

Reviews

A Great Advocate

EDWARD MARJORIBANKS
THE LIFE OF SIR EDWARD MARSHALL HALL
GOLLANCZ 1929 (LONDON); MACMILLAN 1947 (NEW YORK)

Jacob A. Stein

*Fold the worn silk; and let the wig be laid
Into its battered box; their use is done
For ever: now the final cause is won,
The long term closes; the last speech is made.
No prisoner at the Bar may seek his aid;
No judge will hear him now: beneath his flail
No witness now shall writhe – no felon quail,
No jury by his eloquence be swayed.*

*The Roman head on Saxon shoulders set,
The silver hair; the tall heroic frame
Are seen no more; but some will not forget
And, till they die, must reverence the name
Of him, who, as they struggled in the net,
Rose in his strength, and to their rescue came.*

EDWARD MARJORIBANKS wrote this sonnet in memory of Marshall Hall (1858-1927), a leading English Barrister whose specialty was the acquittal of clients (some guilty, some not guilty) charged with murder by poison or by gun shot. Marshall Hall's widow, Lady Marshall Hall, right after she read the poem, said that Marshall Hall appeared to her in a vision and said that Marjoribanks, a barrister who knew and idolized Marshall Hall, must write the biography. He did and it was published in England in 1929.

Marjoribanks was only 29 years old when the biography was published. Three years later he was dead. He committed suicide. Contemporaneous reports were that his suicide may have been connected with his having taken on too many obligations: politics, law and writing. His opportunities overpowered his resources.

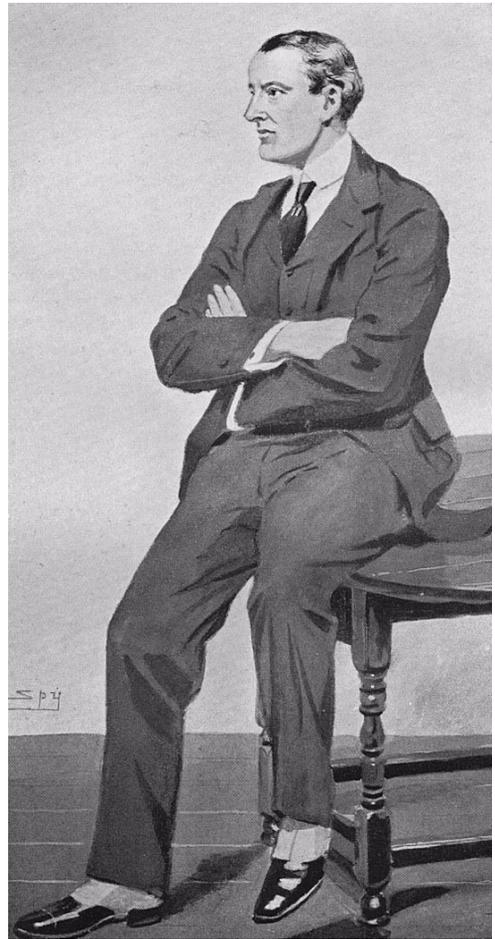
I read the American edition in 1950. Oddly enough, it omitted the poem. The other day, for a few dollars, I picked up the original English edition at a used book sale.

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John Mortimer said that Marjoribanks' *Life of Sir Edward Marshall Hall* is the best ever legal biography. It brought more people to law school in England than any other work.

Marshall Hall's hot temper carried him into frequent run-ins with the judges. For a time it appeared his contemptuous conduct would end his practice. Here is Marjoribanks' opening description of Marshall Hall.

Edward Marshall Hall was a great and remarkable personality; but his character was composed of many contrary things: to his dying day he retained all the buoyancy, and some of the immaturity, of youth. Endowed with pre-eminent personal beauty of the most virile type, and standing six feet three inches high, his life after middle age was a long fight against physical pain. He was at once the most sympathetic and the most egotistical of men; he was very hot-tempered and very warm-hearted. While he made no secret of his ignorance of the law, his name was better known to the public than that of any among his most learned friends, even those whom he would have openly acknowledged as his betters; for Marshall, though his best friend would have admitted his vanity, was not a conceited man, and was the first to recognize a superior. Of all leading counsel, his name was most frequently in the newspapers, and most rarely in the official law reports.



Edward Marshall Hall (1858-1927).

During Marshall Hall's career there was a change in the criminal law. The Criminal Evidence Act of 1898 gave a defendant the right to testify in his own defense. Before the Criminal Evidence Act, a defendant was deemed incompetent to take the stand. It was presumed he would lie under oath and thus add perjury to his other crimes.

