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HOLMESPUN HUMOR

By EDWARD J. BANDER†

I OWE THE INSPIRATION for this collection of anecdotes and humor to a reading of the late Professor Llewellyn's piece on Justice Holmes in 35 COL. L. REV. 485 where he wrote: "Neither is there in print any collection of the anecdotes, but Frankfurter has promised to gather them and submit the gatherings to the secretaries and other friends for authentication, addition, and amendment. There is already a myth-lore full-blown. It should be included. But it should not be confused with its historical base."

No claim is made that the anecdotes retold here are authentic, and their accuracy rests solely on the illustrious names associated with their retelling. The Justice's law clerks, who have contributed substantially to literature over the years, are owed a large measure of thanks. While no effort has been made to contact the late Justice's law clerks, some of them were aware that the task was in progress. Appreciation is also due to the many publishers who consented to a printing of selections from their books.

It would be a simple matter to dismiss these anecdotes as an expendable by-product of a singular figure in American law. Often, however, they tell as much about the source as the object. And, oddly, not all the anecdotes leave the good Justice a victorious knight in shining armor; to put it epigrammatically, a talent to which Holmes added a dimension, he often proved the point that those who choose to live by the word, stand to perish by the word.

Also, it is much more fashionable today to joust with Holmes's philosophy, or detect a flaw in his theory of torts, or even beat that poor old dead horse allegedly called *Liberal*, which Holmes has been accused of riding [See Reid, *Legal History*, in ANN. SURVEY AM. L. 683 (1963)]; however, I suspect, there are more pungent lessons to be learned about the practice of law, the use of language and the grand manner in these pithy episodes than a five-foot shelf of these erudite, amply foot-noted, soporific articles and treatises that will soon "effervesce" when exposed to the air.

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In introducing a great personality, there is always a temptation to foolishly prolong one's words; the writer, by this means, imagines he is introducing an equal, but, for his troubles, acquires a reputation for being a bore. With this in mind, I ask your indulgence to conclude my introduction with one plea.

It is safe to anticipate that anecdotes about Holmes will continue so long as we have a Supreme Court. The value of collecting them in one place is to arrest any impurities, or at least have a fresh source from which the streams may run. Should the source be increased, it is my hope the rainfall will be directed to the collector of this piece; should pollution be evident, I would be happy to take steps to remedy the matter. Fortunately there is a part of Justice Holmes we can all share with unabashed joy, without awakening old prejudices or seeing a challenge to tilt at windmills. It is a fountain of the Justice from which we can all drink safely.*

[This is the first of a three part collection of anecdotes. The succeeding installments will be published in the following two issues of this volume. Though these anecdotes may seem to be unconnected, there is a pattern of the human side of Mr. Justice Holmes woven throughout this first group.] eds.

Justice Holmes was remarking that our ages were sixty years apart, and that he had known a man sixty years older than he was who had known General Washington. And that if we went back this way through history we could get into the room in which the Justice and I were sitting, people who would bring us back beyond recorded human history. . . .

He said, "Do you know what they would be talking about?" . . .

And I said, "What would they be talking about?"

He said, "The one subject they had in common, women!"¹

* Except for the use of brackets and parentheses, all the following material is directly quoted from the source.

1. Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW. 355, 359-60 (1957).

Mr. Justice Holmes (age about 90) was walking through the park with Mr. Justice Brandeis (age about 85). They passed a rather nice-looking woman.

Holmes: Brandeis, wouldn't it be wonderful just to be 75 again.²

Holmes at the age of 90 to a girl of 16: "I won't refrain from talking about anything because you're too young, if you won't because I'm too old."³

He used to attend a burlesque house in Washington; and one evening, when the show was a little razer than usual, which is saying a great deal, he turned to the man on his right, a stranger, and ejaculated: "I thank God I am a man of low tastes."⁴

Mr. Justice Holmes once said, when questioned about certain details of his life: "Since 1865 there hasn't been any biographical detail."⁵

His fondness for French fiction is such that once, when he told a portrait painter that he could have but an hour for a sitting, Mrs. Holmes interrupted with: "Take as much time as you need; he only wants to get away to one of those naughty French novels."⁶

2. MAY, *THE LIGHTER SIDE OF THE LAW* 36 (1956); See also FADIMAN, *THE AMERICAN TREASURY* 783 (1955); but see letter of Laski to Holmes: "I reminded him of Fontenelle who said, you remember, to the damsel of eighteen, 'Ah! Madam, would that I were eighty once more'." 1 *HOLMES-LASKI LETTERS* 324 (1953). Holmes was eighty at the time he received this letter: Jan. 4, 1921.

