The jurisprudence of intoxication : (the newer and truer conception) / by J.F. Sutherland.

THE JURISPRUDENCE OF INTOXICATION

(The Newer and Truer Conception),

BY

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FROM the beginning of the century murmurs, more or less audible, have often been heard about the law's "delays," and now, at the close of the century, there are complaints, loud and long, voiced by public opinion, and by the deliverances of Select Committees and Departmental Commissions and by jurists, of the law's "anomalies," not to say injustice, in regard to the question of the jurisprudence of intoxication. To those who have given attention to this intricate psychological and social problem it is not surprising that there should be a feeling of deep dissatisfaction. The close relationship of alcoholism to insanity is well known and understood by jurists, legal and medical, who have made a study of the insanities of inebriety, which by competent authorities are put down at from *twenty-five* to *thirty per cent.* of all insanity. One of the great Continental alienists, Krafft-Ebing, of Vienna, has placed on record the *dictum* that all forms of insanity, from melancholia to imbecility, are to be found in alcoholism, and most alienists and jurists in this country will be disposed to agree with the distinguished Austrian specialist. His views are shared by others hardly less eminent, such as Magnan, Morel, Flint, Gairdner, Mitchell, Clouston, Maudsley, Crichton-Browne, and Norman Kerr, as well as by the leaders of the schools of jurisprudence and philosophy which in recent times have sprung up on the Continent, who urge that more attention should be paid to the physical, psychical, and ethical aspects of the question. It would be beyond the scope of this paper to

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touch, except indirectly, upon any of the other insanities of inebriety—*e.g.*, mania-â-potu, delirium tremens, dipsomania, general paralysis of the insane (that increasing disease of modern life, especially among the male sex, traceable in large measure to alcoholic excess)(*a*), and alcoholic insanity. It does seem a little strange at this time of day to be under the necessity to prove that the intoxicated state is an insane state; in short, that a bout of intoxication is insanity of a more or less fleeting order. At present I carefully avoid the use of the term "drunkenness," which is not perhaps specific enough, and which, owing to the loose views held by quite a number of respectable authorities and people as to what constitutes this condition, is apt to be misunderstood in defining the mental state. The difficulty in securing a general acceptance of this proposition is all the more remarkable, when one reflects that if the drunkard by occasion goes on long enough in the path he is said to have deliberately chosen (this may well be doubted in many cases), and escapes by the merest accident (as he does hundreds of times) the penalty due by the authors of homicides, &c., the criminal law will at last throw its protection over him, because it recognises it is dealing with a diseased individual who, by reason of much intoxication, has brought about permanent, if not incurable, damage of the brain and vital organs.

Intoxication is insanity pure and simple; in fact, there is no more complete picture of insanity to be met with in the wide and diversified range of lunacy. Inability to convince opponents, and a section of doubting jurists, of the truth of this proposition, creates a barrier to the acceptance of the important contention and conclusion —viz., that the authors of crimes committed in a state of intoxication are not wholly accountable to the law, and therefore punishment (at least that form which, once given

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(*a*) In the aetiology of this disease the alcoholic factor is second only to the syphilitic one.

effect to, is beyond rectification or modification) may well be considered out of place.

The statistics applicable to this class of criminals are highly suggestive. On the 31st March, 1896, there were 58 inmates in the department for criminal lunatics; 51 of whom were there for "crimes of blood," no less than 35 being for murder, the other 16 for culpable homicide and dangerous assaults which might have terminated in death. It is the merest accident that maiming, rather than death, is the result of these furious and reckless assaults. Of the 51, seventeen were found by the Court to be insane when committing the offence; twenty-eight insane in bar of trial; and the remaining six were either reprieved on the ground of insanity, or certified insane while undergoing sentence. Writing from a somewhat extensive experience, it is pretty safe to hazard the opinion that a large proportion of the "insanes at the time," and some of those indicted for homicides on whose behalf insanity in bar of trial was successfully pleaded, were persons suffering from one or other of the alcoholic insanities. These figures, and others which might be taken from the Judicial Statistics, suggest that homicides with motive, or with premeditation, are practically unknown in Scotland. Sir Henry Littlejohn, with his unrivalled experience as a medical jurist, has repeatedly maintained this view.

