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JUSTICE HOLMES AND THE TITANIC

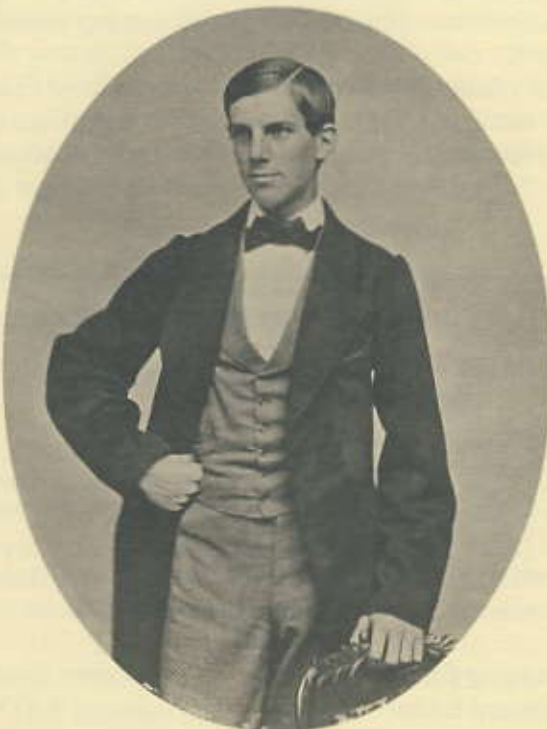
By Richard H. Wagner*

Over two winter's days in 1914, the Supreme Court heard oral argument concerning the most famous maritime disaster of modern times—the sinking of the ocean liner *Titanic*. For Oliver Wendell Holmes, Jr., there was nothing alien about the world that had given rise to the dispute. He had made 22 transatlantic crossings—an impressive number considering the transportation technology of the last half of the nineteenth and early years of the twentieth centuries. During these journeys he had actively participated in the opulent society with which that ship is so often associated. While moviemakers have felt the need to romanticize the *Titanic's* story, Holmes' real life travels had both romance and adventure. It was a world that he had held apart in his mind from his work as a jurist—an escape in which he could “break loose” from his

solitary intellectual pursuits. While this aspect of his life provided no basis for recusal, his story serves to underscore once again that the Court is composed of human beings whose life experiences sometimes touch upon the disputes that come before them.

Holmes' travels across the ocean began in 1866. It was the custom of young upper class Bostonians to make a “Grand Tour” of Europe upon becoming an adult. Accordingly, hav-

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Holmes was a graduate of Harvard and a veteran of the Civil War when he left for Europe on a “Grand Tour” in 1866.

For Mother.

W. J. Jr. 1864



Bergheim
Zürich

Leslie Stephen and Holmes spent several few weeks in Switzerland mountain climbing. OWH drew this charming sketch while in Switzerland which he inscribed and sent home to his mother.



As a noted poet and author, Oliver Wendell Holmes, Sr. (the *Autocrat of the Breakfast Table*) was able to furnish letters of introduction that opened the doors to London Society for his son and namesake. Holmes Sr. and his wife are shown in the photograph above.

ing completed his undergraduate degree at Harvard College in 1860 and having "done my duty" as an officer in the Union Army in the Civil War, it was time for Holmes to make the pilgrimage.

The doors of London society were opened to Holmes by letters of introduction from prominent Bostonians, by being a friend of the son of the American minister in London, and by bearing the same name as his father, an internationally known poet and author. He dined with the Prime Minister William Gladstone, was received by John Stuart Mill and met artists and intellectuals including John Millais and Robert Browning. However, the highpoints of this visit were the receptions and dinners where the handsome former military officer found himself the center of attention. He enjoyed meeting new people, and began several lifelong friendships. He conversed, danced and flirted with the young titled ladies in the capital of an empire then reaching its zenith. As he wrote later: "London society is hard to get into, not from any requirement of 16 quarterings, but because there are too many interesting people in London. You must interest people who, being in the center of the world, have seen all kinds of superlatives."

In sharp contrast, when Holmes left for Paris after five weeks in London, he was just a tourist with no entrée into the court of Louis Napoleon. After visiting the Louvre and other

museums, Holmes joined Leslie Stephen, an English critic and man of letters, for a few weeks of mountain climbing in Switzerland. While he was impressed by the beauty of the mountains, he longed to return to Britain and wrote to ask if he could visit some of his new friends at their country estates. This resulted in invitations to a country house in Wiltshire and then to the Duke of Argyll's estate in Scotland. Once again, Holmes was accepted into the center of a social whirl that included shooting, romance, and discussions of philosophy.

Holmes, of course, does not have a reputation as a frivolous person and thus his captivation with this way of life may at first seem odd. However, it really only serves to underscore the complexity of Holmes' character. Holmes was brought up in an old New England family in what was then still Puritan-influenced Boston. He had a strong devotion to duty, work and intellectual achievement. This led him to undertake the long and solitary study of the law that resulted in his famous book, *The Common Law*; and then to success in the often-solitary world of a judge. But, Holmes also was by nature gregarious and enjoyed the company of people. As G. Edward White has observed: "Given the social whirl which Holmes encountered on his first trip to London, it is not surprising that England came in his later life to symbolize a world in which he could release the gregariousness that was the other side of his solitary self-preoccupation." Indeed, Holmes said "I always feel twice the man I was, after I visit London. . . ."

