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Judicial World of Mr. Justice Holmes (continued)

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THE JUDICIAL WORLD OF MR. JUSTICE HOLMES

(Continued from the November, 1938, issue—NOTRE DAME LAWYER)

We said a little ways back that Holmes became exasperated over the order which had the golden lion as a symbol; a judge is not allowed to show his exasperation. Before we pass to the nature of torts and the rights in land, we must stop a moment to make a note on that. Holmes observed the rule with a patience that is all the more remarkable because it is broken occasionally by a thrust of ironic wit. In overruling a point which was too late because it had not been made in the trial court: "We do not mean to intimate that it would have fared better if it had come earlier." [125] Where a miscarriage was caused by an injury to a woman and administration was taken out on the child's estate and suit brought for damages: "the plaintiff can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." [126] A statute gave a wife a right upon divorce to have back property which came to the husband by reason of the marriage. The husband's right to the wife's property by marriage was repealed in 1857. The provision as to the wife's right to have the property back was contained in the Revised Statutes of 1882. Holmes said it was only an excess of caution: "The legislature reasonably may have contemplated the possibility of subsequent divorces between couples who had celebrated their silver, but not yet their golden weddings." [127] Sureties signed a probate bond in blank supposing it would be filled in for $2000. It was filled in for $4000. Holmes held them on the ground they took the risk. He refused to put it on the ground of estoppel: "A specialty deriving its validity from an estoppel *in pais* is perhaps something like Nebuchad-

125 Commonwealth v. Goulding, 135 Mass. 552 (1883).
126 Dietrich v. Inhabitants of North Hampton, 138 Mass. 14 (1884).
127 Chase v. Phillips, 153 Mass. 17, 26 N. E. 136 (1891).

nezzar's image with a head of gold supported by feet of clay." [128] A city sued by a person falling into a hole in the sidewalk has a verdict against it and appeals on the point that the notice of the accident was not sufficiently definite as to the place. It indicated the street, the side of the street and proximity to a fixed point. "The defendant would hardly ask us to presume that there were several such defects in the neighborhood." [129] An experienced sailor sued because of injuries sustained on a tug. The case finally came down to the point that the master had sworn at him thereby distracting his attention: "And we cannot think that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep." [130] Yarn was sold at an agreed price per pound. It was wound on paper caps. The buyer wants the weight of the paper caps taken out. In construing the contract: "the caps were to be counted in like the bones in a chicken." [131] A street car was struck by a runaway dray. Plaintiffs claim the car should have avoided the runaway: "A horse car cannot be handled like a rapier." [132] A mortgage had been foreclosed. It is claimed notice was not published in a paper in the town where the property was. The paper was published by a firm at Fall River which by changing the name only made it the "local" paper of each of fifteen surrounding towns: "All the fifteen heads of the hydra had their home in Fall River." [133]

The cases involving the operation of railroads which Holmes passed upon are legion but they may be readily classified and a few salient rules which he followed may be indicated. This is made easier because of the clarity which

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128 White v. Duggan, 140 Mass. 18, 2 N. E. 110 (1885).

129 McCabe v. City of Cambridge, 134 Mass. 484 (1883).

130 Williams v. Churchill, 137 Mass. 243 (1884).

131 Nonantum Worsted Company v. North Adams Co., 156 Mass. 331, 31 N. E. 293 (1892).

132 Hamilton v. West End Street Railway, 163 Mass. 199, 39 N. E. 1010 (1895).

133 Rose v. Fall River Five Cent Savings Bank, 165 Mass. 273, 43 N. E. 93 (1896).

comes from the fact that he dealt with them all on basic principle and was consistent throughout. We may start with the right of way. The railroads had in their essentials been established and laid out before this day. But it took little to start a discussion as to where the exact boundaries of the way were. In these cases Holmes was obliged to study and compare old deeds, decide the effects of new legislative grants when consolidation was authorized, and usually the law of prescription was involved and it had to be determined by examining as to the adverse use of the land for a period of twenty years. The eminent domain statutes by which the roads first got their right had to be construed and the various acts which had been done by the railroad in claiming its rights under them. A favorite point was whether the plan of the way had been served on the land owner or filed as required by statute.[134] The railroads also litigated their right to tax exemption under various statutes with respect to land which they used and which was claimed to be without the right of way and thus beyond the exemption, and often this land was so involved with the right of way that the whole subject had to be reexamined.[135] Holmes' opinions in these matters are models of interpretation based on good sense and convincing by their clarity and the application of the practical factors governing the problem presented.

Once the right of way was established it belonged to the railroad with the right to operate trains over it and with no obligation to parties who were illegally on the right of way. They were treated as trespassers and had no right to recover for any injuries they received there and the railroad had no duty towards them. One person had a water closet on the right of way. While in it a train ran off the track and he was

134 Brock v. Old Colony Railroad Company, 146 Mass. 194, 15 N. E. 555 (1888); Googins v. Boston & Albany Railroad, 155 Mass. 505, 30 N. E. 71 (1892); Abbott v. New York & New England Railroad, 145 Mass. 450, 15 N. E. 91 (1888).

135 Norwich & Worchester Railroad Co. v. County Commissioners of Worcester, 151 Mass. 69, 23 N. E. 721 (1890).

killed. The suit brought by his representatives was dismissed.[136] Places of travel which crossed the right of way presented a different matter. If it was an established highway which had legal authority the railroad was obliged to give warning of the approach of trains and if it had or had not done so was an issue of fact for a jury. What crossways were entitled to this warning created some difficulty because there are many paths and ways in the country. If there was twenty years use by the public that entitled the trial judge to instruct the jury there was a right of way.[137] But regardless of rights by twenty years use the railroad might hold out an invitation to the public to cross and if that was found the duty to signal existed.[138] If gates existed by reason of statute or ordinance or by voluntary act the railroad was responsible for their operation.[139] The gateman was their servant and his acts might be an invitation to the public to cross.[140] With respect to liability to passengers Holmes required the relationship to be established before it created rights. Where a person had ridden on the engine of a crowded train, getting off at each station and at one of the stations the train started before he could resume his place, and after the conductor had called "All aboard" he jumped upon the steps of a car and could not get inside because of other passengers, it was held he never had the status of a passenger.[141] But a doctor leaving his home across from the station saying he was going to Boston on the train and who got up the steps on the platform and was killed by a collision from another train was held to be a passenger even if he had bought no ticket. His statement at his home was admissible to show his intent since the purpose for which he was about to take the

136 Dillon v. Connecticut River Railroad Co., 154 Mass. 478, 28 N. E. 899 (1891).

137 Johanson v. Boston & Maine Railroad, 153 Mass. 57, 26 N. E. 426 (1891).

138 Doyle v. Boston & Albany Railroad Co., 145 Mass. 386, 14 N. E. 461 (1888); Donnelly v. Boston & Maine Railroad, 151 Mass. 210, 24 N. E. 38 (1890).

139 Merrigan v. Boston & Albany Railroad Company, 154 Mass. 189 (1891).

140 *Op. cit. supra* note 137.

141 Merrill v. Eastern Railroad Co., 139 Mass. 238, 1 N. E. 548 (1885).

train was put in issue. Since he went to Boston daily it would be inferred he had money to pay the fare.[142] As to the railroad's obligation to passengers, Holmes applied the doctrine of the reasonably prudent person to the circumstances as they were disclosed by the evidence. If there were parallel tracks and a passenger got off on that side instead of the station side he was bound to look and to see what could be seen.[143] If a train was standing at a station and a person intending to board it went across the parallel tracks which were obscured by the smoke of the standing train he took the risk of not being able to see clearly.[144] If a passenger wishing to go to a car further back, got out in the darkness to walk on the track and the train was over a river, he could not recover because he fell into it.[145] There is a definite limiting of these matters to what the railroad offered and was known by the public to offer and an inquiry as to whether the conduct had been prudent under those conditions. One case illustrates it all. A poor woman left her four year old boy on the steps with two children of seven and nine years. She told them to stay there and went back to her washing. Two hundred feet away was a railway track and the earth banked up so the cars could not be seen. In five minutes the children were down there. A train went by. The little boy went on the track to wave it "goodbye" with his hat. His sister told him to come off the track. He said: "Why, the train has gone by, it is passed now and so there is no more." The train had broken in two. The child was killed by the part which was following in the rear. The defendant did not deny negligence but rested upon the boy's and the mother's lack of due care. The verdict was against the railroad. Holmes held: The boy's answer to his sister showed he understood the danger of cars in motion; he was not exercising the care which would be required of an adult

142 Inness v. Boston, etc. Railroad, 168 Mass. 433, 47 N. E. 193 (1897).
143 Connolly v. New York, etc. Railroad, 158 Mass. 8, 32 N. E. 937 (1893).
144 Debbins v. The Old Colony Railroad, 154 Mass. 402, 28 N. E. 274 (1891).
145 Kellogg v. Smith, 179 Mass. 595, 61 N. E. 138 (1901).

because he could have seen the cars if he had looked; but the danger of cars following a train from which they had broken off was so unusual and the passing of the front part of the train had such a tendency to suggest the track was safe that it may not be said as a matter of law that he was not exercising the care of a boy of his years; as to the mother, the poor cannot always keep their children in the house or cause them to be attended when they are out of it; she had a right to believe the children would obey; the time they were out from her eye was only five minutes; the manner in which she left them occupied, the sister being nine and the boy having the degree of intelligence he indicated by his answer, the case falls into that border region between two extremes which courts leave for juries to decide.[146] With respect to the liability of carriers i. e., the transportation of goods, Holmes explained the rule by which the last carrier is held liable where the goods pass through several connecting carrier's hands as resting on a presumption of fact that goods delivered in good condition would remain so until they are found otherwise which happens only on delivery; that the rule had been fortified by convenience and necessity and since the first carrier could not be held liable for the whole journey the last must be held if there is to be any recovery; and this is not unjust because the means of information are more at the carrier's command than at that of a private person.[147]

