one, who, by early sensual indulgencies, has injuriously affected his powers of body and mind. (2) An exception to this principle can only be admitted, either when a real insanity already exists in consequence of the ebriosity (§ XI); or when the ebriosity is connected with certain morbid affections of the mind, which are first thereby brought to light;[1] or when violent passions, as anger, operate upon the inebriate, and, in a manner which tends very much to diminish his consciousness, carry up the excitability to its highest pitch; in all which cases, there is good ground for moderating the punishment. (3) If the inebriate actually intoxicates himself, and, in his drunkenness, commits a crime, the drunkenness must infallibly be regarded as culpable, because he cannot be ignorant how easy it is for him to become intoxicated, and how dangerous his intoxication is; but, even in this case, the greatest foresight is necessary on the part of the judge; for, as the inebriate is habitually accustomed to drink, and, consequently, does not regard the condition of drunkenness as an extraordinary one; as his consciousness is greatly enfeebled, and he consequently does not so clearly perceive the wrongfulness of his acts; and as, finally, the inebriate is more liable than others to become drunken in the highest degree, even when he drinks but little; so the ebriosity, under certain circumstances, may be a ground, either for considerably reducing the degree of culpability, or for removing it altogether, provided the drinker has not drunken immoderately.

[1] For example, the case cited in Hitzig's Journal, No. 5, p. 60.

§ XI. *Mental diseases connected with Drunkenness. Appetite for intoxicating drink. Delirium tremens.*

In the foregoing section, we have intimated that a condition, highly prejudicial to the physical and mental powers, may be induced by habitual drunkenness.

I. If these effects are of such a nature and extent as to destroy the consciousness which is the condition of responsibility, the mental disease which results therefrom must be regarded as a ground of irresponsibility. Against this view, however, a writer highly deserving of the science of legal psychology has expressed an opinion, which cannot be passed by without notice. Heinroth[1] undertakes to prove, that every mental disease is culpable, and, consequently, that an offence committed therein is imputable as *culpa*. This author considers an insane person as on the same footing with one who is drunken, and as he looks upon every kind of insanity as culpable, it is easy to understand, that he must also regard him as punishable, who knowingly puts himself into the condition of insanity by means of drunkenness: but we cannot give our assent to this opinion;[2] for, in the first place, if, in reference to mental diseases, it were really true that they are always culpable, this culpability would only be a moral one, and certainly not practically applicable; secondly, for the reason that experience teaches that the greater part of mental diseases arise only from corporeal affections; and, lastly, that even where moral causes can be shown, it cannot be said, that the existence of the disease is to be placed to the account of the sinfully culpable condition. But, in reference to drunkenness, as the cause of mental disease, it must be mentioned, that even

[1] In Hitzig's Journal, No 15, p. 136.

[2] See, also, in opposition to Heinroth's doctrine, an article by Jarcke, in Hitzig's Journal, No. 23, p. 106.

in the case of an offence committed by an insane person, if it can be shown that the offender was already previously ebrious, he cannot be considered as legally culpable; because the culpability of which we here speak is only a moral, but not a legal one, on the ground, that the drinker might certainly have foreseen that his ebriosity would at last terminate in insanity. When insanity results from drunkenness, it is always an extraordinary circumstance; the drinker sees hundreds of his acquaintances daily drink as much as he himself does; he sees that they sleep off their intoxication, and are then as well as before; he knows, perhaps, that his grandfather and father have often been drunk, but, notwithstanding, lived to a great age, without becoming insane; it cannot, therefore, be asserted, that the drinker might and ought to have foreseen that he would become insane. Many persons become insane, in consequence of selfpollution early practised, or in consequence of other sensual indulgencies, but yet no one thinks of holding such persons legally responsible for criminal acts. There is no doubt, also, that it may be proved by medical observations, that even in cases where ebriosity is followed by insanity, it is not the only cause of the disease, which, on the contrary, may be owing to the operation of many other physical affections and causes.

If we have thus far considered an offence as unpunishable, when committed by one in a state of insanity resulting from ebriosity, we hold it also to be our duty, to warn the judge not to suffer himself to be deceived by many phenomena which occur as the consequences of ebriosity; in particular, we observe in some inebriates an extraordinary irritability, which is not unfrequently denominated by the physicians a morbid irascibility (*excandescentia furibunda*); others, on the contrary, are subject to convulsion fits; but the most common consequences of ebriosity are the so-called hallucinations, which manifest themselves by illusions of

the senses, as, for example, when the inebriate imagines he hears voices, or believes he sees objects before him, which do not really exist. None of these conditions is sufficient to render the subject of them irresponsible for his criminal acts; for they are either signs of a perverted moral sense, in which the inebriate gives himself up to his lusts upon the slightest occasion, or they are morbid corporeal affections, which do not destroy his consciousness, and consequently leave him responsible for his acts. Hallucinations must be distinguished into two kinds: (1) those which are proper illusions of the senses,[1] as, for example, the consequences of diseased organs of hearing and sight; and (2) those which result from a morbid excitation of the imagination.[2] In regard to the first, the understanding always retains sufficient power to distinguish the illusion from the truth; whilst the second appear as the first manifestations of an outbreak of insanity, or as its certain forerunners, and, as such, may either wholly put an end to or very much diminish the offender's responsibility.[3]