His subsequent visits to Europe centered upon the London social season and visits to the great country houses. On his 1889 visit, however, he enlarged his sphere when he contacted Ethel Grenfell. She was the daughter of one of Holmes' English friends and had visited Holmes and his family in Boston after her father's death. Ethel was a member of a circle of young married aristocrats called the Souls who one author has described as "a constellation of exceptionally bright stars, all of them it seems beautiful, intelligent, noble, witty, wealthy and loved." They included such notables as Arthur Balfour, the future Prime Minister, and George Curzon, future Viceroy of India. They believed that they were moving society away from philistinism towards the patronage of the arts. Their forward thinking included the radical view that women were not chattels but rather people with tastes and opinions worth cultivating. Their preoccupation with stimulating conversation often laden with sexual overtones, appealed to Holmes and he made strong friendships within the group. Indeed, Holmes kept a portrait of Margot Asquith in his library for the rest of his life.

Through the Souls, Holmes came into contact with another circle called the "Ascendancy" which was made up of Anglo-Irish aristocrats who came to London each year for the social season. This circle included Lord and Lady Castletown. On his visit to England in 1896, the 55-year-old Holmes and the 41-year-old Clare Castletown often met for lunches, dinners, and for visits to exhibitions. "From all accounts, Clare loved life in all its brilliant and challenging



(Corbis Images)

On subsequent visits to Europe, Holmes developed close ties to a group called "The Souls." One of his closest friends in the group was Margot Asquith and he kept a framed photograph of her on his desk for the remainder of his life.

manifestations. She was remembered as a daring horsewoman, a fine musician, gracious hostess, entertaining conversationalist, and accomplished linguist." She invited him to Ireland to the Castletown's estate Doneraile Court near Queenstown. The two became infatuated and stays in Ireland became a regular feature of his subsequent visits to Europe. However, after 1898, the relationship began to lose much of its fervor.

The extent of Holmes' relationship with Clare Castletown is something of a mystery as much of their correspondence has not survived. Although the two had serious romantic feelings for each other, the relationship was probably not physically consummated. Holmes enjoyed flirting. However, his goal was a mental/emotional intimacy. He desired to know everything about the other person, particularly her thoughts and feelings. Also, Victorians were fascinated with the notion of courtly love, and a romanticized view of the code of chivalry was popular among the British upper classes. This included the idealization of grand passions in which considerations of duty and honor held the lovers apart. Certainly, Holmes had a taste for such chivalric ideals as portrayed in the novels of Sir Walter Scott. And such relationships flourished among his friends in the Souls. Often they were little more than a game indulged in by the aristocracy. Clare had been involved in them before and may well have regarded him as another plaything. It also should be borne in mind that for Holmes, England was a place where he could indulge in "play" and escape from "what one wants to do for life." As

he once wrote to Clare: "My life is my wife and my work."

Holmes' wife, Fanny Dixwell Holmes, only accompanied him on three of his trips to Europe. Fanny was the daughter of Holmes' former schoolmaster and came from an old Puritan family of quite modest means. Her family lived far from the center of Cambridge, Massachusetts, in those days little more than a provincial village. She had little interest in intellectual pursuits except for an interest in art that Holmes encouraged, "if only for her own sake to find a voice for something within her." Shortly after *The Common Law* was published, she displayed some of her needlework embroideries at the Boston Museum of Fine Arts and at the Ladies Decorative Arts Society in New York. A newspaper reviewer praised her as "an American artist of noticeable qualities." However, she never pursued her ambition further and 20 years later when the couple moved to Washington, she destroyed most of her embroideries.

Fanny was eccentric. In the Holmes' Boston apartment, she allowed her pet birds to fly free and marmosets and squirrels ran loose in the bedroom. She was known for her insightful and often caustic comments, but her conversation was prone to drift into eccentric fantasies. She had few friends



(Harvard Law School Art Collection)

Holmes became associated with a group of Anglo-Irish aristocrats called the "Ascendancy." In 1896, Holmes developed a close relationship with Lady Clare Castletown. The nature of his relationship with "Lady Clare" has been the object of speculation over the years.



Harvard Law School Art Collection

When Holmes married at the age of 32, he did not choose a titled aristocrat of England, but the daughter of his old schoolmaster. Fanny Dixwell was considered to be eccentric, and did not enjoy socializing.

and supposedly “hated” several of her younger and prettier sisters who she had been obliged to raise. However, childless she doted on her nieces and nephews and would occasionally give money to groups of children that she met on the streets so they could go to the circus. She made little attempt to make herself attractive, dressing in out-of-date styles and adopting an unflattering hairstyle. One day when Holmes was off at the Supreme Court, she showed his secretary the intricate baby dress that Holmes’ mother had sewn for him over eighty years before. Over the secretary’s protests she tossed the dress into the fire. Despite such episodes, Holmes was always protective of her and her privacy.

