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Mr. Justice Holmes was ninety on March 8, 1931. That anniversary brought him a "shower of birthday congratulations and tributes in writing and print,"[1] which included thoughtful appraisals of his work up to then as scholar and judge.[2] But that work was not yet done. There remained "a little finishing canter before coming to a standstill."[3] The aging justice was to participate in the work of two more

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[1] Sir Frederick Pollock to Holmes, March 19, 1931, in 2 HOLMES-POLLOCK LETTERS, edited by Mark de Wolfe Howe, 282 (1942).

[2] MR. JUSTICE HOLMES, edited by Felix Frankfurter, (1931); Pollock, "Ad Multos Annos," 31 COL. L. REV. 349 (1931); Morris R. Cohen, "Justice Holmes and the Nature of Law," id. 352. In the March issue of the YALE LAW JOURNAL, which was dedicated to Holmes, appeared articles by Harold J. Laski, "The Political Philosophy of Mr. Justice Holmes," 40 YALE L. J. 683 (1931) and Hessel E. Yntema, "Mr. Justice Holmes' View of Legal Science," id. 696. The March issue of the HARVARD LAW REVIEW was dedicated to Holmes. It contained tributes from Chief Justice Charles E. Hughes, as well as on behalf of the English judiciary and the English bar, and from Cardozo and Pollock, 44 HARV. L. REV. 677, 680, 681, 682, 693 (1931). Other Holmes material published in that issue included: T.F.T. Plucknett, "Holmes: The Historian," id. 712; Felix Frankfurter, "The Early Writings of O. W. Holmes, Jr.," id. 717. Appended to the last-named article is a bibliography listing Holmes's early articles, book reviews and comments (id. 797), his Massachusetts opinions (id. 799), and his United States Supreme Court Opinions from 187 U.S. through 282 U.S. (id. 820). A list of the Massachusetts opinions appears also in HARRY C. SHRIVER, THE JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 327 (1940).

[3] In a radio talk on his ninetieth birthday, printed in SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 142 (1936), Holmes said:

"In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task.

"But I may mention one thought that comes to me as a listener-in. The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self: 'The work is done.'

"But just as one says that, the answer comes: 'The race is over, but the work never is done while the power to work remains.'

"The canter that brings you to a standstill need not be only coming to rest. It cannot be while you still live. For to live is to function. That is all there is in living.

"And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:

terms of court before his retirement on January 12, 1932. In Holmes's quiver, waiting to be "fired off,"[4] were a dozen opinions which now grace the pages of volume 283 of the United States Reports, and a half-dozen in volume 284.[5] These final utterances of an acknowledged master of judicial craftsmanship constitute our present theme.[6]

Almost without exception, these opinions never exceeded two pages in length. But this brevity was not due to the fatigue of an aging mind. It was characteristic of Holmes. Twenty years before, he had castigated "superfluous longwindedness."[7] When speaking for the Court, in order to satisfy his brethren, he often had to write with greater fullness than he would have wished; but in his dissents he was free to express his views as sententiously as he pleased. It was his instinctive practice to strike for the jugular.[8]

" 'Death plucks my ear and says, Live—I am coming.' "
See also 2 HOLMES-POLLOCK LETTERS, edited by Howe, 285 (1942).

[4] Id. at 90.

