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LAWYERS AND THE FLOWING BOWL

By CLARENCE J. RUDDY

At a Convention of the Illinois State Bar Association held at Rockford on June 28, 1929, the delegates demonstrated their loyalty to the greatest tradition of their profession by listening attentively and happily to that new and rollicking ballad "Saloon". Unfortunately, I do not remember the words of that enchanting little ditty, but I do recall that it emphasized the one-time familiar habit of placing feet on the rail and drinking beer from a pail. The song was sung, with ability and gusto, by a group of lawyers who must have put their hearts into their task. Their number was applauded so vociferously that they were obliged to give two encores. Gaiety was spontaneously provoked; eyes beamed and mouths watered. Lawyers apparently have not forgotten the scenes familiar fifteen years ago.

Unfortunately, however, there were scattered among the cheerful group a few zealous advocates of Volsteadism; these writhed in their seats and folded hands in laps while the vast majority were whole heartedly laughing and clapping. Finally, one young lady, probably almost nauseated by the emphatic reference to the ancient and plebeian beverage, arose and in unmistakable terms severely denounced the assembled lawyers for their "disgraceful conduct" and ventured the hope that "the words of that disgraceful song would not penetrate beyond the corners of the room". Since the banquet hall was on the top floor of a large hotel, it is probable that the lady's immediate wish was fulfilled, although it is hardly to be expected that her rebuke was heeded. The only appreciable effect of her effusions, besides provoking further chuckles, was to give the entire matter widespread publicity through liberal newspapers. It is doubtful that

lawyers will pay any serious attention to her maledictions; her zeal for reform will probably be matched by their respect for tradition.

The young lady, though a member of the bar herself, probably did not realize that she was trying to overturn a custom of her profession older, perhaps, than the presumption that a defendant is innocent until he is proven guilty. She would probably be amazed and even insulted were someone to tell her that next to their scholarliness, lawyers have always been noted most for their conviviality. A history of the bar of any period cannot fail to disclose the predisposition of its members to moisten their lips with deep draughts of madeira, whisky, porter and wine. Many of the most exhaustive briefs have been written and many of the most brilliant arguments delivered, by men whose features were livid with rare wine and whose brains were fired by whisky. Many of the world's ablest lawyers were absolutely helpless to plea before a jury, argue before a judge or write before a desk, unless they had first fortified themselves with their favorite beverage. Even today some of the country's lawyers manage to sneak in a drink or two before starting on a responsible or a delicate task.

Not all lawyers of the former roseate ages, however, were in the habit of taking a nip or two before trying a case. Some of them reserved their potion until the day's work was done. It is not every constitution that is strengthened by drinking in the morning or afternoon; lawyers soon learned whether they were aided or retarded by it, and adapted their habits accordingly. There was no law forbidding liquor, so the consciences were perfectly free to act. If a thimble of whisky imbibed at half-past nine in the morning tended to make a ten o'clock argument more fiery, well and good; the drink was a good investment. If, on the other hand, it dammed the flow of thought and slurred rapidly spoken words, the act was not repeated; the momentary heat generated was a wanton extravagance. Almost without exception, however, every lawyer, whether he had abstained or indulged throughout the day, found his way to the tavern at night and there amongst his colleagues imbibed madeira, whisky, porter and wine. Lawyers, weary nigh unto death from constant bickering, their nerves on edge from fast thinking and long

speech-making, their eyes and brains sore from digesting long reports of abstruse cases, joyously welcomed the end of the day so that they could meet their fellows in taverns, touch glasses with them, and after a few moments literally drown the day's manifold worries and sail smoothly along a sea of liquors with gleeful companions. Toasts were given, and politics were discussed; clients were damned and the laws forgotten.

