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Judicial World of Mr. Justice Holmes

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We are about to look at society as it existed in Massachusetts from 1882 to 1902. We are about to look at the realities of life in the older America. We are not going to the movies but to fifty volumes of dusty sheep-bound law books. We are going there because we want to see life in its reality. Americans have always known they could find real life in the courts, as they have shown by flocking to court whenever the event was advertised enough so they could know the time and place. We are going to peep into fancy ways of committing and concealing murder, setting fires, defrauding creditors, avoiding taxes, selling liquor illegally and defrauding people of their property. We shall be surprised to find people suing continually and persistently over water and the right to take it. It was then a source of motor power. We shall find citizens and public bodies litigating to cut down every item of public expense. We shall look at trade union wars. We shall look at some wills which are more obscure and far more fascinating than the latest crossword puzzle. We shall meet some town and city fathers and look into things they did. We shall meet ladies of high and low degree with a miscellaneous line of claims. The most fascinating is one who makes no pecuniary claims but boasts she will still sell liquor in spite of all of the officers in Station 1. Incidentally we shall be getting a view of what law and its processes meant in the Golden Age of American Law. It is a judicial world we are to look at which means nothing more than an orderly arrangement of society with some one to regulate matters in an established manner, with that justice which a disinterested common man can feel and understand. We shall in discussing it put both “liberty” and “democracy” aside. These have recently become so indefinite they are hardly more than labels. Besides we shall hardly hear of them in the age at which we are about to look. The New England mind of that day was too real to be
deceived by labels. We shall hear a great deal about law and find much dependence on it. We shall find that law had many quaint customs, some austerity, some humanity and a very considerable authority in the older America. We shall discover sound reasons why it had that respect. We shall hear a little about constitutions but the major emphasis will never be there. Constitutions are something which are written down on a paper. A person cannot write all that he is down on a paper. A nation and a race cannot either. Papers can be changed or amended but what flows in the blood of a race cannot. The forms of law have flowed in the blood of Anglo-Saxons for a very long time. And their essence, since they have one, can be stated in a few words: the right to be heard, the right to a decision, the right to an appeal on questions of law, the right to have the question which was decided below and none other discussed in the appellate court, the absolute equality of suitors and their counsel before every court. Add men of good will to administer the system and what Mr. Justice Fontescue called "a political government" and you have freedom. A people who are capable of preserving those few things will always be free. They do not need to worry about how the fashions in "liberty" and "democracy" change. Tyrants and thieves, masquerading as reformers, liberals, moralists or superior people generally, will always be seeking to break through these essential things either by fraud or influence. They would seize the machinery in order to use it for their own purposes. If they succeed, even in respect to a single one of these essentials, the citizen, his property and his very life are in jeopardy. The age we are to look at here understood this matter well. It was so much a part of the being and the fibre of the people that we must look for and find it in the background. It is like those things which are never expressed because they are so well understood and are taken as the common places of life and of existence.

We also are to meet a very quaint person, Oliver Wendell Holmes, who happened to be an Associate Justice and later Chief Justice of the Massachusetts Supreme Judicial Court during the period we are to examine. He is quaint in several ways. He has smelled powder on a battle field. He can speak of beer without any implication that it is a foreign substance. He can write. He may be called one of the masters of literary style but he tells us that no one can appreciate the resources of the language who has not heard a mule driver search the soul of a mule who refuses to move. He has a great white mustache. He looks like an honorable man. We almost said he looks like an aristocrat. But that word now needs redefinition. So we say he looks like a person who knows what he is about. He has a medieval viewpoint in this: he is extremely competent in his own business and expects others, even the ordinary prudent person which the law takes as its standard, even the merchant and the mechanic, to be competent in theirs. And he proceeds to judge them and their affairs upon that basis. The medieval world required a man to be an apprentice before he became a master. It was only then that he became free. He rightfully is known as Justice Holmes. He has a conscience and he always starts there. He frequently writes that "it would be monstrous" to hold thus and so. It was he who said that a conclusion can always be put in a logical form. But he has something besides a conscience. He has a mind. He has the finest reasoning capacity of any man who ever sat on a bench. By reasoning capacity we mean dealing with the actual facts before the court. The legal moralists have a separate world. Because of his medieval touch he is a master craftsman in his knowledge of the law and its background. I imagine he would not boast of that or even speak of it. It was what he held himself out to do and therefore as a good medievalist he is bound to know it well. It was not at all strange that this Yankee of the 1880's should have

1a Silva Wimpenny, 136 Mass. 253 (1884); Crocker v. Cotting, 170 Mass. 69, 48 N. E. 1023 (1898); Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617 (1897).
2 Holmes, The Path of The Law, Collected Legal Papers 167.
something of the medieval. He was a lawyer. Pollock, who explored the field of Anglo-Saxon law and absorbed its spirit until he was the living symbol of it, summed up his work and thought by referring to "Our Lady of The Common Law." Notre Dame was the symbol of the middle ages. It was something which was bright and glorious and not something brutal, dark and tricky. Because of his reasoning capacity we will claim for Holmes the distinction of being the greatest lawyer of the American scene. His conscience and his good sense are his source of strength and his mind and knowledge are trusted weapons which he has at hand for necessary occasions. When he meets with astute mentalities he does not howl them down. He does not decide cases against them without giving reasons. He calmly reasons them down. He not only reasons them down but overwhelms them. When he is done there is not a shred left of either them or their argument. When he gets mad about these matters he gets intellectually mad and then God help the objects of his madness! And it is an extremely hygienic social process. The police do not need to shoot down malefactors in the street. They can be safely brought to trial. Prosecutors need not indict men who defraud society or the government of its due for lesser crimes. It would be dangerous also for them to bring a man to trial and depend on clamor or prejudice rather than law for a conviction. Holmes' mind is on the alert and if necessary he will look into the Year Books, the old tomes written in a queer mixture of English, French and Latin where the decision of the early common law judges are recorded and explain not only the rule but the reason for it. Such a capacity keeps the law, not only in respect among honest citizens, but among those who would be otherwise.

He is better defined by saying he is a competent rather than a learned man. He has a mastery of a very diffuse body of learning. But it is always a learning which he uses as a skilled craftsman uses tools. There is more of the medieval

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3 Pollock, op. cit. supra, note 1.
in this characteristic. His opinions refer to many old and primitive forms. In the next sentence he is casting a searchlight on those forms and explaining their function. It is not so with the many Latin phrases which he carries into his writing. He seems to believe that they are a part of the common learning of the law and will be understood. He lived in an age when Latin was still a part of the rudimentary education and before it had become a merely "cultural" subject. But there is one Latin phrase which the lay public has lately become much acquainted with which he seldom ever uses. It is the phrase *stare decisis*. Translated literally the words mean "to stand or proceed by the decisions". It has lately come into the public mind to indicate that law is a dead science and its servants are perfectly helpless persons in a changing world. Holmes was never a helpless person and the English and American common law have never been helpless for any marked period of time. There is little or no emphasis on *stare decisis* in Holmes' work in Massachusetts. He does speak at times of the inconvenience which would flow from changing law which has been settled for a long time.\(^3\)a No rule which had its roots in the common law would be likely to phase him. If it ever did, he at least did not yield up any wail about it. And he has several characteristics which narrow the occasions on which he will be at cross purposes with the rule *stare decisis*. The common law reaches back very far in the experience of the English race. Like all those things which are very old it has accumulated a wide experience with human nature and its needs. In the course of that experience it has been found necessary to forge many tools so that it has a large collection of them, some of which have been put in the legal woodshed because the momentary use for them is passed. But they are still available for use if occasions require. Holmes' knowledge encompassed this arsenal of tools. Then also he and his court were particularly careful with the facts of the cases which they passed upon. He always pro-

\(^3\)a Cook v. Merrifield, 139 Mass. 139, 29 N. E. 540 (1885).
ceeds from the facts to the law. We have already said that the grandeur of his reasoning rests in its being directed at the facts before the court. This in itself eliminated the stare decisis rule in many cases and explains in part why Holmes never has to place any great emphasis on the rule. He also kept in mind another fine old Latin phrase of the common law, obiter dictum. This means "said by the way". A court in a written decision of necessity says a great many things. For instance it generally has to state the claims made by those against whom the decision is to be made and to distinguish them upon the facts and the law. Under the common law and American law up until the past decade only the point actually decided in a case was binding on the judges under the stare decisis rule. We find Holmes stating in his opinions, where he is following a previous case, that the point was actually before the court and decided. In this he is following the strict tradition of the Anglo-Saxon and early American legal tradition. Thus the craftsman's knowledge of all of his tools serves to the honor of his guild and never leaves him a ridiculous person holding a tool which not only will not work but which the holder blames for his inaction. In a conference of lawyers held in the United States in the summer of 1936 on the Common Law, Lord Wright called the attention of the American bar to the limitations the Common Law rule of obiter dictum placed on stare decisis. He quoted Lord Sumner that an obiter dictum was a "will o' the wisp" and then went on to say that in it the full sense of responsibility had not been felt by the judge who had made the decision. In all of Holmes' work in Massachusetts this distinction not only is followed but emphasized by the written word. It is an example of the adequacy of the law in dealing with its own problems. The liberal, sociological, economic jurisprudence which came after Holmes, in its haste, swept these fine distinctive old Latin phrases into the dust bin as "tech-

5 The Future of the Common Law 66.
nicalities” unworthy of the new enlightenment. It seized on
stare decisis of course as a horrible scarecrow and examined
it as if it was an ancient deadly weapon. The right of the
judge to legislate was openly declared. Now in the common
law judges could not legislate and if they ever did get close
to that line, far from boasting about it, they were bound to
deny it. Out of the new enlightenment and rising above the
temporary grave of “common law technicalities” came those
two popular illusions the “liberal” and the “conservative”
justice. The lineage of one is traced to Holmes, the other to
Marshall. One wonders if it is actually possible for the dead
to turn in their graves! It will be clear now why we have
given Holmes no greater praise than that he was a competent
man, like the craftsman of the middle ages, and a great lawyer.