[5] McBoyle v. United States, 283 U.S. 25, 51 S. Ct. 340 (1931); Philippides v. Day, 283 U.S. 48, 51 S. Ct. 358 (1931); United States ex rel. Cateches v. Day, 283 U.S. 51, 51 S. Ct. 359 (1931); Carr v. Zaja, 283 U.S. 52, 51 S. Ct. 360 (1931); Flynn v. New York, N.H. & H. R. Co., 283 U.S. 53, 51 S. Ct. 357 (1931); Southern R. Co. v. Hussey, 283 U.S. 136, 51 S. Ct. 367 (1931); Eckert v. Burnet, 283 U.S. 140, 51 S. Ct. 373 (1931); New Jersey v. New York, 283 U.S. 336, 51 S. Ct. 478 (1931); Smoot Sand & Gravel Corp. v. Washington Airport, Inc., 283 U.S. 348, 51 S. Ct. 474 (1931); Young Co. v. McNeal-Edwards Co., 283 U.S. 398, 51 S. Ct. 538 (1931); Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 51 S. Ct. 498 (1931); Northport Power & Light Co. v. Hartley, 283 U.S. 568, 51 S. Ct. 581 (1931); United States v. Kirby Lumber Co., 284 U.S. 1, 52 S. Ct. 4 (1931); Moore v. Bay, 284 U.S. 4, 52 S. Ct. 3 (1931); State Tax Comm. of Mississippi v. Interstate Natural Gas Co., 284 U.S. 41, 52 S. Ct. 62 (1931); Hoeper v. Tax Comm. of Wisconsin, 284 U.S. 206, 52 S. Ct. 120 (1931); United States ex rel. Polymeris v. Trudell, 284 U.S. 279, 52 S. Ct. 143 (1932); Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189 (1932).

[6] Only one opinion was a dissent. Hoeper v. Tax Commission of Wisconsin, 284 U.S. 206 at 218 (1931). Holmes recorded dissenting votes in four other cases. In United States v. Macintosh, 283 U.S. 605 at 635, 51 S. Ct. 570 (1931) (regarding naturalization of a pacifist) he concurred with Brandeis and Stone in a dissenting opinion by Hughes. Cf. Holmes's dissent in United States v. Schwimmer, 279 U.S. 644 at 653, 49 S. St. 448 (1928). Holmes and Brandeis joined Stone's dissent in two railroad cases involving orders of the Interstate Commerce Commission: Chicago, R. I. & P. R. Co. v. United States, 284 U.S. 80 at 124, 52 S. Ct. 87 (1931); United States v. Baltimore & O. R. Co., 284 U.S. 195 at 206, 52 S. Ct. 109 (1931). In a third such case Holmes and Brandeis dissented without opinion. Arizona Grocery Co. v. A., T. & S. F. Ry. Co., 284 U.S. 370 at 390, 52 S. Ct. 183 (1932). In each of these cases Holmes voted to uphold the Commission.

[7] Holmes to Pollock, March 12, 1911, 1 HOLMES-POLLOCK LETTERS, edited by Howe, 178 (1942). See also id. at 245. The intricacy and importance of the case led Holmes to write a dissenting opinion almost a dozen pages long in Northern Securities Co. v. United States, 193 U.S. 197 at 400-411, 24 S. Ct. 436 (1904).

[8] HOLMES, SPEECHES 77 (1918); Frankfurter, "The Constitutional Opinions of

On the very next day after he had become a nonagenarian, Holmes delivered the opinion of the Court in *McBoyle v. United States*.[9] The question for decision was whether interstate transportation of a stolen airplane was punishable under the National Motor Vehicle Theft Act.[10] Section 2 of the act defined the term "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." Holmes concluded that this language indicated "that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies."[11]

The opinion ends with a paragraph in which Holmes's dry wit reappears, as well as his persistent unwillingness to substitute an embroidered version for the actual language of the legislature:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."[12]

Two weeks later Holmes spoke for the Court in three immigration cases,[13] and a wrongful death action under the Federal Employers' Liability Act.[14] The holding in the former was that an alien seaman was deportable under the general terms of section 14 of the Immigration Act of 1924,[15] applicable to "any alien," even though the three-

Justice Holmes," 29 HARV. L. REV. 683 at 698 (1916). See 1 HOLMES-POLLOCK LETTERS, edited by Howe, 95 (1942). Cf. John W. Davis, "The Ten Commandments as Applicable to Arguments in Appellate Courts," in FRANCIS L. WELLMAN, SUCCESS IN COURT 233 (1941).

[9] 283 U.S. 25 (1931).

[10] 41 Stat. L. 324 (1919); 18 U.S.C. (1926) § 408.

[11] McBoyle v. United States, 283 U.S. 25 at 26 (1931).