In return, she was devoted to Holmes. When they married—both bride and groom were aged 32—they had been friends for some 20 years. They had corresponded while he was away in the Army and he visited the Dixwells often during his legal studies at Harvard. Despite her own eye problems, she would read to him in the evening from light novels and newspapers so that he could save his eyesight for his work. She managed the couple’s finances and took care of their domestic arrangements. When he was appointed to the Supreme Court, she overcame her shyness and participated in Washington society as was expected of the wife of a Supreme Court Justice. When she died in 1929, Holmes wrote: “For sixty years she made my life poetry for me . . .”

On their wedding journey in 1874, Fanny was seasick and did not enjoy the company of the Bostonians who comprised the majority of the passengers on the eastbound journey. In London, they dined with Robert Browning and Anthony Trollope, and had tea with Thomas Carlyle. However, ill at ease in public, Fanny did not find London society to her taste. She was shocked by the size of the copious meals, noted the “fat old ladies with immense bosoms and larger stomachs,” and referred to one of her hosts as a “twinkling hippopotamus.” In addition, she may have felt somewhat

excluded from Holmes’ reunions with his various English friends and was not happy with Holmes’ female friends. “Wendell[went] to see his charmer and return the book. Brought the book back with him,” she wrote.

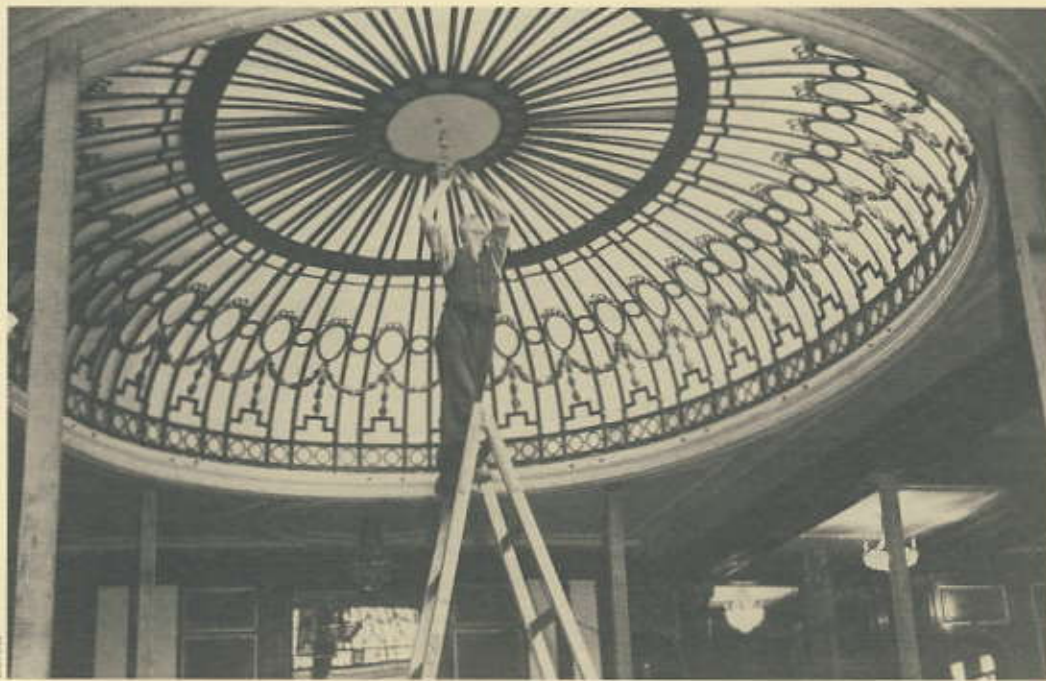
In 1882, they spent the majority of their time sightseeing in England and on the Continent. However, she did not find travel and socializing enjoyable. At the same time, she was aware that Holmes thrived on social interaction and contact with leading legal thinkers in Britain. Accordingly, after this second journey together, she adopted a practice of encouraging Holmes to go on his own while she stayed at home. At first, she overcame Holmes’ reluctance to travel without her by arguing that she was needed at home to care for Holmes’ father and that there was not enough money for two to go. But Holmes knew that her reluctance was really just the difference in their natures. After her death he confided to a friend: “I like solitude with intermissions, she was almost a recluse. I have my work and a fair number of people who I like to see. She shocked Gifford Pinchot once by saying ‘I have no friends’; and it was true that there was no one but me with whom she was very intimate.” On another occasion, he concluded: “She and I are a queer contrast in that way as in many others.”

In 1909, Oxford University invited Holmes to receive an honorary degree and, consistent with her practice for the last five trips, Fanny insisted that Holmes go without her. Because their last separation had been difficult, Holmes refused to go unless she accompanied him. Realizing the importance of the occasion, Fanny acquiesced. The journey was made easier for her because they stayed with close friends—an arrangement enabling Fanny to remain in relative seclusion while Holmes went out in society. Still, she refused to make the final European journey in 1913.