In close communion with kindred spirits the jovial lawyers would drain their glasses and like the ancient Pompeiians, drink "a cup to Jove, a cup to Love, and a cup to the son of Maia". Seventy-year old veterans and twenty-five year old novices lifted their glasses together, dismissed the past, celebrated the present and laughed at the future. Stories were told and jokes were played; unwanted and even unknown was he of reserved mien and sallow countenance. Those glorious occasions were unmarred by hypocrisy; one could be certain that the man who shared his bottle at night would not exhort total abstinence the following day. Modern writers may well boast of the marvelous material advances this generation has made, but they must seek in vain to duplicate the conviviality that was rampant until not so many years ago. There is some credit due to the man who made it possible to go by train from Chicago to New York in twenty-four hours; but more credit is due to the men who made long sojourns in one place more enjoyable than a Mediterranean cruise. In those blessed days of the past, radio was an unknown word; but what red-blooded human wouldn't rather exchange stories over madeira than listen to unseen operatic stars, anyway? It is far better to sing "Sweet Adeline" off-key than to hear it sung harmoniously by vaudeville stars a hundred miles away. If canned music is inseparable from modern civilization, then truly the lawyers of past decades would have preferred to remain barbarians.

By all of the foregoing let me not be misunderstood. The former leaders of the bar were decidedly not drunkards. On the contrary, did any lawyer, young or old, brilliant or stupid, happen to drink more than his constitution could assimilate, he was sure to be reminded of it by numerous friends. Temperance was rigidly observed; drinking was simply a means of bringing surcease from the day's worries; it was never used to

deprive man of his reason. Lawyers whose brains were sharpened by a thimble of Bourbon used it to much the same purpose as some men today take a cold shower—though with much greater effect. Those, on the other hand, whose minds were dulled by intoxicants reserved it for evenings, when by judicious sipping, they could easily forget demurrers and cross-examinations, and become cognizant only of the blessedness of companions and the goodness of the world. Always the ambition of every attorney was to be “a lawyer, sir, and a gentleman”; seldom did convivial habits degenerate into vice. One has but to read the biographies of the most learned members of the bar to realize that as a class the legal profession has been the most upright, the most scholarly, the most convivial withal, of any profession that ever graced a civilized world. A few great lawyers, it is true, abstained rigidly from liquor of any kind; but any student of history will aver that their greatness would have been even more pronounced had they been able to imbibe more freely of the flowing bowl.

But all these statements are generalities; they look well enough on paper, but if not supported by fact are of no more practical effect than a tale of pirate romance. In order to assure those who recognize but one god, and he Volstead, that there really is a tradition of conviviality among the legal profession, it is necessary to cite facts, and facts, too, that are not susceptible of refutation. Very well; in this case, facts are easy to collect. Any law student who has attained to the knowledge that there is no wrong without a remedy can cite many instances of the congeniality of lawyers. He has not been in law school thirty days before there has been imbedded in his brain the realization that one can hardly expect to be a lawyer of any merit unless he can measure up to high standards not only of learning, but of conviviality as well.

To attempt to list the names of all lawyers who liked their bottle would be as difficult as it is unnecessary. It would be pointless, too—for it would immediately be subject to the plausible objection that an equally great list could be compiled of abstainers. So we shall limit our research, and be content with citing the habits of great lawyers. In doing this we need make no apology. In order to show the habits of a people or a class it is

sufficient to study their representative men, men who are a reflection of their particular period. But great men are representative; else they would not have been accorded honor or fame by their contemporaries. Who can deny that Julius Caesar embodied the courage of his Roman soldiers; or that Nero reflected the paganism of his luxury-loving parasites? Charlemagne, Napoleon and Washington were not accorded fame because they were different in structure, but because they typified more than anyone else of their particular generation the thoughts, the hopes and the ambitions of their respective contemporaries. A nation (or a profession, for that matter does not salute a man who disagrees with its habits or philosophy; it salutes rather the one who exemplifies them to the highest degree. The ideas of a people at a given period may be wrong, of course,—as they were in Nero's time—but their hero nevertheless comported with their notions of greatness.