[12] Id. at 27. Cf. Northern Securities Co. v. United States, 193 U.S. 197 at 403 (1904) and Olmstead v. United States, 277 U.S. 438 at 469, 48 S. Ct. 568 (1928).

[13] Philippides v. Day, 283 U.S. 48 (1931); United States ex rel. Cateches v. Day, id. 51; Carr v. Zaja, id. 52. The first two cases arose in the Second Circuit, and were affirmed; the third was decided the other way in the Ninth, and was reversed. See Dumbauld, "A National Court of Appeals," 29 GEORGETOWN L. J. 461 at 462-464 (1941).

[14] Flynn v. N.Y., N.H. & H. R. Co., 283 U.S. 53 (1931).

[15] 43 Stat. L. 153 at 162 (1924).

year period prescribed in an additional statute[16] specifically applicable to any "alien seaman" had expired. Admitting that both statutes were in force, and that petitioner could not be deported under the provision relating to "alien seamen," Holmes nevertheless could not "accept the conclusion that deserting alien seamen are thereby made a favored class to be retained in this country when other aliens would be compelled to leave."[17]

In the wrongful death case it was decided that, since the right to sue on behalf of the widow and children of the decedent was derivative, the action was barred by the lapse of the two-year period of limitation which began to run when decedent was injured, even though he did not die until almost five years thereafter.[18]

It was the anniversary of Thomas Jefferson's birthday[19] when

[16] Section 34 of the Immigration Act of 1917, 39 Stat. L. 874 at 896.

[17] Philippides v. Day, 283 U.S. 48 at 50 (1931). Another opinion in which Holmes remarked that the law makes no exception in favor of seamen is Rosenberg v. John Doe, 146 Mass. 191 at 193, 15 N.E. 510 (1888).

[18] Flynn v. N.Y., N.H. & H. R. Co., 283 U.S. 53 at 56 (1931).

[19] April 13, 1931. Holmes and Jefferson were akin in many respects. Both were men of aristocratic breeding who won great repute as champions of the common people. Both sought first-hand information regarding the living conditions and aspirations of ordinary folk. 1 RANDALL, THE LIFE OF THOMAS JEFFERSON 471-472 (1858); 1 HOLMES-POLLOCK LETTERS, edited by Howe, 44 (1942). Cf. 2 id. 13. Both were of an inquiring mind, and skeptical of conventional religious dogmas. Both were gifted with exceptional literary style; their writings are a boon to compilers and anthologists. But Holmes, unlike Jefferson, had militaristic leanings and did not highly regard the value of individual human lives. G. Kenneth Reiblich, "The Conflict of Laws Philosophy of Mr. Justice Holmes," 28 GEORGETOWN L. J. at 22-23 (1939); LON L. FULLER, THE LAW IN QUEST OF ITSELF 106-107 (1940). Cf. 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 126-129 (1916). See also HOLMES, SPEECHES 3, 11, 58-59, 62-63 (1918); Holmes, "Ideals and Doubts," 10 ILL. L. REV. 1 at 2 (1915); Holmes, "Natural Law," 32 HARV. L. REV. 40 at 42 (1918); SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 153, 181, 187 (1936); 2 HOLMES-POLLOCK LETTERS, edited by Howe, 36, 90, 230 (1942); HOLMES, THE COMMON LAW 43-44 (1881). Holmes was a follower of Hobbes, Jefferson of Locke. Holmes wrote Pollock on August 21, 1919 that he had never read Locke. 2 HOLMES-POLLOCK LETTERS, edited by Howe, 22 (1942). More than thirty years earlier he had referred to Hobbes with relish. 1 id. 29, 44. In 1861 Holmes had just drawn the LEVIATHAN from the Athenaeum Library in Boston when he learned that he had received his commission in the Twentieth Massachusetts regiment. ELIZABETH SHEPLEY SERGEANT, "Justice Touched with Fire," in FIRE UNDER THE ANDES 310 (1927); RICHARD W. HALE, SOME TABLE TALK OF MR. JUSTICE HOLMES AND "THE MRS." 13 (1935); FRANCIS BIDDLE, MR. JUSTICE HOLMES 31-33, 77 (1942). Holmes makes references to the LEVIATHAN in Heard v. Sturgis, 146 Mass. 545 at 548-549, 16 N.E. 437 (1888) and Opinions of the Justices to the House of Representatives, 160 Mass. 586 at 595, 36 N.E. 488 (1894). Holmes also cited Hobbes in Kawananakoa v. Polyblank, 205 U.S. 349 at 353, 27 S. Ct. 526 (1907). This opinion was criticized by John M. Zane, "A Legal Heresy," 13 ILL. L. REV. 431 (1918).

