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## HOLMESPUN HUMOR

By EDWARD J. BANDER†

[This is a continuation of the anecdotes appearing in the first two issues of this volume.]\*

*During the first term of Chief Justice White, teeth were put into the Sherman Act by the decisions dissolving the oil and tobacco trusts. In the second of these cases a lawyer, hopeful of demonstrating the minuteness of foreign competition, asserted before the Court that "no body but dudes and fools smoke foreign cigarettes." Mr. Justice Holmes interrupted gently from the bench. "Are you sure?" he inquired. "I have smoked them, and I am sure I am not a dude."<sup>1</sup>*

*The secretary thought the word "afflatus" [281 U.S. 389 at 397 (1930)] might cause comment, and reminded the Justice that a good many people thought he rather delighted in using terms not commonly understood. "Yes," said Mr. Justice Holmes, "I felt myself that it was rather a cabriole word."*

*The same secretary once objected that the last paragraph of an opinion was not quite clear. "What the hell do you mean? — not clear! Give it to me. Well, if you don't understand it, there may be some other damn fool who won't. So I would better change it."*

*The former secretaries, who adore the Justice, delight in such stories. One of them objected to the phrasing of a certain opinion, maintaining that the shading given to one word meant that "there isn't more than one man in a thousand who will understand it."*

*"I write for that man," the Justice retorted.<sup>2</sup>*

*Holmes used to say of Justice Horace Gray that the premise of his opinion and the conclusion stood forth like precipices, with a roaring torrent of precedents between, but he never quite understood how Gray got across . . .<sup>3</sup>*

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\* The present collection of Justice Holmes' anecdotes will soon be placed in book form by Mr. Bander and published by the Michie Company.

1. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE SHAPING YEARS 1841-1870, 277 (1957).

2. *Id.* at 306.

3. BIDDLE, MR. JUSTICE HOLMES 103 (1942). See BENT, JUSTICE OLIVER WENDELL HOLMES 307 (1932).

*When Chief Justice Taft was sick for a few weeks, Holmes had to act as Chief, and take over the detail administration of the Court, which he thoroughly disliked. Mr. Charles Elmore Cropley, the clerk of the Court, bringing some orders for him to sign at his house at 1720 I Street, waited for an hour before the Justice came down to his library. "Your eminence," he said to the young man, "I am not an early bird — and besides, I don't give a damn for worms."<sup>4</sup>*

*The taxpayer had won below in the Second Circuit, which had held that income from a certain trust fund was a gift and therefore not taxable income under the terms of the Revenue Act of 1913. Holmes was interested. He himself enjoyed such an income, and said so during argument by the taxpayer's lawyer, who was too surprised to say anything until the end, when he ventured: "I hope, Mr. Justice Holmes, that the Statute of Limitations will not have run against you, so you will not be foreclosed from getting back the tax you have mistakenly paid out." The others looked at Holmes, who let a long enough moment slip by to allow the slightly self-conscious suspense to point up his reply. "Nothing," said the Justice, "nothing you have said leads me to hope . . ."<sup>5</sup>*

*Mr. Beck was an industrious and doubtless learned Philadelphia lawyer, but how long-winded, and how by the yard he loved to quote Shakespeare at them. . . . Beck liked to end his arguments with a good solid quotation ("not inappropriate," he would suggest) and then, without looking at his brief, he would recite: . . .*

*Holmes could stand it no longer, and leaning to the Chief, who sat next to him, whispered in his ear, not inaudibly: "I hope to God Mrs. Beck likes Shakespeare!"<sup>6</sup>*

*There were, in fact, three untasted bottles of champagne that Henry White had sent him, not so long ago, that had perplexed his conscience. And he had said to himself, and later to others, more than*

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4. *Id.* at 110–11.

5. *Id.* at 144.