It is already apparent that Holmes had a prodigious ca-
pacity for work. “Our ideal is repose perhaps because our
destiny is effort”,\(^6\) he writes. This was natural. He rose from
a society which felt it “had work to do and loads to lift.” The
hobo who stopped for breakfast at least expected to split
some wood. Not that it was a world lacking in charity. It had
that and kindness too. We shall have some examples of its
charity and of Holmes’ interpretation of charities under the
law. It was a world full of hope which went on the basis that
a man could win his place by honest work. Holmes wrote
over one thousand opinions for his court. There was no case
too small and none too great for his pen. And the written
work indicates on its face that it is but the summary of far
greater work in the preparation. This shines from every page
of his opinions. The opinions are never long. He states the
facts of the case and he reasons to them. He never uses the
butt of his pistol. He faces squarely into the facts and the
law. Each one of these jewels is a work of pain. Speaking of
the court he says that the work there has killed many men.\(^7\)
Like all works of art his opinions are self contained and

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\(^7\) Memorial to Justice William C. Endicott, 177 Mass. 607, 612 (1901)
peculiar to themselves. Here and there we shall be able to extract a witty shaft from them which can stand by itself. This compactness arises from the fact that he is never a moralizer or posing. He reasons to the facts he is called upon to try. In the old New England phrase he always minds his own business.

In order to follow Holmes in administering the law it will be helpful to see first what he understood by government and what his idea of the state was. Government must be lawful and not arbitrary. That is the character of a "political" government. There he follows Chief Justice Fontescue of the fifteenth century Year Books. Since the political power is exercised by the legislative branch its acts are entitled to full faith and credit in the courts. In advising upon the right of the Legislature to appropriate money to pay money to survivors of persons holding office at the time of death he said the power existed if it was exercised in the public good and not if the public advantage was a mere incident to the relief of a private citizen. That distinction he said must be left to the conscience of the Legislature. On an indictment for taking fines from an employee because of weaving defective cloth in a mill he says the Legislature had a right to deprive the employers of an honest tool if they were using it for a dishonest purpose. He cannot say the act is void as based upon a false assumption since he knows nothing about the matter one way or another. Thus he proceeds on the theory that the Legislature acts in conscience and on information.

The same thought appears where he is passing on the acts of municipalities, town meetings, school committees and boards of health. Where the action is purely political he will not interfere. If there is any abuse of the legal forms by which political action expresses itself he immediately steps in. He indicates the proper form, orders its observance, and

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8 Opinion of The Justices, 175 Mass. 599, 57 N. E. 675 (1900).
stops. He never moralizes about it. He is willing to go a long ways to find any form of political action valid.\textsuperscript{9a} If the action of a city under its charter must be by a given board and there was tacit assent of the board that will be enough.\textsuperscript{10} But if a contract was required by law to be let to the lowest bidder and no bids were taken the court has a duty in the matter because “the principal has given directions to insure being dealt with honestly”.\textsuperscript{11} He regards the state as controlled by law created and designed to give free play to political action. The citizens have control of the state through law. It is a government of laws because political action can only work in that way. If there is free play of political action under law, then the destiny of the state depends upon the conscience and intelligence of those who make it up and whose control of it the law preserves. When, therefore, he left a matter to the conscience of the Legislature he was leaving it to the conscience of the citizens who made up the state.

The citizen came in contact with the state not only by the right to exercise the ballot but by the obligation to pay taxes. And the New Engander was so conscious of that fact that he kept his public officers sternly within bounds in spending money. A highway surveyor before he was assigned to a district by the selectmen spent $47.88 for labor on the highways. The statute required the written consent of the selectmen on sums over $10.00. He was found to have spent $30.00 of the money judiciously; Holmes ruled he could not recover any of the sum.\textsuperscript{12} When selectmen, in a moment of enthusiasm, offered a reward of $2500.00 for the arrest and conviction of the person who shot “Mr. Cunningham” and signed it as “Selectmen of Melton” they were obliged to pay out of their own pockets since they only had authority to bind the town for $500.00.\textsuperscript{13}

\textsuperscript{11} Oliver v. Gale, 182 Mass. 39, 64 N. E. 415 (1902).
\textsuperscript{12} Goddard v. Inhabitants of Petersham, 136 Mass. 235 (1884).
\textsuperscript{13} Brown v. Bradlee, 156 Mass. 28, 30 N. E. 85 (1892).
The cost of keeping paupers fell by statute on the town of which they were inhabitants. Towns were very keen in fastening the support of such persons on some other locality. The statute of 1878 for the relief of veterans ran in the same language used by the settlement act as to paupers. It was repealed in 1879. The town of Granville went to law with the town of Southampton regarding the settlement of a veteran named Pomeroy and his wife and children. The former town had supported them and sued to recover from the latter town saying they belonged there. The defendant argued that the relief statute did not apply to Pomeroy until 1879 and got such a ruling from the trial court. It then sought to have the same ruling applied to his family and being refused, on the ground that the veterans' act had taken Pomeroy out of the relief act but not his family, appealed to the Supreme Court —upon that point and upon its obligation to support Pomeroy in any form whatever. This is one of the cases where Holmes gets intellectually mad. He first brushes aside the point as to the family saying that if the veterans were removed from the category of paupers *honoris causa* by the act of 1879 he cannot see why this should disentitle their families to relief. He then sails into a point that the demand for payment was defective in form because it said "Amos B. Pomeroy and family (wife and two children now residing in this town)" whereas in fact Pomeroy had four children. The prior cases had held that the notice was defective unless the persons were sufficiently identified. He says there was no evidence that more than two children were residing in the plaintiff town and that taken with the words "family" and "residing" as used in the notice the reference to children means the two children who were living with Pomeroy in the town. He then takes up a point that Pomeroy enlisted from the plaintiff town in 1861 and from the defendant town in 1863 and the act of 1878 had arbitrarily made the latter prevail over the former. He holds the act of 1878 refers back to the time the veteran's services were rendered. He then dismisses some
refinements as to the words "duly enlisted" by saying that Pomeroy was sufficiently enlisted so the defendant was able to escape from the draft quota levied on the towns in the Civil War by claiming Pomeroy as a volunteer, and having thus claimed him could hardly repudiate the duty to support him.\textsuperscript{14}

As Holmes takes integrity as the ground work of the state he takes the same view with respect to the judicial process. The government of the state must be one of law; it must be political and not arbitrary. The results for good or ill rest on the people if the forms of political expression are kept free and usable. The judicial system rests on the integrity of the trial judge and the jury which is called in to assist in the work. The judicial process must be grounded somewhere. The apex of the pyramid must rest on a sound and firm base. The judicial system rests in its entirety upon the trial courts. It is there that the spring of justice finds its source. The illusion that justice and freedom under the law can be preserved by maintaining a few imposing persons at the top is modern and has no foundation in Anglo-Saxon law. That law and its tradition as expounded by Holmes will show very clearly that its integrity is based on the trial court. The competent and honest craftsman, the trial judge, discharging the daily routine, is essential and the ground work of the whole structure. The integrity of the trial judges rests with the people. That is a political matter. The correction of errors which trial judges make in the law and the keeping of their proceedings within the basic framework of the legal process rests with the judges in the appellate court. The soundness of this analysis is shown in a dramatic way by a rule which Holmes always followed, namely, that questions of fact were finally and irrevocably settled by the trial court. This rule prevailed