opinions were again handed down by Holmes. These dealt with a personal injury case and a tax controversy.[20] It was held that the Southern Railway was liable for injuries suffered on its main line by a passenger on its train even though the negligence complained of may have been that of employees of another railroad using the Southern's tracks pursuant to an arrangement between the two companies. The taxpayer likewise lost. He had claimed a deduction as a bad debt on account of a corporation's notes which the corporation was unable to pay, on which he was endorser. In the taxable year under review he substituted a new note, of which he was maker. He received in exchange the old notes, marked paid, and destroyed them. The Court held that the corporate debt was worthless when acquired; and there was nothing to charge off.

New Jersey v. New York,[21] a controversy relating to diversion of the Delaware River and its tributaries, induced Holmes to write an opinion and decree over seven pages long. The case had been referred to a master, and his report, prescribing an equitable division of the riparian benefits, was confirmed by the Court. Holmes stated the applicable rule in the following language:

> "We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut* v. *Massachusetts*, 282 U.S. 660. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas."[22]

[20] Southern R. Co. v. Hussey, 283 U.S. 136 (1931); Eckert v. Burnet, 283 U.S. 140 (1931).

[21] 283 U.S. 336 (1931).

[22] Id. 342-343. In earlier opinions dealing with litigation of this type, Holmes

A somewhat similar situation, involving the question whether the boundary between Virginia and the District of Columbia is at high or at low water mark on the Virginia side of the Potomac, was decided at the same time in *Smoot Sand & Gravel Corp. v. Washington Airport, Inc.*[23] The airport sought to enjoin trespasses by a contractor on land lying between high and low water mark on the Virginia side of the river. Suit was brought originally in a Virginia court and was removed to the federal District Court for the Eastern District of Virginia. That court's decree dismissing the case for want of jurisdiction was reversed by the circuit court of appeals. The Supreme Court, in turn, reversed the appellate court's decision. The boundary was held to be located at high water mark on the Virginia side. Holmes disregarded a compact made in 1785 between Virginia and Maryland under the terms of which the citizens of each state were given full property rights in the shores adjoining their lands. "But private ownership does not affect State boundaries," Holmes affirms.[24] Mr. Justice McReynolds dissented.[25]

Holmes's long service as a Massachusetts judge and his familiarity with the law of that commonwealth doubtless led to his selection as the writer of the Court's opinion in *Young Co. v. McNeal-Edwards Co.*[26] The point there involved was whether, under the Conformity Act,[27] a federal district court acquired jurisdiction over a nonresident corporation. A Massachusetts statute provided that a nonresident plaintiff may be held to answer in a cross action brought against him by the defendant "if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other."[28] Pursuant to this statute, the Young Company sued a Virginia corporation for breach of warranty of quality when the Virginia corporation brought suit in Massachusetts for conversion of drums in which

"gave a light touch to fundamentals." 1 HOLMES-POLLOCK LETTERS, edited by Howe, 136 (1942). See Missouri v. Illinois, 200 U.S. 496, 26 S. Ct. 268 (1906); Virginia v. West Virginia, 222 U.S. 17 at 19-20, 32 S. Ct. 4 (1911); 1 HOLMES-POLLOCK LETTERS, edited by Howe, 152 (1942). See also Georgia v. Tennessee Copper Co., 206 U. S. 230, 27 S. Ct. 618 (1907); Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S. Ct. 529 (1908); Missouri v. Kansas, 213 U.S. 78, 29 S. Ct. 417 (1909); Virginia v. West Virginia, 220 U.S. 1, 31 S. Ct. 330 (1911); Wisconsin v. Illinois, 281 U.S. 179, 50 S. Ct. 266 (1930).