6. *Id.* at 145–46. See also Biddle, *Mr. Justice Holmes* in DUNHAM, ed., *MR. JUSTICE* 141 (1964).

once: "The Eighteenth Amendment forbids manufacture, transportation and importation. It does not forbid possession or use. If I send it back I shall be guilty of transportation. On the whole I think I shall apply the maxim de minimis, and drink it . . ."

It is said that as Justice Holmes was leaving the banquet hall after the farewell dinner tendered him by the Boston Bar before he left for Washington to take his seat on the Bench of the Supreme Court of the United States, someone called out:

"Now justice will be administered in Washington."

To this the new Justice is reported to have replied:

"Don't be too sure. I am going there to administer the law."<sup>7</sup>

Mr. Justice Brewer, who was the recognized authority on all Indian matters, interrupted the young Kansas lawyer to ask:

"Mr. Counsellor, what do you think the status of an Allottee is?"

The Kansas attorney stopped in front of Chief Justice Fuller and, spreading both his arms wide up in the air, exclaimed:

"If you fellows up there don't know, how do you think us fellows down here should know?"

The Court was stunned! Never before had it been described to its very face and in its own sacred precincts as — "You fellows up there."

The shocked expression on the face of dear Chief Justice Fuller will never be forgotten. Justice Holmes, shaking with laughter, buried his face in his arms on the Bench to hide his amusement, and there was a sort of dazed expression on the features of the other members of the Court.<sup>8</sup>

. . . Mrs. Butler requested me to purchase one of a display of magnificent American Beauty roses in the window . . .

On arriving there, she wrote on her card: "An American Beauty for an American beauty."

She put the card in an envelope and directed the chauffeur to deliver it and the rose to Justice Holmes. Later during the day there came an acknowledgment from Justice Holmes in which he wrote that the word "for" should have been "from."<sup>9</sup>

7. BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 50-51 (1942). See also HAND, THE SPIRIT OF LIBERTY 306 (1960).

8. *Id.* at 75.

9. *Id.* at 177-78.

*He told me that whenever there was a fire in any direction he would be glad to go to it with me even if he had to be routed out of bed. In fact it would not have surprised me had he left the Bench to witness a fire while the Court was in session.*<sup>10</sup>

*On a certain afternoon at the Metropolitan Club, while I was speaking to a group of members in the lobby and claiming to have rendered a service to the country by safely escorting Justice Holmes, then well in his eighties, across several street crossings as he was returning alone to his home, one member exclaimed:*

*"Butler, you think you have rendered the Country a service by saving the life of Justice Holmes. I don't. I think you ought to be indicted."*<sup>11</sup>

*A secretary of Justice Holmes told me that once when he arrived at the Justice's office rather late he made excuses for his tardiness and also explained to Justice Holmes that his breath might indicate he had not come directly from the breakfast table. In fact the secretary admitted, he had stopped on his way to the Justice's office, as some friends were leaving Washington that morning and there had been a little celebration. On hearing this Justice Holmes observed:*

*"Yes, I can visualize a rather long mahogany counter, on which one's arm can rest while holding a goblet with something in it, and below is a brass rail on which one foot is resting. Thinking of this makes me regret some of the limitations imposed on one who occupies my position."*<sup>12</sup>

*Justice Holmes had been on the Supreme Court for many years when President Coolidge succeeded President Harding. There was a release from one of the newspapers in Washington that Chief Justice Rugg of the Massachusetts Supreme Court would succeed him on the Bench. Justice Holmes was then eighty-three or eighty-four years of age and had been on the Bench over thirty years. All during the time*

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10. *Id.* at 179.

11. *Id.* at 180-81.

12. *Id.* at 182-83.