\textsuperscript{14} Inhabitants of Granville v. Inhabitants of Southampton, 138 Mass. 256 (1885). See, also, Inhabitants of West Bridgewater v. Inhabitants of Wareham, 138 Mass. 305 (1885); and City of Boston v. Inhabitants of Mount Washington, 139 Mass. 15, 20 N. E. 60 (1885).
when the trial had been with a jury and also when it had been before a judge alone. If the trial was by jury Holmes would only consider on appeal the question of whether there was any evidence presented which warranted the judge in submitting the issue to the jury. If that was found then the verdict was conclusive and the parties bound by it. If the trial was before a judge he made findings which were his conclusions on the evidence. On appeal there was open only the question whether there was any evidence which would in any way lead to the findings made. Many times Holmes says in his opinions that regardless of what conclusion the appellate court may have as to the evidence and whether it agrees with the lower court or not it is bound by the verdict of the jury or the trial judge’s finding.\textsuperscript{16} He applies the same rule to certiorari proceedings, which are writs brought to review the findings of administrative boards.\textsuperscript{16} He insists there must be an error of law pointed out on the face of the record. In the findings of commissions to compute assessments based on betterments by public improvements and bodies appointed to value land in condemnation proceedings, he applies the same test.\textsuperscript{17} The rule is more than a rule of convenience in that the lower court has seen and heard the witnesses. It proceeds rather on the footing that the trial court is a political means set up according to law and it is to be treated as proceeding in integrity and honor and in that respect the burden rests upon the people of the state who have control of it. It is a body created by law. Its only limitation is that it must proceed according to law and that is the only jurisdiction which the appellate court has over it. The point is illustrated by the trial of John C. Best for the murder of Bailey. These men were living alone on a remote farm at Saugus. It was known as “Break-Heart Hill”. Bailey drove the milk to town one evening. People testified they heard the rattle of his demo-

\textsuperscript{17} De Las Casas, Petitioner, 178 Mass. 213, 59 N. E. 664 (1901).
crat wagon and the peculiar sound of the horses’ hoofs on the road. They also heard the same sounds in the return journey at about nine o’clock in the evening. At about nine-thirty two shots were heard from the direction of the farm. Two weeks later parts of a body came to the surface of a pond in the vicinity. They were collected. It was Bailey’s body. The state police went to the farm and found a Winchester rifle. They took two bullets from the trunk of Bailey’s body. They took a piece of wood and forced a bullet through the old Winchester. The markings on all three of the lead bullets were the same. An old lady, troubled in her sleep, had gone to sit at the window. She heard the rattle of the wagon at sometime after eleven. It seemed to have bags of some kind in the back. She could make little or nothing out in the darkness. Later the wagon repassed on its return journey to the farm. That was the State’s case. Best made a general denial, took the stand, and stood up under Attorney General Knowlton’s cross examination. The trial was adjourned over the week-end. Only the summing up of counsel and the charge of the judges remained. Two judges sat at the trial of a capital case in Massachusetts in those days. On Sunday Best called his brother-in-law to the cell. He told him to go to Break-Heart Hill, to go into the hay mow and take a watch and money which were hidden under a rafter and throw them into the sea. On Monday the brother-in-law went on the stand. The police sped away to the farm and returned with Bailey’s watch and wallet done up in a section cut from the old sheep coat Bailey wore. The verdict was guilty. Holmes wrote for the Supreme Court on the appeal. Best was defended by a man of great ability and standing at a bar, which was remarkable. He raised many points of law and Holmes honored him by disposing of them in detail. Then at the end Holmes came to the motion which had been made in the trial court to test the sufficiency of the evidence. He outlined in pointed phrase, in a single paragraph, the damning evidence and said the jury were fully warranted in
finding that Best killed Bailey. Then he begins a new sentence in which he says they could have found that it was murder in the first degree. He understood human nature so well that with him such a crime might have sprung from a quarrel between the two men and in hot blood. But the record showed the law had been fully explained to the jury by the trial justices and the verdict closed the matter on appeal.  

The rule as to findings on the facts by the trial court was supplemented by a further rule that the trial court could draw reasonable inferences from the facts actually proved. Such inferences were deemed proved just as if they had been testified to by witnesses. Thus a person charged with being an idle and disorderly person, neglecting all lawful business and habitually spending time frequenting gaming houses and tippling shops was not entitled to a ruling that there must be affirmative evidence she was in need of work, was physically able to work and had an opportunity to work. There was evidence she was seen at all times of the day and night in such places and was not seen in any lawful occupation or work. The jury upon their general knowledge might draw inferences from these facts. The rule was applied in a murder case to sustain a conviction where the body of the deceased was burned and only the clasp of his wallet found. The most effective use of this rule was made in suppressing illegal sales of liquor. Massachusetts permitted the sale of liquor by license. But it imposed certain limitations in the public interest. Sales to minors were not allowed. Neither were sales to persons so intoxicated that they might become a menace to themselves or others. Sales on Sunday were forbidden. The licenses were of different classes, granting specific rights, for example, one class of license gave only the power to sell

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liquor which was not to be consumed on the premises. Enforcement of these rules was a task but it was very effectively done. The Legislature passed a statute making it an offense to maintain a common nuisance which by definition included a tenement (here the word is used in the common law sense of a building) for the illegal keeping and sale of liquor. Where enforcement officers found violation of the rules as to licenses they made arrests under this statute. The charges were made before a District Court from which they went by appeal to the Superior Court where there was a retrial before a jury. From there the appeal was to the Supreme Judicial Court. The course of these trials would run somewhat like this: the police would prove a sale to two minors on a given day or a sale to a man who was intoxicated and the putting of beer in a can which an infant carried away. The evidence was of course difficult to get. The defendant would then make a complete denial and in the effort of supporting this his entire entourage was generally brought into the sunlight. Then the defendant would produce and prove his license. He would ask for an instruction to the jury that he could not be convicted of a nuisance if he had a license and a further instruction that he could not be convicted of a nuisance by proof of illegal sales on one or two occasions. These were refused and verdicts of guilty were frequent, judging from the appeals reported. Holmes put an end to litigation of this type. He pointed out that the moment the dealer stepped beyond the qualifications of the license he was under the nuisance law; that while the judges could not charge that a conviction was proper on proof of one sale they could charge that proof of one or two sales was enough if the jury drew the inference that the premises were being used for such sales.\(^2\)

were arranged so persons entering the place could be observed and there were mechanical means by which the bar could be immediately closed up. The officers found a barrel of bottles in which there were drippings of spirituous liquors and fifty bottles of beer covered with hay in the cellar which was reached by a stairs from the bar. There was a verdict of guilty under the nuisance statute. Among the points on appeal it was argued that there was no evidence of an intent to sell. It was disposed of thus:

"We cannot pronounce the inference that the beer was kept for sale so little warranted by the teaching of experience as to be but a mere guess." 22

Two other liquor cases are mentioned because one has the salt of wit, the other spirit. One who had a medicinal license was caught selling for consumption on the premises. Holmes said the conviction must be affirmed since there was no evidence that there was any necessity to drink "this dose" on the premises. 23 A lady being arrested said "We will sell liquor in spite of all the officers of Station 1." It was offered as an admission against the husband who was present. In approving its admission in evidence Holmes wrote in a single paragraph a master statement of the rule as to admissions. 24

Holmes always supported and upheld the judges of the lower courts. He required their attention should be called to an error at the time they made it if it was to be used later on an appeal. In the language of the common law, an exception must be taken. 25 He would not reverse a judge if an examination of the whole circumstances showed that the jury could not have been misled. In a case where it was necessary for the jury to decide if there was an implied invitation to the public to cross railroad tracks at a given point the trial judge instructed that they were to consider not what a child or


woman would conclude from the invitation held out but what an ordinary prudent and intelligent man would understand. Holmes says that the law must have some short test and it is that of the ordinary prudent and intelligent person, not man against woman, but such a person against one who has less, and he finds that is what the judge meant and the jury reasonably understood him to mean.\(^{26}\) He enforced a rule that requests for rulings must be handed to the trial judge before the argument was made to the jury.\(^{27}\) He gave the widest discretion to trial judges as to the admission of evidence that was of doubtful value such as photographs. He places this on the ground that the trial judge could alone say if it was instructive with respect to the case as the evidence then stood.\(^{28}\) There was broad discretion given to the trial judges as to the effect of cumulative evidence offered as a basis for a further trial.\(^{29}\) The trial judge passed in the first instance upon the exceptions which were filed. If he thought they were frivolous he was not obliged to stay a sentence or execution because of the appeal.\(^{30}\) If a trial judge came on a case which involved a difficult question of law which should be settled in the public interest, he could report the case to the Supreme Judicial Court. Some of these trial judges were later made justices of the Supreme Judicial Court under the practice of judicial promotion which was then followed in the state. Justice Braley, who filled the place made by Holmes' resignation in 1902, was one. The names of others are only called to memory by the terse line in the official reports "The case was heard by Dewey, J., and a jury." Their common memorial is

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\(^{27}\) McMahon v. O'Connor, 137 Mass. 216 (1884); Keohane, Petitioner, 179 Mass. 69, 60 N. E. 406 (1901).


