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SOME LITERARY CONFESSIONS OF MR.
JUSTICE HOLMES.¹

BY ANDREW A. BRUCE*

THE Collected Legal Papers of Oliver Wendell Holmes furnishes to the legal profession and to the thoughtful reading public one of the most delightful books of the year. In form, it is merely a collection of various disconnected papers and addresses. In reality, it is an intensely interesting story of a chastened intellectual life. It is a mental autobiography, and if Mr. Justice Holmes had himself undertaken to write the story of his intellectual life in detail, we do not believe that he could have given to us a clearer estimate of his mental attributes, of his yearnings and of his attainments.

The Collected Papers are valuable not merely because of their intrinsic merit, but because they furnish a sidelight to Mr. Justice Holmes' judicial opinions. They confess the attitude of mind and the social outlook which the cases suggest.

In Justice Holmes we find the scholar upon the bench, the litterateur in public life. He is a lover of logic and of legal refinement. Often perhaps his opinions are too ornate, often perhaps they appear to flaunt legal learning. Yet with it all there is a directness, though obscured by lack of illustration, a great human element and an abiding faith in the genius of democracy.

As disclosed by his opinions, Mr. Justice Holmes is both a metaphysician and a practical man of affairs. He is a lover of the old, yet he recognizes and believes in the evolution of the new. He delights in refinement, yet after all he is just. Constantly we find a veiled protest against those who seek to confine society in a procrustean bed of jurisprudence. Constantly there is a struggle between the logical and the practical, yet usually the practical prevails.

This struggle is freely admitted in his Collected Papers. At times there is an open confession of the fact. By the very comprehensiveness of their subjects the Papers disclose it.

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¹A review of the Collected Legal Papers, by Oliver Wendell Holmes, compiled by Harold J. Lasky and published by Harcourt, Brace & How.

LITERARY CONFESSIONS OF JUSTICE HOLMES

The Collection includes technical treatises on the Law of Agency, on Early English Equity, on The Theory of Legal Interpretation, on Executors, on Privilege, Malice and Intent, and on similar subjects. In these papers Mr. Justice Holmes is a technical scholar and a metaphysician. The Collection however includes a number of addresses and papers on more general subjects, many of which were read before Bar Associations and similar bodies where the comradeship of the occasion called for the human and not for the metaphysical. In these papers and addresses, we find a confession of the Judge's intellectual yearnings, and an expression of his democratic ideals, his faith, and his aspirations. It is these papers and addresses that are the most interesting. They disclose Justice Holmes as he is, a litterateur, a scholar of the old school, a man who has been sheltered but who yet has sympathised and appreciated, a scholar who loves legal refinement, but who yet has breathed the atmosphere of economically progressive Massachusetts, and who has sensed the heartbeats of a progressive humanity.

In these papers and addresses, however, as in his opinions, we find a certain incoherency, but an incoherency which sometimes has saved the Justice from being the subject of lurid headlines, and of much adverse criticism.

On account of his training, his ancestry, his associations, Mr. Justice Holmes has never had the opportunity of meeting with the rank and file. He was not long enough a practicing lawyer to realize the necessity of convincing the twelfth man on the jury even though that twelfth man might lack intellectual grasp. For the scholar and to the thoughtful man, all that is necessary is to throw out an idea. There is no need of analysis. In his opinions and in his articles and addresses, though not to the same degree, Mr. Justice Holmes appeared to be talking to the scholar and not to the public. In these articles, as in his opinions, he makes statements which would be startling to the multitude if the multitude understood them, which would furnish lurid headlines for the newspapers if only the newspaper reporters understood their import. In fact, Mr. Justice Holmes is a legal insurgent, though for intellectual pastime he enjoys metaphysics. His insurgency, however, is couched in language which is so chaste, so literary, that it is hardly recognized.

