To The Summit Lighthouse Students

MOSHE: We have the actual Gas Stokers Strike case of which Judge Oliver Wendell Holmes had for you to review. It was what Judge Holmes had asked for her to type as the case relevant, to your judgment call.

JUDGE Oliver Wendell Holmes: The word I used was "criminal". Also "they were then agreeing to do that which would bring them within the definition of conspiracy."

GOD HELIOS: I have as Mother Mary explained, not answered your 20.12's and it is for a reason. You actually know not what you do to challenge in doubting Her word. It is that which you do not have that right to do to challenge the non-answering of 20.12.

I am God Helios. *To you.* A word of warning. If you are given such loving instruction as to why you will not be ascending and you are given a path out of it, why do you rebel? Why would you go about cursing the kind word?

MOSHE: We will end here. You have now heard from God Helios. Thus do take off thy shoes, as thou standest on holy ground.

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THE MIND AND FAITH OF JUSTICE HOLMES

HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS

SELECTED AND EDITED WITH INTRODUCTION AND COMMENTARY BY *Max Lerner*

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NEW YORK

"MASTERS AND MEN": THE GAS–STOKERS' STRIKE[1]

The famous strike of the gas-stokers in December last, by which all London was plunged for several nights into partial darkness, at last found its way into the courts. The company prosecuted five men for conspiracy. The trial lasted only one day; the facts were simple and undisputed, substantially as follows: The stokers are hired by the company under special contracts, which require a certain notice to be given of an intention to leave work; the time of this notice varies in the contracts of different classes of workmen, ranging from one week to thirty days. Most of the stokers were combined together into a trade-union association. One of them, a member of the association, was discharged by the company, for what cause did not appear; but it was not claimed that the discharge was in violation of the contract. His fellow-members of the association demanded his reinstatement, but in vain. They thereupon, on the second of December, refused altogether to go to work unless their demand was complied with. There was no violence towards officers of the company; but there was some violence, accompanied by a good deal of threatening, towards members of the association who had not been advised of the intention of the conspirators, and who at first hesitated to fall in with the design. The court charged the jury that the defendants had a perfect right to form a trade-union, and that the fact that their action was in restraint of trade, which would have made it an offense at common law, could not be considered in this action; but that the company alleged that the defendants "either agreed to do an unlawful act or to do a lawful act by unlawful means; and he asked the jury whether there was a combination between the defendants either to hinder or prevent the company from carrying on their business by means of the men simultaneously breaking the contract of service they had entered into with the company. This was an illegal act, and, what was more, a criminal act. If they did agree to interfere with their employers' business, by simultaneously breaking such contracts, they were then agreeing to do that which would bring them within the definition of conspiracy."

The jury were out only twenty minutes, and then brought in a

[1] 7ALR 582 (1873). This first appeared as a commentary on a case of current interest to lawyers.

verdict of guilty, but with a recommendation to mercy. This, however, the court disregarded, and sentenced the accused to imprisonment for one year. In imposing the sentence the judge said that he had told the jury that "on the question whether they were to find the defendants guilty or not, they ought not to be influenced by the suggestion that what they were attempting to do would be dangerous to the public. But it did seem to him now, when he was called on to consider what kind of conspiracy they had been guilty of, that he could not throw aside what was one of the obvious results of the conspiracy into which they entered, and what must have been in their minds; and he could not doubt that the obvious result was great danger to the public of this metropolis; that that danger was present to their minds; and it was by the acting on that knowledge and on the effect they thought it would have upon their masters' minds, and trading upon their knowledge of the danger, that they entered into this conspiracy, in order to force their masters to follow their will. . . .

"The prisoners were the principals — the chief actors; two of them were delegates chosen by the men, and therefore evidently men to whom they looked up. They took a leading part in the conspiracy. Therefore, notwithstanding their good character they had unfortunately put themselves into the position of being properly convicted of a dangerous and wicked conspiracy. The time had come when a serious punishment, and not nominal or a light one, must be inflicted — a punishment that would teach men in their position that, although without offence they might be members of a trade-union, or might agree to go into an employment, or to leave it without committing any offence, yet that they must take care when they agreed together that they must not agree to do it by illegal means. If they did that they were guilty of conspiracy, and if they misled others they were guilty of a wicked conspiracy."

Those who are interested in the immediate social aspects of this case, and who wish to hear the other side of this resort to the courts, as a move in the game between masters and men, will do well to read an able article on Class Legislation in the *Fortnightly Review* for February last, which combines much sense with some unsound notions of law.[2] The aspect of the various instances of class

[2] The article Holmes refers to is "Class Legislation," by Henry Crompton, 13 *Fortnightly Review,* n.s. (1873), 205–217. In the same issue is an article by A. V. Dicey, and in the following month's issue one by Holmes's friend, Leslie Stephen.

legislation there collected to which we would call attention, is their relation to such essays on the theory of legislation as Mr. Herbert Spencer publishes from time to time. It has always seemed to us a singular anomaly that believers in the theory of evolution and in the natural development of institutions by successive adaptations to the environment, should be found laying down a theory of government intended to establish its limits once for all by a logical deduction from axioms. But the objection which we wish to express at the present time is, that this presupposes an identity of interest between the different parts of a community which does not exist in fact. Consistently with his views, however, Mr. Spencer is forever putting cases to show that the reaction of legislation is equal to its action. By changing the law, he argues, you do not get rid of any burden, but only change the mode of bearing it; and if the change does not make it easier to bear for society, considered as a whole, legislation is inexpedient. This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false. The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully.

The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class has gained in power, or that it transcends the limits of self-preference which are imposed by sympathy. In-

terference with contracts by usury laws and the like is open to the first objection, that it only makes the burden of borrowers heavier. The law brought to bear upon the gas-stokers is perhaps open to the second, *that it requires to* be backed by a more unquestioned power than is now possessed by the favored class; and some English statutes are also very probably open to the third. But it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that; and none the less when the *bona fide* object is the greatest good of the greatest number. Why should the greatest number be preferred? Why not the greatest good of the most intelligent and most highly developed? The greatest good of a minority of our generation may be the greatest good of the greatest number in the long run. But if the welfare of all future ages is to be considered, legislation may as well be abandoned for the present. If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands. The fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else. Communism would no more get rid of the difficulty than any other system, unless it limited or put a stop to the propagation of the species. And it may be doubted whether that solution would not be as disagreeable as any other.

SELECTIONS FROM THE COMMON LAW[1]

(1) Liability and Revenge[2]

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The *felt necessities of the*

[1] Holmes's book *The Common Law* was a series of lectures originally delivered in Boston. The selections that follow are from the first four lectures. About a quarter of the material from these lectures is here included. I have chiefly left out further illustrative material and scholarly references to authorities. I have sought only to preserve the essential frame of the argument.

[2] This selection is from Lecture I, "Early Forms of Liability."