Further, during the past decenniad, 44 persons were admitted to the criminal lunatic asylum for crimes of blood; 23 were found to be "insane at the time;" while in regard to 21, "insanity in bar of trial" was established. Of the 30 accused of murder, 17 were found to be "insane at the time," and "insanity in bar of trial" was accepted by the Court on behalf of the remaining 13. In 1895, 1825 persons were tried before the Justiciary Judges and Sheriffs with or without juries, of whom 386, or 20 per cent., were charged with crimes of blood and of violence against the person. Of the 158 persons charged with crime, and whose cases were investigated in the Justiciary Courts, 37, or 21 per

cent., were for crimes of blood; and of 961 before Sheriffs, 285 persons, or 30 per cent., were in the same category. Two points not less significant, and bearing intimately on the subject under consideration, are these—first, *88 per cent.* were of the male sex; and second, it may be accepted that *95 per cent.* were in a state of intoxication, more or less complete, when the crimes were committed. The estimate, based as it is upon some knowledge of the three counties of Lanark, Renfrew, and Dumbarton, which, with 35 per cent. of the population of Scotland, yield 50 per cent. of such crimes, is a high one. These figures not only are not pleasant reading, but there is nothing to indicate that these grave crimes resulting from drunkenness are decreasing, or to prove that sentences of death or penal servitude have any deterrent influence, as some judges seem to think, in reducing the number of them, any more than the "twenty-four hours or half-a-crown" of a police magistrate has in diminishing the minor offences of disorderly conduct and incapacity associated with the same cause. The authors of the minor offences of disorderly conduct and of incapacity of to-day, at least, many of them, become in time the perpetrators of the graver crimes of to-morrow.

An explanation of the excess of both types of offences against law and order in certain districts (making allowances for the unreliable nature of the minor offences from a statistical point of view in different localities which do not apply to crimes of blood, there being everywhere in these cases uniformity and certainty of action on the part of the criminal authorities), may be found in large measure in physical, ethnic, economic, and sociological causes.

Looking through the calendars of crime for a number of years, another point of considerable significance in connection with crimes of blood and their proximate cause, and their unpremeditated character, is this, that as a rule they are committed between Saturday night and Monday morning, and especially on these nights during festive occasions such as "Fair," "Trade," and New Year holidays.

The usual "week ends" are the occasions when the majority of "pay day" drunkards indulge their folly, or disease, or both by the commission of simple assaults, or by disorderly conduct. Fortunately for them these offences have, in the vast majority of instances, no disastrous ending, but such occasions are surely leading up in men of diseased body and excitable temperaments to crimes of violence which they may have (as the law is now often interpreted) to expiate by their lives. Each drinking bout is silently and imperceptibly bringing about physical and mental changes which leave *buveurs* with less resistive power.

On a recent occasion the writer had the privilege of briefly discussing the criminal in relation to "crimes of blood" with the great Italian philosopher and psychologist, Lombroso of Turin. He remarked on the want of interest manifested in Scotland in regard to the newer conceptions of criminology. It was explained to him that this absence of interest might be ascribed to the fact that "crimes of blood" were comparatively few in Scotland when contrasted with Italy, the ratio per 100,000, according to his own countryman, Garofalo, being in the latter 25, in the former 1·4, (Spain 11, Austria 4, Belgium 3, France 2·7, United States 2·3); and that in Scotland such crimes, except in very rare instances, were committed by persons more or less completely under the influence of alcohol, and suffering from varying degrees of mental and physical degeneration incidental to the alcoholic habit long indulged.

