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978-1-107-51209-2 - The Pollock-Holmes Letters: Correspondence of Sir Frederick Pollock and  
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Excerpt

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**THE POLLOCK – HOLMES LETTERS**

**VOLUME II**

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# VI

## 1919-1921

WASHINGTON, January 24, 1919

Dear F. P.:

Your studies in Natural Law are not forthcoming on a rapid look around. I remember your writing on the subject but I couldn't recite on what you said, although of course I read whatever I know of yours. But I didn't expect you to agree with me altogether. As to Ethics I have called them a body of imperfect social generalizations expressed in terms of emotion. Of course I agree that there is such a body on which to a certain extent civilized men would agree — but how much less than would have been taken for granted fifty years ago, witness the Bolsheviks. John M. Zane walks into me in the *Mich. Law Rev.*<sup>1</sup> and later in the *Ill. Law Rev.*<sup>2</sup> and thinks I am hopelessly precluded from the place that otherwise I should occupy by accepting the old notion of a sovereign being superior to the law that he or it makes and by believing that judges make law. I suspect he means a different thing from what I do by law and that the fight is more about words than he thinks. But there is a real difference expressed by him in a tone of dogmatism upon which I should not venture, although I think I could smash him if he would say what he thought and not only what he didn't believe. He does believe that Hobbes, Bentham, Austin, and every German jurist that ever was were asses. So he has taken rather a large contract. My brother Brandeis, Okakura<sup>3</sup> a Japanese writer on art, and a dame who showed me early Chinese paintings that she thought showed spiritual heights never

<sup>1</sup> "German Legal Philosophy," 16 *Mich. L. Rev.* 287 (March 1918).

<sup>2</sup> "A Legal Heresy," 13 *Ill. L. Rev.* 431 (June 1918).

<sup>3</sup> Kakuzo Okakura; author of *The Ideals of the East* (1903), which Holmes had recently read.

reached by us, have happened to concur in assuring me in their several ways of the superiority of the oriental mind to ours. I said to Brandeis produce the documents; I can show you any number of books that I believe touch life and the world more profoundly, more exquisitely, and at more points than anything I know of or believe exists in the East. As to the Jap writer I content myself with the contempt of the dame for the whole Jap lot as an inferior offshoot from the Chinese (not that I believe that an adequate statement by any means), and as to the dame I think she has wrought herself into a hyperaesthesia on her theme. I have bought an etching of Ostade — a peasant family saying grace over their bowl of porridge that is as tender as Millet's *Angelus* and without any touch of melodrama. I saw the reproduction in Hind's *Short History*<sup>4</sup> and have kept a dealer on the lookout for a good while. It makes me want to cry — κ. τ. λ. You remember what Lord Coke says of Littleton's "etc."<sup>5</sup> There is much general discourse remaining. My love and thanks to Lady Pollock for a charming short letter which I hope soon to answer — but work is humming just now.

Yours ever,  
 O. W. H.

LONDON, January 30, 1919

My dear Holmes:

As soon as I could get free of the Attorney-General's Committee on Breaches of Law (problem thereof shortly stated being: Expand "Hang the Kaiser" in rational terms), my wife and I went to Bath, not for the waters but as a pleasant place where we knew of a really good hotel, and so continued for a week. . . .

We know now from a Russian engineer who has come to London via Norway that he saw Jack in Moscow on Sept. 8, well and unmolested — my wife has seen him and I am going to see him on Sunday.

<sup>4</sup> Arthur Mayger Hind, *A Short History of Engraving and Etching* (1908).

<sup>5</sup> Describing the virtues of Littleton's treatise on Tenures, Lord Coke said: "Certain it is, that there is never a period, nor (for the most part) a word, nor an *etc.* but affordeth excellent matter of learning." (Preface to *Coke on Littleton* (15th ed.), p. xxxvii.)

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POLLOCK TO HOLMES

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The *Law Reports* have changed their printers and I am striving to teach the new people divers things they ought to know — such as not meddling with punctuation out of their own heads. General difficulties of printing are no way abated so far.

The League of Nations appears to be making itself at Paris under pressure of events, so fast as to supersede all private discussion and speculation. I am glad it is settled that the Germans are to have none of their colonies back.

Three weeks ago, I installed my successor in the Royal Colonial Institute Lodge, so masonic duties will be less pressing. During the war masonry did work in consolidating relations between G. B. and the Dominions which will probably never be known to the general public. Also, to a certain extent, with the U. S.; but I suppose that for some reason masonry is more active in the central and western states than on the Atlantic Coast, so I feel that the time given to it has been well spent. . . .

Yours ever,  
 F. POLLOCK

LONDON, February 17, 1919

My dear Holmes:

On Saturday we had a further telegram from Jack notifying his arrival at Helsingfors.<sup>1</sup> I have ascertained that the Foreign Office is instructing our consul there, and we may hope to see Jack in his proper person within a month or so. Details are wanting until we have a letter.