[23] 283 U.S. 348 (1931).

[24] Id. at 351.

[25] Ibid.

[26] 283 U.S. 398 (1931).

[27] 28 U.S.C. (1940) § 724.

[28] Mass. Gen. Laws (1932) c. 227, § 2.

it had shipped Menhaden oil to the Massachusetts purchaser, who under the terms of the original contract was to receive 1,107 drums of oil and return the drums. The buyer had attached the drums in a previous action *quasi-in-rem* against the nonresident seller, alleging breach of warranty, but the attachment was insufficient security for adequate damages. The Young Company discontinued this action after bringing its cross claim under the statute when sued for conversion of the drums by the Virginia corporation. The Supreme Court ruled, reversing the circuit court of appeals, that the Massachusetts statute was applicable, since it was "only a slight extension of the doctrine of recoupment recognized in Massachusetts apart from statute." The fact that the counterclaim is given "the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law."[29]

On the same day that he disposed of the suit involving the Massachusetts procedural statute, Holmes delivered the opinion of the Court in another case under the Federal Employers' Liability Act.[30] A railroad switchman had been killed while on a moving car by striking a semaphore near the track. An order of the South Carolina Railroad Commission required that no such structure be placed nearer the track than four feet therefrom. The semaphore in question was four feet and ten inches from the track. The judgment of the state court was reversed, on the ground that no negligence was proved and a verdict should have been directed in favor of the railroad. Holmes made the observation that:

> "... the question is not whether a reasonable insurance against such misfortunes should be thrown upon the travelling public through the railroads, but whether the railroad is liable under the statute according to the principles of the common law regarding tort."[31]

Holmes's last case at October Term, 1930 was *Northport Power & Light Co. v. Hartley*,[32] a suit against the Governor and other officials of the State of Washington to enjoin them from enforcing section 33, article 2 of the state constitution and an act of 1921 in pursuance of the same. It was alleged that these provisions were repugnant to the federal Constitution and a treaty with Great Britain. The challenged

[29] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 at 400 (1931).

[30] Atlantic Coast Line R.R. Co. v. Powe, 283 U.S. 401 (1931).

[31] Id. at 403. For another case where Holmes decided a question of tort law favorably to the railroad, see the much-criticized case, Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66, 48 S. Ct. 24 (1927) and comment thereon in LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 205-207 (1943).

[32] 283 U.S. 568 (1931).

provisions prohibit ownership of land by corporations controlled by aliens. The Northport Power & Light Co. was such a corporation. The state constitution was in force before the company acquired its alleged rights; the statute was passed after the acquisition. The bill alleged that a suit to forfeit the company's rights might be instituted in the courts of the state.

In rejecting the company's claim for injunctive relief, Holmes pointed out that:

> ". . . no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the State Courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial Court upholds it, still the appellant can protect its rights as fully in the State Courts as elsewhere." [33]

A tax case, *United States v. Kirby Lumber Co.*,[34] was the first matter dealt with by Holmes at October Term, 1931. The holding was that when a corporation purchases its own bonds in the open market at less than par, the difference constitutes taxable gain or income. Said Holmes:

> ". . . The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here." [35]

At the same time Holmes rendered an opinion in a bankruptcy case.[36] The question was whether a chattel mortgage by a bankrupt took priority over claims of creditors who became such after the mortgage was recorded. For want of compliance with state law, the mortgage was admittedly void as against creditors who were such at the date of the mortgage or who became such before it was recorded. The Bankruptcy Act of 1898 provided that the trustee in bankruptcy "may avoid any transfer by the bankrupt of his property which *any creditor* of such bankrupt might have avoided." [37] Accordingly, the appellant contended that the mortgage, being void as to one creditor or class of creditors, was void *in toto* at the suit of the trustee, even though under the state law the mortgage would be valid as against parties extending credit

[33] Id. at 569.