\(^{29}\) Freeman v. City of Boston, 175 Mass. 208, 55 N. E. 1043 (1900).

in the splendid confidence which the justices of the high court placed in them, which shines from every page of the reports, and in the universal public respect for the law which existed in their time.

The right to a review of all questions of law was carefully preserved but subject to rules and statutes. Order was necessary there as elsewhere. In a case where by an error the decision below had not been filed for a period of nine months, Holmes reviews the case with a precision and clarity exceeding even that which was his custom. If the trial judge had differences with counsel as to the exceptions which had been taken at the trial the appellate court stepped in by a writ to settle the exceptions and if necessary appointed a commissioner to report the facts to it. The right of appeal was thus preserved as one of the fundamentals of the judicial process.

On the proceedings in the appellate court Holmes was careful to limit the case to the same aspect which it had in the lower court. Counsel was not allowed to present an entirely different theory of the matter on the appeal. This was in part the policy of protecting the integrity of the trial court which has already been stated. But it had a further aspect which was still a part of the same idea, namely, the preservation of respect for the law and its processes. In one case Holmes says that, where one point alone was relied upon in the trial court, the other side may not have put forth its full strength on the different issue relied upon in the appeal. Law with Holmes was a matter of reason, but he made a distinction between reason and agility because, while the former established confidence, the latter created fear. That in the end might lead to disrespect for the law and its officers among the lay public. He also knew the lawyer is by nature

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a contemplative being and that his strength and his benefit to society rests there and not in the speed at which he can jump. In his address on Marshall he speaks of "the farther-reaching contemplation of the lawyer".\textsuperscript{33}

We stated one side of Holmes’ grandeur in saying that he had made himself a competent man. We approach another now which is its noble supplement. If there is one single word which would characterize the universal attitude towards Holmes, it is confidence. This sprang not only from his competence but from the absolute equality with which he treated lawyers and litigants in his court. This equality shines out through the dust which rests on these old reports. Let us first make proof of it and then indulge in observation on it. The modern looking over these reports will most likely say: "But what petty cases he wrote about." The remark is true but it misses the rainbow! He wrote about small cases but when he touched them they became alive and litigants went from his court room with a higher respect for the equality of the law than they had known. Smith sues the railroad over half a rod of land. Holmes analyzes the deeds and explains the law of abandonment.\textsuperscript{34} White sold a mannikin for $35.00, payable $10.00 down and $5.00 a month. The buyer will not accept it from the express company. White sues for the contract price. The buyer claims he is limited to the loss he sustained. Holmes reads the contract and finds that it says delivery to the express company was all that White must do. He cites a case from the Queen’s Bench division of the English courts. Chief Justice Field and two associates dissent in an opinion holding that title did not pass and White can have only his damage.\textsuperscript{34a} Way delivers two buggies and a harness for Dennie at Staughton. He asks $8.00. Dennie tenders $5.00 and offers evidence that $2.00 per buggy was a fair charge. The railroad’s charge would have been $4.00 each. Way hitched them

\textsuperscript{33} 178 Mass. 619, 624 (1901).
\textsuperscript{34} Smith v. New York etc. Railroad, 163 Mass. 569, 41 N. E. 110 (1895).
\textsuperscript{34a} White v. Soloman, 164 Mass. 516, 42 N. E. 104 (1895).
to his express wagon and drove out. Holmes rules the rail-
road's charge was some evidence of the value and Way did
not lose his rights by delivery to plaintiff's residence rather
than his place of business.\textsuperscript{35} Hooker has converted Mrs.
Bradley's mahogany frame lounge "covered with plush, old
gold in color". He admits it but puts the value in issue. Mrs.
Bradley calls an expert who says that to anyone who likes
antique furniture it was worth $50.00 but if sold at auction
it would only bring $15 to $20. Defendant wants the refer-
ence to $50 struck out and appeals because he was refused.
And here the law meets the market place. The Chief Justice
writes. He says that in the stock exchange the buyers and
sellers are brought together in a focus and there is no danger
of missing the higher price by missing the man who would
give it. There is no such focus for old furniture and therefore
an uncertainty of encountering one who would give the highest
price reasonably possible; so the market oscillates because it
lacks a balance like the stock exchange and in regard to a
single sale and a single object there is an element of accident
which was eliminated by allowing the jury to consider both
values.\textsuperscript{36} Mr. Goddard slipped on a banana skin at the North
Station. There were many people getting off the train and
he did not look down. There was no evidence as to how long
it had lain there. Holmes explains to him it might have been
dropped within a minute by a person getting off the train and
without notice he could not hold the company.\textsuperscript{37}

On the pages of these reports are spread the names of many
lawyers. We can pick out names of men who rose to fame in
their native state and a few who won national fame. But the
vast majority of them are now unknown. But, beside the
names of some of these forgotten ones, we find the outline of
an argument, which Holmes is about to reason down, but
which he admires enough to note down in the report. The

\textsuperscript{35} Way v. Dennie, 174 Mass. 43, 54 N. E. 347 (1899).
\textsuperscript{36} Bradley v. Hooker, 175 Mass. 142, 55 N. E. 848 (1900).
\textsuperscript{37} Goddard v. Boston & Maine Railroad, 179 Mass. 52, 60 N. E. 486 (1901).
point Holmes looks at is not the man but what he has to present. He was preserving there the equality of the bar which was the contribution and peculiar distinction of early American law. Holmes would surely say that he owed much to these men. Their industry and clarity of thought stimulated his own and they gave him the working papers from which he forged his great opinions. He is wise enough to give back what he takes. By holding himself thus open to all men, by making his court a realm of ideas and not of pomp and circumstance, he drew to the law the finest industry, the best thought and the highest devotion. Men who had eaten black bread to win their place in the profession had their chance before him. He knew they would give all they had. He wanted it for himself and the greater glory of the law. Out of such a bar rose men who could prosecute and defend a capital case with a thoroughness and a dignity that left the New England conscience clear when it exacted the penalty. From it rose a Herbert Parker, never known as a wealthy man, but as a great lawyer, to whom Governor Coolidge could turn for solid legal advice in the crisis of the Boston police strike, a Richard Olney and William H. Moody whom a President of the United States called to the service of their country, finally, those men who today sit as Justices of the Supreme Judicial Court of Massachusetts. All of these men are signaled by one mark: their status as lawyers forever characterized them whatever other work called them and they never asked for any greater distinction.

The law, as Holmes understood it, was a science on which organized society moved. It must therefore have a set of fixed rules that it might give security and confidence. A man must know what the consequences of his act of today will be tomorrow in mercantile affairs and he must know today what duties others expect of him and what rights he may demand of them. In theory, therefore, the law is fixed. The two modifying factors are the changes in the society itself and the fact that the law, in seeking to adjust the rights and
duties of individuals, has justice as its end. It is inexact therefore to speak of the fundamental forms as "technical". That is a treacherous word and at most it can only be applied to the procedure where it tends to defeat justice. The law of the period we are now considering was very stern with respect to the fundamental concepts which that society had adopted and chose to be governed by. It was entirely free from technicality with respect to its procedure. What is more, a mighty effort is always apparent to keep it free in that respect. Over forty of Holmes' opinions can be cited on that point. The plaintiffs were riding in a horse and buggy which they owned in common. They and the horse and buggy were injured by the defendant's negligence. It was claimed that the torts for the personal injury were distinct from each other and yet had to be joined with the injury to the property and they each had filed separate declarations. Holmes said it was too late to raise the point after the evidence was in. And he went on to say that whatever "sua" meant in the early writs "the plaintiff's carriage" and "the plaintiff's horse" were satisfied by proof of any interest sufficient to support an action. An indictment for adultery did not read that the act was against the peace and against the statute. A statute of the state said an indictment should not be quashed on such grounds. It was argued that the statute was unconstitutional. Holmes held that while a statute could not authorize the omission to describe a specific crime, yet technical and formal objections of the nature presented, were not constitutional rights.

