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HOLMESPUN HUMOR

By EDWARD J. BANDER†

[This is a continuation of the anecdotes appearing in the first issue of this volume.]

I can remember the time before the Civil War when I was moved by the abolition cause so deeply that a Negro minstrel show shocked me and the morality of Pickwick seemed to me painfully blunt. I have no right to an opinion as to public conditions for I am a recluse and don't even read the papers. Moreover, at times I have felt as you do. Nevertheless, I rather more than hope that there is more intelligent and high-minded thinking of public matters than ever before. One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point, and that one must mistrust the suggested conclusion. Just after the Civil War there appeared on the fences and elsewhere S T 1560 X. I believe it was an advertisement, perhaps of bitters, which then had a locus standi. I said and proved to myself that if one should accept that as a revelation of the secret of the universe one would be astonished by the corroboration that a fortnight would furnish. I think that a type of the way our minds act. I venture this word of caution from the experience of an old man.

Very sincerely yours,

O. W. Holmes¹

Justice Holmes once told Solicitor General William D. Mitchell: "I have always appreciated your fairness to your opponents."

Then as Mitchell's chest swelled, he added: "Candor I have always thought was the best form of deception."²

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1. HAYS, *CITY LAWYER* 231 (1942).

2. ALLEN, *MORE MERRY-GO-ROUND* 109 (1932); see also, LEWIS, *High Drama in High Court*, N.Y. Times, Oct. 26, 1958, (Magazine), p. 10.

The story is told of the great Justice Oliver Wendell Holmes, who, at the time, was still sitting on the Supreme Court at the age of eighty-nine. The Court had temporarily adjourned for lunch, and when argument resumed thereafter Justice Holmes dozed off after about ten minutes of oral argument. Chief Justice Hughes soon detected that his colleague had fallen asleep and cautiously poked him in the leg. Startled, Holmes sat up and burst forth with a epithet that shook not only the courtroom but also the lawyer presenting his case.

At this moment Justice McReynolds interrupted the lawyer to ask a question irritating to Justice Holmes. Holmes turned sharply to the Chief Justice and audibly mumbled something which those in the courtroom interpreted as berating the Chief Justice for awakening him out of a peaceful slumber to hear the annoying question.³

I have been much bothered with coughing at night — and on her insistence that smoking was at least part of the trouble, have without admitting it to her — stopped all except the morning cigar, and to my infinite chagrin the cough seems to be stopping.⁴

I value enthusiasm but not enthusiism.⁵

Two generations ahead of me there was a well known lawyer in Boston, Charles G. Loring, whom my mother-in-law pronounced a really good man because he never took a case that he didn't believe in — perhaps a more sardonic way of putting it would be that he believed in every case that he took.⁶

The new generation of novelists has discovered the act by which it came into being and is happy in the discovery.⁷

3. Kaufman, *Speech*, 36 CONN. B.J. 694-95 (1962); For another and more profane version, see 2 PUSEY, CHARLES EVANS HUGHES 285 (1951).

4. 1 HOLMES-LASKI LETTERS 390 (Howe ed. 1953).

5. *Id.* at 722.

6. 2 *id.* at 1019.

7. 2 *id.* at 1180.

Harrison Hale Schaff, an alumnus still living in Boston, recalls an interesting episode in which Professor Swasey was the hero. It was before the Supreme Court, in a session in which Oliver Wendell Holmes was the presiding Justice. At a certain point a murder case in which Mr. Swasey was the defending counsel was called. Mr. Swasey arose, and in a low-pitched, agreeable voice, clearly presented his request for a continuance of the trial of his client. Mr. Holmes listened with the courteous attention that always characterized his attitude on the bench, and then said, in effect:

"Mr. Swasey, the record shows that the trial of this case has at your request been continued once. Last summer when I was in England visiting the law courts, Mr. Justice Stephen invited me to sit with him on the bench in a criminal session during which he commented to me on the importance of speedy trials in the administration of criminal justice, particularly in capital cases while witnesses were available, evidence fresh in the mind, and before suggestions could create false psychological memories."

Mr. Justice Stephen had for years been a terror to evil doers in England. His name was one to conjure with in legal circles throughout the English-speaking world. The motion was obviously lost, though the judge paused before uttering the words of refusal silently to extend to the petitioner's counsel the courtesy of any further plea he might wish to advance. Swasey, unmoved and motionless, looking Holmes full in the face with those brown eyes of his that shot golden gleams in his rare moments of suppressed emotion, had listened to the unfavorable trend of the Court's opinion. When the pause came to allow him a final word, he said, "Has your Honor read the morning papers?" Even the Court officers came to life, and Holmes inquired what press report might have a bearing on the case at bar.

"None," replied Swasey, "but they do report that yesterday Mr. Justice Stephen was judiciously committed to an institution for the feeble-minded."