While Fanny did not enjoy ocean travel, Holmes thought “one of the greatest experiences of life” was witnessing “a storm at sea.” Indeed, seeing the forces of nature unleashed and feeling the sea tossing a great ship as if it were a leaf in the wind is an awesome and humbling experience. And the North Atlantic, which has been described as the most dangerous ocean in the world, has some of the most spectacular storms. Although Holmes’ crossings took place during the summer months when that sea can look like a placid pond, there was always the possibility of storms and, in the latter part of August, even hurricanes. Considering the technology available during this period, Holmes must have had a strong sense of adventure.

During the course of his travels, Holmes saw an unprecedented transformation in passenger ships. When he began, they looked much like the sailing ships that had traversed the seas for thousands of years. In less than fifty years, he saw them lose all resemblance to the ships his ancestors had known to become steel leviathans, some of the largest moving objects ever created.

Holmes’ first journey to Europe in 1866 was on the Cunard steamship *Persia*.



By the time of Holmes' last eastbound trip to Europe on the *Mauretania*, travel at sea had become luxurious. Ornate rooms included items such as the intricate glass dome (above) which graced the first class lounge.

When she appeared on the Atlantic some ten years earlier, the *Persia* had captured the transatlantic speed record making the journey from New York to Liverpool in 9 days, 10 hours and 22 minutes. However, it took Holmes two weeks to make the crossing. While the *Persia* had the relatively recent innovation of a cast iron hull, she also had sails to assist the paddlewheels located on either side of the ship. Compared to modern cruise ships the *Persia* was tiny, just 3,300 gross tons or less than one-twentieth the size of Cunard's current flagship, the *Queen Elizabeth II*. Two hundred and fifty passengers could be accommodated in her 376 foot by 45 foot dimensions.

On the return trip, Holmes took the *China*, another Cunard ship. Although only six years newer than the *Persia*, the *China* was radically different because she had a propeller instead of paddlewheels. In earlier ships, the huge machinery necessary for the paddles occupied the prime commercial area and required large quantities of coal. In addition, whereas a submerged propeller is applying its full force all the time to moving the ship, only one-third of a paddlewheel is in the water at any given moment. A propeller was not only more efficient but allowed the steamship company to use the center of the ship, i.e., the most stable part of the ship, for first-class accommodations. In turn the stern area that had been used for first class cabins, could now be used for the growing immigrant trade. As a result, even though the *China* at 2,658 tons was smaller than the *Persia*, she could accommodate 268 first class and 771 steerage passengers.

In 1896, Holmes traveled on the *Etruria* and two years later, on her sister ship, the *Umbria*. These ships had been built in the mid-1880s. Each ship had two smoke stacks and three masts. However, by this time, steam power and propellers were considered so reliable that the sailing masts had

been vestigial. Unfortunately, this Victorian confidence proved somewhat misplaced as both ships experienced problems with their propellers during their careers, which left them wallowing helplessly in mid-ocean. Still, Holmes was not deterred from making repeat voyages on both ships.

Other innovations were more successful. Both ships featured electric wiring in the public rooms, although not in the passenger cabins, and refrigeration equipment replaced ice rooms. Below decks, Holmes could roam through several public rooms including a grand saloon, a ladies saloon, a music saloon, a smoking saloon, and a dining room. In earlier ships, passengers were required to sit on long wooden benches on either

side of the dining room table. *Etruria* and *Umbria* had individual leather swivel chairs. Holmes was delighted when the captain of the *Umbria* invited him to dine at his right hand on the eastbound voyage in 1898.

Of course, in order to keep passengers from flying into their food or into each other as the ship rolled and pitched, the chairs were bolted to the floor. For the same reason, the table was fitted with edges that could be raised up to prevent dishes from landing in the passenger's lap. Still, this was a considerable improvement over what Holmes had found just a few years earlier when the ships were so unstable that each piece of china was fitted into circular cutouts on wooden racks to prevent their movement.

Indeed, life onboard an ocean liner in the second half of the nineteenth century bore little resemblance to life on a modern cruise ship. There was no schedule of activities for the passenger to choose from and there were no theatrical productions in the evening. Passengers had to entertain themselves. Parlor readings, songs, recitations, and the for-charity ship's concert (also known as the passenger talent show) were popular. Furthermore, until ships began to have refrigeration compartments, the quality of the food deteriorated as the voyage progressed. On the return leg of his first trip, Holmes gave the captain a pair of grouse that he had shot in Scotland. It is unlikely that many cruise ship captains today receive gifts of food from their passengers.

At this time, the dress code on board was informal. Passengers wore practical "steamer clothing" which would both keep their owners warm in the cold North Atlantic weather and which would not be damaged by the spray or by the sea water which occasionally washed into the passenger area. It was not until the early 1900s that ocean liners became a venue for fashion displays.