3. 104 *CONG. REC.* A3847 (daily ed. April 23, 1958) (remarks of O'Hara).

4. BENT, *JUSTICE OLIVER WENDELL HOLMES* 19 (1932); Compare: "And the late Justice Holmes, when a joke by an old Howard [Boston] comedian outdid the Restoration drama in frankness, is reported to have muttered, "Thank God I am a man of low taste!" Editorial in the *Saturday Evening Post*, Sept. 26, 1959. See also HAGEDORN, *AMERICANS* 37 (1946).

5. *Id.* at ix; See, Book Review, 18 *V.A. L. REV.* 922 (1932).

6. *Id.* at 16.

On another occasion, while a Judge of the Supreme Judicial Court of Massachusetts, when he found the long-winded speeches of the lawyers especially trying, he advised them gravely to take a course of reading risqué books, that they might learn to say things by innuendo.⁷

The allusion to Malthus reminds me parenthetically that Holmes in his college days was so stricken with the Malthusian theory that he thought it should be written in letters of fire on the heavens. "This fellow," he said to himself, "has stuck a sword into the very bowels of the principle of population." But, he told a visitor, nearly three-quarters of a century later, that he observed the principle of population still walking jauntily about, apparently not at all discommoded by a sword in its vitals.⁸

It may be said in passing that in later life Mr. Justice Holmes was fond of uttering a dissent when reminded that he had the reputation of reading the classics in the original: Latin and Greek, as a matter of course, and French and German almost as much as a matter of course; but Italian and Spanish and even Portuguese also. With a "pony," he vowed, it was not so difficult. "But," he once added solemnly, "I always qualify that against the Day of Judgment; for I read in the original only the purple patches. . . ."⁹

When Mr. Justice Shiras resigned, Roosevelt appointed in his place William R. Day of Ohio, a wisp of a man. His son, a former football player and a six-footer, once argued a case before his father and the others of the Court. Mr. Justice Holmes surveyed the upstanding dimensions of this offshoot of his associate and passed a pencilled note along the bench: "He is a block off the old chip."¹⁰

7. *Ibid.*; See also 105 CONG. REC. A2691 (daily ed. March 25, 1959); Sergeant, *Justice Touched with Fire*, in MR. JUSTICE HOLMES 202 (Frankfurter ed. 1931).

8. *Id.* at 17.

9. *Id.* at 35.

10. *Id.* at 270. See Leach, Book Review, 45 HARV. L. REV. 1437 (1932). It also should be noted, perhaps with poetic justice, that Justice Holmes, himself, was a block off the old chip.

Supreme Court Justice Oliver Wendell Holmes was an avid scholar who never lost his zest for learning.

One day, when Holmes was 90, a friend found him reading Plato. "Still studying at your age?" asked the friend.

"I'm preparing for the final examination," explained the jurist.¹¹

When I was his secretary in Washington in 1911, he had to attend the obsequies of a Massachusetts dignitary for whom he had no particular esteem, and with a play of seriousness asked me whether I thought it all right if he wore his second-best overcoat to the funeral of a second-rate man.¹²

In June, 1922, Holmes wrote to Harold Laski, who had suggested some books for reading: "You mention for Beverly Farms, good God! Webb on this and that — and Clothing Workers of Chicago. My boy I mean to enjoy myself if I can — to get the unexpurgated Pepys — even read (going on) John Dewey's last in a philosophical way or Pound on Law but if you think that I am going to bother myself again before I die about social improvement, or read any of those stinking upward and onwarders — you err. I mean to have some good out of being old . . . I mean to go my own way, read what gives me pleasure, and leave the 'undone vast' for others." His writing was hard to decipher, and he added: "Those two words from Browning look a little like 'undone vest' . . . to be buttoned up by others. . . ."¹³

. . . after argument in an antitrust case, John W. Davis walked away from the Court with the Justice. "Mr. Solicitor," asked Holmes, "how many more of these economic policy cases have you got?" "Quite a basketful," Davis answered airily. "Well," said the Justice, "bring 'em on and we'll decide 'em. Of course I know, and every other sensible man knows, that the Sherman law is damned nonsense, but if my country wants to go to hell, I am here to help it."¹⁴

11. Boston Globe, Feb. 22, 1960, Editorial Page.

12. BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 5 (1961); See also BIDDLE, MR. JUSTICE HOLMES 80 (1942).

13. *Id.* at 6.