While it would be superfluous to describe in detail the phenomena of intoxication, the more salient do call for mention, indicating as they unmistakably do a rapid representation of insane acts and scenes. The exhilarating stage is one of exaltation and rapid ideation; motor co-ordination is defective; the gait is unsteady. The pathology of this stage is paralysis of the vaso-motor nerves, and a disordered cerebral circulation. Alcohol has a special affinity for brain tissue. By-and-by cerebration and speech become incoherent. Reason, perception, and sensation, are

blurred. All the special senses are affected. Sight is disturbed. The tactile and muscular senses are so affected by incomplete anæsthesia as to make it impossible to apprehend the degree of violence which is being used. This is the stage marked by incontrollable outbursts of passion and of blind and destructive fury. There is increased reduction of inhibitory control, following a partial paralysis of the higher nerve centres by the toxic agent. The whole case is well put by Maudsley (*a*), who speaks of the artificially produced insanity of one bout becoming the chronic insanity of many.

The insane phenomena observed in the intoxicated state, whether induced by one bout or many, are from the medico-legal point of view much the same. But it must not be forgotten that the drunkard of many and frequent bouts who is mainly the subject of enquiry in criminal courts (whether it has been up till this point recognised or not by the physician) is in a more or less pathological state, the brain and other vital organs being impaired, if not permanently damaged and altered. The precise degree it would, unless where the changes are gross and well-marked, be difficult to state. But in such a person, apart from questions of heredity and neurosis, which often might be urged in his case, the point often made in law courts that the condition has been *voluntarily* induced may fairly be considered a matter of considerable doubt. To dogmatise on this point would be to assert positively that the toxic agent in the beginning of the bout of an occasional or chronic drunkard has in no way lessened inhibition, and did not pave the way for successive libations until the individual is beside himself. It was *voluntary* no doubt up to a certain point in some cases, but not at the point of foolish conduct or raging madness. The folly is not of so much moment, it is the violence. There was no intention in the vast majority of instances of becoming intoxicated, just as there was without exception no intention of becoming maniacal after intoxication. There was, it is safe to say, as

(*a*) "Physiology and Pathology of the Mind," p. 228.

little intention to enter on the first as on the second stage of a course ending in violence. Eminent legists, past and present, are not quite agreed on the two difficult problems involved. Coke, Blackstone, Hale, and other writers of the seventeenth and eighteenth centuries, admit the insanity, but by qualifications rob it of its protective value by insisting on the theory of voluntary indulgence. Some modern legal authorities, who admit neither the state to be one of insanity nor the possibility of its being involuntarily brought on, introduce something like certainty of view into what at the best is a region of speculation and uncertainty.

From the medico-legal point of view, there is no use in raising the question of a man's mental state while sober, his condition then is one more for legislators and sociologists; but the pathological condition present during sobriety as well as ebriety, vastly more significant in the latter state, should, under a more perfect system of jurisprudence than we yet possess, be made the subject of enquiry at the trial, as well as questions of the heredity of insanity or of inebriety, environment, habit, and disease. The presence at one time or other of sunstroke, syphilis, malaria, puerperal trouble, influenza, &c., which leave a profound impression on the nervous system, is most important. The physical aspect, it is safe to say, has more to do with inebriety than is yet dreamt of in legal, medical, or moral philosophies.

Dr. Clouston (*a*), writing from a rich and ripe experience in the field of insanity, says of the excessive drinker, "We can now prove that such a man's brain is diseased. . . . The alcohol has, in fact, established as a permanent condition of brain, even when it is not circulating in the blood, the state of inhibitory paralysis, which is characteristic of actual drunkenness."

It is indeed a strange commentary on our system of jurisprudence that so little heed is paid to the striking pathological effects of alcohol, when in most forms of insanity

(*a*) "Responsibility in Drunkenness." The *Juridical Review*, April, 1894.

it is all but impossible to discover any. So to speak, the pathological brain is, to a very large extent, a *terra incognita*, but in the alcoholic insanities it is different. The physical poison partaken produces distinct changes in the blood itself and in the tissues, whether the bout be one or many, each bout accentuating the changes.

Sir Arthur Mitchell, in a communication (*a*) addressed to the *Scotsman* in 1877, thus describes the condition :— "It should at once be understood that alcoholic intoxication—that is, ordinary drunkenness—is really a state of insanity. The person labouring under it can legally and scientifically be certified to be a lunatic. . . . It is nothing but the known transitoriness of his condition which prevents him being sent to an asylum." Few, if any, will be found to dispute the weight which attaches to such an opinion. One may not be able to find it in text-books on medical jurisprudence, but it is none the less in accordance with scientific truth. It is an opinion which every barrister, briefed to defend persons charged with crimes of violence committed in a drunken state, would do well to know and to act upon.