To show the time-honored tradition of conviviality of lawyers I shall refer only to men whom not even the most fanatical exponent of a mirthless land can deny left their mark indelibly on our own system of law. And, because to cite instances of men known only as lawyers might provoke the rebuke that their greatness is a matter of one man's opinion, we shall further limit our research to great constitutional lawyers, to men whose anniversaries are nationally celebrated and whose portraits adorn schoolroom walls. I shall show, in brief, that the constitutional system for the United States was developed by drinking men.

And we shall start with Blackstone . . . Now, Sir William Blackstone was an Englishman, and a Lord at that; but not even Volstead himself can deny that he profoundly affected the development of our country. The name Blackstone is considered the symbol of legal excellence, and his Commentaries are still cited by the courts. This monumental work was published in 1765, the same year that James Otis delivered his famous argument against the Writs of Assistance, the philippic which started the rumblings that terminated in the stormy revolution against England. An American edition of the commentaries appeared in 1771-1772, and so well was it received in this country that on March 22, 1776, less than four months before the Declaration of Independence was signed, Edmund Burke declared on the floor

of Parliament that the publisher had sold nearly as many of Blackstone's Commentaries in America as in England.

Nor was the later bitterness of the wronged colonists toward their tyrannous mother-country ever reflected in their attitude toward the Commentaries. Such patriots as Patrick Henry, William Wirt, Edward Pinkney, Edward Livingston and John Marshall, to name but a few, felt no qualms about alternating fiery invectives against British injustice with the calm perusal of a tome written by a British Lord; patriotic feeling was realized to be entirely distinct from intellectual merit . . . And what the passion of time could not destroy, the mere lapse of time has been unable to corrode. The Commentaries are still accorded an honored place among lawyers' shelves; to call a jurist a Blackstone is still the highest encomium within the power of man to bestow. Possibly even Mabel Walker Willebrandt will admit that.

How astonished then must be exponents of a mirthless bar to learn that Blackstone wrote his world-famed Commentaries with wine at his elbow! Edmund Malone, a notable contemporary of the learned author, is quoted by Fredrick Hicks in his "Men and Books Famous in the Law" as saying: "Blackstone, being of a languid, phlegmatic disposition, needed a cheerful glass of wine to rouse and animate him, and after he returned from college in the evening frequently had some wine left in his room while writing, 'in order to correct or prevent the depression sometimes attendant upon close study' ". Malone then hastens to add that Blackstone never indulged to excess, as indeed "the Commentaries themselves, one of the most methodical, perspicuous books in our language, clearly show"

Approximately a decade after the foundation of the new government, and at a time when Blackstone's Commentaries had gained a valued place in every lawyer's library, a group of men convened at Philadelphia to correct the manifest deficiencies of the Articles of Confederation, and to establish the infant republic on a sound basis. The result of this Convention was the Constitution of the United States, called by all authorities the greatest political document ever written by man, and which for one hundred and fifty years has withstood the ravages of insensate criticism. It is true that the hysteria of the present day has

caused the ratification of an emasculating amendment; but undue optimism is not needed to sustain the hope that when the effect of the experiment inappropriately called "noble" has become a little more general Congress and the various legislatures will repent of their rash action, and return to the true spirit of the original Constitution—which, if anyone should ask, is undoubtedly that every means should be taken to guarantee the development of the individual, unimpeded by suffocating functions of the state.

The Constitutional Convention met at Philadelphia, which was the home of Benjamin Franklin, then a man long past the prime of life, but still in full possession of his enormous faculties. Franklin who regarded himself as the host of the visiting delegates as indeed he was, and the personification of hospitality itself, thought the momentous occasion demanded fitting celebration. And what better celebration could be devised than a dinner? The answer was obvious; a dinner he gave. On May 16, 1787, the delegates who had arrived at Philadelphia assembled at the home of the great statesman. James M. Beck, in his admirable work on the Constitution, gives a vastly instructive and highly entertaining account of this dinner. Franklin, says Beck, had recently received a cask of porter, and in a letter addressed to Thomas Jordan a few days after the affair, wrote of the delegates: "They did me the honor of dining with me last Wednesday when the cork was broached, and its contents met with the most cordial reception and universal approbation. In short, the company agreed unanimously that it was the best porter they had ever tasted." The brilliant company evidently had no compunction about indulging in a few glasses of choice liquor.