The major part of the cases dealing with water arose under statutes which granted municipalities the right to take water for public purposes. In some instances the damage arose from the actual taking which diverted the water from its former users. In others the erection of dams for the purpose of impounding the water flooded nearby lands. The

146 Butler v. New York, New Haven & Hartford Railroad Co., 177 Mass. 191, 58 N. E. 592 (1900).

147 Moore v. New York, New Haven & Hartford Railroad Co., 173 Mass. 335, 53 N. E. 816 (1899). The origin of the common carrier rule was explained in Teaver v. Bradley, 179 Mass. 329, 60 N. E. 795 (1901).

statutes provided compensation to owners of lands which were damaged. The taking was usually required to be done by means of the city filing a description of the lands. This when done compelled the owners to apply for the damages within the time and under the method and means provided in the statute which was usually before a commission. The filing of a description sufficiently broad was extremely difficult with respect to water. The dam would back water up beyond the point anticipated [148] or pumping operations at one pond might draw by percolation the waters of a neighboring pond used by a manufacturer for storage.[149] In such cases the municipality was open to a common law action for damages. The failure of the description removed the protection of the statute authorizing the action of taking or flowing. The damages must then be determined by the court and jury and not by the commission or board authorized by the statute. There were two different epidemics of this type of litigation, the first when the towns began diverting the waters of brooks for sewerage purposes[149a] and the second when the cities began constructing municipal systems of public water supply. The climax in it was reached when the Metropolitan Water System was created for the City of Boston and the town of West Boylston was partly wiped out in order that the work might be properly done. The statute provided for damages to those injured. One of the curious cases Holmes passed upon with respect to this was the claim of a physician for loss of his practice. The commissioners found the facts and returned two alternative possible awards, $750 or $7360, one being the market value and the other the loss and income over the period it would require to establish a similar practice. Holmes ruled out the market value as a factor saying the statute allowed the decrease in

148 Kenison v. Inhabitants of Arlington, 144 Mass. 456, 11 N. E. 705 (1887).

149 Hollingsworth & Vose v. Foxborough Water Supply District, 165 Mass. 186, 42 N. E. 574 (1896).

149a Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070 (1890); Collins v. Waltham, 151 Mass. 196, 24 N. E. 327 (1890).

the value of the business and not the elements of it which could be sold. He was not satisfied with the higher figure and sent it back for further consideration.[150] In construing these statutes Holmes held that injury to business was not an appropriation of property within the constitution and diminution in value was even more vague in that respect. He limited property itself to the protection of not being taken without compensation. This interpretation was made because those who were dissatisfied with the awards made by the commissions authorized by statute sought to get jury trials as a matter of constitutional right.[151]

The litigation between private parties on flowing by dams usually turned upon a prescriptive right which the plaintiff claimed was being exceeded as where flash boards were added to a dam to create more storage of water and resulted in a greater flow of the servient lands. There the extent of the prescriptive right had to be ascertained.[152]

A brief reference must be made to some of the great explanatory decisions Holmes wrote on rights in land and the law of torts. A quarry was sold with an agreement not to quarry from the land reserved. The lands passed on to other hands and the present owner of the quarry sued to restrain the then owner of the adjacent land from working his quarry. Holmes explained that ancient covenants of this kind are pure matters of contract and it is hard to understand how one who was never a party to the contract may sue on it. But heirs are allowed to sue as standing in the place of the ancestor and later this was extended to assigns, if mentioned in the deed, but these must have privity by estate with the party who had the benefit of the covenant. Rights such as easements went with the land and sometimes these went as far as being active duties. Here the covenant is a negative

150 Earle v. The Commonwealth, 180 Mass. 579, 63 N. E. 10 (1902).

151 Sawyer v. The Commonwealth, 182 Mass. 245, 65 N. E. 52 (1902).

152 Ludlow Manufacturing Co. v. Indian Orchid Co., 177 Mass. 61, 58 N. E. 181 (1900).

restriction for the benefit of the land which was conveyed. It indirectly increases its value by excluding competition. Equity has a discretion as to enforcing it or not. It is unlimited in form and creates a monopoly. It may create a personal obligation but will not be enforced since it does not directly benefit the land.[153]

Where a party owned a pond which it used in manufacturing purposes and another party owned the adjoining hillside which he was cultivating in the usual manner by bringing onto it manure and ashes and digging and spading the soil to raise vegetables, the surface water carried the materials into the pond and the owner sued for an injunction. Holmes says there is no mathematical line in such a matter; it is a matter of degree; a certain amount of noise, smells, shaking, percolation, and surface draining must be endured; here if it were offensive drainage from a vault it would be restrained; it does not appear that the fertilizers were unusual or unreasonable; if no solid substance may go down then the owner of the hillside cannot dig his soil because surface drainage carries off more soil after it has been dug. The pond owner must protect himself as best he may.[154]

Then a case came on in the same year in which the city of Lowell had constructed a sewer emptying into a pond. Up to 1873 surface drainage had been carried by the sewer; after that date house sewerage was sent into it. The pond owner shows that a ten to thirty inch deposit has collected in the pond and sues to restrain. Holmes held there was no public use of sewerage at the time the easement began; it did not cover the house sewerage; prescriptive rights are based on actual usage and not threatened usage so the injunction will issue.[155]

Cutting off natural drainage of surface water, discharging surface water upon adjoining land, shutting off the view

153 Norcross v. James, 140 Mass. 188, 2 N. E. 946 (1885).
154 Middlesex Company v. McCue, 149 Mass. 103, 21 N. E. 230 (1889).
155 Middlesex Company v. Lowell, 149 Mass. 509, 21 N. E. 872 (1889).

and light and air, gave no right of action at common law and were lawful on the part of the adjoining owner, Holmes states in another case.[156] The artificial diversion of surface water did create a right of action.[157]

Massachusetts enacted a statute against spite fences and Holmes passed upon it twice. It defined such fences as those unnecessarily exceeding six feet. He pointed out that if there was good reason for the fence being higher the statute did not apply to it; that the police power may limit the use of property in ways which diminish its value and so the act was constitutional.[158] In the first case the fence had been erected before the statute was passed and Holmes held the defendant was entitled to an instruction to the jury that if a motive to annoy existed and it was inferior to a motive to use and there was a bona fide use, the plaintiff could not recover. This was the rule of the common law before the statute changed the law of the state and was applicable because the fence was erected before the statute and the evidence did not show the fence was now being maintained. In the second case the plaintiff was not in occupation of the premises affected by the fence and the trial judge dismissed the case. Holmes held the statute applied to an injury to enjoyment of the estate which meant rents and profits and so occupation was not necessary to recover.[159]

Where a party leased the third floor of a building and installed delicate and expensive machinery and subsequently the other party leased the fourth floor and allowed sands, acids and fumes to come on the third floor through the common shafting and damaged and corroded the machinery, an injunction was issued; where the meritorious interests of adjoining owners necessarily conflict the law may draw a quasi-physical line and say the damage is on the right side; but

156 Cassidy v. Old Colony Railroad, 141 Mass. 174, 5 N. E. 142 (1886).
157 Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070 (1890).
158 Rideout v. Knox, 148 Mass. 368, 19 N. E. 390 (1889).
159 Smith v. Morse, 148 Mass. 407, 19 N. E. 393 (1889).

discharging acids on another's land in quantities to do substantial harm is beyond reasonable use; it is actionable under the English cases; the uses of the neighborhood may influence the rule but the basis for such a point is not suggested here; it is a practical matter and in those counties in England where great works are carried on juries are instructed that parties may not stand on extreme rights; that a purchaser has come to a nuisance makes no difference.[160]

Holmes explained in three different decisions the law with respect to the recovery of damages for injuries arising from fright. The rule which prevents recovery from fright, he says, is not a logical deduction from the general principles of tort but a limitation upon purely practical grounds; the law requires evidence of impact so the reality of the cause may be sufficiently guaranteed. Where there was evidence of any physical impact he refuses to extend the rule just as in a case where there was no such evidence he refused to limit it.[161]

He outlined the law as to the effect of the negligence of a driver of a vehicle on the rights of a person riding on the vehicle and the negligence of a third party which injured the person so riding. He said such a person might not have independence with respect to the conduct of the vehicle and the ruling must depend on that and the degree of opportunity the person had to refuse the risk of the danger and upon the rule as to proximate cause which could not be eliminated by an arbitrary ruling.[162]

Holmes also explained the rule of intervening negligence in tort cases. A telephone wire had come down from the house to which it was fastened and lay in the street hanging from the pole. It had been there the day before. The plain-

160 Boston Ferrule Co. v. Hills, 159 Mass. 147, 34 N. E. 85 (1893).

161 Smith v. Postal Telegraph Cable Co., 174 Mass. 476, 55 N. E. 77 (1899); Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737 (1902); Cameron v. New England Tel. & Tel. Co., 182 Mass. 310, 65 N. E. 385 (1902).