In regard to the responsibility of the individual committing a crime in a state of intoxication, if that state be accepted as one of insanity pure and simple as it undoubtedly is, then the corollary is obvious that at the trial the plea in defence should be "insane at the time." This plea, if successful, does not only vindicate the law, but effectively protects society (which on full consideration of the whole matter is not quite free from blame in regard to this class of criminal) from the possibility of further outrages, because the drunkard criminal is removed to a safe place of custody, from which *parole* is only granted after many years of enforced abstinence and of a healthy regimen, and then adequately safeguarded by the prison administrators. One would have

(*a*) *Vide* Minutes of Evidence of Scottish Departmental Committee on Habitual Offenders, Inebriates, Juvenile Delinquents, &c. App. L., Proposed Legislation for the Cure and Control of Habitual Drunkards, p. 526.

thought that this procedure would satisfy the most exacting upholder of the majesty, not to speak of the certainty, of the law. It is not contended by those who advocate something short of capital punishment in such cases that deprivation of liberty, it may be for a lifetime, is a warning to drunkards—and there are many in this country qualifying for crimes of blood—any more than forfeiture of life, as many eminent judges conclude. To come to any such conclusion would be to betray ignorance of the psychology of the drunkard and of questions intimately associated with and inseparable from his psychological state, such as heredity, habit, and disease. On the other hand, there is no evidence to show that crimes of violence, any more than the minor offences committed by drunkards, are decreasing, but rather the reverse.

One has to go back a hundred and fifty years ago, to the time when there were 220 capital felonies on the statute book, when learned judges believed that sheep-stealing was put down by a free use of the gallows. The parallel attitude in this respect between legal beliefs, generally in the eighteenth century, and partially at the close of the nineteenth, serves to mark the advance which in the long interval has been made. It is by no means flattering. Capital punishment in most civilised countries is the penalty for deliberate, premeditated homicides, and, most people are agreed, rightly should be retained for such. The cause of the insane state produced by intoxication, like the cause of any other form of insanity, is, as has been said, immaterial, unless indeed the alcohol was taken for the specific purpose of fortifying the author of homicide to accomplish his work. Alcohol, doubtless, is put to many debased uses, but the number of people who utilise it for this purpose is so small (the writer knew of none in a somewhat long experience in a large field of observation) that it may be left out of account in considering the general question, and left to adorn text-books. If such a criminal crops up at a time, better far that he should escape justice, than that hundreds should suffer injustice by the prevalence

of such a belief, creating as it does such a mistaken view of the true jurisprudence of inebriety.

A luminous exposition of legal practice was set forth very fully six years ago by Lord James(*a*) in regard to the criminal responsibility of inebriates. In answer to the question, put with reference to murder committed without premeditation, and in a sudden burst of passion, the crime being reduced to manslaughter, "ought, in such cases, the same measure of justice be applied to the passion of drunkenness and sobriety alike?" he replied, "I think it should," and added, "the sudden unpremeditated act may spring on the one hand from a bad disposition and evil passions, on the other from the hot blood quickened by drink."

If the variety of rulings by judges in these cases does not suggest, as is alleged, that the personal judicial equation counts for something, then to some extent the rulings and the verdicts which as a rule follow, must be traceable to the different methods of presenting such cases by the defence, or the line of defence chosen, which likewise varies. It is even asserted that much depends on the composition of juries, whether the verdict will be the gravest of all, or culpable homicide. But the public are not, except very rarely, allowed into the secrets of the jury room. One of these exceptions occurred last year at Bury, in Lancashire, when the jury signed the public memorial praying for a respite, and two days before the date fixed for the execution sent a telegram to the Home Secretary, praying for the same thing on the ground, to use their own words, of "being firmly convinced that the man was in a drunken frenzy, and had no intention of taking his wife's life." It was granted.

