THE POLLOCK – HOLMES LETTERS

VOLUME I

I

1874-1894

BIDEFORD, July 3, 1874[1]

My dear Mr. Holmes:

Many thanks for your papers, which I have read in a slovenly way this morning, that being the only way at this distance from law books. There are many points you discuss or suggest which I should like to look more into—meanwhile I will give you some rough jottings as evidence that I have really read your articles. (You know the formula to thank an author for a work one means *not* to read — write off before you open the packet: "My dear xxx: Thanks, etc., etc. for your etc., etc. just received from the reading of which I hope to derive etc., etc.") On the notice anent Austin,[2] I thoroughly agree that the only definition of law for a lawyer's purposes is something which the Court will enforce. As to duty in cases of contract, I think the enforcement when practicable of specific performances clearly distinguishes the "sanction" from what you call a tax on a course of conduct.[3] As to the paper on Torts,[4] I am glad you so clearly expose the fallacy of treating legal negligence as a state of the negligent's consciousness. I wholly agree that both here, and in the nearly parallel cases you mention, where the question is whether a certain variation of a thing from the description it

[1] At the time when this letter was written Holmes was in England.

[2] 6 *American Law Review* 723 (1872). The notice was concerned with Pollock's article "Law and Command," 1 *Law Magazine and Review* (N.S.) 189 (1872), in which John Austin's definition of law had been criticized. Holmes's notice is reprinted in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (Shriver, ed. 1936), hereinafter cited as Shriver, p. 21, and in 44 *Harvard Law Review* 788 (1931).

[3] In this review Holmes had stated that "the notion of duty involves something more than a tax on a certain course of conduct." 6 *Am. L. Rev.* at 724; Shriver, at 26; 44 *Harv. L. Rev.* at 790.

[4] "The Theory of Torts," 7 *Am. L. Rev.* 652 (1873); reprinted, 44 *Harv. L. Rev.* 773 (1931).

was sold by amounts to difference in kind so as to annul the sale, the true theory is that all attempts to get a scientific measure are out of place and we can only seek a rough measure in "the average opinion of the community" — or such of the community as are accustomed to dealings of the kind in question. And by the way not only the juryman's verdict but the judge's applications of "natural justice," "the reason of the law," *et hoc genus omne*, really come to the same thing. As to the case which professed to lay down a mathematical rule about rights to light and air,[5] I think you will find that notion has been exploded by several later decisions in the Appeal Court. (*N. B.* Our equity cases in courts of first instance are for various reasons to be used with great caution as authorities on questions of pure law,)

As to mercantile custom, see the important late case of *Crouch* v. *Crédit Foncier*,[6] showing that the law merchant cannot now be extended by evidence of any modern custom: a curious contrast to the time when the law was still so fluid that the Court could take the evidence of merchants to satisfy itself whether pirates were perils of the sea. On the other hand the customs of particular trades as distinct from mercantile custom in general have of late years had more weight given to them than ever before, *e.g. Fleet* v. *Murton*.[7] . . . Your classification of Wrongs [8] falls in partly with a notion I have had in my head some time, thus: The text-writers say there is no intelligible distinction between the *delict* and *quasi-delict* of the Roman lawyers. I think there is one. *Delict* proper being the breach of a general duty, *i.e.* not arising from any special position of the party. (Whoever & whatever I am, I may not throw things on my neighbour's head.) *Quasi-delict* the breach of a particular duty (*i.e.* one which does arise from, etc.). (*As a householder*, I may not let anybody throw things out of my window on my neighbour's head.) I think that in English law the somewhat anomalous action for a "tort arising out of a

[5] Beadel v. Perry, L.R. 3 Eq. 465 (1866).
[6] L. R. 8 Q. B. 374 (1873).
[7] L. R. 7 Q. B. 126 (1871).
[8] In his essay on "The Theory of Torts," Holmes suggested that the subject Torts included Duties of All to All, Duties of Persons in Particular Situations to All, and Duties of All to Persons in Particular situations. See his tabular analysis, 7 *Am. L. Rev.* 663; 44 *Harv. L. Rev.* 785.