We may leave these to look briefly at the law operating on the society of that day. The liquor situation has already been discussed. We therefore pass to the other aspects of the criminal law. One of the early opinions Holmes wrote in this field was the case of a physician who was indicted for manslaughter because he directed the application of flannels soaked in kerosene to a patient by which she was burned and from

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which she died. The evidence showed the treatment was con-
tinued after the patient complained and that another patient
had been so treated and badly burned. There was a verdict
of guilty. The defendant on the appeal relied upon an earlier
Massachusetts case which said the killing must be a conse-
quence of some unlawful act and a prescription could be
made for a person with his consent if it was honestly intended
to cure him. Holmes said the case was wrong in some of its
implications. He defined moral recklessness as a state of con-
sciousness with reference to the consequences of acts, de-
pending upon an actual condition of mind. Here an external
standard must be applied of what would be recklessness in a
man of ordinary prudence. This he says is the rule governing
the redistribution of losses and there is equal reason for ap-
plying it in the criminal law.\(^4\)

A person was employed to ascertain the price of certain
land. The price was $125.00. He reported the price as $325,
made up as follows: $300 for the owners of the land, $15 for
the real estate agent and $10 for the defendant. The em-
ployer came to defendant's office and defendant said, "Pay
over the money". It was counted out and laid on the table.
The defendant picked it up, went into another room, paid
the real estate agent $125 and put the rest in his pocket. He
was indicted and convicted of larceny. The defendant's coun-
sel argued that since the employer had voluntarily turned the
money over there could be no conviction for larceny which
was a taking without consent. Holmes sustained the convic-
tion on several grounds: the money was only in the defend-
ant's custody while title and possession (in the legal sense)
were in the employer; if the money was obtained by a trick
the possession was fraudulent and the employer did not part
with title; while defendant had the right to take $10 out of
the money it all belonged to the employer until that right was
exercised and the defendant had appropriated the whole.\(^6\)

The defendant was a bar tender and the master, suspecting he was being cheated, hired detectives to make purchases with marked bills. The defendant did not ring up the sale but dropped the bills in the till and when it was opened on a later sale took them out and they were found on his person. An indictment was laid in embezzlement. The defendant asked the trial judge to instruct the jury that the crime was larceny and not embezzlement. This was based on the fact that the evidence showed the bills were actually in the till and on the further point that the bills were the master's money which he had given to the detectives for the purpose. Holmes pointed out that under the early common law there would be embezzlement if the servant was not a custodian. Statutes passed in the time of Henry VIII made conversion of goods by a servant a felony and many refinements had grown up around the rule that whether or not the servant was a custodian turned on the place of deposit and the master's control; the mere presence of the bills in the till for a few moments was not enough, and on that, the intention with which the defendant put them there was important, since the control he was exercising depended on the defendant himself; that when all was said and done the defendant only was deprived of the right to claim he was guilty of larceny when he was convicted of embezzlement.42

In an indictment for breaking and entering, one of the defendants got in by pretense of making a purchase. When the clerk went downstairs to get the goods, this defendant unbared the door and let in the second who hid himself and remained and broke the till. Holmes ruled that there was breaking and entering if the second defendant never touched the door because he was let in by the hand of an accomplice.43

In an indictment for the abuse of a female child a complaint which she made to her mother the next morning was let in evidence. In ruling on the exception Holmes explained

that at the very early law a person was obliged to make a hue and cry when he was wronged if he wished to appeal to the courts in the matter; that this curious rule had survived in cases of attacks upon women, and as an arbitrary rule; Lord Hale had justified its admission as corroborating evidence but it could not be justified by any modern rule of evidence; that it could not be excluded as not part of the *res gestae* because of its arbitrary nature and it rested with the trial judge to make a preliminary finding that it was not too late under all of the circumstances which had occurred.\(^\text{44}\)

In an indictment for an *attempt* to set fire to property; defendant used the first floor and basement as a shop for painting and repairing carriages and the upper stories as a dwelling, the building was insured but there was a mortgage under which the insurance was payable and also insurance on the personal property. The city marshal, advised by an informer, visited the premises at night. In the varnish room he found a dish pan full of turpentine in which there was a block of wood weighted down by irons. It was surrounded by excelsior and wooden boxes which had been saturated with turpentine. On a shelf was a thick slow-burning candle which had not been used. The informer testified he had worked for defendant and had been laid off, that on July 5th defendant had called him to a hotel and said the business was in a bad way and he was in debt and offered the informer $25 and then $50 to go and light the candle and place it on the block of wood in the pan, which the informer refused to do; but he had entered the building and seen the arrangement. The same night he was with the defendant at Salem who asked him to get a team and drive with him to Beverly where the building was; that after driving to within a quarter of a mile of the place the defendant said he had changed his mind and they drove back to Salem; that the informer then reported to the city marshal. The indictment alleged an attempt but con-

\(^{44}\) Commonwealth v. Cleary, 172 Mass. 175, 51 N. E. 746 (1898).
tained no allegation of the solicitation of another to light the collected materials or take part in the acts alleged. Holmes said the statute relied upon was not intended to punish every act done toward the commission of a crime but only acts done in an attempt to commit it. When natural forces are set in motion which would bring about the result except for an unforeseen interruption—for example, if the candle had been lit and put out by the police, there is an attempt. The same applies where an act is done but fails by an error in judgment, as firing with a pistol and missing. In such cases the criminal has done his last act. But when first steps are taken and other acts remain to be done there is a chance for a change of mind. Attempt suggests an act seemingly sufficient to accomplish the end. Here the mere collection of materials without a present intent was too remote. If the offense was to be made out by successful solicitation of another to do it, that being the defendant's last act, the solicitation must be alleged. The evidence of solicitation was properly admitted on the issue of intent but it could not be relied upon as an overt act as it was not so set out.45

The Commonwealth v. Storti presented a legal battle which just falls short in its determination of a similar case which arose after Holmes' day. Storti, who is described in the reports as a subject of the King of Italy, was found guilty by a jury of murder in the first degree. On the appeal the case was argued on the sufficiency of the indictment which contained two counts. The first was drawn under the common law and the second which was drawn under a statute of 1889 was a mere recital that the defendant and another had beat the deceased with an ax and killed and murdered him. They were both descriptions of the same act. The first count was admitted to be good and the verdict had been a general one upon the whole indictment. It was argued that it could not be said the jury had not acted on the second count and

it was claimed that that count and the statute authorizing it was a violation of the Bill of Rights. Holmes pointed out, that without giving any countenance to the suggestion, the two counts were for the same offense and the evidence justified a verdict of guilty under either, therefore, no constitutional issue was involved. A number of questions as to the admissibility of evidence were raised and disposed of and the verdict was found to be within the law. The sentence of death had recently been subject to legislative action whereby its execution was changed from hanging to electrocution. After the case had been disposed of by the Supreme Judicial Court upon the merits, a writ of error was taken on the sentence and a petition of habeas corpus was sued out against the warden of the state prison. These were based upon the point that the punishment was cruel or unusual, in violation of the Bill of Rights, and that it was in fact cruel and unusual and of uncertain character. Thereby the punishment was gotten before the court as a question of law and also of fact. On the issue of fact the lower court took evidence and found that if electricity is properly applied it is necessarily fatal, causes death practically instantaneously, and in causing death is more speedy, less painful and more humane than is hanging, that it is not uncertain in character and does not necessitate “a remote combination of circumstances circuitously affecting the functions of organic life by secret and invisible means” as claimed by the petitioner. The writs were refused. On the appeal Holmes said he would put all issues of procedure aside, that there was but a single punishment prescribed, death; that while you cannot separate the means from the end, the means here was chosen to reach the end as simply and painlessly as possible; that the word “unusual” as used in the constitution must be construed with the word cruel and was not so broad as to include every humane improvement not previously known; that while means might be adopted which would have to be considered part of

the punishment, here they were chosen because they were instantaneous; that mental suffering was not more horrible because one was to be struck by lightning rather than to be hanged with the chance of slowly strangling; the general fear of death the law meant to be felt; that the warden had discretion as to any day in a given week was not intended to enhance the suspense but of a humane purpose and the uncertainty is not a part of the punishment.\textsuperscript{47} This judgment was given the day following the argument. But there was more to come. There were further delays and Storti became sick and the Legislature passed a statute amending in some respects the right of visitation, in requiring identification of the family, and approval of the warden as to advisers, and providing that where an execution was respited by the governor or delayed by process of law the warden might in his discretion remove the prisoner from the execution place and confine him in the \textit{solitary prison}. A writ of habeas corpus was sued out claiming the right of access had been cut down and solitary confinement had been substituted and was \textit{ex post facto} and void. On the appeal Holmes pointed out that the \textit{solitary prison} was one for separate confinement, that the prisoner had not been in solitary confinement and the act had been passed to mitigate his lot; the amendment as to access was by way of clarification only; that it was never intended that any one could walk in by saying he was a member of the prisoner's family or his adviser, that the original act was not intended to confer rights on the prisoner but was directed to prison discipline.\textsuperscript{48}

As a branch of the criminal law Holmes construed statutes forbidding lotteries, pools and betting on horse races. These statutes opened the way to a maze of technical defenses and subtle distinctions as to whether the offense charged was within the statute. The lotteries statutes came before the courts first. It was put to Holmes that a policy or envelope

\textsuperscript{48} Storti's Case, 180 Mass. 57, 61 N. E. 759 (1901).
game was a wager and not a lottery. He said a wager is executory and decided by events aside from the action of the parties. Here it was determined by a mechanical device.\textsuperscript{49} When the trial judges followed this ruling cases were appealed on distinctions of fact and Holmes said it had been found to be a lottery and there was no need of going on taking the opinion of juries forever.\textsuperscript{50} When the officers came into a room with many people in it and testified to the implements in use and transactions going on the defendants insisted the state should trace one transaction all the way through. This went down under the inference rule which has been already stated.\textsuperscript{51} Finally the Legislature passed a statute making it an offense to be present in places where bets were registered and the issues became simpler.\textsuperscript{52} Statutes were also enacted against offering prizes as an inducement to buy merchandise. These did not fare so well with Holmes. Reading them literally he upheld the right of a tobacco dealer to give away prizes of pictures of "notorious men and women" with a purchase\textsuperscript{53} and when the trading stamp made its way into New England, that also was held beyond the statute on the ground the nature of the gift was known at the moment of purchase and Holmes distinguished a previous decision of the court made in \textit{Commonwealth v. Emerson}, 165 Mass. 146.\textsuperscript{54}