An illustration of this insurgency can be found in his after-dinner address on the subject of *The Law and the Court*, which

was delivered before the Harvard Law School Association on Feb. 15th, 1913. He said:

"It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seems to him to be first principles are believed by half his fellow men to be wrong. I think that we have suffered from this misfortune, in state courts at least, and that this is another and very important truth to be extracted from the popular discontent. When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the constitution or the common law. Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.

"I have no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle—I may add, the passage of a law—has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or a law. Hence I am not much interested one way or the other in the nostrums now so strenuously urged. I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do not think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end. But I am not aware that there is any serious desire to limit the court's power in this regard. For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized."

Perhaps if this had been said by someone else, and in some other manner, in less polished phrases, and with a little more bluntness, there would have been much criticism in the conservative journals, and perhaps even some charges of radicalism.

On Mr. Justice Holmes' faith in democracy, let him, himself, speak; and perhaps no man has spoken better. In an after-dinner address before the Harvard Law School, which was delivered in 1913, he said:

"If I am right it will be a slow business for our people to reach rational views, assuming that we are allowed to work peaceably to that end. But as I grow older, I grow calm. If I feel what are perhaps an old man's apprehensions that competition from new races will cut deeper than working men's disputes,

and will test whether we can hang together and can fight; if I fear that we are running through the world's resources at a pace that we cannot keep; I do not lose my hopes. I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead—perhaps with smaller numbers, but perhaps also bred to greatness by the splendor of science. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth, I catch a dreaming glimpse of peace.

“The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's statue to the west, the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the Gotterdammerung will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.”

In the Collected Papers also, we find Mr. Justice Holmes' theory of life. It is ex-President Roosevelt's gospel of a strenuous life, but in another form. It includes a life summary and a life analysis; it discloses the weariness of the scholar and the writer, whose output is in the form of thoughts and ideas, and value of which he can never realize, and whose influence he can never measure. It is suggestive of Elbert Hubbard's remark that “after all, success is merely years of toil and endeavor illumined by passing and momentary realizations of accomplishment.” He says:

“The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk seems to me about equally unreal. With all humility, I think ‘Whatsoever thy hand findeth to do, do it with thy might’ infinitely more important than the vain attempt to love one's neighbor as one's self. If you want to hit a bird on the wing, you must have all your will in a focus, you must not be thinking about yourself, and, equally, you must not be thinking about your neighbor; you must be living with your eye on that bird. Every achievement is a bird on the wing.

“The joy, the duty, and I venture to add, the end of life. [Is life.] I speak only of this world, of course, and of the teach-

ings of this world. I do not seek to trench upon the province of spiritual guides. But from the point of view of the world the end of life is life. Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself. Until lately the best thing that I was able to think of in favor of civilization, apart from blind acceptance of the order of the universe, was that it made possible the artist, the poet, the philosopher, and the man of science. But I think that is not the greatest thing. Now I believe that the greatest thing is a matter that comes directly home to us all. When it is said that we are too much occupied with the means of living to live, I answer that the chief worth of civilization is just that it makes the means of living more complex; that it calls for great and combined intellectual efforts, instead of simple, uncoordinated ones, in order that the crowd may be fed and clothed and housed and moved from place to place. Because more complex and intense intellectual efforts mean a fuller and richer life. They mean more life. Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.

"I will add but a word. We are all very near despair. The sheathing that floats us over its waves is compounded of hope, faith in the unexplainable worth and sure issue of effort, and the deep, subconscious content which comes from the exercise of our powers. In the words of a touching negro song:

Sometimes I's up, sometimes I's down,

Sometimes I's almost to the groun';

but these thoughts have carried me, as I hope they will carry the young men who hear me, through long years of doubt, self-distrust, and solitude. They do now, for, although it might seem that the day of trial was over, in fact, it is renewed each day. The kindness which you have shown me makes me bold in happy moments to believe that the long and passionate struggle has not been quite in vain."

It is well that the Collection has been published. It is always well when we gain an insight into the lives and ideals of our judges who exercise so great an influence in our public affairs, but who to the general public are so little known and so little understood.