contract," as against a carrier *e.g.*, must be explained in this way. Thus *Delict* would comprise your "Duties of All" and *Quasi-Delict* would coincide or nearly so with your "Duties of Persons in Particular Situations to All." Have you abolished special pleading of the ante-Common-Law-Procedure-Act kind in Massachusetts? If not, here is a gem from Viner's *Abridgment* somewhere in title Pleader, which may be useful to you. I think it is not generally known. I turned it out once by chance, looking for something else, and its oddity fixed it in my mind. A declaration in trover for bottles without naming how many bottles is ill: but a declaration for twelve pair of boots and spurs without naming how many spurs is well enough: for it shall be intended of the spurs that belong to the boots. I write at once in this disorderly fashion, as I don't know how long you are to stay in town or in England. I should like to have your Boston address before you go, for some day I propose to inflict on you a copy of a book I am now at work on which (if it ever comes out) will embody with improvements the most of what I wrote in the *Law Magazine*.[9]

My wife adds to my own her kindest regards for you and Mrs. Holmes.

Yours truly,
F. POLLOCK

LONDON, May 2, 1876

My dear Mr Holmes:

I have been rather busy the last week or two, or I should have sooner thanked you for your very interesting paper on "Primitive Notions."[1] Your position seems well made out by evidence and analogy, and I think it a good piece of work in itself, and of just the kind now wanted to clear the way for an adequate handling of the general body of the Common Law. Whether it would be at all possible, until much more has been done in this way, to produce a really good institutional book, *quaere*. A Mr. Nasmith produced this last winter 2 vols. of so-

[9] Pollock, "Law and Command," *supra*, note 2.

[1] "Primitive Notions in Modern Law," Part 1, 10 *Am. L. Rev.* 422 (1876).

called *Institutes of English Private Law*. They had only the merit of good intentions. If you read our *Saturday Review*, you may have seen there what I thought of them.[2] It is wonderful how little we (on this side) have improved upon Blackstone. The tinkerings of his modern editors are mostly pitiful. Kent is a considerable advance, but leaves much to be desired.[3] For one thing, it is too large for a first book. I wonder from which side further advance will come. Prof. König of Bern, who has given my book a very handsome notice in the *Zeitschrift des Bernischen Juristen-Vereins*[4] (so you see I have a European reputation!) observes that American lawbooks are as a rule more scientific than English, & I suppose he is right, though I should not call Story's a happy instance. Anyhow, your *Law Review*[5] is far above anything of the kind here.

I don't think we shall mend matters by getting people who know nothing of the law of England to lecture on something they choose to call Jurisprudence: and the Inns of Court seem by the late changes in their arrangements in this behalf to have come to the same mind.[6]

You were good enough to ask about the chances of my coming to Boston. I should like it of all things (with or without further proceedings to the West: one may dream, while one is dreaming, of Yosemite valley & Sierra Nevadas), but don't see my way to it for at any rate the next year or two.

Yours truly,
F. Pollock

[2] 41 *Saturday Review* 54 (Jan. 8, 1876.)

[3] The twelfth edition of James Kent's *Commentaries*, edited by Holmes, had been published in 1873.

[4] *Principles of Contract* (1876), reviewed by K. G. König in 11 *Zeitschrift des Bernischen Juristen-Vereins* 289 (1876).

[5] The *American Law Review*, of which Holmes had been editor from 1870 to 1873.

[6] In 1873, following the recommendation of the Council of Education, the Inns of Court adopted a new system of legal education by which the six readerships on various subjects were done away with and in their place were established four professorships. The professors were to be assisted by tutors. In place of the Readership on Jurisprudence there was instituted a Professorship in Jurisprudence, including in that subject International Law, public and private, Roman Civil Law, Constitutional Law, and Legal History.