A statute was enacted forbidding the sale of any oleomargarine unless the public was advised of its real nature and it was free from coloration to make it look like butter. Holmes enforced the coloration provision on the ground that it was directed against resales after the first buyer had been warned as required by the act.\textsuperscript{55} Later he held as a fact that the sub-

\textsuperscript{49} Commonwealth v. Wright, 137 Mass. 250 (1884).
\textsuperscript{50} Commonwealth v. Sullivan, 146 Mass. 142, 15 N. E. 491 (1888).
\textsuperscript{51} \textit{Op. cit. supra} note 50.
\textsuperscript{52} Commonwealth v. Healey, 157 Mass. 455, 32 N. E. 656 (1892).
\textsuperscript{53} Commonwealth v. Emerson, 165 Mass. 146, 42 N. E. 559 (1896).
stance could be made without coloring and without conceding that the legislative finding on the matter could be disputed.\textsuperscript{56} He also overrode technical defenses\textsuperscript{56a} but later the statute was amended to make the possession of the substance with intent to sell it an offense.\textsuperscript{57}

In the field of domestic relations one or two definite courses of public policy are apparent in the cases and there is also a field where Holmes appears ready to go further than the thought of the day. Massachusetts asserted its right to maintain jurisdiction over the marriage relationship and its duties and rights when the state was the matrimonial domicile. The point came before the court in 1900. Kate Andrews applied for letters of administration on the estate of C. S. Andrews. She had been married to him in Massachusetts. He had been divorced from her in South Dakota. He had then married Annie Andrews who also appeared and claimed the letters as the lawful wife. The South Dakota statute required residence in good faith for a period of ninety days in order to maintain the action there. It was found Andrews had lived there for ninety days and obtained a divorce for a cause not recognized in Massachusetts. It was also found he intended to come back to Massachusetts after he did what was needful to obtain the divorce. Kate Andrews had appeared in the South Dakota court and denied Andrews' residence and after having been paid a sum of money by Andrews directed her counsel to withdraw. Holmes wrote that there was a distinction between cases where parties have submitted to the power of a court and where they have not. If they have they may not question the judgment as to jurisdiction any more than on the merits; but the state of domicile, Massachusetts, has an interest; it has declared by statute it will be governed by the facts as to domicile and so that issue must be tried and found; the statute does not go beyond constitutional powers.

\footnote{\textsuperscript{56} Commonwealth v. Kelly, 163 Mass. 169, 39 N. E. 776 (1895).} \footnote{\textsuperscript{56a} Commonwealth v. Mullen, 176 Mass. 132, 57 N. E. 331 (1900).} \footnote{\textsuperscript{57} Commonwealth v. Ryberg, 177 Mass. 67, 58 N. E. 155 (1900).}
since it is confined to persons who have retained a domicile in the state; the decree is void in Massachusetts for all purposes and Kate Andrews gets the benefit of it regardless of connivance; she only remained silent and that is not an estoppel; she is entitled to the letters.\textsuperscript{58}

In a case which came up fourteen years earlier the jurisdiction over the status of married persons had not only been declared but also the right to reach it by publication. The parties were married in Massachusetts. The wife still resides in Massachusetts and sues for separate support and other relief. The husband lives in New York. He appears specially and says he was served with the petition in New York and by publication. Holmes wrote that the domicile of the wife did not follow that of the defendant when the separation was without her fault; jurisdiction did not depend on service in the state; the decree would be at least valid in the state; that is clear as to the custody of the child and protection of the plaintiff's person, it is more difficult as to the payment of money; the proceeding is for the regulation of a status subject to regulation by Massachusetts; an order to pay money is not an isolated obligation but a duty incident to the status; it is not given extraterritorial force but that is not the test; it is enforcible against property in Massachusetts.\textsuperscript{59}

The basis of the rule is made clear in an opinion of 1887. The parties were married in New Hampshire and lived and separated there and went to Massachusetts living separately there. The husband sued for divorce. Holmes wrote that the statute only gave the action where the parties had lived in the state as husband and wife and the husband must establish the statutory residence.\textsuperscript{60}

The law compelled the husband to support the wife and made him liable for her necessaries to others by an implied

\textsuperscript{58} Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333 (1900).
\textsuperscript{59} Blackinton v. Blackinton, 141 Mass. 432, 5 N. E. 830 (1886).
\textsuperscript{60} Weston v. Weston, 143 Mass. 274, 9 N. E. 557 (1887).
agency. But it gave the wife no right to interfere with the husband’s property or his disposal of it. Two cases came before the court upon that issue and the second tested the rule to the limit. The wife sued in equity after the husband’s death to set aside transfers of real estate and personal property made in his life time to his nephew and his nephew’s wife. She got a finding from a master that the transfers were without consideration and evidence was presented that the husband had made statements that he had so arranged things that the wife would get none of his property. In the earlier case the right to convey property even where it was alleged to have been done collusively, the husband being still alive, had been upheld by Holmes and in still another case the court held conveyances based on dislike of a wife to be bad. Here the master found the principal purpose was to defraud the wife. There was in the record however some evidence of care bestowed upon the husband by the nephew. Holmes writing for his court went at it in this way: the husband had a right to convey regardless of his foresight of the effect on his wife’s interest; motive does not affect validity; it is material in the case of creditors where there is a right, irrespective of motive; it had not been intended in the earlier case to hold all conveyances based on dislike of the wife were bad; there, control had been retained; here, there was an out-and-out conveyance. He then examines the evidence and, as far as consideration could be found, it is sustained and the remainder declared void. In other cases Holmes sustained the wife’s right to her separate property against the husband’s fraudulent acts.

In weighing these human relations Holmes reached back to the realities. Where a railway company was sued for loss

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of the society and services of a wife because of negligence resulting in her injury he upheld the trial judge in admitting evidence that it was the plaintiff's custom to kick his wife with his boots on and police officers had to frequently regulate the household. He found the trial judge had limited the evidence to the issue of damages and he let it stand. In an action for alienation of a wife's affections brought against her relatives and based upon suggestions they had made to the wife, the trial judge allowed the defendants to testify they had acted thus "to befriend them both, what I thought was for their best interest". Holmes upheld this. He pointed out the advice would have been ineffective except for the wife's act, a married woman was presumably capable of receiving advice to separate from her husband without losing her reason or responsibility; good intention will not excuse slander but to be answerable for advice it must not represent real opinion. In another of this class of cases we could find Holmes in his entirety if all his remaining work were destroyed. A couple in middle age took a child from an orphan asylum and brought her up. She was married years later and continued to live in her adopted home. Then she went to live in a house which the couple had given her. The wife died and the man remarried. The couple had never adopted the child. In 1901 the orphan brought an action against the man's estate based on services from 1870 to 1887 on an account annexed in which she set off against herself board and clothing. There was a second count upon a contract made in 1892 to pay for past services in consideration of a promise to render future service. There was a third count based on a representation made in 1870 that the deceased would adopt the plaintiff and allegations she had relied upon it and rendered services and she was deceived. She supported the contract claims by testifying as to conversations with the deceased. Her husband testified that on going to a hospital in 1893 the de-