By the time of his last eastbound voyage in 1913 on the 31,000 ton *Mauretania*, all of this had changed and life at sea had come to resemble life in a grand hotel. "With half again as much space and natural light to work with as had ever been before [Cunard's designers] changed for good the expectation that an ocean crossing would consist of long days of enclosure, stupefying hours in rolling salons, or at best camaraderie in dim chambers." Passengers found richly carved wooden paneled public rooms reminiscent of a London gentleman's club or of a salon in a French chateau. *Mauretania's* alternative dining room, the Veranda Grill, had topiary art in wooden tubs. The private suites were decorated with echoes of Sheraton, Chippendale and Adams. Many cabins had such modern luxuries as telephones and private bathrooms. The nearly identical *Lusitania* upon which Holmes made his final ocean voyage, was considered even brighter and prettier. It featured stained glass skylights, an Italian Renaissance grand staircase, and a two-story dining room based upon the Petit Trianon at the Palace of Versailles.

Holmes found the atmosphere of these ships conducive to unwinding from his work at the Court. He wrote to Felix Frankfurter from the *Mauretania*: "The first 48 hours on this voyage I felt like a fog rather than a man but I have gradually reconstituted and have ascended like the race through victuals, drinks, standing about till I was tired and resting till I was bored, to your book and the potentiality of human converse."

The *Mauretania* and the *Lusitania* not only had splendid appointments, but they were technological marvels which had rendered all the first-class tonnage of the North Atlantic fleet obsolete when they went into service in 1907. Equipped with the still-novel Parsons steam turbine engines, they were the first ships to make the crossing in less than five days. Indeed, *Mauretania* would hold the transatlantic speed record for an unprecedented twenty years. They were the first liners to use four propellers and they carried 7,000 tons of coal to feed their 24 boilers—twice as many propellers and boilers as their existing competition could boast. The ships could accommodate 2000 passengers and 850 crew members.

The impetus for building these ships was two-fold. First, in the early years of the twentieth century, the financier J.P. Morgan, made a move to monopolize the transatlantic passenger market forming a trust called the International Mer-

OCEAN STEAMSHIPS.

CUNARD



EUROPE VIA LIVERPOOL LUSITANIA

Fastest and Largest Steamer
now in Atlantic Service Sails
SATURDAY, MAY 1, 10 A.M.
Transylvania, Fri., May 7, 5 P.M.
Orduna, - - Tues., May 18, 10 A.M.
Fusania, - - Fri., May 21, 5 P.M.
LUSITANIA, Sat., May 29, 10 A.M.
Transylvania, Fri., June 4, 5 P.M.

Gibraltar-Genoa-Naples-Piraeus
S.S. Carpathia, Thur., May 13, Noon

FOUND THE WORLD TOURS
Through bookings to all principal Ports
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Company's Office, 21-23 State St., N. Y.

NOTICE!

TRAVELLERS intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies; that the zone of war includes the waters adjacent to the British Isles; that, in accordance with formal notice given by the Imperial German Government, vessels flying the flag of Great Britain, or of any of her allies, are liable to destruction in those waters and that travellers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.

IMPERIAL GERMAN EMBASSY
WASHINGTON, D. C., APRIL 22, 1915

In 1915 the Cunard line advertised travel to Europe on its super ship the *Lusitania*. The Imperial Embassy in Washington warned would-be travelers of the risks inherent in sailing on a ship flying the flag of its enemy, Great Britain.

compare the sea trials of the *Titanic* with those of the *Mauretania* five years earlier. Both ships were the second of their class to be built, so the owners had some idea of their capabilities based upon their predecessors' performances. Nonetheless, Cunard always concerned about safety, put the *Mauretania* through an extensive trial, taking the ship around Scotland even though the builder had already put the ship through an extensive unofficial trial in the North Sea. In sharp contrast, White Star conducted a half-day of sea trials with the *Titanic* in Belfast Lough. As a result, when the *Mauretania* went into commercial service her officers had a good idea of her speed, the distance it would take to stop the ship, and the

cantile Marine Corporation. Within a short period, Morgan had purchased or signed agreements with every major shipping line except Cunard and the French Line. This posed a serious threat to Britain's long-standing domination of the North Atlantic passenger ship business. Second, Germany, which was emerging as Britain's archrival, had constructed larger, faster, and more luxurious ships than anything the British had to offer. Consequently, the British Admiralty made a £2.5 million loan to Cunard, plus an annual subsidy to defray operating costs, for the construction of two new ships designed to regain Britain's preeminence on the North Atlantic.

Morgan, however, was not to be undone. He could not build ships faster than the two new Cunarders but he could build ships that were larger and more luxurious. Accordingly, his Oceanic Steam Navigation Company Limited, or White Star Line as it was better known, authorized the Belfast firm of Harland & Wolf to construct three super liners. These ships would be so vast that no existing dry dock or pier could accommodate them. Since White Star was an old British company, the ships would carry the British flag and be manned by British crews even though owned by Morgan. The first of the three was the *Olympic*, launched in 1910. A year later, with J.P. Morgan himself present, the even more luxuriously appointed *Titanic* was launched.