162 Murray v. Boston Ice Co., 180 Mass. 165, 61 N. E. 1001 (1901).

tiff was driving; a wagon was driving towards him. The wire became entangled in the wheels of that wagon and plaintiff was hurt while bending back on his seat trying to get out of the way. The town claimed the plaintiff could not recover if the other driver concurred in bringing about the injury. Holmes said: This was true; but it might be found the other driver was not negligent; then his cooperation stood on no different footing than the force of gravitation; the mere fact another human being intervenes is not enough; his intervention is important not *qua* cause but *qua* wrongdoer; it is because the act is negligent not because it is a concurring cause that the defendant escapes in such cases.[163]

And now that we have examined man and his implements and his lands and waters let us close this part by looking at another worthy who was a very important part of the age, the horse. Let us see how he fared and was judged. The plaintiffs were driving a buggy; there had been heavy rains some time before and a part of the street had caved in. The horse was totally blind and had been for two years before the accident. The defendant city asked a ruling that a blind horse was not a suitable horse to drive on a highway. The trial judge refused it. Holmes wrote that if it was so dark that the plaintiffs could not see the road the jury might have found that a horse with sound eyes could not see it.[164] This case merges into another. The plaintiffs were driving home late at night. There were mud holes on the road which had been there for some time. It was necessary to keep to the northerly side until these had been passed. The driver testified that when he reached that point he could not see because of the darkness and he allowed the horse, whom, he had taken over the road many times, to go unguided because the horse knowing the road could do better in the road than he could guide it. The carriage was tipped over, the occupants injured. The city asked that the case be dismissed.

163 Hayes v. Hyde Park, 153 Mass. 514, 27 N. E. 522 (1891).
164 Breckanridge v. Fitchburg, 145 Mass. 160, 13 N. E. 457 (1887).

It was refused. The refusal was affirmed.[165] Defendant was found guilty of working his horse while it had sores on its back. He comes up to the appellate court on the ground that there was no allegation that he knew the horse was unfit for labor. The word "cruelly" as used in the statute, Holmes tells him, exhausts the requirements of the statute with regard to the mind of the actor and therefore an allegation that he cruelly drove the horse is sufficient.[166] The plaintiff sued because he was kicked by defendant's horse and injured. The horse had just been beaten by the defendant who now claims that as every dog is entitled to one worry every horse is entitled to one kick. Holmes writes that there is no universal rule in the matter and that a horse which had been beaten would be nervous and a jury could find it was negligence to leave him near a sidewalk and the lower court was right in refusing a ruling for the defendant.[167] Finally a horse gave the court the basis of one of its sharpest differences of opinion. The plaintiff had sued for the conversion of a horse in Connecticut and got a judgment there which was unsatisfied. Later the horse was brought into Massachusetts and plaintiff brought replevin. Replevin proceedings were also pending in Connecticut which had been taken by the plaintiff under the judgment. The majority of the court held that while at common law the judgment for conversion passed title to the horse and the plaintiff after such an action had no title in it yet under the modern cases title did not pass until there was satisfaction of the judgment. They pointed out that in the early law the plaintiff's means of satisfying his judgment were more certain than now. Holmes dissented in an opinion. Chief Justice Field joined in Justice Knowlton's concurring opinion. Holmes begins his dissenting opinion thus:

"I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I have never been able to understand any other."

165 Pomeroy v. Westfield, 154 Mass. 462, 28 N. E. 899 (1891).
166 Commonwealth v. Porter, 164 Mass. 576, 42 N. E. 97 (1895).
167 Hardiman v. Wholley, 172 Mass. 411, 52 N. E. 518 (1899).

He goes on:

"I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right." [168]

Justice Knowlton held that there was a voluntary election in Connecticut to take the value in beginning the replevin proceedings there after the judgment; so that regardless of the effect of the judgment in passing title the plaintiff was bound by an election.

Machiavelli, educating a prince as to his future duties as king, told him that he would have little difficulty with the common people because their only demand upon him would be freedom from tyranny and a desire for justice. The people of England, about to exact from their king at Runnymeade a charter of liberties, were able to specify their ideas as to the proper administration of justice in a phrase. The undertaking they submitted and secured was this: *"Nulli vendemus, nulli negabimus, aut differmus, rectum aut justiciam."* "To none shall we sell, to none shall we deny, to none shall we delay right or justice." That charter became a part of American law because the colonists brought the English common law to this country. It was not taken into the written constitutions because the men of that time took it to be a part of their heritage, so well understood that it need not be expressed. It is expressed in the old phrase: the equality of the citizen before the law. And its spirit is also in the phrase used in the Mayflower Compact: "To the end that this may be a government of laws and not of men." The moment there is even a suspicion of a departure from this basis of equality in the administration of law and it descends from the spiritual to a grosser plane there is a tryanny worse than any ancient tyranny and the state is on its way to chaos. Machiavelli in his statement to the prince was proceeding on his observation of the instinct for justice which God had instilled in the human heart. The persons who try to tamper with that

168 Miller v. Hyde, 161 Mass. 472, 37 N. E. 760 (1894).

are touching something which is beyond their power to control. If they succeed in corrupting the hearts of men they turn men into wolves. If they succeed only partially with this effort there is turmoil in the state until the equality has been restored. In the course of such a struggle respect for government and law breaks down, the courts and judges fall into disrespect, and the legal profession loses its standing in the state. That profession exercises in its capacity as counsellor a juridical capacity apart from its capacity as advocate. If a party is advised he has no cause of action and because of confidence in the lawyer follows the advice that is an adjudication of a right; also attorneys settle controversies between their clients. The English system of law when properly administered rightfully claims that it has carried an ideal of equal justice and ordered right into every quarter of the world, whereby men have been able to live peacefully in society and conduct their affairs in tranquility and prosperity. That is why the men who set up these United States declared that the proper administration of justice was the finest pillar of good government.

Holmes has left us some very penetrating remarks and some word pictures of the type of men who are best suited to properly administer justice in a state. First, let us call up Justice William Allen.[169] We must observe closely now because the master craftsmen are speaking of each other in their common art. A man who had served the state well has passed and one who is supremely competent to judge his work is about to make a note.

"The bar found him very silent upon the bench. He was not so in the consultation room."

"As with others whom I have known that were brought up in similar surroundings his Yankee caution and sound judgment were leavened with a touch of enthusiasm capable of becoming radical at moments, and his cultivation had destroyed rather than fostered his respect for the old merely as such."

169 Memorial to Justice William Allen, 154 Mass. 607, 614 (1891).

"I never felt quite sure that nothing had been overlooked in a statement of facts, until his eye had scrutinized it."

"In discussion, if you did not agree with him, you always reached an exact issue, and escape in generalities was impossible. I know few qualities which seem to me more desirable in a judge of a court of last resort than this accuracy of thought, and the habit of keeping one's eye on the things for which words stand."

Holmes would not send him to his rest with the flutter of flags and the gleam of steel because:

"such symbols do not express the vast and shadowy command which a thinker holds."

"Unless we are are to accept decadence as the necessary end of civilization, we should be grateful to all men like William Allen, whose ambition, if it can be called so, looks only to remote and mediated command, who do not ask to say to any one, Go, and he goeth, so long as in truthful imagination they yield, according to their degree, that most subtle and intoxicating authority which controls the future from within by shaping the thoughts and speech of a later time."

"Such men are to be honored, not by regiments moving with high heads to martial music, but by a few others, lonely as themselves, walking apart in meditative silence, and dreaming in their turn of spiritual reign."

Through this eulogy we see Holmes himself. He was careful of the facts in a case. They made all of the difference in the world to the law. Law to him was not a dead and unresponsive thing but as we saw in the adopted orphan's case and the little boy who was run over by the broken train it was like the surface of a magnificent material which gives forth different nuances as it is influenced by different lights. The people had not called upon him to devise new legal systems for them. They had asked him to properly administer the one which they had. It was work enough for him. He had to be sure of the facts. He had to reach beyond the gloss of words. He was the counsellor to the state. His duty was to expound and explain. He could never become a judicial tyrant. His eyes were on other things, "the shadowy command which a thinker holds." He was a man standing apart from ordinary men that he might better serve them, with men like William Allen, "dreaming of the spiritual reign."

In the memorial read from the bench to John Marshall he goes back again to the supremacy of ideas which he had mentioned in the memorial to Allen:

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or the telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind."

"To one who lives in what may seem to him a solitude of thought, this day — as it marks the triumph of a man whom some Presidents of his time bade carry out his judgments as he could — this day marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends first to become a catechism and then a code, and that according to its worth his unhelped meditation may one day mount a throne, and without armies or even with them, may shoot across the world the electric despotism of an unresisted power." [169a]

This is not the creed of a materialist. Holmes was never that. He carried that integrity into his court room. We have seen in the trade mark case how it was argued that the advertisement had great money value. But money value he found is not a conclusive reason for recognizing rights. He wrote somewhere, outside of his opinions, that the law is no place for the artist or the poet; it is the calling of thinkers. He immediately adds that it is a place where one may wear his heart out after the unattainable. Pollock is different in that respect. He speaks of the master craftsman in the law as an artist. Pollock is a medievalist and conscious of it. Holmes is one without being conscious of it. He is himself an artist and a poet. He is an artist in his faith in an idea, his dependence on the integrity of thought and of the spirit, his willingness to stand alone, and in the fact that he does his work as if it were to live forever. He is a poet by virtue of his insight into the material in which he works, his capac-

[169a] Memorial to John Marshall, 178 Mass. 619, 624 (1901).

ity to make it plain to the common man, and the lunar delicacy he weaves about the people and events that interest him. In one of his cases, as Chief Justice, writing the opinion of his court, he states with a magic clearness and precision the reasoning upon which the judgment of the court is being given, then he states the point which had been made by the losing party and the fact that he agrees with it, and then this: "but upon that point I stand alone." [170] We see the sturdy pine or oak on the side of the mountain, serene in its loneliness, undisturbed in its isolation.