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ceased had asked him to look out for the house and he would pay for the past and future services and pay well. Another witness testified he heard the deceased say he would pay the plaintiff and pay her well. The trial judge applied the statute of limitations. But that left the second count based on the alleged contract of 1892. He refused to submit that or the third count to the jury. He let the case go to the jury on the services claimed to have been rendered from 1890 to 1893 and the plaintiff had a verdict for $114.75. She appealed. Holmes wrote for the court: The plaintiff's case must go on the ground of fraudulent misrepresentation as to the statutes and that the law will imply a contract in aid of justice; but since the remedy is an action for tort a contract cannot be implied; the strong ground of the case is that the deceased made a new promise in consideration of the plaintiff's continuing to care for him; this would cover the past and future services; there is no trouble about the sufficiency of the consideration and it is not reached by the statute of limitations but it goes on the meaning of the evidence and none of it by fair construction relates to the period when the plaintiff was living in the house as a girl or young unmarried woman.68 One more case belongs in this group. In 1901 a petition was filed in the Probate Court claiming the right of administration had been wrongly given to the defendants as the heirs at law of Robert Irving otherwise known as Sheridan W. Ford and that the petitioner and Julia Anne Brown were alone entitled as heirs. In 1846 Ford was a slave in Virginia. Julia Ann Gregory was also a slave. Julia's master performed a marriage ceremony between them and pronounced them man and wife. Three children were born and the petitioner is the survivor. In 1854, to evade being sold, Irving escaped to Massachusetts and took the name of Ford. Julia was imprisoned so she might not escape. She did not hear of Irving for eleven years and had married another slave and after his death another. Clarissa David had also escaped from

slavery in Virginia and went to Massachusetts. She lived with Ford and there is a marriage certificate among her papers. Two children were born. The respondent to whom the letters were granted is one of them. After the Civil War the children who were born in Virginia visited at Ford’s home in Massachusetts and Ford went to Virginia and recognized the petitioner as his son. A Virginia statute passed in 1866 provided all colored people who were living together at that time who had agreed to occupy the relation of husband and wife would be deemed so whether rites had been solemnized or not and all children recognized by the man would be deemed legitimate. The lower court found for the respondent. Holmes wrote on the appeal: the common law as to marriage would not have applied in Virginia to slaves; the statute shows that; the statute hardly applies, but assuming that it did, the marriage in Massachusetts must be found void if the petitioner is to succeed; a slave brought into Massachusetts could not be removed against his will; a runaway slave had a de facto freedom until it was terminated; he could sue in the courts; the state would not have tolerated the idea he had the incapacity of a slave; if he could sue he could marry; marriages in slave states could be ratified after freedom under slave state laws; the trial court found the Virginia marriage was not valid in fact; whether the petitioner could share in the estate was not decided.69

In the matter of contracts between husband and wife, while they had to be made through a third person as trustee, they were upheld in many cases during this period. Holmes dissented when the court held a contract granting the wife consideration for returning after she left the husband was invalid. The majority thought the relationship could not be discarded or resumed for money. Holmes put it on a straight legal ground, she had a right to sue for divorce and a right not to return. Giving up these was sufficient consideration

and a lawful act might be mingled with other motives. In a later case Holmes wrote for the majority in upholding an agreement made in North Carolina valid under the laws of that state between husband and wife which related to Massachusetts lands and which would not have been valid if made between a husband and wife in Massachusetts.

There are two classes of litigation that brought numerous cases before Holmes in the field of business relations, namely, insolvency and poor debtor's bonds. The latter arose on executions on judgments. The debtor was required to appear and be examined. He was required to give a bond for his appearance in order to avoid arrest. If on the examination it appeared he had no means and had not fraudulently contracted the debt, he was allowed to take the poor debtor's oath. This and the trustee process for reaching property in the hands of third persons were the means of enforcing judgments. Where the debt was for necessaries the court had power to make a decree directing payments in fixed amounts at set times and failure to comply without good cause was a contempt of court. Holmes held the act was valid: the fact that the particular courts empowered to enforce it did not exist in all parts of the state did not create special privileges and practical necessities of administration do not conflict with the Fourteenth Amendment of the United States Constitution; preferences as to classes of creditors have always existed; it made purchases of necessaries easier by giving a means of reaching those who wilfully avoided paying for them; a jury trial was not constitutionally necessary since the proceeding was based on a valid judgment; the judge must be satisfied the refusal to pay was without just cause, there was no right to even have this question asked and therefore no choice as to whether it should be answered by a judge or jury; a court need not resort to a jury to determine if a

72 Macaig's Case, 137 Mass. 467 (1884).
73 Atwood v. Dumas, 149 Mass. 167, 21 N. E. 236 (1889).
defendant is obeying its decree; the imprisonment is not punishment but means of compelling obedience; until he obeys, the statute, and not the Constitution, is the limit of his liability.\textsuperscript{74}

The state administered its own insolvency system and evidently assignees were very diligent in the discharge of their offices. They litigated to set aside transfers and to avoid preferences. The test laid down on preferences was whether the preferred creditor had reasonable cause to know of the insolvent's condition\textsuperscript{75} and insolvency was defined as inability to pay debts in due course.\textsuperscript{76} Holmes also held foreign property could not be reached by the state proceedings\textsuperscript{77} and foreign debts were not discharged.\textsuperscript{78} The last rule was applied by him to a case where the foreign creditor had qualified as a foreign corporation in Massachusetts, had a place of business there and delivered the goods from there. Holmes went on the ground that the domicile of the corporation was in the state where it was organized. Chief Justice Field dissented, holding the foreign corporation had brought itself within the state by authorizing the commissioner of corporations to accept service for it in any legal proceeding.\textsuperscript{79} Holmes dealt with debts created after the assignment had become operative by holding they had not gone to swell the fund being administered and therefore could not participate.\textsuperscript{80} This doctrine of unjust enrichment if applied to contingent claims in bankruptcy would have avoided endless uncertainty and litigation.

Trade mark and trade name litigation were frequent in the state courts at that period and Holmes made many fundamental contributions to that law especially in explaining the

\textsuperscript{74} James W. Brown\'s Case, 173 Mass. 498, 53 N. E. 998 (1899).
\textsuperscript{75} Cozzens v. Holt, 136 Mass. 237 (1884).
\textsuperscript{77} Chipman v. Manufacturer\'s National Bank, 156 Mass. 147, 30 N. E. 610 (1892); Chase v. Henry, 166 Mass. 577, 44 N. E. 988 (1896).
\textsuperscript{79} Berger & Engel Brewing Co. v. Dreyfus, 172 Mass. 154 (1898).
\textsuperscript{80} Spurr v. Dean, 139 Mass. 84, 28 N. E. 452 (1885).
background and nature of the rules which regulate it. He tells us that, while an exclusive right to use words as an advertisement may have a considerable money value, yet money value is not a conclusive reason for recognizing rights, that when the common law developed the doctrine of trade marks and trade names it was not developing a property in advertisements more absolute than it would have allowed the author of "Paradise Lost" but its intention was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means and perhaps from defrauding the public.\footnote{Chadwick v. Covell, 151 Mass. 190, 28 N. E. 1068 (1900).} He points out that a trade mark cannot be transferred apart from the good will of a business. It must truly indicate a point of origin.\footnote{Op. cit. supra note 81.} He pointed out that, while there could be no monopoly in the color of a label, still a universal element when used and claimed only in connection with a sufficiently complex combination of other things, would create a right.\footnote{New England Awl Co. v. Marlborough Awl Co., 168 Mass. 154, 46 N. E. 386 (1897).} He held the cigar makers' union label was a trade mark under the state statute and the labor union was a person authorized to register a label under the act.\footnote{Tracy v. Banker, 170 Mass. 266, 49 N. E. 308 (1898).} In the Waltham watch case, he held that a geographical name may acquire a secondary meaning and become associated with a person's goods so as to put later comers to the trouble of taking reasonable precautions from diverting the first comer's customers.\footnote{American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85. 53 N. E. 141 (1899).} He held that abandonment of a trade mark even when it continued for four years was a question of fact.\footnote{Burt v. Tucker, 178 Mass. 493, 59 N. E. 1111 (1901).}

In the world of affairs Holmes explained the origin of the \textit{caveat emptor} rule, "let the buyer beware", as arising out of allowance for the weakness of human nature, because it was not thought desirable to interfere too much by helping men
in their voluntary transactions more than they help themselves and because if they claim the representation essential they can make it so by requiring a warranty.\textsuperscript{87} He upheld the right of a proprietor of a patent medicine to make a contract restricting the price of resale on the ground the agreement was a license which could be limited.\textsuperscript{88} He took the view that the courts would be astute to discover consideration for the purpose of upholding business transactions seriously entered into when they were made with the intention of binding the parties.\textsuperscript{89} The railroads of the time were in the habit of issuing bonds with a provision that they were convertible into stock. As time went on consolidations of the various roads followed and the conversion right became an advantage. The bonds would then be tendered to the consolidated company and the stock demanded. The consolidations were pursuant to special statutes. In the first of these cases upon which Holmes wrote, the statute provided that the consolidated company was to take over the constituent company subject to its duties, debts and liabilities and its claims and contracts might be enforced by and against the consolidated company. Holmes held these words were too strong and the contract of the constituent company could at least be enforced in its terms or damages must be paid.\textsuperscript{90} The matter was very shortly put before the court again by the same defendant and this time argued upon the ground that the contract went out of existence when the constituent company ceased to exist by reason of the consolidation. Holmes wrote again and said that identity might be preserved for certain purposes and here the legislative intent was clearly to continue the old corporation for the purpose of carrying the old contract obliga-