14. *Id.* at 9.

He liked to talk with a flourish about wicked French novels — “now for some French indecency to restore the tone of my mind” he confided to Einstein — and to suggest that if only he had time to indulge in capers there was nothing that would please him more.¹⁵

Holmes used to tell his secretaries that the only “prime” authority was found first in his opinions in the Supreme Court of the United States; second, in his opinions on the Massachusetts Court; and, of much less importance, in the opinions of his brethren on the United States court.¹⁶

For years Brandeis urged Holmes to read more along economic and social lines. Holmes is a prodigious reader, but his tastes run to the classics and general literature. One of his favorite diversions is paper-backed French novels which he reads by the score, heaping them in piles on the floor of his library as he consumes them. So, to counteract this “low” literary taste, Brandeis once informed Holmes that he would send some worth-while material for summer reading.

Several weeks later a large box sent by the Library of Congress reached Holmes at his Massachusetts home. He had his servant open the lid and scanned the upper layer of books. They dealt with workmen’s compensation acts, insurance laws, labor codes, and similar subjects. Holmes read the titles.

“Bob, put this box down in the cellar,” he ordered his servant, and returned to the paper-backed novels. In the fall the box of books was returned to the Library.¹⁷

. . . They all come to see him, even Mrs. Mahlon Pitney, wife of the late Justice Pitney, who once told the aged friend of her husband about a burglary in her home. The robber had backed a truck up to

15. *Id.* at 12.

16. *Id.* at 66–67.

17. ALLEN, MORE MERRY-GO-ROUND 110–11 (1932). For a similar version see BENT, JUSTICE OLIVER WENDELL HOLMES 280–81 (1932).

the rear door and taken all the furnishings out in a most thorough manner. But the police caught him, Mrs. Pitney said, and put him in jail. There she went to visit him in his cell.

Mrs. Pitney talked at great length to Justice Holmes about the incident.

"I tried to find out how ever he had embarked on a career of crime," she explained. "I tried to point out the error of his ways and I hope I have done some good. I think I must have talked to him for two hours."

"Poor man, poor man," nodded Justice Holmes sympathetically.¹⁸

Grandfather Jackson's high desk stood in a corner of the library. Wendell had always been proud of Judge Jackson, pleased when in court he had to refer to his rulings. Now he stood at the desk to write his opinions. "Doesn't it tire you?" Fanny asked, watching him write, one knee propped against the desk. "Yes," Wendell replied, "But it's salutary. Nothing conduces to brevity like a caving in of the knees."¹⁹

Quite a number of Congressmen's wives had called on her, Fanny replied politely. There was a veiled note in her voice that caused the President [Roosevelt] to look up, sharply. "You found the ladies pleasant?"

"Washington," Mrs. Holmes replied blandly, "is full of famous men and the women they married when they were young."²⁰

One day when Holmes was eighty-seven a newspaperman, seeking copy, decided to walk round Capitol Square and ask passers-by if they had heard of Justice Holmes.

A mechanic in overalls was sitting on a bench reading the sports page. The reporter strolled up. "Holmes?" the mechanic said. "Oh, sure! He's the young judge on the Supreme Court that's always disagreeing with the old guys."²¹

18. *Id.* at 111.

19. BOWEN, *YANKEE FROM OLYMPUS* 324 (1945).

20. *Id.* at 362.

21. *Id.* at 399.

The stories were endless. Mary Donnellan said the Judge was very fussy about his books. One time in Washington some old volume was lost and the Judge made an uproar, cussing at his secretary, at Jones and everybody that came near. All through it Mrs. Holmes hadn't said a word, just looked at him in that sharp way she had.

But when the Judge came back from Court the book was in its place on the shelf. An American flag stuck out above it and underneath Mrs. Holmes had hung a sign, neatly printed: "I am a very old man. I have had many troubles, most of which never happened." Mary said the Judge laughed until he cried.²²

After breakfast the Judge announced he was going to loaf all day. "Ninety-two has outlived duty," he said with what seemed a vast satisfaction. Half an hour later he was calling for the secretary to read to him. "Let's have a little self-improvement, Sonny."²³

22. *Id.* at 401.

23. *Id.* at 414.