When we read any of Holmes' work there comes to mind a sentence of Walter Pater's where after describing a work of art he concludes by saying that the fire of the man who made it still smoulders there. If Marshall is the Michael Angelo of American law Holmes is its Delecroix. When we read Abel Bonnard's description of the genius of the Renaissance seeking to rebuild the world we feel the role of the nation builder belonged to the great Chief Justice. Holmes is of a different world. He has no ambition to reshape the course of empire or to directly shape its destiny. He does not care to impose his will. His is a more solitary world. There he meditates and his thought always leaves a suggestion of parts still unexplored. That is why we compare him to Delecroix out of whose spade work came the Impressionists, and the glory of a later day. So may it be with Holmes!

And now we must examine him in the economic troubles of the Massachusetts of his day. We shall curiously enough start with a manure case, because he found some fundamental economics in that, and then pass on to the fellow servant rule and the cases involving industrial disputes. The plaintiff was tenant of a farm. The lease had expired and the premises were vacated. The plaintiff attempted to remove thirty-five cords of manure which were piled up in the barn cellar. The defendant landlord refused to let the tenant do so and

170 Scollans v. Rollins, 179 Mass. 346, 60 N. E. 983 (1901).

he sued for conversion. The plaintiff says that he purchased two cords of the manure and brought it on to the place, that the rest was made during his tenancy and that more than half of it from hay and grain which he bought. The tenant was engaged in the milk business and had more cattle than the land could support. A verdict was directed for the defendant. On the appeal Holmes held that manure made in the ordinary course of husbandry belongs to the landlord. But when more cattle were brought on the land than the land could support a different rule applies. The plaintiff therefore had rights. On the matter of apportionment the defendant might insist that the milk sold was a drain on the land.[171] This decision moves on the thought that what comes out has to be replaced and if you want to get anything out you have to put something in. Therefore it has been included under the economic cases.

A master's liability to a servant for injuries in the course of employment was extremely limited under the Massachusetts law. The doctrine that an injury arising from the negligence of a fellow servant gave no rights against the master had been established in an opinion by Chief Justice Shaw long before Holmes appears on the scene.[172] The doctrine that the servant assumed the risks of the place where he worked and of the tools in so far as the risks were obvious also come down to the period we are considering from the

171 Nason v. Tobey, 182 Mass. 314, 65 N. E. 389 (1902).

172 Farwell v. Boston & Worcester Railroad Corp., 45 Mass. 49 (1842). An engine went off a track due to the negligence of a switchman. The engineer lost his hand. The case was certified to the Supreme Court on an agreed statement of facts. If the plaintiff had no cause on the facts agreed he was to stand "non suit." If he had a cause it was to be sent back for trial. In that event the defendant wished to put the engineer's care in issue. The facts certified set forth that the switchman was an experienced and competent employee and the defendant had exercised due care in his selection. The opinion of the court proceeds upon that statement as to the switchman. Shaw's world was the competent world. The fellow servant in the case he passed on was a competent man and the employer had exercised care to see that he was so. The competence of the fellow servant and the care exercised in selecting him were essential to the competent man outlook. The application of that doctrine required such a limitation as to the fellow servant. The doctrine was so limited by Shaw's actual decision.

law of a prior time. These doctrines were based upon an implied contract which the worker was assumed to have made with the master at the time of the employment. The legal basis of the doctrine has been questioned by so great an authority on the law of torts as Pollock. He says that the courts which had first to deal with claims of servants went at the matter by asking the servant: "Where is your contract?" And finding no contract they set out to imply one by which the worker assumed the risk.[173] Holmes wrote over eighty opinions on this subject and he rigidly enforced the rules regarding the assumption of risk on both the law and the evidence. He had to do so because it was the law of the state. It is already noted here that there is a popular will-o-the-wisp concerning the "liberal" and "conservative" justice. Those who assert such a distinction generally cite Holmes as an example of a "liberal" justice. Such persons, since they are in error in the making of such a distinction, would get a great surprise if someone could compel them to read Holmes' eighty odd opinions on employees' injuries. Their affection for Holmes as a "liberal" would be very severely shaken. There is one case where he gets very near to holding that a railroad company's rule that a "wild" engine (i. e. one running outside the regular schedule of trains) must ring its bell on nearing curves was for the protection of the railroad property and not the men who happened to be working on that part of the track.[174] But we must do more here than upset the false notion as to "liberal" and "conservative" justices. And we shall have occasion to touch upon that again. We must try to understand the servant rule as Holmes understood it and, if we can, see it through his eyes. Now in order to do that we must get rid of the idea that the society which set up these rules was lacking in humanity or given to exploitation. Having followed Holmes so far we are sure that he never looked at life in that way. The

173 POLLOCK, *op. cit. supra* note 1 at pp. 101-107.

174 Sullivan v. Fitchburg Railroad, 161 Mass. 125, 36 N. E. 751 (1894).

difference does not rest there. It rests rather on a different outlook on what was expected of the individual. He was expected to be honest and humane as we have already seen. But there was one thing more. He was also expected to be competent in what he held himself out as capable of doing. There we believe is Holmes' philosophic approach to the servant rules. The moment that line is crossed he refuses to apply the rule.[175] He does not express himself thus nor does he explain the rule in that way. But in every case we find him heading straight for the question of how long the servant had worked with machinery of the type in issue and what he knew about the conditions from which the accident arose. And repeatedly we find that if the servant had that experience in fact he is assumed to have a certain amount of knowledge. The assumption of risk by a servant runs parallel in this respect to the rule *caveat emptor*, "let the buyer beware," in the law of sales. If a man holds himself out as acquainted with certain kinds of goods he will not be heard to say that another imposed upon him in such matters. He is bound to show a certain competence in the matters in which he deals. And if he is in doubt he can always require the other party to make the point specific which the law calls giving a warranty.[175a] These rules are not to be condemned and rejected because of their harshness, if we wish to condemn or reject them. Nor are we entitled to consider ourselves the children of light because we have rejected them. They were not harsh in the society they set out to govern. The difficulty has come in the change in society itself. Developments have taken place there which defeat the operation of the rules as they were originally intended to operate.

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175 Pierce v. Cunard Steamship Co., 153 Mass. 87, 26 N. E. 415 (1891); Spaulding v. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134 (1893); Veginan v. Morse, 160 Mass. 143, 35 N. E. 451 (1893); LaPlante v. Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294 (1896); Flaherty v. Powers, 167 Mass. 61, 44 N. E. 1074 (1896); McKee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071 (1896); Cote v. Laurence Manufacturing Co., 178 Mass. 295, 59 N. E. 656 (1901); Haskell v. Cafe Ann Anchor Works, 178 Mass. 485, 59 N. E. 1113 (1901).

175a Burns v. Lane, 138 Mass. 350 (1885); Way v. Ryther, 165 Mass. 226, 42 N. E. 1128 (1896).

If the whole world is let loose to pursue any type of calling it chooses and regardless of the individual training or competence and by stress of competition a man is forced to go where he can get bread and industrialists will take him on that basis these rules will work very harshly on him and his fellows. They assume in him just the thing which he does not have. Furthermore if a society develops in which men are less dependent on themselves and more naive, and has those in it who would exploit rather than earn, *caveat emptor* will work as harshly there as assumption of risk in the world of workers just described. Holmes' faculty of getting at the facts of a case and working from there to the law generally kept him well alert to social changes which made the assumption of risk rule inapplicable. There is every reason to believe that he saw the background of the rule as it has been described and that he applied it not arbitrarily but in the light of its origin. The Employers' Liability Act of 1887 attempted to abolish the inequality arising from the worker being compelled to seek work in order to live by abolishing the assumption that the servant took the risk. Holmes accepted the statute as remedial legislation. He refused to hold that it abolished any rights which the servant had at common law and that it left the worker to rely upon the statute alone.[176] In doing this he laid down rules to determine the scope of English statutes which are copied by American legislative bodies. He held that the long established case law is taken over in such an event as well as the statute.[177] He does not apply the assumption of risk rule where he finds what he so often refers to in tort cases as a trap — that is, where there is a concealed danger.[178] The legislature further modified the rule so the servant did not

176 Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766 (1889).

177 *Op. cit. supra* note 176.