LONDON, July 26, 1877

My dear Mr. Holmes:

Many thanks for no. 2 of "Primitive Notions,"[1] which is very interesting & I think important for the scientific understanding of the law. The Select Committee of the House of Commons on Employers' Liability for Injuries to Servants (*i.e.* with regard to the doctrine of "common employment") has just published its report & evidence, which strongly bring out the difficulty of accounting for the general rule of vicarious liability for a servant's act unless as a survival. If you can get at English Blue Books this would I think interest you.

There seem to me to be two fictions mixed up in the doctrine. (1) The *personal* fiction that act of agent = act of principal — which properly belongs to the region of contract, but has got extended beyond it. (2) The *real* fiction (as pointed out by you) that the *thing* or instrument is liable. In the modern legal notion (1) prevails; historically I suppose (2) is almost or altogether the original efficient cause. . . .

Do you think Codification a humbug in the sense that codified arrangement of the law is undesirable *in itself*, or only that there is no advantage in doing it by legislative authority? In your article on "Theory of Torts"[2] you seem to desire "comprehensive arrangement" which I suppose means some more or less codified exposition.

I so far agree as to admit that the consideration of case-law as a pure science tends to make one look on codes as a kind of brutal interference with the natural process of legal reason. In 1874 I wrote a series of articles in the *Pall Mall Gazette* on "Case Law and Inductive Science"[3] which were I believe taken by several people as a covert argument against codification. They produced a long half-controversial letter from Sir James Stephen[4] & I had to explain that such was not my meaning.[5]

[1] "Primitive Notions in Modern Law," Part 2, 11 *Am. L. Rev.* 641 (1877).

[2] 7 *Am. L. Rev.* 652 (1873), reprinted 44 *Harv. L. Rev.* 773 (1931).

[3] Reprinted in Pollock's *Essays in Jurisprudence and Ethics* (1882), p. 237, *sub nom.*, "The Science of Case Law."

[4] Sir James Fitzjames Stephen, first baronet (1829–1894); Judge of the High Court of Justice, 1879–1891; author of *History of the Criminal Law* (1883); vigorous advocate of codification of the English law.

[5] Pollock's views at this time concerning the problem of codification were developed at some length in the introduction to his *Digest of the Law of Partnership* (1st ed., 1877)

(I pursued the analogy afterwards into the region of moral judgments, comparing the manner in which ethical standards are gradually refined & modified to the development of case-law by decisions[6] — this however has only a philosophical interest). Stephen met the supposed scientific objection with (as I think) the right answer: that laws exist not for the scientific satisfaction of the legal mind, but for the convenience of the lay people who sue & are sued. Now to say that law is for practical purposes more certain without a code than with one seems to me sheer paradox. Compare the Indian Penal Code with the amazing muddle English criminal law has drifted into through (among other causes) the combined meddling & timidity of the Legislature. However, I am not really in possession of your view: I hope you will put it into shape some day in the *American Law Review* or elsewhere. If so, I might be strongly tempted to reply — or could we (this as a mere conjectural suggestion) get up a sort of moot in print and have the two together? . . .

Yours truly
F. Pollock

London, Nov. 26, 1878

Dear Holmes:

Sir H. Maine[1] tells me that he duly received your paper,[2] and was much interested by it but, being much exercised by the affairs of India and the two Universities, has not yet been able to acknowledge it as he would like. I don't know that I have any comment to make myself, as I agree with little or no exception. In the definition *ad fin.* how do you mean "exclude *others than* the owner" to be taken?[3] For a possessor, *e.g.* a

[6] See his essay "Ethics and Morals" in *Essays in Jurisprudence and Ethics* (1882), p. 287.

[1] Sir Henry Maine (1822–1888), author, *inter alia*, of *Ancient Law* (1861); *Village Communities* (1871); *Early History of Institutions* (1875); *Popular Government* (1885). In 1871 he had been appointed to a seat on the Indian Council, in 1869 he became Corpus Professor of Jurisprudence at Oxford, and in 1877 he was elected Master of Trinity Hall, Cambridge.

[2] "Possession," 12 *Am. L. Rev.* 688 (1878).