After an ocean liner is launched and fitted out, it is put through a series of tests called sea trials before going into commercial service. The purpose is to detect any problems with the ship and to familiarize the new owner with the ship's abilities. It is interesting to com-

ship's ability to turn. Conversely, the officers of the *Titanic* had only a vague notion of their ship's abilities—an ignorance that was to cost them dearly just a few days later.

The story of the *Titanic*'s maiden voyage is well known. At noon on April 10, 1912, she left Southampton, England. As she pulled away the turbulence created by her passage caused the American liner *New York* to snap her moorings and nearly collide with the *Titanic*. If that collision had occurred, the *Titanic* would have been delayed and the tragic collision that ended her voyage four days later would not have occurred.

After stopping at Cherbourg, France, and at Queenstown, Ireland, *Titanic* sailed uneventfully through an unusually placid North Atlantic. However, at 9:00 a.m. on April 14, 1912, *Titanic* received a radio message that there was ice in the vicinity. Five more reports of ice were received during the course of the day and into the night. Still, *Titanic* raced along at 22 and one-half knots. While the *Titanic* was incapable of taking the North Atlantic speed record from the *Mauretania*, White Star felt it was important to its competitive position for the new flagship to arrive in New York on schedule.

Again, it is interesting to compare *Titanic* and *Mauretania*. On her maiden voyage, the *Mauretania* encountered a thick fog off New York. A deputation of influential passengers asked the captain to ignore the fog and proceed so that the ship could dock. The captain, citing the risk of a collision, refused to do so and instead anchored until the danger passed.

At 11:40 p.m., a large black shape emerged out of the darkness directly ahead of the *Titanic*. The ship swerved to avoid it. However, *Titanic*'s relatively small rudder and her three propellers were inadequate to turn the ship quickly. At first, she appeared not to be answering at all. She gradually began to turn, but not before the iceberg brushed along the *Titanic*'s side. In so doing, it ripped open five of *Titanic*'s watertight compartments, dooming the ship. Ironically, the ship might well have survived had the crew made no attempt to avoid a collision, instead allowing the ship to strike the iceberg head on.

Although there were more lifeboats onboard than required by law, there was only capacity in the lifeboats for 52 percent of the people onboard. Compounding this difficulty, in the chaos following the collision, several of the boats were launched at less than full capacity. Many people were reluctant to leave the big warm ship to be lowered onto the cold, dark sea in a rowboat. At 2:17 a.m. on April 15, 1912, *Titanic* plunged below the water. 1503 people died including millionaires John Jacob Astor, Benjamin Guggenheim, and Mr. and Mrs. Isidor Strauss. In addition, while efforts were made to save some of the valuables onboard, the ship went down with a priceless copy of the *Rubaiyat of Omar Khayyam*, several motorcars, jewels, securities, cash, and other valuable freight.

News of the disaster spread quickly and, responding to the public clamor, a United States Senate investigation commenced within days of the sinking. Holmes confided to Sir Fredrick Pollock: "Naturally we have all been thinking about

the *Titanic* on which were lost men like Millet the painter, war correspondents, etc. and Archie Butt who were known and loved here. I am afraid that the Senator in charge of the investigation [William Alden Smith of Michigan] has shown a want of good taste and has opened himself to some ridicule. I know him but slightly, but have kindly feeling toward him, I haven't read the proceedings."

Holmes' reference to a lack of good taste probably refers to the speed with which Senator Smith instituted the inquiry. Senator Smith obtained the assent of the Senate to conduct an investigation, selected the members to sit on the subcommittee, and traveled to New York with his subcommittee and staff in time to meet the survivors of the *Titanic* as they arrived in the Cunard line's *Carpathia* only six days after the disaster. He then commenced hearings in the Waldorf Astoria Hotel.

Overlooking the fact that the *Titanic* was ultimately owned by Americans, the members of the British press were indignant that the Americans were conducting an inquiry into the sinking of a British flagship on the high seas. As a result, the British Board of Trade commenced its own investigation into the disaster.

Even in that less litigious time, lawsuits were also bound to result from such losses. Soon, White Star was faced with over \$16 million in claims. The wealthiest and most socially prominent families, however, filed no claims viewing it as vulgar to attempt to place a price on a gentleman's life.

Facing numerous lawsuits, on October 8, 1912, White Star filed a petition in the United States District Court for the Southern District of New York invoking a federal statute that allowed ship owners, under certain circumstances, to limit their liability to the value of the owner's interest in what remained of the lost ship. The purpose of this statute was to encourage investment in ships by limiting an owner's financial exposure for acts that occurred when the ship was out of the owner's immediate control. The petition asked the Court to determine the value of the owner's interest in what remained from the *Titanic* and her pending freight; adjudge that the owner's liability was limited to that amount; and enjoin the prosecution of any other suits against the owner. According to the petition, the owner's interest consisted of the 14 remaining lifeboats from the *Titanic* (13 of which the *Carpathia* brought back to New York and one of which was found drifting abandoned in mid-ocean by the *Oceanic*), some freight that was to have been loaded aboard the *Titanic*, and some remaining passage money for a total of \$91,805.54.