The list of prominent guests on that memorable occasion is illuminating. Chief was of course George Washington; he and the venerable Franklin, friends of long standing, exchanged toasts—and toasts in those happy days weren't made with ginger ale, either. Besides Washington there were also present John Blair, George Clymer, Thomas Fitzsimmons, Jared Ingersoll, James Madison, Robert Morris, Gouverneur Morris, James McClurg, Edmund Randolph, Thomas Mifflin, James Wilson, George Wythe, and a score or more of lesser lights who may seem to us unimportant but who were of sufficient calibre never-

theless to have been entrusted with the task of changing a whole system of government.

Not all of the guests were lawyers, it is true. But John Blair was a leader of the Virginia Bar and had become one of its judges, Jared Ingersoll and James Wilson were the acknowledged leaders of the Philadelphia Bar, Gouverneur Morris was in a few years to be nationally acclaimed as a brilliant constitutional lawyer, and George Wythe was not only a lawyer but the preceptor of such men as William Wirt, Patrick Henry, Thomas Jefferson and John Marshall. There is no record that any of these representative American lawyers either refused Franklin's porter or criticised his taste. Small wonder that with the aid of such spirituous beverages the Convention was able to draft a document as epochal as the Constitution of the United States.

The mere drafting of a Constitution, however, or even its ratification by the people of the various States did not insure the lasting fame of the delegates. The Constitution, admirable as a theoretical exposition of proper governmental functions, must yet be made effective as a practical guide. Its provisions had to be interpreted, its mandates enforced, its spirit vitalized. Obviously, there was still work to do.

Credit for giving vitality to the Federal Constitution must be given almost solely to John Marshall. During thirty-five years of the most critical formative period of our government he was Chief Justice of the United States; he, more than any other one man, made of the Constitution a living, dynamic thing, and of the Supreme Court an independent and a fearless tribunal. When Marshall took the oath of office in 1801 the Supreme Court had but little more influence than a police magistrate has today; although it had been endowed by the Constitution with powers every bit as important as those of the Executive and of Congress, yet a spirit of timidity on the part of early justice made of it a body almost wholly subservient to the legislative or the executive will; this attitude naturally reflected on the Constitution itself and tended to make it nothing more than the tool of strong-willed statesmen. During the thirty-five years that Marshall was Chief Justice, however, the Court became so important that not only did it dare to place its own legal interpretation on the Constitution, but relying on that paramount authority actually

declared Acts of Congress and of the various States to be absolutely void. And for the metamorphosis that occurred during Marshall's tenure, he himself was responsible. He personally wrote the overwhelming majority of the Court's' decisions and every important constitutinal one. Neither before nor since his time has any jurist arisen who has been blessed with the equivalent of Marshall's sterling honesty, unblemished character and profound intellect.

To some people, I suppose, to assert what is undoubtedly true, that John Marshall was fond of his wine, is equivalent to blasphemy; it at least shows a pitiful lack of reserve for the dead. It is, however, not for any purpose of disparagement that such assertion is made; but rather to show that although he was without doubt the most brilliant jurist this country ever produced, he was human too. And what sane person dares to claim that a man is any less a judge because he likes to smile and tell stories and sip a glass of madeira? To say that Marshall was a connoisseur of all the vintages known to his period detracts not one whit from his greatness; rather, it shows that in one case a least the mild use of intoxicants did not retard, but aided efficiency. It is very doubtful that John Marshall would be grateful for any attempt to make of him a pietistic puritan. And, may it be added, I am not a member of the "de-bunking" school either. Although the painting of haloes around the portraits of past heroes is to be deplored, there is no profit to be derived from the revival of personal frailties or petty scandals of famous men. But to aver that John Marshall was fond of his wine is to commit neither offense; it merely flavors his being with the salt of humanity and endows him with virtues which since time began have made men more lovable.