[34] 284 U.S. 1 (1931).

[35] Id. at 3. Cf. McBoyle v. United States, 283 U.S. 25 (1931) cited supra, note 11.

[36] Moore v. Bay, 284 U.S. 4 (1931).

[37] 11 U.S.C. (1937) § 110 (e). (Italics supplied).

after the mortgage was recorded. The Supreme Court accepted this interpretation of the Bankruptcy Act, and ruled that that act supplanted the state law. Consequently it followed that the property to which the trustee thus obtained title should be distributed on a basis of equality to all claimants, except such as have priority or are secured.

In *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.*[38] a decree was affirmed which enjoined the commission from enforcing a privilege tax against the gas company. The only intrastate activity of the company was to measure the amount of gas supplied to distributing companies which tapped its pipes near Natchez, and to reduce the pressure before the gas passed into the purchaser's hands. The Court held that:

> ". . . The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail."[39]

The only dissenting opinion Holmes handed down during his nonagenarian period on the bench was in *Hoeper v. Tax Commission of Wisconsin.*[40] The majority of the Court, speaking through Mr. Justice Roberts, held that a state tax law was invalid which assessed against a taxpayer a tax computed on the basis of both his and his wife's income. The majority opinion pointed out that in Wisconsin the common-law status of a married woman no longer prevails, and that hence the wife's property was "in no sense that of her husband." Accordingly, it was ruled that:

> ". . . any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income."[41]

Holmes, however, believed that the tax statute should be regarded as an express exception to the rule relieving married women from their common-law status; and that such retention or re-establishment of the former regime was within the scope of the state's legislative power. According to his view:

"This case cannot be disposed of as an attempt to take one

[38] 284 U.S. 41 (1931).
[39] Id. at 44.
[40] 284 U.S. 206 at 218 (1931).
[41] Id. at 215.

person's property to pay another person's debts. The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one the husband; and that as the husband took the wife's chattels he was liable for her debts. They form a system with echoes of different moments, none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption, in the sections quoted, of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned, the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property, and shall or shall not be liable for his wife's debts, it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over, but actual enjoyment of, the property taxed. See *Corliss v. Bowers*, 281 U.S. 376, 378. In some States, if not in all, the husband became the owner of the wife's chattels, on marriage, without any trouble from the Constitution; and it would require ingenious argument to show that there might not be a return to the law as it was in 1800. It is all a matter of statute. But for statute, the income taxed would belong to the husband, and there would be no question about it.

"I will add a few words that seem to me superfluous. It is said that Wisconsin has taken away the former characteristics of the marriage state. But it has said in so many words that it keeps this one. And when the legislature clearly indicates that it means to accomplish a certain result within its power to accomplish, it is our business to supply any formula that the *elegantia juris* may seem to require. *Sexton v. Kessler & Co.*, 225 U.S. 90, 97."[42]

Nearing the end of his service as a judge, Holmes spoke out in *United States ex rel. Polymeris v. Trudell*[43] with all his wonted vigor in support of his often-reiterated conception of law as an expression of state power, utterly divorced from considerations of moral or ethical propriety.[44] The case involved the fate of Aspasia Polymeris and her

[42] Id. at 219-220.

[43] 284 U.S. 279 (1932).

[44] See HOLMES, THE COMMON LAW 110 (1881); Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 461 (1897); Kawananakoa v. Polyblank, 205 U.S. 349 at 353 (1907); American Banana Co. v. United Fruit Co., 213 U.S. 347 at 356-358, 29 S. Ct. 511 (1909); The Western Maid, 257 U.S. 419 at 432, 42 S. Ct. 159 (1922); SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND

daughter Antigone, Greek citizens who lawfully entered the United States and lived in New York City. Because of Aspasia's husband's illness they went back to Greece for a temporary visit. After his death the necessity of settling his estate prolonged their stay until 1924. Failing to obtain documents which would permit them to return to New York, they finally succeeded in getting authority to cross Canada on a pretended trip from Greece to Japan. In 1930 they sought to enter the United States at St. Albans, Vermont, but were taken into custody. They sought release by habeas corpus, on the ground that they were entitled to enter the country. The court below held that they were properly excluded "since the Secretary of Labor did not admit them in his discretion" and they did not possess "an unexpired valid immigration visa or an unexpired valid permit to reenter in accordance with the regulations promulgated" under the Immigration Act of 1924.[45] This holding was affirmed by the Supreme Court.