Surprisingly, only two claimants filed exceptions to the petition. In addition to arguing that White Star had not alleged sufficient facts to show that the limitation of liability applied, they argued that as a matter of law the American limitation of liability could not apply because the disaster involved a British ship in international waters. If any limitation of liability applied, they argued, it had to be one created under the law of Great Britain.

The British Merchants' Shipping Act of 1894 was not so forgiving as the American statute. A ship owner's liability for personal injury was limited to £15 for each ton of the



Curtis

Bruce Ismay (center with moustache) testified before the Senate Committee investigating the *Titanic* disaster. A Manager of the White Star Line, Ismay had been a passenger on the ill-fated voyage.

ship's tonnage and £9 per ton of the ship's tonnage for property loss. Since *Titanic* was over 46,328 tons, under that statute, White Star's liability for personal injury would have been £694,920 and £370,624 for property loss. Assuming an exchange rate of \$5 for £1, White Star's potential liability was 58 times greater under British law than under American law.

Judge George C. Holt agreed with the claimants concluding that three fundamental principles of law were decisive. First, the rule that a nation's laws do not take extra-territorial effect. Second, the rule that a ship on the high seas is part of the country to which she belongs. Third, the rule that liability for a tort was governed by the law where the wrong occurred. Since the sinking did not occur in United States territory and did not involve an American ship, these principles compelled the conclusion that American law did not apply. If it were otherwise, Judge Holt hypothesized, American law including its limitation of liability would govern even if the sinking had occurred in the harbor in Southampton, England. Furthermore, the mere fact that actions had been commenced in American courts could not be determinative. If the governing law were the law of the place where the action was commenced, the rights of the parties would be subject to the differing standards of each country in which an action was brought. Since there were many different nationalities aboard the *Titanic*, the court foresaw numerous actions brought around the globe, each governed by different legal standards. Clearly, Judge Holt concluded, such differing results could not have been within the intent of Congress in enacting the limitation of liability.

Although Judge Holt reviewed a substantial number of cases concerning the American limitation of liability, he placed primary reliance on the Supreme Court's decision in *The Scotland*. In that case, a British ship collided with an American ship in the Atlantic off New York. Both ships sank and the owners of the American ship brought an action against the

owners of the British ship. The United States District Court for the Eastern District of New York and the Second Circuit agreed with the plaintiffs that the owners of a foreign ship could not invoke the American limitation of liability. The Supreme Court did not agree. Justice Bradley, writing for a unanimous Court, held that Congress had made no express provision in the statute limiting its applicability only to American ship owners. Therefore, the law was construed to be of general applicability and could be invoked by anyone using American courts, including foreign owners. However, in *dicta*, Bradley said that if an accident involved two foreign ships sailing under a common flag then a court would administer the maritime law as accepted and used by their own sovereign. Seizing upon this *dicta*, Judge Holt reasoned that a collision involving a foreign ship and a natural object of no nationality is the same as a collision between two ships from the same country. Therefore, he held, the exception set forth in *The Scotland* governed. Accordingly, Judge Holt ordered the petition dismissed.

White Star appealed the decision but the Second Circuit felt unable to resolve the controversy. Instead, it certified three questions of law upon which it "desire[d] instructions" from the Supreme Court:

A. Whether in the case of a disaster upon the high seas, where (1) only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner's liability for such disaster, such owner can maintain a proceeding. . . .?

B. Whether, if in such a case it appears that the law of the foreign country to which the vessel belongs makes provision for the limita-

tion of the vessel owner's liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner of such foreign vessel can maintain a proceeding in the courts of the United States, under said statutes and rules?

In the event of the answer to question B being in the affirmative:

C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?

The case was argued to the Supreme Court over two days in January 1914. As a young lawyer in Boston, Holmes had practiced admiralty law and this area of the law was not unfamiliar to him. He and the rest of the Court were initially skeptical of the owner's position, "but when I got pen in hand I thought there was no doubt, and all but McKenna came in, Lamar absent making peace with Mexico, and Lurton not taking part." Accordingly, on May 25, 1914, Holmes, over the dissent of Justice McKenna, delivered the opinion of the Court.

Holmes began his analysis by conceding that an act of Congress could not govern the conduct of a British ship on the high seas and that the foundation for recovery upon a British tort is an obligation created by British law. However, neither of these points was determinative. The statute in question was a limitation on liability, which by its very nature, was designed to limit liabilities assumed already to exist elsewhere. As a result, the issue was whether Congress could legislate so as to preclude American courts from enforcing an obligation created under foreign law on the ground that it is contrary to domestic policy. Holmes held that Congress had such power. Citing *The Scotland* and another Supreme Court decision, *The Bourgogne*, he pointed out that the limitation of liability was applied in those cases even though no act of Congress or law of the United States governed the parties' substantive relations. "The essential point was that the limitation might be applied to foreign ships if sued in this country although they are not subject to our substantive law."

