LECTURE THREE

TORTS—TRESPASS AND NEGLIGENCE

THE OBJECT OF THE NEXT TWO LECTURES IS TO DISCOVER WHETHER there is any common ground at the bottom of all liability in tort, and if so, what that ground is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law. The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the wrongdoer to bear the loss occasioned by his act. If A fails to pay a certain sum on a certain day, or to deliver a lecture on a certain night, after having made a binding promise to do so, the damages which he has to pay are recovered in accordance with his consent that some or all of the harms which may be caused by his failure shall fall upon him. But when A assaults or slanders his neighbor, or converts his neighbor's property, he does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for doing so must be found in some general view of the conduct which everyone may fairly expect and demand from every other, whether that other has agreed to it or not.

Such a general view is very hard to find. The law did not begin with a theory. It has never worked one out. The point from which it started and that at which I shall try to show that it has arrived, are on different planes. In the progress from one to the other, it is to be expected that its course should not be straight and its direction not always visible. All that can be done is to point out a tendency, and to justify it. The tendency, which is our main concern, is a matter of fact to be gathered from the cases. But the difficulty of showing it is much enhanced by the circumstance that,

until lately, the substantive law has been approached only through the categories of the forms of action. Discussions of legislative principle have been darkened by arguments on the limits between trespass and case, or on the scope of a general issue. In place of a theory of tort, we have a theory of trespass. And even within that narrower limit, precedents of the time of the assize and *jurata* have been applied without a thought of their connection with a long forgotten procedure.

Since the ancient forms of action have disappeared, a broader treatment of the subject ought to be possible. Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning. But the present willingness to generalize is founded on more than merely negative grounds. The philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.

The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known, but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm, that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.

If, therefore, there is any common ground for all liability in tort, we shall best find it by eliminating the event as it actually turns out, and by considering only the principles on which the peril of his conduct is thrown upon the actor. We are to ask what are the elements, on the

defendant's side, which must all be present before liability is possible, and the presence of which will commonly make him liable if damage follows.

The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral shortcoming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion; I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter.

To test the former opinion it would be natural to take up successively the several words, such as *negligence* and *intent*, which in the language of morals designate various well-understood states of mind, and to show their significance in the law. To test the latter, it would perhaps be more convenient to consider it under the head of the several forms of action. So many of our authorities are decisions under one or another of these forms, that it will not be safe to neglect them, at least in the first instance; and a compromise between the two modes of approaching the subject may be reached by beginning with the action of trespass and the notion of negligence together, leaving wrongs which are defined as intentional for the next lecture.

Trespass lies for unintentional, as well as for intended wrongs. Any wrongful and direct application of force is redressed by that action. It therefore affords a fair field for a discussion of the general principles of liability for unintentional wrongs at common law. For it can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case. And the greater part of the law of torts will be found under one or the other of those two heads.

It might be hastily assumed that the action on the case is founded on the defendant's negligence. But if that be so, the same doctrine must prevail in trespass. It might be assumed that trespass is founded on the defendant's having caused damage by his act, without regard to negligence. But if that be true, the law must apply the same criterion to other wrongs differing from trespass only in some technical point; as, for instance, that the property damaged was in the defendant's possession. Neither of the above assumptions, however, can be hastily permitted. It might very well be argued that the action on the case adopts the severe

rule just suggested for trespass, except when the action is founded on a contract. Negligence, it might be said, had nothing to do with the common-law liability for a nuisance, and it might be added that, where negligence was a ground of liability, a special duty had to be founded in the defendant's *super se assumpsit*, or public calling.[1] On the other hand, we shall see what can be said for the proposition, that even in trespass there must at least be negligence. But whichever argument prevails for the one form of action must prevail for the other. The discussion may therefore be shortened on its technical side, by confining it to trespass so far as may be practicable without excluding light to be got from other parts of the law.

As has just been hinted, there are two theories of the common-law liability for unintentional harm. Both of them seem to receive the implied assent of popular textbooks, and neither of them is wanting in plausibility and the semblance of authority.

The first is that of Austin, which is essentially the theory of a criminalist. According to him, the characteristic feature of law, properly so called, is a sanction or detriment threatened and imposed by the sovereign for disobedience to the sovereign's commands. As the greater part of the law only makes a man civilly answerable for breaking it, Austin is compelled to regard the liability to an action as a sanction, or, in other words, as a penalty for disobedience. It follows from this, according to the prevailing views of penal law, that such liability ought only to be based upon personal fault; and Austin accepts that conclusion, with its corollaries, one of which is that negligence means a state of the party's mind.[2] These doctrines will be referred to later, so far as necessary.