Nineteen years ago the late Lord Deas, one of the most eminent of the criminal judges who have adorned the Scottish Bench, and reputed to be severe rather than otherwise in his judgments, was among the first to set aside the judicial dicta acted upon for two centuries, by the declara-

(*a*) Letter to *Times*, 5th January, 1892, by Sir Henry James, Q.C., M.P.

tion that although a state of drunkenness, and even habitual drunkenness and allied conditions, such as delirium tremens, not amounting legally to insanity, formed no excuse for crime, he saw his way in several cases to establish a precedent in favour of reducing the quality of the offence from murder to culpable homicide.(*a*) Commenting upon this deliverance in one of his lectures delivered in 1879 at the Royal College of Physicians, under the Morison bequest, Sir W. T. Gairdner, of Glasgow, said, in regard to the two cases calling for this exposition of the law, "they illustrate in the strongest manner the tendency of the law to disown insanity as a defence, whenever the mental disorder is attributable to alcohol excess." But the difference between the eminent legal and the eminent medical jurist and philosopher is further emphasised by the declaration of the latter, that his instincts wholly revolted from the position which Lord Deas attributed to the law in holding that aberration of mind, *not amounting to insanity*, might legitimately form an element in the question between murder and culpable homicide, and that the case of acutely developed delirium tremens formed one to which this description was applicable. The medical jurist's admirable and well-timed criticism must have left a permanent impression upon this judge, for when before him two years later a drunken soldier was charged with murdering a fellow prisoner in one of the Glasgow police cells, his ruling was a remarkable advance on any previous one: "If the man was insane at the time he committed the offence, no matter whether the insanity lasted for *ten minutes or for half-an-hour*, merely under drink would not do, but if drink produced insanity for however short a time, and the man did certain things while insane that there was no reason to think he would do while sane, that was quite enough."

At the High Court of Justiciary in Edinburgh, in

(*a*) *H.M. Advocate* v. *Dingwall*, 19th and 20th September, 1867, 5 Irvine, 479; and *H.M. Advocate* v. *Granger*, September, 1878, *Scottish Law Reporter*, vol. xvi. p. 253.

1892 (*a*), the Lord Justice-Clerk (Kingsburgh) laid down at considerable length the criminal law in regard to such cases, in terms which medical jurists hailed with satisfaction. He said, *inter alia*:—"You are entitled to take into consideration in the question whether the full guilt of murder has been incurred in this case, the important fact that the man was intoxicated at the time, and to a certain extent using violence, quite unconscious as to the extent of it. Although he is responsible for that, he may not necessarily be guilty of murder."

In 1892, Mr. Justice Collins remarked that "drunkenness, although often said to be no defence to crime, was a material factor, where proved intention was a necessary ingredient of crime, for a person might be so drunk as to be incapable of forming an intention." This principle, that where there is no intention to kill, the death penalty is out of place, has been accepted by most of the States of the American Union. Clark Bell, of the New York Bar, in 1888, gave the opinion that "the better rule of law undoubtedly now is that if the person, at the moment of the commission of the act, was unconscious and incapable of reflection or memory by intoxication, he could not be convicted. There must be motive and intention, and in such a case the accused would be incapable by intoxication of acting from motive." A ruling which has been viewed with much satisfaction was that given by Lord Low at Glasgow in 1891. His Lordship expressed "his willingness to give the prisoner the benefit of the belief that there was no malice and no deliberation, but that he committed the crime while maddened by the influence of strong drink. While that was sufficient to take the case out of the category of murder, it still left the charge of culpable homicide."

In several recent rulings of quite another kind, both in England and Scotland, the "wilful" nature of the crime, and

(*a*) Kane, 3 White, 386. The writer regrets that space does not admit of a fuller statement of Lord Kingsburgh's ruling, which was followed by a verdict of culpable homicide.

the "voluntarily" induced state of mind, have been much dwelt upon. These judgments, with all deference to the high sources from which they emanate, provide several texts for disputation.