178 Coates v. Boston & Maine Railroad, 153 Mass. 297, 26 N. E. 864 (1891); Young v. Miller, 167 Mass. 224, 45 N. E. 628 (1897); Hogarth v. Pocasset Manufacturing Co., 167 Mass. 225, 45 N. E. 629 (1897); Spaulding v. Forbes Lithograph Manufacturing Co., 171 Mass. 271, 50 N. E. 543 (1898); Collins v. Greenfield, 172 Mass. 78, 51 N. E. 454 (1898).

assume the risks of the negligence of those exercising superintendence. It left to the courts to determine what were acts of superintendence. Holmes held that the act had to be one of superintendence in fact in order that the servant might have the benefits of the rule, and an act done by one having the title of superintendent or exercising such duties might not be such an act within the statute.[179] He held the superintendent must know the risk into which he was sending the servant.[180] He made a distinction between permanent and transitory conditions in the place of work and applying the doctrine of notice excused the master from liability in those which were transitory.[181] Holmes last opinion in the court dealt with a statute, which forbade any railroad to haul or permit to be hauled any car not equipped with automatic couplers and further provided that any employee would not be deemed to have assumed the risk of any car hauled contrary to the act, even if he had knowledge. Holmes held the act did not apply to a locomotive tender and that a servant caught on such a coupler could not recover, having assumed the risk. And that in spite of the fact that the statute refers, in the section giving the servant freedom from the assumption doctrine, to "any locomotive, car or train." The decision goes on the ground that the word "car" does not include a tender and proceeds under the principle that statutes which change the common law are to be strictly construed.[182] Weighty argument can be made for a contrary view both on the interpretation of the act and on the application of the principle; the act was plainly designed to get at a certain type of coupler which the legislature deemed dangerous; the act was remedial and that principle might have prevailed

179 Whittaker v. Bent, 167 Mass. 588, 46 N. E. 121 (1897); Fleming v. Elston, 171 Mass. 187, 50 N. E. 531 (1898); Allard v. Hildreth, 173 Mass. 26, 52 N. E. 1061 (1899); Joseph v. George C. Whitney Co., 177 Mass. 176, 58 N. E. 639 (1900); Roche v. Lowell Bleachery Co., 181 Mass. 480, 63 N. E. 943 (1902).

180 Chisholm v. New England Tel. & Tel. Co., 176 Mass. 125, 57 N. E. 383 (1900).

181 Copithorne v. Hardy, 173 Mass. 400, 53 N. E. 915 (1899).

182 Larabee v. New York, New Haven & Hartford Railroad Co., 182 Mass. 348, 66 N. E. 1032 (1902).

over the strict construction rule; the basis of society was changing and this was not the first time that the legislature had indicated a change of public policy.

The two remaining economic cases are notable. They involve the right of a labor union to carry on a patrol before a place of business in which a strike had been called and the right of a labor union to conduct a boycott against a business which would not help drive out a conflicting union. Both are declared illegal by the court and Holmes is dissenting. In the patrol case Chief Justice Field also dissents but in a separate opinion. In the boycott case Holmes is the sole dissenter. The cases as a matter of law involve what Pollock described as "a controversy not yet extinct as to the possibility of conspiracy being in itself a cause of civil action apart from any ulterior object which can be definitely called unlawful." He goes on to refer to the "chaos of the books" and then adds: "It would be hard to find any adventure in which our lady the Common Law was worse served, or from which she came out, if she has finally come out, with less worship." [183] Pollock did not live to reflect upon the problem of the sit-down strike and the other modern methods of industrial strife.

In the patrol case [184] an injunction was asked against the two labor unions and individuals who were evidently their officers. The plaintiff was a furniture manufacturer. His upholsterers had asked for a nine hour day and refusal was followed by a strike. An injunction was issued *pendente lite* which prohibited (1) patroling for the purpose of preventing persons in the employ from entering or continuing; (2) obstructing or interfering with such persons; (3) intimidating them by threats or otherwise; (4) any scheme or conspiracy among the defendants for the purpose of annoying, hindering or interfering with persons now or hereafter in the employ or desirous of entering the employment or continuing in it. The appeal came on before Holmes sitting as a single

183 POLLOCK, *op. cit. supra* note 1 at pp. 101-107.
184 Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896).

justice. He found there was a conspiracy among the defendants to prevent the plaintiff getting workmen and carrying on his business until he adopted the schedule of hours requested but for no other purpose. The means used were (1) persuasion and social pressure; (2) threats of personal injury or unlawful harm. He found there was a patrol of two men who were changed every hour and continuing from morning to night which became greater at times so as to incline to stop the plaintiff's door; that the patrol went further at times than simple advice but its main purpose was to act by persuasion. He held that so far as the patrol confined itself to persuasion and giving notice of the strike it was lawful and limited the injunction accordingly. He also enjoined persuasion of any kind for the purpose of breaking existing contracts. The plaintiff appealed to the full court which reversed Holmes and put the injunction back in the form in which it was issued by the trial judge. The court said that the right to employ and to work were constitutional rights, that the patrol was a means of intimidation against those seeking to work and made such work unpleasant and intolerable; intimidation was a criminal offense by statute; intimidation is not limited to threats of violence or physical injury; there is a moral intimidation which is illegal; it amounted to a private nuisance; a combination among persons to regulate their own conduct is allowable and lawful competition even if it affects others, but such a combination to do injurious acts by way of intimidation directed against another is outside of allowable competition and is unlawful; equity will not restrain a crime but continuing injury to property or business may be enjoined. Chief Justice Field said in his dissent that the English cases on the matter were very doubtful authorities and that in England the matter had been regulated by statute and left to be worked out in the criminal courts and the Massachusetts criminal statute would seem adequate in the absence of irreparable injury to property which is not shown. If the patrol was using or inter-

fering with the use of property it is illegal. If it violates street ordinances the police can prosecute. But informing prospective employees of the actual facts in the absence of statute is not illegal and no ground for an injunction.

Holmes said in his dissent that the exact issue was whether there could be organized persuasion or argument free from any threat of violence express or implied with respect to persons not bound by contract; the majority assumes the patrol carries a threat even if threats are enjoined; several persons conspiring to injure a business is illegal unless the law finds justification; that is determined by policy and social advantage which is never unanimous or capable of unanswerable proof; free competition is accepted as justification in the battle of trade if not done by force or threats of force; "threats" only has meaning depending on what is threatened; "free struggle for life" may be substituted for free competition; a combination to do what any of the persons singly might do is not unlawful; free competition means combination; capital combines on the one side; combination on the part of those who wish to get what they can for their services is its counterpart; either side has the same liberties to support their interest by argument, persuasion and bestowal or refusal of those advantages lawfully controlled; a great mercantile house may lower prices of its goods to drive an antagonist out of business.

In the boycott case [185] a union known as "Union 257 Painters and Decorators of America" which was a national union with a branch in Massachusetts sought to restrain another national union of the same name from preventing the plaintiffs getting employment or continuing therein. The plaintiff was composed of men who had withdrawn from the defendant union and defendant was seeking to get control of the field and declared the plaintiffs "non-union men"; they visited shops and solicited employers to compel plain-

185 Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900).

tiff union to reinstate itself with defendant union and suggested strikes and boycotts in the business of the employers who did not bring this about or else discharge members of the plaintiff union. This was followed up by strikes and taking names of the employers off a "fair list," and attempts to injure such businesses even to ruin. The majority of the court held this procedure to be illegal. It said that the right to dispose of one's labor with full freedom is a legal right; it is not a case between capital and labor but between members of the same craft each having the same right as the other to pursue his calling; the right of one may be said to end where the right of the other begins; the right of several to do what one may lawfully do and the right of a man to work or not as he pleases does not answer since the lawfulness of an act depends on the justification; here there was a threat, and liberty is not only of the body but of the mind and will; others could not be forced to join; the acts complained of are offensive to the free principles of the country and if allowed would establish a tyranny of irresponsible persons over labor and mechanical business; the injunction must be modified so as not to include peaceful persuasion but otherwise must stand.

Holmes in dissenting pointed out that his dissenting view in the patrol case had been adopted in England; a boycott to override the courts would be illegal, but one to raise wages if it did not embrace violence, breach of contract or other illegality would not be illegal because of combination alone; the purpose here was to strengthen the defendant's union so it might make a better fight for wages or in other clashes of interest; unity is necessary and laborers may employ in preparation the means that they may use in the final contest, the total economic result of strikes is that larger associations get a larger share for their association at the expense of the unorganized laboring mass; something cannot be created out of nothing; the matter of consumption really controls and the rest is all an illusion; but subject to

that, working men may try to get more even at the expense of their fellow workers and for that end may strengthen their union by the boycott and strike.

It would be presumptuous to add anything to what Pollock has said with respect to all this. With respect to what Holmes wrote it is notable that in the second opinion he got out to the ground that society is a whole. That is the significance of what he said about consumption being the test and his pointing out that what was gained was only at the expense of some other worker. His first opinion goes on the ground that it is an inevitable struggle of class against class and in that struggle the law must give equal opportunity. In the second opinion he states that again but qualifies it by saying it is all an illusion and he implies the only solution is in treating society as one and approaching the matter from that viewpoint. If anything at all belongs in legal opinions about economic matters we may be happy that Holmes pointed out the economic unity of men and that his maturer thought was able to reach and formulate that principle. Until that thought finds its way to social action the economic aspect of these matters is likely to remain in the same chaos as Pollock finds with respect to its legal aspects.

And now we move into that world in which judges must declare what is constitutional and what is not. We must take the record as we find it, state it, and draw what inferences seem reasonable. Some of the material is clear enough. A city policeman insisted on doing missionary work of a political nature. He was brought up on charges of violating the rule of his department in such matters and dismissed from the force. He comes to the Supreme Court on the point that the regulation violated the constitutional right to freedom of speech. He loses. "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" writes Holmes.[185a] Unfortunately the subject

185a McAuliffe v. New Bedford, 155 Mass. 216, 29 N. E. 517 (1892).

as a whole does not proceed so easily. There are some general observations which the opinions suggest. Holmes is very different from Marshall in at least one respect. He is not a dynamic character in any sphere that rests beyond the strict limits of the judicial sphere. He is not at all interested in the course of legislative matters. He looks upon that as a world foreign to his own. It is very difficult at times to reduce a thought to words. This is especially so where we are trying to distinguish two such great men as Holmes and Marshall. These men are both justly held in reverence and what is attributed to one does not subtract from the other. Their works have established them beyond the reach of mortals. When we analyze and compare or contrast their work we do so only in order to learn thereby from the masters themselves. Great men are peculiar to themselves. They have certain characteristics in common but in the essence of their greatness they differ as an El Greco painting from one by Sargent. Holmes leaves the legislative world to itself. He lets it proceed at its own risk. A second point is that Holmes in the interpretation of a written constitution was influenced by the view which Chief Justice Parker, one of his predecessors, had stated in these words:[186]

". . . words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if consistently with the general object of the authors and the true principles of the compact, they can be expanded to other relations and circumstances which an improved state of society may produce."