Holmes's words rang out in peremptory tones:

> "The relators have no right to enter the United States unless it has been given to them by the United States. The burden of proof is upon them to show that they have the right. Immigration Act of 1924, § 23, 43 Stat. 165; Code, Title 8, § 221. By § 13, and the regulations under it, as remarked by the court below, a returning alien can not enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States, by the only voice authorized to express its will, has said so. Obviously it has not done so, and therefore the judgment must be affirmed."[46]

On the day before his retirement, Holmes rendered his last judicial opinion. The case was *Dunn v. United States*,[47] where it was contended that the jury's verdict in a liquor case was inconsistent. The indictment was in three counts, charging: (1) maintaining a nuisance by keeping liquor for sale at a specified place; (2) unlawful possession; (3) unlawful sale. There was an acquittal on the second and third counts, and a conviction on the first. The testimony was identical on all three counts, the defendant testifying that he was elsewhere at the time of

UNCOLLECTED LETTERS AND PAPERS 157 (1936); 2 HOLMES-POLLOCK LETTERS, edited by Howe, 212, 307 (1942); J. C. Ford, "Fundamentals of Holmes' Juristic Philosophy," 11 FORDHAM L. REV. 255 at 259 ff. (1942).

[45] 43 Stat. L. 153 at 161 (1924).

[46] United States ex rel. Polymeris v. Trudell, 284 U.S. 279 at 280-281 (1932). *Fiat lex, ruat justitia.*

[47] 284 U.S. 390 (1932).

the alleged sale. The Government argued that even if the jury believed the defendant's alibi, it might consistently have found that some other person was doing the unlawful business on the premises, with defendant's knowledge.

Holding that "consistency in the verdict is not necessary,"[48] since each count is regarded as a separate indictment, Holmes went on to say:

> "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."[49]

As the foregoing analysis of his opinions rendered after reaching the age of ninety indicates, Mr. Justice Holmes retained to the last his powers of keen analysis and cogent statement. To be sure, some of Holmes's earlier opinions on important constitutional issues were more colorful and more significant historically. A placid period of humdrum routine litigation (antedating the stirring struggles over the constitutionality of "New Deal" measures) did not offer the occasion for memorable pronouncements. But Holmes was always adequate, whether dealing with the interpretation of the Constitution of the United States or the construction of a statute penalizing interstate transportation of stolen motor vehicles. Part of his greatness as a judge lay in his ability to give appropriate treatment to small matters as well as great.[50] Thus, Holmes's valedictory utterances from the bench were not unworthy to rank with the products of his prime.[51] If " a man's spiritual history is best told in what he does in his chosen line,"[52] it is a heartening record which these final labors of a mighty craftsman relate. They fortify his right "to believe when the end comes, for till then it is always in doubt, that one has touched the superlative."[53]

[48] Id. at 393. On the authority of this holding, the Court on January 25, 1932 in Borum v. United States, 284 U.S. 596, 52 S. Ct. 205 sustained the collective conviction of three defendants, each of whom was individually acquitted by the same jury, for killing a prohibition agent. See New York Times, January 26, 1932, p. 10, col. 4.

[49] Dunn v. United States, 284 U.S. 390 at 394 (1932). Mr. Justice Butler dissented.

[50] LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 41, 412 (1943).

[51] Of course Holmes's output was less than it was in earlier years when he was "working like a beaver . . . turning out about one written opinion a week." Holmes to Pollock, January 5, 1907. 1 HOLMES-POLLOCK LETTERS, edited by Howe, 137 (1942).

[52] SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 167 (1936).

[53] 2 HOLMES-POLLOCK LETTERS, edited by Howe, 72 (1942).