THE

AMERICAN LAW REGISTER.

SEPTEMBER 1876.

DRUNKENNESS AS AN EXTENUATION IN CASES OF MURDER.

THE relation of drunkenness to moral agency is one of those vexed questions with regard to which the opinions of moralists have ever been at variance, and upon which their conclusions are to-day not more harmonious than they were when the matter may have first attracted their attention. Jurists, too, have differed very widely among themselves as to the degree of guilt which may attach to deeds perpetrated by agents who had voluntarily yielded to an appetite whose indulgence they well knew would destroy their reasoning powers and rob them of all prudence and self-control. So great disagreement have the laws of different times and of different nations shown upon this question that we may find intoxication variously regarded as leading to acts done under its influence—almost every shade of guilt, from that slight degree of moral laxity of which the laws of most countries take no notice, to the baseness and turpitude which would render it an aggravation of the offence. Accordingly as the spirit of the age upon which their lot was cast inclined toward the doctrine that "mercy and reformation," rather than "severity and annihilation," should be the rule of society in dealing with its criminals, mankind have been disposed to look upon drunkenness as an excuse, a matter of indifference or an aggravation of guilt. In England, for instance, in the days of Lord COKE (4 Bl. Com. 25), when all the

higher species of crimes were punished with death in one form or other, intoxication was held an aggravation of whatever offence a criminal might commit, and the justice might take account of it as ground for increasing the severity of the punishment; though no *additional* penalty was inflicted for the drunkenness itself, as was the case with a law of Pittacus, dictator of Mitylênê, which provided that he who committed a crime when drunk should be doubly punished, first for the crime itself, and again for having brought himself into a state of ebriety. Through a period of many years later, in the criminal jurisprudence of England, no account whatever was made of the fact that a person at the time of committing an unlawful act was deprived of the use of his reason and prudence by strong drink. It could neither modify the nature of the offence nor affect the penalty which should follow it.

Within the last half century, however, the harshness of the English law, in this respect, has been considerably mitigated, and the question of drunkenness in cases of homicide has been taken into consideration, not only in determining whether or not there were sufficient provocation to reduce the crime to manslaughter, but also in the inquiry as to intent and malice, where no provocation whatever existed. Thus judges have charged that "drunkenness may be taken into consideration, in cases where what the law deems sufficient provocation has been given; because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excited in a person when in a state of intoxication than when sober:" *Rex* v. *Thomas*, 7 Car. & P. 817. And in a later case the justice said that "such a state of drunkenness may no doubt exist as would take away the power of forming any specific intention:" *Regina* v. *Monkhouse*, 4 Cox C. C. 55; and this would seem to indicate that the degree of guilt must necessarily be less in a case of homicide happening under such circumstances, than where it was wilful, deliberate and with intent to destroy life.

The doctrine of this latter decision is that upon which are founded the rulings under our various state statutes which divide murder into two degrees, according as the killing is wilful, deliberate, premeditated and malicious, or as it is unattended by some of these attributes. In many of the states where such distinction has been made by statutory enactment, it has been held that murder

done by a man in a state of intoxication so great as to render him incapable of forming a design, shall be murder in the second degree; provided, of course, a premeditated design of murder did not exist in the mind of the criminal previous to his becoming intoxicated. For "if a man designing a homicide drinks to intoxication, and commits the crime in that condition, he is guilty of murder the same as if he were sober:" *Smith* v. *Commonwealth*, 1 Duv. (Ky.) 224. Thus it was said in the late Pennsylvania case of *Commonwealth* v. *Fletcher*, 33 Leg. Intelligencer 13, following a number of similar decisions in the same state (*Keenan* v. *Commonwealth*, 8 Wright 55; *Commonwealth* v. *Hart*, 2 Brewster 546; *Kelly* v. *Commonwealth*, 1 Grant's Cases 484; *Commonwealth* v. *Crosier*, 1 Brewster 349; *Commonwealth* v. *Miller*, 17 Leg. Int. 276; *Warren* v. *Commonwealth*, 1 Wright 45): "If a man's intoxication is so great as to render him unable to form a wilful, deliberate and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be murder of the first degree to murder of the second degree." And like rulings are to be found in other states: *People* v. *Harris*, 29 Cal. 678; *Pirtle* v. *State*, 9 Humph. (Tenn.) 664; *Commonwealth* v. *Jones*, 1 Leigh (Va.) 612; *People* v. *Hammill*, 2 Parker C. R. (N. Y.) 223; *State* v. *Harlow*, 21 Miss. 446; *State* v. *Bullock*, 13 Ala. 413; *State* v. *Johnson*, 40 Conn. 136.