The owner had hoped to use this action to end all of the litigation over the disaster wherever it was pending. However, Holmes dashed that hope. Because the limitation of liability only served to limit the recovery of those who saw fit to sue in the United States, it did not require all claimants to join in this proceeding or "cut down rights vested under English law, as against, for instance Englishmen living in England who do not appear." Although the Court could imagine that the owner might face difficulties in having to comply with different local requirements in each country in which it was sued, that was "no sufficient reason for not apply[ing] the statute as it has been construed; on the whole, it would seem with good effect."

In conclusion, Holmes held that the first two questions certified by the Second Circuit must be answered in the affirmative and the third, the law of the United States.

Justice McKenna's single sentence dissent said without

elaboration that he considered "it a proper deduction from *The Scotland* that the law of the foreign country should be enforced in respect of the amount of the owner's liability."

Holmes' opinion has been criticized for its brief, seemingly cold, recitation of the facts. "The *Titanic*, a British steamship, which sailed from Southampton, England, on her maiden voyage for New York, collided on the high seas with an iceberg, on April 14, and sank the next morning, with the loss of many lives and the total loss of vessel, cargo, personal effects, mails and everything connected with the ship except certain lifeboats." However, that portion of the opinion simply recounts the Second Circuit's statement of the facts upon which that court had certified its questions to the Supreme Court. For Holmes to have written more about the disaster would have meant going beyond what had been certified which, of course, would have been improper. In addition, the parties in presenting their case to the courts placed no emphasis on the events of that night other than the fact that *Titanic* was sailing under the British flag and the fact that no other ships were involved in the collision that sank the *Titanic*. "Of course, the eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials. . . ." Holmes wrote in a letter to Frankfurter in December 1915.

Turning to the merits, as noted earlier, Holmes initially found the owners' legal position dubious. In addition, with the loss of people he admired in the disaster and being a frequent transatlantic passenger, his natural sympathy would have been with the claimants. It should not be assumed, however, that Holmes was in any way in awe of people merely because they were fashionable. "I was saying to some one that I rather thought that if the fashionable world of America (excluding those people of power who happen to belong to it but do not derive their distinction from belonging to it) was destroyed by pestilence, the world would be better off on the whole, and I surmised the same of England," Holmes wrote to Canon Patrick Sheehan an Irish priest and correspondent in November 1907.

So while his natural inclination might have been to sympathize with the claimants, once it emerged that the dispositive issue was the power of Congress to enact such a statute, Holmes's personal inclinations became irrelevant. "Of course, such considerations have no effect on the mind of one who is accustomed to weigh questions impersonally or who is fit for his business," Holmes wrote to Patrick Sheehan in 1904. Indeed, a cornerstone of Holmes' philosophy was judicial restraint. No one had appointed him to overrule the decisions of the political branches of government just because he disagreed with their choices. He expressed that sentiment in a letter to Felix Frankfurter written on March 24, 1914: "[A] law should be called good if it reflects the will of the dominant forces of the community even if it takes us to hell." Explaining this phenomenon to Felix Frankfurter in a letter in 1921, Holmes said he found that he often "loathed most of the things I decided in favor of."

The Supreme Court's decision did not end the case. While the Supreme Court had determined that White Star could invoke the limitation of liability, White Star now had to show

that it indeed met the conditions set forth in the statute for the limitation of liability to apply. Accordingly, when the case was remanded back to the district court, White Star had to demonstrate that there had been no negligence in the sinking, or if there was negligence, White Star had no privity or knowledge of the negligence.

However, the claimants could cite a decision in a British case in which White Star had been held negligent. Furthermore, the argument that the owners had not had direct control of the ship at the time that it collided with the iceberg was undercut by the fact that White Star's managing director, J. Bruce Ismay, had been aboard and had participated in decisions about the ship. Indeed, there were claims that he had been given a copy of a report from another ship warning of ice in the vicinity and merely put it in his coat pocket.

On December 17, 1915, the lawyers for White Star announced that a settlement had been reached. White Star would pay \$664,000 to be apportioned among the claimants based upon a revised schedule of the claimed losses. The average claim had been for \$1,500, and the average payment under the settlement was \$1,000. Claims for loss of life were capped at \$50,000. In exchange, the claimants would drop all of their cases in American courts and in English courts. In addition,

the claimants agreed that White Star was not in privity and did not have knowledge of the negligence—an acknowledgment which White Star could use if any further litigation was filed.

As for Holmes, World War I put an end to his transatlantic sojourns. The world he knew in Britain had vanished along with the torpedoed *Lusitania*. In addition, even before the war Holmes was becoming very reluctant to travel without Fanny. "As one gets older the anxieties of distance increase," he wrote Patrick Sheehan on August 14, 1910. "What would bring me [to Europe] would be to see my friends—not least, yourself. But as I have told you, I grow more unwilling to risk the ocean between my wife and myself so that I hardly think I shall do it unless she comes with me. . . ." Still, looking back in 1930 at age 89, he wrote to the expatriate Lewis Einstein: "I envy you and wonder if I have been foolish not to risk another trip abroad. I had my cousin . . . at luncheon the other day who is a year and some months older than I and who has just returned from Algiers etc., a three month trip that seemed to have made him younger. But me—not."

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