\textsuperscript{87} Burns v. Lane, 138 Mass. 350 (1885).
\textsuperscript{88} Garst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900).
Richard Olney argued these cases. Ten years later he brought the same subject matter before the court again with respect to a street railway organization. The plaintiff rested upon the two prior cases which Olney had lost. Holmes writes for his court. "I think myself they were decided rightly" he begins. But he says it was but an option the present plaintiff had, and this was but a hope that the company would continue. The Legislature had limited the stock to be issued by the consolidated company and left none to cover these bonds. That indicates the Legislature intended to terminate the constituent company and the option ended with it. When the Boston and Maine Railroad and the Fitchburg Railroad consolidated, the protesting stockholders in each company were entitled under the statute to have their stock valued and to be paid off. Stockholders who had voted for the consolidation at their respective corporation meetings later brought proceedings to have their stock valued. Holmes turned them out. The reorganization of the Vermont Central Railway came before the Massachusetts Courts upon a constitutional issue by reason of a suit being brought in Massachusetts for the value of grain destroyed in Ogdenburg, New York. The consolidating statute passed by the Vermont Legislature did not mention the claim now made as among those the reorganized company was to assume. The statute was enacted in 1898 and it contained a provision that it was subject to alteration, amendment or repeal as the public good might require. In 1900 the Vermont Legislature passed an amendment requiring the consolidated company to pay the claims on which the present action is based. The defendant rested on the point that the amendment was unconstitutional. Holmes, with a magnificent deference, wished that the matter could have been presented to

the courts of Vermont whose constitution was involved but found the case was squarely before the court and there was no escape from facing the question. He pointed out that the second statute is in no way a corrective of the first, that it is not claimed that there was any intention to include such claims under the first statute and no claim that they were omitted by a mistake; the amendment requires private property to be applied to a private use and encounters the express prohibition against that sort of thing in the Vermont constitution; the statute must fail unless it rests within the power to amend which was reserved; the power to amend is not a confiscation clause beyond the constitutional restriction; the power reserved by the right to amend is by its terms to be exercised in "the public good" and that can hardly require the defendant to pay another person's debts. It should be stated to supply the background that the Central Vermont had become insolvent and the consolidated corporation had been permitted to take it over by foreclosure.\footnote{Woodward v. Central Vermont Railway, 180 Mass. 599, 62 N. E. 1051 (1902).}

In the field of corporation law the court, writing through Holmes, upheld agreements which were the forerunners of the modern voting trust agreements. They touch these matters with a fundamental sense and reason. The agreement was for "gain and advantage" says Holmes. But it was not thereby unlawful unless the gain was at the expense of the corporation or a wrong was worked to other stockholders and such matters if they are to be regarded with suspicion are to be considered upon the basis of proof.\footnote{Brightman v. Bates, 175 Mass. 105, 55 N. E. 809 (1900).} There is a reasonableness about this and hopefulness and also a competency which makes one believe that an economic society could work out its destiny under the guidance of such men. Their vision seems to encompass the whole of life. The court, again through Holmes, upheld the validity of covenants in a stock certificate that the shares would not be sold without
first offering them for sale to the Board of Directors. The stock he says was called into existence with the restrictions in it by the consent of all concerned and a corporation is still a personal relationship in which those involved may choose their associates. In still another case he explains the basis of the liability of a corporation for the contracts of its promoters. The fact that the corporation was not a party to the contract under common law rules did not end the matter. The corporation might have acted on the contract with knowledge of its terms, there might be an implied undertaking to perform the contract. He does not turn the plaintiff out of court but sends him back to the Superior Court so he may consider amendments in his declaration. There is a largeness of view and a competence and this attribute is not claimed by the judge but is assigned to the law itself.

Insurance was a subject of much litigation. Some cases are concerned with defenses raised under clauses in the policy and the clause against sale or transfer of the property is a favorite topic arising out of cases where there is a transfer between partners, and assignment of the policy as collateral. But the bulk of the litigation is concerned with the necessity of the court interfering in fraternal benefit organizations. "The Supreme Lodge of The Golden Lion" is one of these and is not the only fantastic title which we meet. Holmes examines these benefit certificates, the by-laws and the constitutions, the financial background. We might have said that he never becomes exasperated but now we must limit ourselves to saying that it takes considerable to exasperate him so that he shows it. In one case he examines the whole structure and points out that the reserve fund in such a business increases as people drop out and thereby terminate any rights which they have in it. He finds that the benefits

when considered in reference to payments indicate that at some time assessments must fall thick and fast with the consequence that many will be forced out. The courts cannot say such a business is fraudulent because the Legislature has authorized it. But it is one where the legislative requirements will be strictly enforced. The people who went into it were poor and did not understand the nature of the contract but the representations are promissory and the court cannot say wholesale that the parties should have more consideration than those making a contract usually get; the business should be wound up before more are crowded out by the assessment war; that however does not warrant a court in acting; but it is found as a fact below that the society employs paid agents; that is contrary to the statute; the fund is a trust fund; the certificate holders may stand where they are and refuse to pay and not incur forfeiture; a receiver will be appointed and the fund distributed. The by-laws of the "American Legion of Honor" came before the court ten years later. The plaintiff's husband took out a certificate in 1888 for $5000. The certificate was subject to the by-laws now existing "or hereafter adopted". Deceased had paid in until his death. In 1900 the by-laws were changed so the highest amount to be paid on death was $2000. Holmes held that "compliance" with the by-laws referred to paying the assessments; the certificate was a contract and the submitting to the by-laws intended did not extend to deductions from the face of a certificate any ordinary man would be led to believe secure.

The court was able to reach and penetrate all kinds and forms of fraud including fraudulent sales of stock. It exercised a capacity to get at that form of activity whether the corporation belonged in New Hampshire or the land was

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100a Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938 (1887).
in Florida. Words of hopeful encouragement sounding only in prophecy were not a basis of claim because it was a society that looked for some competency in its members in their transactions. The prospectus must have been relied on. The fraud must have resulted in actual damage and not be a paper claim or the pretender would run into a line of technical rules which would blow his hat off. But the court understood the old-fashioned word "cheat". It used it sometimes, and it was always able to reach transactions where there was actual misrepresentation. Frauds on municipalities fared no better. Members of a committee on streets who bought horses and then sold them to a dummy who in turn sold them to the city at a considerable advance in price and through the committee, found that the court knew a great deal about the criminal law of conspiracy. A town could not by way of gift discharge the account of a tax collector over the objection of a minority at a town meeting. Making false returns to the city of Boston’s disbursing officers as to the number of men and teams which had worked on a job and upon which the contractor was paid was held to be a breach of an agent’s trust and unusually large bank accounts were held to be evidence which might be considered in relation to the other evidence. Planting imported voters in a party caucus for the nomination of candidates for public office caused Holmes to write more extensively than was his custom on constitutional and statutory interpretation, the nature of conspiracy and the nature of the evidence admis-
sible in such cases, but did not get the defendants any further than they were when the verdict of guilty was entered in the trial court. But the court left political actions, done within the framework of the statute and the charter, to the city whether it involved disciplining firemen or counting votes or determining the validity of ballots.

The cases which arose out of the operation of the railroads and the private and public interference with water rights gave Holmes an opportunity to explain and develop the law of those rights which arise from the duty a member of society owes to others and which the law calls torts or wrongs. These cases also opened the door to the explaining and definition of the rights which a land owner enjoys. The society was on an agricultural and industrial basis. Land and rights in it were important to the one and the water of the many rivers was important to the other as a source of power. This does not state the entire activity of the community. The rights in land brought before the court the seashore and the "flats" along the estuaries of the sea. The commercial activity extended afar. A London firm sued for the price of machinery delivered in Boston; the liability of a forwarding express from Paris must be settled; and who should bear the water damage to sets of Balzac imported from Paris; also the effect of a draft drawn on a bank in Turkey; the right of Massachusetts firms to recover the price of liquor sold in Boston with a knowledge it was to be shipped into dry Maine for illegal sales there; marine policies on ships lost or damaged at sea

were frequently litigated;\textsuperscript{120} firms in New York, where women might contract separately, sued men in Massachusetts on business contracts their wives made in New York;\textsuperscript{121} Nova Scotia parents sued local liquor dealers for selling liquor to their son while intoxicated and whereby he was injured;\textsuperscript{122} Rhode Island firms claimed damages for the diversion of water from rivers which flow through both states;\textsuperscript{123} an Irish emigrant boy is killed in industrial work and his dependent mother in Ireland brings an action under the statute and gets a verdict. It is appealed on the ground the mother has no rights under the statute being a foreigner. Holmes can see no distinction under this particular statute between a mother in Ireland and one in Rhode Island; a large body of foreign labor is employed in the state; if the deceased had been maimed just short of being killed he could have sued and got his damages;

"We cannot think that workmen were intended to be less protected if their mothers happen to live abroad or less protected against a sudden than against lingering death; an exception of that kind would not be left by the Legislature to be silently read into the act."\textsuperscript{124}

\textit{(To be continued)}

\textit{Perlce P. Fallon.}

New York City.

\footnote{121 Ridley v. Knox, 138 Mass. 83 (1884).}
\footnote{122 McNary v. Blackburn, 180 Mass. 141, 61 N. E. 885 (1901).}
\footnote{123 Mannville Co. v. City of Worcester, 138 Mass. 89 (1884).}
\footnote{124 Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386 (1900).}