These two observations indicate Holmes' attitude toward legislative acts insofar as they are involved in relation to a written constitution. But then it is necessary to note something further. A written constitution represents far more than it expresses in words. It has a history and a background. There are clustered about it the traditions of the race and the most important among those is the body of the

186 Henshaw v. Foster, 9 Pick. 312 (1830).

common law by which the affairs of the people are and have been controlled. By this is not meant the cases in which the constitution has been interpreted. They are there of course but the reference here is to something deeper still. The tradition of the race expresses it but not exactly. The ideals of the common law is perhaps better. For example the law and the traditional processes for the administration of justice are a part of the constitution. The English constitution is a very shadowy thing when compared with an American state constitution but we have found that on occasion it can become a very definite thing. It is made definite by reaching back into the not always apparent precedents which make it up. It follows from what has been said that so called constitutional questions sometimes involve the application of conflicting legal principles, which are apparent to the mind of the judge, which rest beyond the words, and cannot be avoided in making a decision in the matter. Holmes' work will be definite, consistent and clear where the word problem is involved because he has a precise attitude there but even his genius cannot escape the difficulties which the traditional background of a constitution presents to a judge when he is called upon to decide what falls under its penumbra and what does not.

The Supreme Judicial Court of Massachuetts renders, upon request, opinions to the other branches of the government upon proposed acts and measures. This old custom implies that the judges are counsellors to the state upon legal matters. In 1892 [187] the House of Representatives asked an opinion on its power to enact a law by which a city or town might purchase coal or wood as fuel in excess of its ordinary requirements and for the purpose of selling the excess to its own citizens. Five of the justices answered in the negative. They stated that taxes could only be laid for a public purpose; promoting the private interests of many individuals is not a public purpose; the question is largely historical

187 Opinion of The Justices, 155 Mass. 598, 30 N. E. 1142 (1892).

and nothing shows that at the time of the adoption of the constitution buying and selling of fuel was an ordinary function of government, on the contrary they were a matter of private enterprise; purposes of taxation have changed but have not yet included trade or commercial business; gas and electricity are different; there the city acts for itself and the inhabitants, the laying of pipes and lines in public ways is involved; there is no emergency shown so the authority in extraordinary exigencies is not presented; a cooperative plan is not a public service. Holmes answered in the affirmative; the article is one of necessity, the money is taken so a public body may offer the necessity without discrimination; it is no different than water, gas, electricity, education, support of paupers, taking land for railroads or public markets. Justice Barker said it depended on an emergency being shown and he added: "It (the legislature) has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics, or to put in practice a theory." [188]

In 1894 the same House asked the Justices if it might grant women the right to vote in town and city elections upon approval of the plan by (a) vote of the entire state; (b) a majority vote of a city or town; (c) an election in which women are authorized to register and vote on the question alone. Four justices answered in the negative. They said the legislative power was vested in the legislature and not reserved by the people and the legislature could not delegate it; this covers the first question; the matter is of general not local concern like division or union of municipalities or local option; taxation affects all of the people and if local will controls some may vote and others not; such a law must have uniform application. Holmes answered in the affirmative; the question is: what words express or imply that a power to pass a law subject to rejection by the people is withheld? There are none; there is no evidence such a ques-

188 Opinion of The Justices, 160 Mass. 586, 36 N. E. 483 (1894).

tion ever occurred to the framers; it is but a short step to say it is not forbidden; an agent may take the advice of his principal; Hobbe's theory was that surrender of sovereignty by the people was final; he urged this to support the absolute power of Charles I; one of the objects of the Massachusetts constitution was to deny it. Justice Knowlton answered the second question in the affirmative saying it involved voting in local affairs only.

In 1901 the Legislature [189] submitted a question as to whether it could authorize the use of voting and counting machines at popular elections of national, state, district, city or town officers. As to the national elections the matter was controlled by an act of Congress permitting voting machines and the Justices all answered, yes. As to the state and local elections four Justices answered, no; three answered, yes. Holmes wrote for the three answering yes. The constitution provides for "written votes" and there is a provision for sorting and counting the votes; "written votes" was used by the framers to get away from votes by a show of hands, secure greater certainty and the preservation of a material record; this is satisfied by the machine; the requirement as to sorting and counting is not a constitutional end and is an assumption based on written votes; it was not preferred since no other was thought of; it is possible to eliminate error in machines and whether the existing machines do so rests with the Legislature; the question assumes the machines exclude internal error and external fraud. Justice Loring voted in the negative saying the possible errors in the machines were so different from the possible errors in the manner set up by the constitution that they could not be considered within it. Justice Morton wrote for the three other negatives; the early records show voting was by Indian corn and beans and there was a practice of sealing votes and carrying them to shire towns and the results being ascertained; the idea is expressed of something being turned over

189 Opinion of The Justices, 178 Mass. 605, 60 N. E. 129 (1901).

to the officer separate from any other ballot; sorting and counting is a personal act of the election officer, something must remain in material form capable of being read and understood; the machines do not permit this; the purpose of written votes was to have something capable of being sorted and counted at an open meeting and which would have weight unless a responsible man failed in a sworn duty: "The constitution does not authorize the General Court to put the expression of the voters will to the chance of being nullified or perverted by slipping cogs, defective levers, or other mechanical devices which have no living intelligence, no conscience and no liability to punishment to insure their going right."

We turn now to constitutional cases which go on a different footing. They involve not the letter and the spirit but the background. In the former we found Holmes took a loose construction view. In the cases we are to consider now and which involve the tradition and the background we shall find Holmes at times inclined to a stricter view. With that inherent honesty which is a part of the man we shall find him stating at times that he has been on swampy ground. We can make this class of cases stand forth clearer if we state that where the point which rises from the constitutional background is separate and standing by itself we find clarity and decisiveness in the approach. For example, an assessment [190] which is not based upon the benefit to the land; that is ruled unconstitutional with directness and simplicity. Another example is an ordinance forbidding blasting with gunpowder [191] without the written consent of selectmen. This he has no difficulty in finding reasonable. The cases which create difficulty are those where two conflicting social desirabilities present themselves. There we find him both resisting and sustaining legislative encroachment. The matter which he will most firmly resist is taking property for a

190 Lorden v. Coffey, 178 Mass. 489, 60 N. E. 124 (1901).
191 Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174 (1892).

public use without compensation. But he never follows words alone on this. The taking must be clear. It was urged on him in the blasting case but he could not find it there since the blasting was not entirely prohibited but only made permissive. Where he does find a taking he is adamant.

A board of cattle commissioners condemned a horse [192] as having glanders and the selectmen who were also a board of health shot the horse pursuant to a statute which provided the animal should be killed without appraisal. The plaintiff sues for the value of the horse. He offers to show that when the defendants came to kill the horse he called two veterinary surgeons who advised them the horse did not have glanders. The trial court finds the horse did not have glanders and gives judgment for the defendants and reports the issue of law to the Supreme Judicial Court. Holmes writing for the majority says that since the statute provides for no compensation it must be read literally and the issue is open as to whether the horse had glanders; if it did not, the order of the cattle commissioners will not save the defendants; a man may not be deprived of his property except by the judgment of his peers or the law of the land; the Legislature only directed that certain horses be killed; there is a difference between regulating property and ordering its destruction; this healthy horse was appropriated just as much as if seized to drag an artillery wagon. Justice Devens writing for the minority of three says the statute was a police regulation and judicial power was vested in the cattle commissioners and cannot be reviewed. Holmes takes the same position with respect to a statute which authorized the dredging of flats on the South Bay [193] in Boston. The dredging involved removal of the earth and changed the surface of the flats so as to put them permanently under water. The statute was indefinite as to compensation and was therefore held unconstitutional. The police power he writes in this

192 Miller v. Horton, 152 Mass. 540, 26 N. E. 100 (1891).
193 Bent v. Emery, 173 Mass. 495, 53 N. E. 910 (1899).

case authorizes small diminutions of property rights incidental to the free play of the machinery of government; it is a matter of degree and the degree is greater when the harm is incident to some general requirement for the public welfare; sooner or later the point is reached where the constitution applies. The Legislature limited the height of buildings in the vicinity of the state house.[194] The statute said that "insofar as this act, or proceedings to enforce it, may deprive any person of rights existing under the Constitution" such persons sustaining damage might have them assessed. The petitioners whose property was in the zone brought proceedings and the state resisted on the ground that the act and the proceedings did not deprive the petitioners of any rights existing under the constitution because there was an exercise of the police power passed to satisfy the love of beauty. Holmes wrote that the police power required a legislative adjudication that the public welfare required the property to be restricted and that being lacking in the statute the petitioners could have their damages.