These statutes and the rulings under them do not change in the least the nature of the crime known as murder, but only provide that one species of it shall be called murder in the first degree and shall be visited with a punishment more severe than that assigned to a less malignant form of killing, to which the name murder in the second degree is given. So that, whatever was murder at the common law, with all its forms of implied malice, its doctrine of momentary deliberation and its disregard of voluntarily produced madness, is murder to-day. In *Weighorst* v. *State*, 7 Md. 442, it was said: "the statute does not create a new offence, but merely establishes a rule to guide the courts in awarding punishment." Such interpretation has abundant authority: *Minn.* v. *Lessing*, 16 Minn. 75; *State* v. *Pike*, 49 N. H. 399; *State* v. *Verrill*, 54 Me. 408; *Commonwealth* v. *Flanagan*, 7 W. & S. 415; *Green* v. *Commonwealth*, 94 Mass. 155; *Gehrke* v. *The State*, 13 Texas 568; *Commonwealth* v. *Miller*, 1 Virg. Cas. 310; *People* v. *Murray*, 10 Cal. 309; *Fitzgerrold* v. *The People*, 37 N. Y. 413; *Mitchell* v.

The State, 8 Yerg. 514; *The State* v. *Johnson*, 8 Iowa 525. The effect, then, of intoxication is simply to lessen the severity of the punishment that shall follow the crime which by the common law and by our law is defined to be "the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and in the peace of the Commonwealth, with malice aforethought, either express or implied." In this we have practically followed the rule of the civil law, which provides that capital punishment should be remitted where the crime had been occasioned by ebriety: 4 Blackstone's Com. 26. An attempt to assign to it any different effect only involves us in hopeless confusion, as strict reasoning upon the subject would almost lead to the conclusion, that a wrongful act done by one who is in such a state as to be unable to form any deliberate design or to judge of the reasonable consequences of his actions, should be wholly excused, and the penalties of drunkenness merely inflicted; especially so, when we remember that all forms of insanity are, to a greater or less extent, brought about by the patient's own indiscretions, only more remotely and by slower degrees than in the case of common drunkenness. And, indeed, such was the view taken of the matter in France, a few years since, where juries in several instances acquitted prisoners on the ground of intoxication; the only way in which they could afford relief being by entire exculpation. For as the penal code says nothing about intoxication, but declares insanity without distinction of any kind to be a ground of exoneration from guilt, it was believed that this should be made to include the temporary insanity produced by strong drink. Such reasoning, however, would in its practical effects be too dangerous to the community.

Next, as to the degree of intoxication which should be permitted to reduce the grade of the offence, and thus remit the death penalty. In the practical determination of this question is found much difficulty, and jurymen err quite as frequently as they arrive at reasonable and just conclusions. It is too often the case that juries conduct themselves in their deliberations as if the law were that drunkenness simply, without regard to the character and degree of it, reduces the grade of the crime, and as if they were privileged to return a verdict of murder in the second degree in case they find that the defendant, when he gave the fatal blow, was at all under the influence of liquor. The evidence in almost every case of felonious homicide discloses the fact, as a matter of course,