This bombshell was too much for the gasping attorneys and officials, and Holmes and Swasey alone of those in the precincts of the Court retained their equanimity. Following a brief colloquy at the bench, the continuance was allowed and Swasey set out for his office.⁸

On another occasion he himself subjected to a similar ordeal a talker far more vain of his prowess than Holmes. This was Andrew

8. Marsh, *The Making of Lawyers*, 22 B.U.L. REV. 175, 189 (1942).

*Lang, and it must be admitted that Lang deserved the treatment. He had been asked to meet Holmes, and on coming into the room went up to Holmes, looked him over with ineffable insolence, and said: "So you are the son of the celebrated Oliver Wendell Holmes." "No," replied Holmes promptly, "he was my father."*⁹

*A German the other day quoted apropos of him their saying that in the vulgar herd there is one more than each of us suspects. . . .*¹⁰

*Fashion, as I long have said, is a law of life, and I suppose as soon as the odious automobiles get cheap the rich will give them to their servants, as Mr. Dooley said the other day.*¹¹

*I heard the other day that you can tell a Bostonian anywhere, but you can't tell him much — which I thought good.*¹²

*I used to say that he [Harlan] had a powerful vise, the jaws of which couldn't be got nearer than two inches to each other.*¹³

*I made a little jest yesterday that pleased me. My brother Clarke was saying that knocking off wine and spirits had made it necessary for the clubs to raise their annual charges. I said they used to raise the Devil and now they raise the dues.*¹⁴

*I am on most friendly terms with all the judges, but I suspect that if I should be gathered to Abraham's bosom some of them would think it an advantage to the law, even if they missed a friend.*¹⁵

9. I HOLMES-POLLOCK LETTERS xxx-xxxii (Howe ed. 1961).

10. *Id.* at 56.

11. *Id.* at 102.

12. *Id.* at 139.

13. II *id.* at 7-8.

14. II *id.* at 44.

15. II *id.* at 268.

The story every Frankfurter law clerk enjoys most telling quite naturally involves Justice Holmes.

The first question Justice Holmes asked on his first day on the Supreme Court was the standard inquiry on the appeals procedure by which the pending case reached the high court.

"How did you get here?" Justice Holmes inquired timidly. And the attorney replied from the stand:

"By the B. and O. Railroad, Your Honor."

During his years as Byrne Professor of Law at Harvard, Frankfurter selected from the graduating class each year an outstanding member to serve as law clerk to Holmes.

Upon learning of the selection Holmes invariably replied to Mr. Frankfurter the same way.

"So and so sounds all right to me. Please tell him to report to my office on such and such a day at 10:00 a.m.," wrote Holmes, "and tell him to be here not a minute before or a minute after that time."

When he reached 75 Holmes started adding this sentence to his annual letter to Professor Frankfurter.

"Please tell the lad that I reserve the right to die or resign."¹⁶

Legend has it that Mr. Justice Holmes stated that the standard to be applied by a court in allowing attorneys' fees was to be reasonably mean.¹⁷

"I feel like Holmes when he was wounded at Antietam," Hughes whispered to Fletcher with a sigh that seemed to come from deep within him. "If I ever get out of this, I think I shall never love another country."¹⁸

16. Winship, *Justice Frankfurter*, Boston Sunday Globe, Nov. 10, 1957; see also Sergeant, *Justice Touched with Fire*, in MR. JUSTICE HOLMES 209 (Frankfurter ed. 1931).

17. Concord National Bank v. Town of Haverhill, 145 A.2d 61, 63 (N.H. 1958).

18. 2 PUSEY, CHARLES EVANS HUGHES 558 (1951).

I must say I do remember that my wife and I were having tea with Justice Holmes one day and we got to talking about Thoreau and I'd always thought of him as a dissenter and a non-conformist, and he told me this story, which is the source of the only doubt about Thoreau I've ever had. Holmes said that a friend of his in Concord had once said, "You know, I've read everything Henry's ever written about those nuts and berries he used to eat, but I never found a word about the apple pies that he used to get at our back door."¹⁹

The difference, as Mr. Justice Holmes once observed, between gossip and philosophy is merely background.²⁰

[Chief Justice Taft to his class at Yale about his experiences as Chief Justice:] "And I said to Holmes: 'But do you think it was right or fair to leave that fact out of consideration?' " "And," continued Taft with the mountainous chuckle, "he said, 'I'm sorry; I didn't read that far in the record.' "²¹

Sometimes the judicial reaction to a law review citation is essentially one of amusement, as for example the remark (probably not wholly apocryphal) attributed to Mr. Justice Holmes: "I don't mind when the lads on the Law Review say I'm wrong, what I object to is when they say I'm right."²²

Once he quoted Emerson at his own expense. This happened when, still an undergraduate at Harvard, he had written an essay criticizing Plato as being a superficial thinker. With youthful conceit he had

19. SEYMOUR, COMMENT, GOVERNMENT UNDER LAW 501 (1956).

20. Smith, Book Review, 56 HARV. L. REV. 677, 679 (1942).

21. LLEWELLYN, THE COMMON LAW TRADITION 21 (1960).

22. WIENER, EFFECTIVE APPELLATE ADVOCACY 130 (1950); see also Wiener, *Avoidable Faults in Appellate Briefs*, 41 NEB. L. REV. 434, 446 (1962).

shown this to Emerson who promptly rebuked him in one short sentence that he had never forgotten: "When you strike at a King you must kill him."²³

