

June 1, 1944

Dear Summer:

Your cablegram was heartening. May all word received from you be always as heart warming. God be with you and send you back to us safe and sound.

It has been sometime since I myself have written you. As a matter of fact the last time I wrote you was when I gave you a review of the first part of Yankee from Olympus, the biography of Justice Holmes and his father and grandfather. Now let us resume the review.

Lady luck, or whoever it is who guides and shapes our destinies, has smiled benignly on the Justice. A member of the Brahmin caste he belonged to the right societies at Harvard. He was born into the Porcellian and Hasty Pudding; but by his own efforts he was editor of the Harvard Magazine and was admitted to Phi Beta Kappa. When war broke out he joined the New England Guard. His father hoped he would be a lieutenant but the son was only a simple private, at the outset and he wished his father would mind his own business. At commencement in June, 1861, young Holmes was still at Harvard and as he was the class poet it was his privilege on class day to speak "with the verse that pleases". To the audience young Holmes was a worthy scion of his father.

He served his country in the Civil War honorably and gallantly; thrice he was wounded and the epic, now so well known, is the occasion of his second casualty, at the battle of Antietam, when a bullet went through his neck. The news reached his father by telegram; then came the famous search which lasted for eight days until finally the doctor learned that his son was to be a passenger on a certain train for Philadelphia. The train came to the station and Dr. Holmes climbed the high steps and turned into the first car. On the right of the aisle, in the fourth seat, sat Wendell Holmes. His father smiled, put out his hand.

"How are you, Wendell?"

"How are you, father?"

Invalided home, stayed only long enough to repair his wound and return to service. At Chancellorsville he was wounded for the third time by shrapnel which tore ligament and tendons. This time he returned home to recover and to be mustered out. This ended his military career after three years of service.

One interesting story is here worth relating. Lincoln had gone to Alexandria to welcome the troops and see a battle at close range. He climbed a parapet. The firing began. He was advised to get out of the range of the fire but he did not move. Even without his tall hat he stood six foot four, a splendid target. On this parapet five feet from him a man fell. Three feet away, so close Lincoln could have touched him, an officer fell dead. "Get down, you fool!" a young voice shouted. It was Wendell Holmes, angry and terrified. Lincoln looked down at the white face, streaked with dirt, the brown hair wild. "Captain", he said, "I am glad you know how to talk to a civilian."

To the Law School Holmes went and that is where he had wanted to go, in spite of the remonstrances of his father, who himself had tried a year of it and found it decidedly not to his liking. Father tried to discourage son. "A lawyer cannot



be a great man," Dr. Holmes observed. Wendell was determined. Not to be a lawyer but to know the law. For Holmes never became a lawyer in the sense that we understand the term. He never was a successful practitioner and up to the age of 39, when he was appointed Professor at the Law School, he had to be subsidized by his father. Holmes was no practitioner. He was the student, the scholar, the philosopher, and the legal analyst. During the intervening years between graduation and his appointment as Professor, he spent much of his time on research, the writing of what has now become a magnum opus, his treatise on the common law and preparing his Lowell Institute lectures on the common law. He was at once recognized as a scholar and as a great lawyer in the deep philosophical connotation of that term. President Eliot recognized him as brilliant and possessed of the scientific outlook. A man who would produce books as well as teach was the combination that Eliot insisted upon. Holmes met all the specifications including those of Harvard family associations and Massachusetts birth. So Lowell offered in 1882 this distinguished young man of distinguished background, the recently created professorship, Weld Professor of Law. But Holmes accepted it with one reservation, namely, that if the opportunity were offered to him to become a member of the Massachusetts Supreme Court he would be permitted to resign to accept the new appointment. To this arrangement Eliot agreed, because he felt that once settled at the Law School Holmes would become rooted there for his lifetime. It was not long, however, in fact within three months of the appointment, that Holmes was asked to become an associate Judge of the Massachusetts Supreme Court. Eliot had reluctantly to accept the resignation, though it was years before he forgave the new Judge for relinquishing the professorship. As a matter of fact it was for that reason that it was many, many years later that Harvard awarded Holmes an honorary degree. Some 17 years later, in 1899, he became Chief Justice of that high court and three years later President Roosevelt named him to the Bench of the United States Supreme Court, where he served with dignity and with increasing growth and acclaim until 1935.

To write about Holmes as jurist would take more than the narrow limits of a letter. Several interesting volumes have already been written about him as a Judge. Only recently Max Lerner edited his opinions. For myself, I do not want to describe him as a liberal, because I confess I do not know the meaning of the word as it is now in vogue. Some times I think a liberal is one who agrees with your point of view and that could hardly be said of Holmes who was to be known as "The Great Dissenter". He was neither pro capital nor pro labor, he was pro mankind. He saw and understood and appreciated the constant struggle of man to better his lot and he believed that man had every legal right to resort to such means as would tend to realize that improvement, as long as the means pursued were peaceful. Learned in the law, author of learned articles in the Law Review, Editor of Kent's Commentaries (Kent was the great Chancellor from New York who shaped the law in this country), author of the Common Law, respected at home and abroad, a Professor for three months at Harvard Law School, Holmes saw the law as an agency in helping develop the experiments of life. "A constitution is not intended to embody a particular economic theory", he said, "whether of paternalism or of laissez faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the constitution of the United States. Constitutional law, like other mortal contrivances, has to take some chances. The constitution is an experiment, as all life is an experiment."

The burning issues of the day, when Holmes came to the Bench was labor's grievance against the employer and in the now famous case of *Vegeahn vs. Guntner*, in 1896, Holmes wrote a dissenting opinion which has since become the accepted law of the courts. He said:

"I have seen the suggestion made (Holmes said) that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy



on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests . . .

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages."

Let's stop here for the time being and let me say just a personal word to you before closing this particular letter. The past several weeks have been trying ones for Mother and me but we found comfort and courage in our daily letters to you. We were with you every hour of the time you were on the high seas, as we are always with you and we silently share your experiences. We know how beautifully you measure up to what is required of you. Even though we know nothing of your whereabouts or of your duties, we are proud of you because we know that you are doing not only your duty but going beyond that giving just that much more, which makes the difference between the ordinary soldier and the person of your type and character. In this terrible time of war you give us the comfort of knowing that you will not be found wanting and you give us the added hope that when you return to civil life you will be the better prepared to be a useful citizen and a leader amongst men.

Affectionately,