We look now at the other side of the medal, where Holmes finds a social desirability which can stand at least equal with the tradition. The state passed an act providing for the registering of title to land [195] by proceedings based on publication, mailing, and posting notice on the land. The returns of the sheriff as to posting and of the recorder as to publication and mailing were made conclusive. The notice ran to all persons known to have an adverse interest, including those discovered by the examiner, and adjoining owners and occupants and all whom "it may concern" and the decree cut off all adverse rights in the land. It was argued that the notice provided to those having adverse interests was not sufficient to permit their rights to be adjudicated. The majority of the court held the statute was valid. Holmes was

194 Parker v. The Commonwealth, 178 Mass. 199, 59 N. E. 634 (1901).

195 Tyler v. The Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812 (1900).

willing to justify the statute on the ground that it was a proceeding *in rem*. The other justices of the majority evidently did not care to go on that ground but believed that the notice of opportunity to appear and be heard was not so far different from that given by personal service or its equivalent in an action *in personam* as to be beyond the power of the Legislature. Two Justices dissented. They said a judgment not based on personal service had never been held binding; and persons having an adverse interest could be cut off without actually being made party defendants unless the applicant was careful enough or honest enough to do so; lapse of time was the only means for clearing titles so far known under the constitution and that is different from a title by judgment as proposed by the act; the constitution speaks to each person directly and it is not enough to say ninety-nine persons out of a hundred would have notice under the proceeding proposed; will proceedings are not analogous because there the purpose is not to declare title but to adjudicate rights to share in a fund in the possession of the court; the test of an *in rem* proceeding is whether the proceeding is one to enforce a liability for which the *res* is liable irrespective of who owns it. This dissenting opinion is a masterpiece and there is little left of Holmes' argument except the point that the proposal should not be rejected because it is new and it may work. Looking at the matter historically, it has worked with substantial justice, and so the majority of the court stand justified.

In the land registration case Holmes had a ground to go on: the prospective benefits to the state in the legislation far outweighed the possible detriment it might sustain by the departure from tradition which was necessary in order to validate the statute. The last case we shall examine, *Danford v. Groton Water Co.*,[196] presented a closer conflict between the traditional rights and the policy Holmes followed of validating an act of the Legislature if it could be reason-

[196] 178 Mass. 472, 59 N. E. 1033 (1901).

ably done. The defendant had interfered with the plaintiff's water rights and was liable for damages under its charter. But the plaintiffs were required by the charter to file their claim with the county commissioners within one year from the diversion of the water. They filed their petition in the Superior Court. It is impossible from the report to learn how they fell into this error in procedure. The number of similar cases in the books indicates there may have been some ambiguity. The claim was dismissed in the Superior Court because no application had been made to the county commissioners. That court reported the case, however, to the Supreme Judicial Court which affirmed the judgment of the lower court. After the case had been argued and before the decision was filed, the legislature passed an act providing that no petitions "now or hereafter pending" in the Superior Court for such relief should be dismissed solely on the ground that no previous application had been made to the county commissioners and that the Superior Court would have jurisdiction to hear and determine "all such petitions now or hereafter filed or pending therein." The statute did not come to the court's attention until after the decision was filed. A rehearing was granted. The defendant's charter provided that a person injured by the taking of water might have his damages assessed "in the manner provided by law for the laying out of highways" at any time within one year "but no such application shall be made after the expiration of one year." The water was diverted in November, 1897. The petition to the Superior Court was filed in October, 1898. The statute was passed in May of 1900. Since the Superior Court had reported the case to the Supreme Judicial Court the case was still pending in the Superior Court awaiting the result of the report when the statute was passed in May, 1900. The plaintiffs were blocked out by the time limitation if they could not maintain the petition now on file. It would appear upon this statement of the facts that the legislature had merely changed the form of the remedy or per-

haps the forum. The charter required the damages to be assessed in the manner the law provided in cases of land taken for highways. The legislature had changed the proceedings in cases of that kind so the Superior Court had jurisdiction and not the county commissioners who had such jurisdiction when the claim arose. The claim was on file in the Superior Court within the year required by the time limitation in the charter. The plaintiffs by inadvertence had at first gone to the wrong court which turned out in the end to be the right court. The legislature had validated the error by changing the forum. Evidently many persons in the state had made a like error or the legislature would not have intervened in the matter. If the plaintiffs were removed from the court they could not get back in again because of the time limitation in the charter. But the plaintiffs were within the time limit of the charter and it is difficult to see how the time element had anything to do with it. The charter did not prescribe the remedy or the forum but left it to the legislature since the reference in the charter is to the law in cases of land taken for highways. The remedy might be said to have been retroactively changed. The retroactive part is difficult to see in view of the holding that the case was still pending in the Superior Court. The case was argued for the defendant by William F. Wharton, a great lawyer, and a man of rare personal charm, and distinction — a man like Holmes. Holmes shows his appreciation of him by outlining his argument in the report. The statute was sustained by the court. Holmes writes:

"Reasoning in the cases has not always been as sound as the instinct which directs the decisions. Attempts should not have been made to make such judgments consistent with constitutional rules if such rules are taken to have the exactness of mathematics. It would be better to say constitutional rules, like those of the common law, end in a penumbra where the legislature has a certain freedom in fixing the line, as has been recognized with respect to the police power."

He says the decisions in the matter have been put on various grounds, distinguishing between remedial and substantive

right, lack of a vested right in a formality, denial of a vested right to do wrong, curing an irregularity, "one device or another have prevented a written constitution from interfering with the power to make small repairs which a legislature naturally possesses." He then goes straight to the ground that the saving of the case from the time limitation was only secondary and stands on the firm ground that the obligation sprang from an exercise of the power of eminent domain, the claim was being prosecuted in good faith, and there is no sticking equity by which the claim must be turned out because of a mistake in procedure when the legislature has said otherwise. It seems an admirable decision. But Holmes was never satisfied with it. He refers two years later "to the somewhat swampy ground" [197] of *Danford v. Groton Water Co.* and in following it in a still later case he says that he does so with great difficulty.[198] Mr. Wharton's argument had evidently made a deep and lasting impression upon the court.

Holmes in his work in this field always avoided being mislead by words. It did no good to argue constitutional issues before him if there were actually none in the case. We have already mentioned the policeman's case. Where a water company [199] had accepted a charter by which the municipality might purchase the water plant and the right was exercised the constitutionality of the charter is not open. The terms of the charter had been accepted. That you cannot eat your cake and have it was good constitutional law. An ordinance requiring a permit in order to speak on Boston Common [200] does not raise any constitutional issue as to free speech. Finally Holmes handled *stare decisis* like a living and not a dead thing. The court had found it necessary to bring out

197 Woodward v. Central Vermont Railway, 180 Mass. 599, 62 N. E. 1051 (1902).

198 Dunbar v. Boston & Providence Railroad, 181 Mass. 383, 63 N. E. 916 (1902).

199 Rockport Water Co. v. Rockport, 161 Mass. 279, 37 N. E. 168 (1894).

200 Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895).

very definitely that assessment upon real property for public benefits must be based upon the benefit to the assessed land. It then found itself confronted with the suggestion that its prior decisions should be reexamined on public improvements which had been long since in progress.[201] Holmes did not permit himself to be limited by a discussion of technical legal rules. The statute which was now questioned had stood so long under the shelter of judicial decision and such costly improvements had been made on the strength of it that it would be a misfortune if it must fall now. But this is only the overture. Holmes is not just taking a position. He says that perhaps there has not been such slaughter among the older decisions as is claimed. Then he comes to his ground. A law of future application cannot be supposed to have compared the local benefit with the cost and constitutional rights can only be preserved by limiting the assessment to the benefit received. But when a legislature has contemplated a certain region and taken action in view of a specific scheme there are reasonable limits within which it may determine that the cost of an improvement will fall on a designated district. The ring of the coin which Holmes throws down is that of gold. The law in the hands of the masters is ever thus.

In Holmes' work as a constitutional authority there must be taken into account the respect which he and his court were able to maintain for the law. They are forever careful to avoid even the appearance of standing on a technicality. Over and over in the opinions we find them assuming this and assuming that, supplying or repairing weak links so they may test a whole chain and reach the fundamental ground upon which the parties before them need their advice. They are forever expounders and explainers of the law and its justice.

This court which was open to a wide variety of appeals, to which the trial judges could report cases on their own

201 Smith v. The Mayor & Aldermen of Worcester, 182 Mass. 232, 65 N. E. 40 (1902).

motion or on the suggestion of counsel, which travelled from county to county, like the justices who rode out from Westminster to carry the King's justice to the country, and which often sits in the same court room where the case was heard by the trial judge and his jury, is also called upon by the legislature to fix the rates at which water companies may sell water to the public.[202] There is magic in the manner in which Holmes approaches this. There is also cautious Yankee dignity and a willingness to accept all tasks. He must first make clear that the legislature cannot transfer law-making power to the court. But, if without perverting the statute, it can be construed as consistent with the constitution, it must be accepted, even if the court has doubts if the legislature had the limit of its power in mind. He says that the court has before it parties who are in relation to each other in the matter; it can properly determine if a bill already rendered for water is reasonable and in doing that fix a reasonable charge; there is nothing to prevent the legislature sanctioning that rate without further hearing. Then we have a grand example of the sufficiency of the law for its purposes. The act is silent as to how the court will proceed. Holmes says that the legislature could not have had in mind a common law proceeding and the analogy is to equity; there the court may call in a master to sift the details and report the ultimate facts to it for action.