II. An appetite for liquor,[4] which irresistibly impels one to drink, may be regarded as a proper diseased condition, which it is necessary to distinguish into two kinds. (1) The first kind is that which results from ebriosity, the effects of which, in the inebriate, have reached the highest degree.[5] In this kind of liquor appetite, in consequence of a diseased

[1] Clarus, l. c. p. 136.

[2] In reference to hallucinations of the imagination, see the remarks of Esquirol in the notes to the French translation of Hoffbauer's Legal Medicine, p. 85.

[3] See also on the subject of hallucinations, Horn's Archives of Medical Practice, 1825, May number, p. 532; Grohmann in Friederich's Magazine, (für Seelenheilkunde,) No. 4, p. 123.

[4] Brühl Cramer, on the Appetite for Liquor, Berlin, 1819; Henke, Dissertations, vol. iv, p. 253; Vogel, Contributions to the Doctrine of the Competency to Imputability, p. 171.

[5] Clarus, Contributions, p. 127.

state of the digestive organs, and the defective quality of the nourishment afforded by them, a morbid irritability arises, which is characterized[1] by an irresistible impulse to relieve the exhausted nervous activity by means of strong drink, and manifests itself habitually and constantly, or periodically. This kind of appetite is a culpable one, and a criminal act committed therein is imputable as *culpa;* but, as has been remarked in regard to ebriosity, in this case, and in a yet stronger degree, the culpability may fall so low as to disappear altogether; though the liquor-appetite seems not to be a true insanity which relieves from responsibility, since it is only a form of bodily disease, in which the diseased person always retains a consciousness of his acts. (2) Different from this is the liquor-appetite,[2] which without any connection with ebriosity, but as the consequence of a diseased digestive system and a disordered stomach, manifests itself by an irresistible impulse to cool the burning thirst by means of strong drink. Persons, laboring under this form of disease, when the paroxysm is not on them, abhor every kind of strong drink, and are moderate and mild; but by drinking are easily wrought up to the highest pitch of excitement. This kind of liquor-appetite is not culpable, but most nearly resembles the condition (the existence of which is very much controverted by some) of *mania sine delirio.*

III. Lastly, we are accustomed to speak of *delirium tremens*[3] as a particular form of disease; and, it is undoubtedly true, that as a consequence of ebriosity, a state of insanity or madness may arise, which is characterized by a violent trembling, and thence has received its name, but which is only to be distinguished from other mental disease by its cause or occasion. On the contrary, it is going too far, as is

[1] Clarus, Contributions, p. 128.

[2] Esquirol, as above cited, p. 244.

[3] Henke, Dissertations, vol. iv. p. 277; Vogel, Contributions, p. 173.

sometimes done, to consider the convulsive trembling, which often occurs in connection with mere ebriosity or liquor-appetite, as *delirium tremens*, and to regard it as proof of a mental disease already existing in the inebriate. For the criminalist, it is only important to inquire,[1] whether the condition of the inebriate carries in itself the signs of a true mental disease, which is characterized by an absence of the consciousness of the actor, or whether the phenomena are only the consequences of corporeal suffering, without the consciousness of the actor being thereby affected. In the first case only is the disease a ground of exculpation, and in the second it relieves from responsibility precisely in the same manner as other bodily affections may do,[2] when they exert an influence upon the mental activity, so long as this influence falls short of that degree of strength, in which the consciousness of the actor is entirely destroyed.

[1] See also Heinroth, System of Psychological Medicine, p. 263; Clarus, Contributions, p. 142.

[2] Jarcke, in Hitzig's Journal, No. 23, p. 37.

ART. III.—BENTHAM'S THEORY OF LEGISLATION.

Theory of Legislation; by JEREMY BENTHAM. Translated from the French of ETIENNE DUMONT, by R. HILDRETH. In two volumes 12mo. Boston: Weeks, Jordan & Co. 1840.

IN an article published some time since (vol. XX, p. 332,) under the head of the "Greatest-Happiness-Principle," we took occasion to express our opinion of the celebrated author of the theory of legislation, in his threefold character of a philosopher,—an exposer of existing abuses,—and a legislative reformer. In the work before us, he appears in the