I share your feelings under talk about the superiority of “the Oriental mind,” or art or most things to ours. There are many schools of Eastern thought and Eastern art agreeing together in very little except that their several assumptions and conventions are different from ours, and there is no common standard to enable one to talk of superior or inferior. (To talk of Japanese art as an inferior offshot from Chinese is even worse than it would be to talk of the French landscapist as an inferior offshot from Constable). On our part we have to remem-

<sup>1</sup> In a Cablegram to Holmes, dated Feb. 6, 1919, Pollock said: “Jack safe Finland escaped Bolsheviks.”

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ber that the Bible is Oriental before we talk of *our* superiority. There is one thing common to the thoughts of the farther East, a certain contempt for transitory matters of fact — strongest in India, where I believe the whole of Sanskrit literature has not a single historical work to show, perhaps weakest in Japan.

Zane's belated storm in a teacup is almost comic. Any medieval man would have said that of course the king's judges can't sit in judgment on the king — not to mention that the Court of K. B. was formally *coram ipso rege* — and would have thought it odd if not perverse to ask for any more reason. At the same time he would have admitted that there are some things neither the King's Courts nor Parliament can change, such as the law of Holy Church — not however meaning thereby anything any Pope chooses to say. The Pope can't repeal the Decalogue, as Cardinal Merry del Val remarked to me when I saw him at the Vatican to get some information about the canon law of marriage and divorce, being about to give evidence before our Royal Commission. <sup>2</sup> (Gorell Barnes was an excellent modern reformer but weak in knowledge of ecclesiastical jurisdiction).

On looking up the report of *Kawananakoa v. Polyblank* <sup>3</sup> . . . I find Harlan seems not to have wholly approved your reasons. I wonder why.

I have just finished Boethius (*De Consolatione Philosophiae*) in the Loeb Classics edition — not only a curious and historically rather important book but of greater intrinsic merit than I expected to find it. The other contents — theological tracts, *De Trinitate*, etc., which the best recent critics accept as genuine Boethius — I have left alone.

<sup>2</sup> In 1912 Pollock had testified before the Royal Commission on Divorce and Matrimonial Causes, the Chairman of which was John Gorell Barnes, First Baron, (1848–1913), Judge of the Probate, Divorce and Admiralty Division of the High Court of Justice, 1892–1905; President, 1905–08.

<sup>3</sup> 205 U. S. 349 (1907). It was Holmes's opinion in this case which John M. Zane had criticized in his article, "A Legal Heresy," 13 *Ill. L. Rev.* 431 (1918). In the course of his opinion, holding that the territory of Hawaii was not a necessary party to the suit, Holmes had said: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." 205 U. S. at 353. Harlan, J., concurred in the result.

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HOLMES TO POLLOCK

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The 17th century translation which was found good enough to use for this edition with no great amendment, is quite remarkable, especially the versified parts.

Yours ever,  
 F. P.

WASHINGTON, April 5, 1919<sup>1</sup>

Dear Pollock:

. . . I am glad that the hitches in Jack's coming over are coming to an end. You know that I have sympathized with you both, but I didn't dare to write while you were in doubt. I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service so far as the law was concerned.<sup>2</sup> I wondered that the Government should press the case to a hearing before us, as the inevitable result was that fools, knaves, and ignorant persons were bound to say he was convicted because he was a dangerous agitator and that obstructing the draft was a pretence. How it was with the Jury of course I don't know, but of course the talk is silly as to us. There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case — *Schenck v. U.S.*<sup>3</sup> . . . also *Frohwerk v. U.S.*<sup>4</sup> . . . As it happens I should go farther probably than the majority in favor of it, and I daresay it was partly on that account that the C. J. assigned the case to me.

Your mention of Boethius made me want to get it but our book sellers in this one horse place no longer keep the Loeb series. I believe I have mentioned before what a shame I think it that such a good plan should be so spoiled by not giving critically accurate translations. As to Harlan's qualified concurrence in *Kawananakoa v. Polyblank*, that sage, although a man of real power, did not shine either in analysis or generalization and I never troubled myself much when he shied. I used to say that

<sup>1</sup> A short note from Pollock, dated March 18, 1919, is omitted.

<sup>2</sup> *Debs v. United States*, 249 U. S. 211 (1919).

<sup>3</sup> 249 U. S. 47 (1919).

<sup>4</sup> 249 U. S. 204 (1919).

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HOLMES TO POLLOCK

[1919]

he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other.

For the moment my work is done and I hope for a little leisure during the next week. I propose to devote it first to Laski's new book *Authority in the Modern State*, which he dedicates to me and Frankfurter. Do you know anything about him in Oxford? People in Boston<sup>5</sup> seem to have got the idea that he is a dangerous man (they used to think me one). I don't know whether because he is inspired by Figgis<sup>6</sup> more or less in his discourse on sovereignty or because (as I am told) his wife has written some come-out or subversive articles — I know not what. I have had the greatest pleasure in his conversation as he is a portent of knowledge though still very young. There is also a prejudice against Frankfurter; I think partly because he (as well as Laski) is a Jew. I believe him to have been very valuable as a stimulus in the Law School,<sup>7</sup> but Boston is nothing if not critical. It never occurs to me until after the event that a man I like is a Jew, nor do I care, when I realize it. If I had to choose I think I would rather see power in the hands of the Jews than in the Catholics', — not that I wish to be run by either. I have let the League go its way without much study. I have my hands full and am too old and too busy to take a part, and futile worry is waste.