In the field of taxation there were cases involving the valuation of shares of stock,[203] also involving the right of the state to tax the shares of local corporations by a transfer tax on the estates of foreign decedents,[204] the right to deduct the United States tax before computation of the state transfer tax on a decedent estate,[205] and the right of the

202 Janvrin, Petitioner, 174 Mass. 514, 55 N. E. 381 (1899).

203 National Bank of Commerce v. New Bedford, 155 Mass. 313, 29 N. E. 532 (1892); also 175 Mass. 257, 56 N. E. 288 (1900); Tremont & Suffolk Mills v. Lowell, 178 Mass. 469, 59 N. E. 1007 (1901).

204 Moody v. Shaw, 173 Mass. 375, 53 N. E. 891 (1899).

205 Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361 (1900).

state to tax the increase of an estate after the decedent's death under the tax statute covering such transfers.[206] There were many cases in the matter of assessments for public improvements and the distribution of their costs.[207] Also existent was the matter of condemnation of land for such purposes.[208]

We have found that intention played a great part in the problems which arose in this judicial world. In the case of the doctor who treated the woman with kerosene flannels it was not his intention but an external standard which was applied. The same was true in the tort cases. Holmes applied the same standard in the various opinions which he wrote on actions for libel. The defendant's intention he said was not controlling there if libel was the manifest tendency of the words.[209] And in defining privilege in such actions he explains to us the privilege which relates to judicial proceedings. The defendant had published the contents of a petition which had been filed with the court.[209a] He defended the action of libel which followed on the ground of privilege. Holmes said the privilege applied to a fair account of the actual judicial proceedings only. This privilege he said arose from the general advantage of having such proceedings public which overbalanced any disadvantage to the individual. Publicity gives security to the proper administration of justice; those who administer it should always act under a sense of public re-

206 Hooper v. Bradford, 178 Mass. 95, 59 N. E. 678 (1901).

207 Lincoln v. Street Commissioners, 176 Mass. 210, 57 N. E. 356 (1900); Hall v. Street Commissioners, 177 Mass. 434, 59 N. E. 68 (1901); De Las Casas, Petitioner, 178 Mass. 213, 59 N. E. 664 (1901); Sears v. Street Commissioners, 180 Mass. 274, 62 N. E. 397 (1902); Tileston v. Street Commissioners, 182 Mass. 325, 65 N. E. 380 (1902); Carson v. Brocton, 175 Mass. 242, 56 N. E. 1 (1900).

208 Titus v. Boston, 161 Mass. 209, 36 N. E. 793 (1894); Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112 (1895); Cassidy v. Commonwealth; 173 Mass. 533, 54 N. E. 249 (1899).

209 Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462 (1893); Rutherford v. Paddock, 180 Mass. 289, 62 N. E. 381 (1902); Squires v. Wason Manuf. Co., 182 Mass. 137, 65 N. E. 32 (1902); Fay v. Harrington, 176 Mass. 270, 57 N. E. 369 (1900); Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275 (1897); Billings v. Fairbanks, 139 Mass. 66, 29 N. E. 544 (1885); Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619 (1900).

209a Crowley v. Pulsifer, 137 Mass. 392 (1884).

sponsibility, and every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. But the privilege applied to the proceedings alone and not to papers which were filed, which are not judicial proceedings but merely preliminary statements which depend upon the will of an individual.

There were two fields where Holmes was compelled under the law to seek and establish the intention of the parties. One of these was in the interpretation of contracts and the other in the construction of wills. If we were to choose the form for a painting which would suggest the judicial character of Holmes we would place him with a document before him meditating over it in order to ascertain the true intent of it. If he was a prince in the other fields of law, in these matters he was like one of those ancient monarchs whom we were taught about when we were children. His task in these two fields is not exactly the same. In contracts he must seek the fair purport of the words as one who stood by would have understood them when exchanged, because there are two parties depending upon these words.[210] In the field of wills he must seek the real intent. The cases he passed upon in these fields run into hundreds. The wills which he analyzed might form a chart for those who draft such documents. In contracts he considers the surroundings, the words, the circumstances, the accompanying papers.[210a]

We can get a picture of him dealing with a will by taking a single case which must stand for all the work he did in the field of wills and trusts. The trustees under a will come to the court and ask instructions as to how they will proceed. The testatrix owned a summer place at the shore known as "Seven Oaks." She left it to her husband for life and on

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210 Smith v. Abbington Savings Bank, 171 Mass. 178, 50 N. E. 545 (1898); Nash v. Minnisota Title Insurance & Trust Co., 163 Mass. 574, 40 N. E. 1039 (1895); Alton v. First National Bank of Webster, 157 Mass. 341, 32 N. E. 228 (1892); Rotch v. French, 176 Mass. 1, 56 N. E. 893 (1900).

210a Williams v. Boston Water Power Co., 134 Mass. 406 (1883); Flagg v. Mason, 141 Mass. 64, 6 N. E. 702 (1886).

his death to trustees to be used as a temporary home for poor women and their young children and for invalid women both young and old, and under the control of the Sisters of St. Margaret, which is a Protestant Episcopal charitable society. The residue of the estate was left to the trustees to be disposed of for the benefit of the home. The will itself said the trustees would have no power to sell but a codicil authorized them to lease or sell any portion of the estate with the consent of the beneficiaries, if it could not be used, and to use the proceeds for the other needs of the same charity. The trustees were to hold the place as long as the Sisters choose to occupy it for the purpose and at the end of their occupancy it was to be placed under a similar charitable institution of the same faith. If no such institution would occupy it, the place was to go to the Massachusetts General Hospital to be used for the charitable purposes named. The purpose was further defined as an opporunity to such poor persons to see and appreciate the self-sacrificing lives of the Sisters so each might adopt a higher standard of right and duty. The testatrix left no other real estate and no personal property after legacies were paid. The Sisters declined the home because they had no funds to maintain it. It was offered to other Sisterhoods and declined. The Hospital also declined it. The Sisters suggested that if the place were sold and a smaller place bought on Cape Cod and the remainder of the proceeds put at interest and paid to them they would carry out the wishes of the testatrix. The Hospital stated they had a convalescent home, that Seven Oaks was not healthy, that if the place were sold they would accept the proceeds and devote them to the home they had. The Salvation Army offered to accept the place and carry out the intent. The Florence Crittenton Home Society offered to accept the place and move the present home they had in Boston to "Seven Oaks." None of the charities which were willing to take the home were found to come within the class designated by the testatrix. It was further found that a suit-

able place could be bought for $6000. Holmes, writing for the court, said there was a good charitable trust.[211] There is a definite direction to the trustees. The charity has not failed. The leading purpose expressed is the creation of a charitable fund and there is an intention that it should not fail by a failure of the scheme with respect to the Sisters. The heirs do not attain rights by the finding that the purposes of the testatrix cannot be attained in the particular mode specified in the will. The testatrix's prescribed mode will be carried out by the court as nearly as may be. The emphasis in the will is on a Sisterhood and the other charities which claim do not fall within that class. The gift to the Hospital adheres to the intent that the land should be kept and used and when that fails the disposition of the proceeds is left untouched by the will. If the place is converted into money the new fund may follow the order established in the will. An unscrupulous beneficiary might reject to get the money but it has been found below that the case is honest. The sale may be made and $6000 of the proceeds invested in the purchase of a home near the seashore whenever the trustees are satisfied that the income of the remainder of the proceeds of the sale and the other resources of the Sisters are sufficient to enable them to permanently maintain the home in accordance with the directions of the will. In going to the Sisters the income goes to the hands which the testatrix preferred; the scheme contemplates a home such as she wished but in a different place.

In the law of wills, Holmes explained the nature of an executor,[212] distinguished life estate from absolute ownership;[213] defined accountings of testimentary trustees with

211 Amory v. Attorney General, 179 Mass. 89, 60 N. E. 391 (1901). Accord: Attorney General v. Goodell, 180 Mass. 538, 62 N. E. 962 (1902); Minot v. Baker, 147 Mass. 348, 17 N. E. 839 (1888); Stratton v. Physio-Medical College, 149 Mass. 505, 21 N. E. 874 (1889).

212 Brown v. Greene, 181 Mass. 109, 63 N. E. 2 (1902).

213 Welsh v. Woodbury, 144 Mass. 542, 11 N. E. 762 (1887); Lewis v. Shattuck, 173 Mass. 486, 53 N. E. 912 (1899).

respect to premiums paid for bonds [214] and stock dividends,[215] defined the words "issue" [216] and "residuary" [217] and also specific [218] legacies and the nature of gifts.[219]

Looking back over these pages now there comes to mind Whistler's answer when someone noted that he had never etched a cathedral: "What could one do with a masterpiece?" The Holmes who lived and felt and thought and wrote may be found only in the opinions and all effort to draw him out from there is futile. He is too rich, too native, too original. There is the grandeur of his vision of the American law, the sense of justice flowing from conscience and good sense, the recognition of equality, the matchless reasoning to given facts, the literary style, so clear, simple and compact, so close to its content, that it is like those fine jewels the cuttings of which are unseen. There throbs the life blood of the American law and there is the bedrock of American freedom.

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214 New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69 (1886).
215 Davis v. Jackson, 152 Mass. 58, 25 N. E. 21 (1890).
216 Dexter v. Inches, 147 Mass. 324, 17 N. E. 551 (1888); Hall v. Hall, 140 Mass. 267, 2 N. E. 700 (1885).
217 Batchelder et al. Petitioners, 147 Mass. 465, 18 N. E. 225 (1888).
218 Bradford v. Brinley, 145 Mass. 81, 13 N. E. 1 (1887).
219 Tyndale v. Randall, 154 Mass. 103, 27 N. E. 882 (1891).