that the prisoner at some time during the day or evening upon which the deed was done had been in a drinking saloon and had taken a dram or two, and on the strength of this a verdict of murder in the second degree is brought in. Some of the most heinous cases of wilful and malicious murder thus go unwhipt of justice, the criminal is sent to reside for a few years in the state prison, and is then again let loose upon society, prepared for a repetition of the offence, should it suit the purposes of his depraved life. One wrong determination gives rise to another, and precedent and example are supposed by the minds of jurymen to justify conclusions the most unreasonable. Hence this mockery is continued until public sentiment becomes aroused by the manifest failure of justice, when the pendulum is likely to swing back as far on the side of severity as it had formerly been raised toward leniency and mercy. But strict attention to the *character* and *degree* of the drunkenness will alone insure a just verdict; for, as was said in *Commonwealth* v. *Fletcher*, above cited, there never was a greater mistake or a greater libel on the administration of justice than to suppose that drunkenness is an excuse for crime; and it is not all drunkenness that can be permitted to reduce the grade of the offence. On the contrary, we have the authority of *Commonwealth* v. *Hart*, 2 Brewster 546, for saying that intoxication short of a destruction of reason is an aggravation of, rather than an excuse for, crime.

Now, insanity produced by the use of alcoholic liquors may be either permanent or temporary, involuntary or voluntary. Permanent, settled insanity, as it exists in the disease to which the name *delirium tremens* is given, must of course affect moral and legal responsibility in the same way as any other species of madness, and wholly exculpates the patient who may be so unfortunate as to commit violence when in the throes of its terrible paroxysms. See Wharton's American Criminal Law, Book I., § 33, where the subject is fully treated and the leading cases collected and reviewed. Another form of insanity from this same cause, which would seem to be wholly beyond the control of its victim, is that called dipsomania, in which there comes upon the patient *periodically* "an impulse which he has not the power of resisting," that hurries him to an excessive indulgence in strong drink. As soon as this irresistible craving has been satisfied and the effect passed off, he becomes again a most temperate and abstemious person, until the

period for another fit has arrived, when the same course ensues: Ray's Med. Jurisp. of Insanity, § 550.

We come now to voluntary, wilful drunkenness, which writers on medical jurisprudence usually distinguish as being of three distinct grades or degrees. The first is that in which the inebriate's memory is unimpaired and his command of self not less perfect than at other times. Thus far he is perfectly capable of forming or carrying out any design with the utmost deliberation and through the promptings of every form of malice, having control of all his faculties, some of them being only more vivacious than usual; hence his moral and legal responsibility is not affected. It is to this state of intoxication, we presume, that reference is made in such cases as *Pennsylvania* v. *McFall*, 1 Add. 255, where it was said: "Drunkenness does not incapacitate a man for forming a premeditated design of murder, but frequently suggests it." Again, in *People* v. *Robinson*, Parker (N. Y.) Cr. R. 235: "If a drunken man retains mind enough to plan and execute a crime, it is enough to subject him to legal responsibility." In *Shannahan* v. *Commonwealth*, 8 Bush (Ky.) 464: "Voluntary drunkenness that merely excites the passions and stimulates men to the commission of crimes, neither excuses the offence nor mitigates the punishment."

In the second stage of intoxication, all the senses have become enfeebled or distorted. The victim finds it impossible to see straight or to hear distinctly without a special effort, what is said to him. His memory fails him just when he needs it most and his perverted judgment leads him into all sorts of absurdities. He conducts himself as if the present only were his, having little regard for the consequences of his acts or for what the next moment may bring forth.

The third and last stage is that in which the individual loses all consciousness of things about him. Reason is gone and his senses so blunted as to be of little use to him. As to the legal responsibility of one in this latter state no inquiry is necessary, for there can be little possibility of one who is "dead drunk" injuring anybody.

The second and the beginning of the third periods seem to be the degrees of voluntary drunkenness which may be allowed to reduce murder from the first to the second degree. This alone can be said to be a state of intoxication which renders a man