I got a rattling good French book on Rembrandt's etchings the other day — *Coppier*, the author.<sup>8</sup> Just now I am looking a gift horse in the mouth and trying to ascertain whether an Ostade is first, second, or third state: also I read with great interest Rhodes's *History of the Civil War* — a real work of art I think — although I hate to read about those times and read this only because his sister sent it to me. My love to Lady Pollock.

Yours ever,  
 O. W. H.

<sup>5</sup> Laski was a lecturer and instructor in History at Harvard University, 1916–20.

<sup>6</sup> Rev. John Neville Figgis (1866–1919). Figgis, a distinguished churchman and political philosopher, was largely concerned with the conflicts between church and state, and was insistent upon the value and significance of the independence of church from state.

<sup>7</sup> Felix Frankfurter had been appointed Professor of Law at the Harvard Law School in 1914.

<sup>8</sup> André Charles Coppier, *Les Eaux-Fortes Authentiques de Rembrandt* (1917).



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POLLOCK TO HOLMES

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LONDON, April 7, 1919

My dear Holmes:

Our young poet John Drinkwater has produced a chronicle play on Abraham Lincoln — acted by a Birmingham company at Hammersmith with considerable success: we saw it on Saturday afternoon, my wife for the second time. It is curious to see how many different worlds there are in London: the audience was not the least like the audience at a west-end theatre — likewise the acting, which was conscientious, rather heavy and sometimes amateurish. For the play, it is in good dignified English frankly renouncing any attempt at local colour, except the disastrous one of making F. Douglas[s] (the negro) a grotesque figure talking a sort of pidgin English. There was then a real negro dialect it seems (*ex relat.* E. Robins), but Douglas[s] would not have talked it. Lincoln made too solemn and preacher-like I think, but it is honest work. Two things really interest me: the proof that the revival of the chronicle play is possible at all, and the desire of the intelligent middle class Briton to know about Lincoln and the Civil War. They go to learn American history from Drinkwater as their ancestors did to learn English history from Shakespeare (and his half forgotten predecessors) at the Globe, and the necessary defects of a chronicle play from the point of view of dramatic art trouble them as little.

. . . The uniforms were presumably after authentic models, but I did not know that U. S. general officers had a frock-coat undress of a slaty gray tint — this must have been a passing fashion. Lee appeared in Appomattox Courthouse (an effective scene this) in a much smarter uniform of bright blue, verging on green to my eye, but my wife saw it as sky-blue. Can that be right? I don't know where authority for the Confederate uniforms is to be found in Europe — possibly in the great military museum of the *Invalides* in Paris. . . . Of course Drinkwater's play would not do in America unless it were revised from top to bottom in concert with a competent American: I have not heard that any such thing is thought of. His worst mistake is making Lincoln deliver the Gettysburg speech in Ford's theatre: not that great novelists and dramatists have not taken

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POLLOCK TO HOLMES

[1919]

as great liberties with history, but because transposing that speech to the end from the middle of the war robs it of its moral and historical greatness.

Another and very different American function last Friday — a memorial service for those fallen in the war, at the Abbey — massive, simple, impressive, ending with the *Battle Hymn of the Republic* and the *Last Post*.

I have got Lord Charnwood's *Life of Lincoln* — more instructive to the English reader but less human than Norman Hapgood's which seems not to be generally known.

Did I tell you I am starting on a new book — on the League of Nations, bespoken by my law publishers, rather a new venture for them. It will not be a large book, and I shall cut the historical inducement short. "Precursors" have been overdone I think. They are a fatal temptation to doctoral theses which magnify them as prophets, whereas when you turn up the original you find oftener than not that the precursor was grinding some other axe (Alberico Gentili<sup>1</sup> always excepted to the honour of Italy and Oxford.) On which there will be just a hint for the judicious. . . .

Yours ever,  
 F. POLLOCK

WASHINGTON, April 27, 1919

Dear Pollock:

A good one from you, April 7, came a few days ago. As to the play A. Lincoln and F. Douglas[s], I believe Douglas[s] was a man of considerable education and rather a handsome old boy. I don't imagine that he talked negro any more than you or I. I hate to recur to Civil War times — yet a while ago I read Lord Charnwood's *Life of Lincoln* with pleasure and recently Rhodes's *History of the Civil War* with much ditto. Both books seem to me extremely well done. As to Appomatox, Lee met Grant in full uniform, but of course it was Confederate gray. As to the other uniform you mention I can't speak by the book but I am sceptical. . . . I await the appearance of your book on

<sup>1</sup> 1552-1608; Italian jurist; Regius Professor of Civil Law, Oxford.