Do such cases admit of any other interpretations? Might it not be argued with a degree of plausibility both on its own merits and in the light of other rulings:—(1) whether a man drunk can legally do a wilful act; (2) whether, at any stage of a chronic drunkard's bout, the drinking was voluntary, for that would imply the certainty of an absence of latent or patent physical and mental degeneration; and (3) whether admitting, as in the case of an occasional drunkard, that the imbibing of a moderate quantity was voluntary, the moment inhibition is sufficiently impaired, sooner in some than others, depending upon temperament and habit, by a partial paralysis of the higher nerve centres by the toxic agent, further drinking, leading up to the paroxysmal and phrensied stage, becomes involuntary. These seem cases where a plea of "insane at the time" would have been a good and valid one.

Reviewing the whole matter, there is much to be said for those who contend that the criminal code which regards the authors of crimes committed in a state of intoxication as fully responsible to the law, and thus places them on the same footing as criminals actuated by *malice prepense*, is not only not in harmony with the views expressed by the modern schools of psychology, jurisprudence, and ethics in the closing years of the nineteenth century, but is anomalous and illogical, and unjust. The position of this country is not an enviable one. In regard to the criminal code and its attitude towards drunkenness, casual or habitual, her place is not in the European Concert. But her voluntary exclusion, if one may judge by the trend of public opinion, is only a matter of time.(*a*) In Germany, France, and Russia extenuating cir-

(*a*) The Home Secretary, Sir M. W. Ridley, Bart., M.P., has introduced to the House of Commons a Bill to provide for the Treatment of Habitual Inebriates.

cumstances are more frequently admitted, and punishments, suggestive of the acceptance of "partial responsibility," are more graduated. The anomalous attitude of the criminal law is heightened by consideration of the attitude of the civil law, which to all intents and purposes shields the drunkard from the consequences of civil acts, testamentary dispositions, and contracts made in a state of intoxication. As a justification of their position, it has been urged by jurists that the death penalty is a deterrent to the drunkard. There can be no greater delusion. It is to the deliberate murderer, but it enters not into the mind of the inebriate. When he begins imbibing, he does not mean intoxication, least of all intoxication associated with violence; when he has drunk, he is past the reflective stage, and, with will-power paralysed, acts like a madman. That many drunkards are potential murderers may be accepted as an axiom. It is the merest accident that many of the assaults which they commit do not terminate fatally, and that as a consequence capital punishments are not multiplied a hundredfold. The fault is not theirs; the violence is not measured.

In considering the fate and punishment of persons who have committed serious crimes in a state of intoxication, it is not asking too much, *first*, that the Legislature of this, as of most civilised countries, should make drunkenness *per se*, and habitual drunkenness, offences against the law,—the latter offence calling for special treatment; and, *second*, that regard should be had by the judiciary and juries to the attitude of the civil law, which practically recognises the condition as one of being *non compos mentis*.

It is a strange reflection upon our legal system that drunkenness *per se* is freely tolerated, and that the victims of habitual drunkenness are permitted to make wreckage of themselves and their substance; and in either instance no hand is raised, until acts of violence are committed. To be fair, the law should either view these offences differently from what it does at present, or the crimes which inevitably

result from them. They should be made *de jure*, what they are *de facto*, offences against society.

All things considered, there is little excuse for the severity of the criminal code, and if justice is to be done to the intoxicated authors of crimes of blood, the code should be so altered that the crime would be charged, not as of the *first* degree, to be expiated only on the scaffold, but of the *second* degree, and punishable by such detention or imprisonment as would protect society. Of course, it may be argued that the logical plea to advance is that of "insane at the time," which, if sustained, would result in the accused being sent into a safe place of custody for a long period. Either course is preferable to the present procedure, and either would remove from the criminal code a stigma suggestive of revenge, and of a too reverent regard for legal precedents not in harmony with modern medical science. In conclusion, the fact should not be overlooked, that the defence of the majority of criminals is not entrusted to experienced lawyers, and that they are generally further handicapped by the want of means required in order to put the best construction on the case by the employment of experienced counsel and skilled witnesses, while the prosecution is conducted by the powerful resources of the State. It is not asking too much that judges and juries should in every such case, before the verdict is reached, have presented to them the aspects of the question set forth, it may be feebly and imperfectly, in this communication.

J. F. Sutherland.

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