Be it known, therefore, that when John Marshall was at the zenith of his influence, at a time when his judicial opinions had already profoundly affected the policies of the new country, he was wont to pause in his arduous duties of the bench and at his home in Richmond entertain his genial associates and fellow lawyers at dinners where every joke was punctuated with the sipping of rare wine. Scarcely one lawyer of any ability throughout the entire country could say that he never attended at least one of those famous "lawyer-dinners", and those who did

attend never forgot their good fortune. For a lawyer not to be able to say he was once a guest at Marshall's home was a badge of inferiority—and to refuse his invitation was an emblem of insanity. Attentive servants kept the glasses filled, and appreciative guests gulped the contents down. Witty leaders of the bar proposed innumerable toasts, and listeners eagerly drank them.

Nor was Marshall's addiction to liquid refreshments confined to his Virginia home. Casks of madeira were not unknown to the custodians of the Supreme Court at Washington. The following episode narrated by Joseph Story, Associate Justice, and given space in Beveridge's *Life of Marshall*, is illuminating. Story ever dutiful to his wife, wrote her once of the habits of the Justices while holding Court. It seems that the court was often so busy that in the interests of economy of time, the Justices had a room fitted up in the Capitol where they could not only discuss pending cases, but eat and sleep as well. For long hours Marshall and his associates would discuss cases around the determination of which hinged the policy of a whole country; quite naturally, their mouths would occasionally become a bit parched. Assuring his wife that overwork did not make the Judges intemperate, Story faithfully informed his wife: "We are great ascetics, and even deny ourselves wine except in wet weather. What I say about wine gives you our rule, but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain'. And if I tell him that the sun is shining, Judge Marshall will sometimes reply, 'All the better, for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere'." Is comment necessary?

And if eminent jurists were not abstainers, what could be expected of the practitioners? Keenly alive to their grave responsibilities, constitutional lawyers realized that if minds were to be at best during the day, recreation must be had in the evening. We learn that in the taverns after night had fallen and clients had taken their worries home, the lawyers would gather and over glasses of sparkling wine, relate entertaining incidents and exchange anecdotes. The man who could not appreciate the

joy to be obtained from viewing a glass held on high before draining it completely was an outcast; the post-revolutionary lawyers, all of high scholarly attainments, were connoisseurs of good liquor; they would today indeed be called heavy drinkers. . . . Of all these convivial souls, perhaps the one who consumed more intoxicants than any other lawyer was Luther Martin. Now, Martin was no inconsequential barrister; for thirty years he was Attorney-General of the State of Maryland (the refusal of that State to aid in the perpetration of the Eighteenth Amendment may well have been out of respect to his memory) and for even a longer period of time was recognized to be one of the ablest constitutional lawyers of the country; he was on one side or the other of almost every important case decided by the Supreme Court until his retirement. "For two generations", says Senator Beveridge, "he was acknowledged leader of the American Bar and his preeminence in that noble profession was brightened by fine public service." But Martin drank—and how! If he was ever sober none of his contemporaries observed it; they all agree that no matter what the hour or occasion his face was always livid and his stomach always full. The Supreme court of the United States once continued the argument of a case solely because he was not quite in condition to appear. Only once was such a continuance necessary, however, for at all other times, though never sober, he was well able to take care of both himself and the interests of his clients. Beveridge declares "the inexplicable feature of his continuous excesses was that his mighty drinking seldom appeared to effect his personal efficiency". This intemperance did not lessen the high regard entertained of him by his legal brethren, either. Indeed, so beloved was this devotee of Bacchus that "when in his old age he was stricken with paralysis the Maryland legislature placed a tax of five dollars annually upon all lawyers for his support"! After his death in 1826 the bench and bar of Baltimore passed a resolution that "we will wear mourning for the space of thirty days". Heavy drinking was not a crime in those days—it was tradition.