Marshall Hall saw the change as good and bad. It weakened the principle that the defendant was innocent until proved guilty because a defendant's failure to testify drew an unfavorable comment by the judge. Therefore defense counsel must choose between exposing his client to the judge's unfavorable comment or to the ordeal of

cross-examination by the prosecutor and the judge.

The American practice concerning the option not to testify connects with the Fifth Amendment to the Constitution. The judge may not comment on the defendant's refusal to testify.

A relic of the rule limiting a defendant's right to take the stand came before the Supreme Court of the United States in 1961 in *Ferguson v. Georgia*, 365 U.S. 570. Ferguson was charged with first degree murder. Georgia retained the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf. Georgia allowed the criminal defendant to make an

unsworn statement and counsel was not permitted to ask Ferguson any questions or assist him in any way in the giving of his testimony. Ferguson was convicted. The Supreme Court reversed the conviction stating that the defendant was denied his Sixth Amendment right to the assistance of counsel. The Court refused to deal with the question of whether the Georgia statute was unconstitutional on its face.

Marshall Hall became involved with the insanity defense while defending a party named Frederick Rothwell Holt charged with murder. Hall was convinced his client was suffering from a severe mental disorder related to his World War military service.

The M'Naghten rule for determining insanity, announced in Daniel M'Naghten's case, 8 Eng. Rep. 718 (1843), was applied. It states that the accused is not criminally responsible if at the time of the committing of the criminal act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong. Marshall Hall challenged the right and wrong rule. He was unsuccessful.

Here is the way Hall explained his views to the jury:

Will is different from reason. A man may know the difference between right and wrong and appreciate the nature and quality of his acts and the consequences thereof, and yet be deprived of that instinctive choice between right and wrong which is characteristic of a sane person. Hitherto, intellectual insanity, defective reason, has been the only insanity recognized by the law, but our contention is that a man's reason may be clear, even his judgment may be clear, yet his will-power is absent or impaired or suspended, so as to deprive the person affected of the power to control his actions or exercise his will-power.

The Durham rule, also called the Durham test, was announced in *Durham v. U.S.*, 214 F.2d

862 (D.C. Cir. 1954). It follows Hall's theory. It states that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. It did away with the rigid right and wrong test. The Durham rule itself has been modified by the courts. What is right and wrong? What is mental illness? What is free will? These are things that continue to trouble the courts and no doubt the puzzle will be with us for a long time.

Marshall Hall was involved in another case that connects with an evidentiary issue that remains with us. Hall's client, George Joseph Smith, was charged with murdering his wife in order to profit from her estate. The prosecutor contended that Smith drowned his wife in the bathtub the day after their marriage. Smith claimed it was an accidental death. What made the case so difficult to defend was that the prosecutor offered evidence that Smith had married two other women; that the two had died in their baths; that he had been the sole beneficiary under their wills. This uncharged conduct showed a pattern, a plan. Hall put his heart and soul into the defense. The whole principle of the presumption of innocence, he said, was at stake. Evidence of a pattern was only admissible where a defense, denying intent or the like, was to be set up. In Smith's case there was no *prima facie* case to answer. No previous decision allowed evidence of pattern to be used when there was no sufficient evidence in the case charged to displace the primary presumption of innocence. Hall lost as he knew he would when the evidence was admitted. The Brides in the Bath principle appears in Federal Rules of Evidence 404(b):

Rule 404(b). Other Crimes, Wrongs, or Acts
...

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

First this rule declares that uncharged bad acts cannot be used to prove the charged offense and then (as in *Brides in the Bath*) the uncharged bad acts can be used. First it giveth and then it taketh away. It is the prosecutor's delight.

I claim a connection with Marshall Hall. Here it is. When I first read the biography I was trying criminal cases. I was taken with one of Hall's closing arguments in a murder case. Here is the way he ended his argument:

I have nothing more to say than to remind you that the responsibility is yours now, and not mine. If you are satisfied beyond all reasonable doubt that the man standing there murdered Emily Dimmock, though it breaks your hearts to do it, find him guilty and send him to the gallows. But, if, under guidance of a greater than any earthly power, making up your minds for yourselves upon this matter, if you feel you cannot truthfully and consciously say you are satisfied that the prosecution have proved that this man is guilty, then I say it is your duty, as it must be your pleasure, to say that Robert Wood did not murder Emily Dimmock.

I adapted Hall's speech to a case of my own in a closing argument. My client was a woman charged with a gun shot murder. The defense was self defense. Marshall Hall got an acquittal. The best I could do even plagiarizing Marshall Hall's speech was a hung jury later converted into a plea to manslaughter. *JB*