[3] The article had concluded with the following words: "But it is enough for the

termor, pledgee, or bailee having a lien, in many cases intends to exclude all the world *inclusive of* the owner. So that it should run, *semble*, "all persons or all persons other than the owner." I suppose you would hardly say that every possessor *is* owner *ad hoc*.

The first vol. of a new edition of Bracton, in the Rolls Series, is just out [4] & will I suppose find its way to you speedily. I fear it will be better used on your side of the ocean than on this. The editor is Travers Twiss. If he has used his mss. properly, they are all derived from an archetype which was itself carelessly written (some existing ones come by his account so near the date of the original that one can hardly talk of *corruption*). In Güterbock's *Henricus de Bracton*, p. 88, note 94, is a manifestly corrupt passage & the obvious correction, but the new print simply repeats the edition of 1569. In Bracton, fo. 16*b* (Güterb., p. 85) I strongly suspect that "*Tu eam quasi* TRADITAM *accipias*" is not a blunder of Bracton's but a clerical error for CREDITAM, which Bracton would naturally have written from the corresponding passage in the *Digest* cited by Güterbock. The new edition however gives TRADITAM with the vulgate. What is still odder, a few words before it gives "vel quid tal*i*" for "v. q. tal*e*" of edition 1569 — which is a change for the worse in sense. I shall make inquiries about Twiss's competence as a diplomatist; for it seems to me queer. It would be very annoying if it should turn out that so important a work is not being competently done. My opinion of Sir T. T.'s merits as a jurist, from what I have read of his, is pretty mean — but that proves nothing as to his care & accuracy in dealing with mss.

Did you ever hear the defunct Confederate States spoken of as the Lost Cause? They are so in a new (& otherwise rather silly) English book. Truly there is great virtue in capitals.

Yours truly,
F. POLLOCK

present if, with some incidental matters, it has been shown . . . that, except in the instance of servants as explained, one who manifests physical control over a thing with the intent and power (judged by the manifested facts) to exclude others than the owner from it, acquires possession, whether he has or has not the intent to deal with it as owner," *id.* at p. 720.

[4] *De Legibus* (6 vols., 1878–83).

BOSTON, December 9th, 1878

Dear Pollock:

. . . I of course agree with the doctrine suggested by your criticism of my final sentence, but I think you will find that the passage is not intended as a *definition* but simply a statement of the proposition I had sought to establish, *i.e.* of the more disputable part of a definition — leaving the rest to follow *a fortiori*.

I have been looking for Bracton for some time and had supposed that Twiss was a very good man for the semi-mechanical work of collation etc. If it should prove otherwise I should agree with you that we should be better off with the old prints and the *spes* of a critical edition by and by.

I am just now in a mild excitement. The judiciary of the U. S. (as distinguished from the State) is made up as follows.

1. The Supreme Court, sitting only to determine questions of law.

2. The Circuit Courts, the Circuits embracing several states & the Court having formerly been composed of a judge of the Supreme Court and the District judge, but most of the work being now done by local circuit judges (one for each circuit) not members of the Supreme Court who are of recent creation.

3. The District Court, held by a single judge appointed for the District. *This* District is coextensive with the State & known as the District of Massachusetts. Our local Circuit Judge having died last summer [1] there has been talk of promoting the District Judge Lowell,[2] and a good many of the bar have mentioned my name as Lowell's successor if he goes up.[3] The place is not desirable for the money, for the salary is only $4000. But it would enable me to work in the way I want to and so I should like it — although it would cost me a severe pang to leave my partners. But this morning from the papers it rather looks as if the Attorney General of the U. S.[4] was

[1] George Foster Shepley, circuit judge, died on July 20, 1878.

[2] John Lowell (1824–1897), United States District Judge for the District of Massachusetts from 1865 to 1878.

[3] Concerning the possible appointment of Holmes to the District Court, see George F. Hoar, *Autobiography of Seventy Years* (1903), II, 418–419.

[4] Charles Devens (1820–1891) was Attorney General of the United States, 1877–81,