I shall read some sociological books — with great delight to find so much talent, civilization, and good writing in American authors. Lester Ward is the leader; an original thinker of no mean degree. He has lived in Washington, but leaves to take a professorship. I called on him to express my appreciation and was delighted to have him ask what Court I belonged to and express a polite surprise that any member of our Court should read his books. The implication was obvious.²⁴

If one can keep the pace, do one's job in the superlative degree, and keep out of the Insolvency, Divorce, and Criminal Courts until one retires on a pension I call it a success.²⁵

If you ask what a certiorari is I must answer with Jeremiah Mason to a client: "That is something that your Heavenly Father never meant you to know."²⁶

However, this last year has brought in my share of superlatives. If I were naive I should be intolerable.²⁷

Perhaps I am unjust, but he has rather roused my prejudice, so that I have gone back over what I have read in the vain effort to find a passage, it is there somewhere, that shows he is not at home in the differences between shall and will.²⁸

23. HOLMES-EINSTEIN LETTERS xviii (Peabody ed. 1964).

24. *Id.* at 22.

25. *Id.* at 46.

26. *Id.* at 194.

27. *Id.* at 242.

28. *Id.* at 296.

*I used to say it is vain to say that this is the best of possible worlds — when it could be so improved if we could go to bed drunk and wake fitter than ever for achievement.*²⁹

*. . . having vainly expected my eminent friend, Morris Cohen, at luncheon. He had agreed to come, but being a philosopher did not turn up.*³⁰

*You speak of my biography [Bent, Justice Oliver Wendell Holmes]. I have not read it, but I should think it was harmless. I had nothing to do with it. Perhaps when I die my executor (John Palfrey and/or Felix Frankfurter) may do something, with more materials, but I have done my best to destroy alluminating documents.*³¹

*Like any other members of their society, lawyers could claim no more than that to a degree they had channeled or harnessed forces which they had not created. "Sonny," Holmes in legend replied to his inquiring law clerk, "I just remember, I'm not Lord God Almighty."*³²

*Holmes' distinction of himself from God cannot be traced to a document; the story so fits the character of speaker and situation that it demands acceptance for its validity in spirit if not in letter.*³³

One theory [as to why Puerto Rico is in the First Circuit] presented to me was that Mr. Justice Holmes arranged it. He was Circuit

29. *Id.* at 302.

30. *Id.* at 308.

31. *Id.* at 349.

32. HURST, *THE GROWTH OF AMERICAN LAW* 336 (1950).

33. *Id.* at 467 (bibliographical notes).

*Justice for the First Circuit and I was told very seriously once that Mr. Justice Holmes organized the attachment of Puerto Rico to the First Circuit so he would have a place to spend a winter vacation. It is a very interesting theory except for two things: That sort of thing was entirely out of character for Mr. Justice Holmes, and in the second place, Mr. Justice Holmes never went to Puerto Rico so far as I have been able to determine.*³⁴

*As he grew older Holmes grew even better looking and there remained to the end something pre-eminently military, something Gascon, in that mustache and that spare soldierly figure. "He may be a better lawyer than I am, but I was a d. . .d sight better soldier," so the legend runs, he commented on the criticisms of an eminent jurist who had attained Holmes' military rank behind a Washington desk in 1917-18.*³⁵

I remember a former Justice of the Supreme Court much given to interrogation who engaged counsel in a long colloquy of question and answer at the very threshold of his argument. In a stage whisper audible within the bar Chief Justice White was heard to moan, "I want to hear the argument."

*"So do I, damn him," growled his neighbor, Justice Holmes.*³⁶

*Once I had taken a book from the shelves, and to read it better, flattened it out on my desk. He happened to see. "Young man," he said, "do not brutalize my book." I have never forgotten that admonition.*³⁷

"I early realized the illusion of personality in the really mechanical action of the mind. When I was wounded in the heel, I would see man

34. Woodbury, *Puerto Rico, Southernmost District of the First Circuit*, 1960 MAINE ST. BAR ASS'N PROCEEDINGS 32, 33.

35. BROGAN, *AMERICAN THEMES* 173 (1947).

36. Davis, *The Argument of an Appeal*, in ROSSMAN, *ADVOCACY AND THE KING'S ENGLISH* 220 (1960).

37. Derby, *Recollections of Mr. Justice Holmes*, 12 N.Y.U.L. REV. 350 (1935).

*after man approach with self-gratulatory smile as he made a reference to Achilles. Each had the feeling of personal achievement while he really was moving along the path of least resistance. . . .*³⁸

*On the following day, Tuesday the 5th, his life as a full-fledged lawyer began: "Read to Allen. Bought a chair of Smith — \$9.50. (pd. 6th). The rush of clients postponed on account of weather."*³⁹

*Somebody boasted of being a self-made man, and Holmes said, "Well, a self-made man usually hasn't made much."*⁴⁰

38. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE SHAPING YEARS 1841-1870, 156 (1957).

39. *Id.* at 264.

40. FRANKFURTER, FELIX FRANKFURTER REMINISCES 11 (1960).