With the death of Marshall in 1835 a new era began in the country; the "last of the Federalists" was dead, and Andrew Jackson (himself certainly not an abstainer) was President. The difficulties which Marshall had solved by his powerful intellect

gave way to new problems. Already the slavery question had become a burning issue, and even thinly veiled threats of secession were not infrequent. The conciliatory efforts of Henry Clay postponed but did not permanently avert Civil War, and eventually a succession of Compromises were abruptly discarded and mortal conflict began. In that trying period a new hero arose; Abraham Lincoln took his place among the immortals.

The superb character of the Civil War President needs no extended eulogy here; Abraham Lincoln is perhaps better known and more beloved by all Americans than any other personage in our history. A man of much the same type as Marshall, his piercing intelligence and benign spirit made even war less horrible.

Here I pause to give a little re-assurance to the Women's Christian Temperance Union; I agree with them on one point: Lincoln did not drink. Beyond that, however, I refuse to go. Although Abraham Lincoln did not enjoy wine or whiskey (and we must not condemn him for this peculiarity), he was never known to object to drinking by others. His whole gospel of relations with others was built on the Golden Rule; personal habits of others must not be interfered with, lest others interfere with his. During his Illinois circuit-riding days he convened with his brethren at the tavern, and while they told stories and drank whisky, he told stories only; he did not rebuke their conduct . . . And what conduct it was! Again I refer to Senator Beveridge, who was the biographer of Lincoln as well as Marshall, and whose every assertion in both works is supported by primary authority. Beveridge tells of the nocturnal habits of the traveling lawyers and judges. "At the tavern when the county-seat was reached at nightfall, mirth and jollity reigned among them. Indeed all of the court time at these county towns was full of activity and varied interest—in court all day, at the tavern all night, every waking hour 'replete with bustle, business, energy, hilarity, novelty, irony, sarcasm, excitement and eloquence' as the lawyer historian (Whitney) of the old Eighth Circuit describes the life." The young lady who spoke at the Illinois Bar Banquet in June, 1929, can find little to comfort her in the history of the bar of her own State. There were no pasty-faced lawyers in those days. All members of the bar were as jovial as they

were brilliant. As in Illinois, so elsewhere; tavernkeepers the country over numbered lawyers among their best customers.

But that generation of lawyers has also passed away; new names have graced the Supreme Court reports. What of the lawyers of the first third of this century? Attend any modern Bar Convention and you will find the answer; listen to the laughter and look for the flasks. The old habits, so beloved by the creators of American law, have not disappeared. The country club has supplanted the tavern, true; but most present-day lawyers, loyal to the tradition of their profession, are still justly noted for their conviviality. The atmosphere, however, is not so clear; the epidemic of hypocrisy which began with this decade has entered their ranks too, and some must be rather careful not to let others see them smack their lips over what they loudly demand should be prohibited: but at times the temptation is too strong for even the most rabid dry, his discretion vanishes, and, errant son of Blackstone that he is, he will ravenously gulp down huge quantities of beverages many times more potent than madeira, porter, whisky or wine. Down in the heart of every lawyer, whether he admits it or not, is the realization that a law which attempts to deprive man of one of the most enjoyable pleasures of life is tyrannical; and he rebels.

The young woman who criticized the Illinois lawyers was in grave error when she accused them of having committed grave misconduct by singing the song "Saloon". They had done nothing disgraceful at all; they merely had been true to the traditions of their profession. There would have been infinitely greater cause for depression had they not sung a rollicking ballad. But the legal profession has not succumbed to the shallow pleas of the fanatic; saner heads still rule the profession, and are well able to protect its time-honored habits—if not by toasts, then at least by song. Blackstone, Wythe, Marshall and Martin have no cause to turn over in their graves. The professions to which they devoted their lives is still true to the traditions they transmitted. There is no reason to suppose that lawyers of to-day are ready to place the beer-stein, the wine-glass and the whisky-thimble back in the cupboard. From the beginning of time lawyers have been convivial; the prospect is that they will ever continue to be so. The rebukes of misguided Portias will always echo but unavailingly on the ears of her jovial brothers.