*he was on the Bench he had worn the same robe that he had worn back when he was Chief Justice of the Massachusetts Supreme Court. A few days after this article appeared Holmes came out with a brand new robe — and remained for several more years on the Court.*<sup>13</sup>

*Justice Holmes learned about this prejudice in his first years on the Supreme Court: He was in the habit of studying the opposing briefs as soon as they were argued. He would brood on them for a day or two at most and write and deliver his opinion. This habit, which was natural to his temperament, alarmed his colleagues and spread the rumor that he was a glib and offhand fellow. He accordingly changed his routine while staying true to his bent. He wrote his opinion as before but aged it in a desk drawer for a month or two and then uncorked it for his brethren. Thereby, he later disclosed, he acquired that reputation for mellow judgment and judicial restraint which guaranteed his subsequent transfer to Olympus.*<sup>14</sup>

*One man complained that in the argument of an important case, the Chief Justice kept saying: "But, sir, the comma is there; the comma is there."*<sup>15</sup>

*. . . with separate lavatory facilities in the office of each Justice, Holmes is perhaps apocryphally said to have observed that the abandonment of a common men's room meant that off the bench he would no longer see his brothers at all.*<sup>16</sup>

*Justice Holmes was fond of telling a story. In his early days, he said, "I'm afraid my temper was a little short." And there could hardly be two men more different than Mr. Justice Holmes, who wielded a rapier, and Mr. Justice Harlan, who wielded a battle-axe. A rapier and a battle-axe locked in combat are likely to beget difficulties for innocent bystanders. Justice Harlan, who was oratorical while Justice Holmes was pithy, said something that seemed not ultimate wisdom to*

13. Carey, Speech, 1961 Maine State Bar Association Proceedings 169.

14. Cooke, "Journalists Who Make History," *Atlantic Monthly* 156 (Nov. 1959).

15. Follansbee, *Mr. Justice Holmes — A Judge with Imagination*, 11 *AMERICAN LAWYER* 10 (1903).

16. FRANK, *MARBLE PALACE* 110 (1958). And see 2 Holmes-Pollock Letters 169 (1961).

Holmes. Justice Holmes said he then did something that isn't done in the conference room of the Supreme Court. Each man speaks in order and there are no interruptions, no cut-ins — or cuts-in, whichever the plural is — because if you had that you would soon have a Donnybrook Fair instead of an orderly proceedings. But Holmes said, "I did lose my temper at something that Harlan said and sharply remarked, 'That won't wash. That won't wash.'" Tempers flared and something might have happened. But when Holmes said, "That won't wash," the silvery-haired, gentle, small, Chief Justice Fuller said, "Well, I'm scrubbing away. I'm scrubbing away."<sup>17</sup>

When a law clerk of Justice Holmes — fresh from the Harvard Law School — was helping the justice to make out his income tax return, the young man expressed sympathetic resentment at the burden the Justice had to bear. Holmes reproached his law clerk, observing that taxes are the price we pay for civilization. . . . The cure for most of our ills, he was fond of saying, is more civilization.<sup>18</sup>

One recalls the epigram of Justice Holmes: "We can forgive a man the defects of his qualities, if only he has the qualities of his defects."<sup>19</sup>

Remember what Justice Holmes said about "justice." I don't know what you think about him, but on the whole he was to me the master craftsman certainly of our time; and he said: "I hate justice," which he didn't quite mean. What he did mean was this. I remember once I was with him; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."<sup>20</sup>

17. Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 888-89 (1953). Also in FRANKFURTER, *OF LAW AND MEN* (1956); DAVENPORT, *VOICES IN COURT* 255 (1958); Clark, *Supreme Court Conference*, 19 F.R.D. 306-07 (1957); CASE AND COMMENT, May-June 6 (1957).

18. Freund, "Mr. Holmes Had Cure for Most of Our Ills," Boston Sunday Globe, Sept. 30, 1956 (Editorial Page).

19. HAND, *THE SPIRIT OF LIBERTY* 270 (1960).

20. *Id.* at 306. See also BUTLER, *A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES* 50-51 (1942); also Hill, *Memorial*, 298 MASS. 600 (1937); Sergeant, *Justice Touched with Fire*, in MR. JUSTICE HOLMES 206-07 (Frankfurter ed., 1931); CURTIS, *A COMMON PLACE BOOK* 27 (1957).