The other theory is directly opposed to the foregoing. It seems to be adopted by some of the greatest common-law authorities, and requires serious discussion before it can be set aside in favor of any third opinion which may be maintained. According to this view, broadly stated, under the common law a man *acts* at his peril. It may be held as a sort of set-off, that he is never liable for omissions except in consequence of some duty voluntarily undertaken. But the whole and sufficient ground for such liabilities as he does incur outside the last class is supposed to be that he has voluntarily acted, and that damage has ensued. If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor.

In order to do justice to this way of looking at the subject, we must remember that the abolition of the common-law forms of pleading has

not changed the rules of substantive law. Hence, although pleaders now generally allege intent or negligence, anything which would formerly have been sufficient to charge a defendant in trespass is still sufficient, notwithstanding the fact that the ancient form of action and declaration has disappeared.

In the first place, it is said, consider generally the protection given by the law to property, both within and outside the limits of the last-named action. If a man crosses his neighbor's boundary by however innocent a mistake, or if his cattle escape into his neighbor's field, he is said to be liable in trespass *quare clausum fregit.* If an auctioneer in the most perfect good faith, and in the regular course of his business, sells goods sent to his rooms for the purpose of being sold, he may be compelled to pay their full value if a third person turns out to be the owner, although he has paid over the proceeds, and has no means of obtaining indemnity.

Now suppose that, instead of a dealing with the plaintiff's property, the case is that force has proceeded directly from the defendant's body to the plaintiff's body, it is urged that, as the law cannot be less careful of the persons than of the property of its subjects, the only defenses possible are similar to those which would have been open to an alleged trespass on land. You may show that there was no trespass by showing that the defendant did no act; as where he was thrown from his horse upon the plaintiff, or where a third person took his hand and struck the plaintiff with it. In such cases the defendant's body is the passive instrument of an external force, and the bodily motion relied on by the plaintiff is not his act at all. So you may show a justification or excuse in the conduct of the plaintiff himself. But if no such excuse is shown, and the defendant has voluntarily acted, he must answer for the consequences, however little intended and however unforeseen. If, for instance, being assaulted by a third person, the defendant lifted his stick and accidentally hit the plaintiff, who was standing behind him, according to this view he is liable, irrespective of any negligence toward the party injured.

The arguments for the doctrine under consideration are, for the most part, drawn from precedent, but it is sometimes supposed to be defensible as theoretically sound. Every man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors. In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than one who has had no share in producing it.

We have more difficult matter to deal with when we turn to the pleadings and precedents in trespass. The declaration says nothing of negligence, and it is clear that the damage need not have been intended. The words *vi et armis* and *contra pacem,* which might seem to imply intent, are supposed to have been inserted merely to give jurisdiction to the king's court. Glanvill says it belongs to the sheriff, in case of neglect on the part of lords of franchise, to take cognizance of mêlées, blows, and even wounds, unless the accuser add a charge of breach of the king's peace (*nisi accusator adjiciat de pace Domini Regis infracta*).[3] Reeves observes, "In this distinction between the sheriff's jurisdiction and that of the king, we see the reason of the allegation in modern indictments and writs, *vi et armis,* of 'the king's crown and dignity,' 'the king's peace,' and 'the peace,' this last expression being sufficient, after the peace of the sheriff had ceased to be distinguished as a separate jurisdiction."[4]

Again, it might be said that, if the defendant's intent or neglect was essential to his liability, the absence of both would deprive his act of the character of a trespass, and ought therefore to be admissible under the general issue. But it is perfectly well settled at common law that "Not guilty" only denies the act.[5]

Next comes the argument from authority. I will begin with an early and important case.[6] It was trespass *quare clausum.* The defendant pleaded that he owned adjoining land, upon which was a thorn hedge; that he cut the thorns, and that they, against his will (*ipso invito*), fell on the plaintiff's land, and the defendant went quickly upon the same, and took them, which was the trespass complained of. And on demurrer judgment was given for the plaintiff. The plaintiff's counsel put cases which have been often repeated. One of them, Fairfax, said:

> There is a diversity between an act resulting in a felony, and one resulting in a trespass. . . . If one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c., and also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito,* it is no felony, as has been said, &c.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, &c., and the wrong which the other receives was against his will, &c.; and so here, &c. Brian, another counsel, states the whole doctrine, and uses equally familiar illustrations. When one does a thing, he is bound to do it in such a way that

by his act no prejudice or damage shall be done to &c. As if I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, &c.; and yet the raising of the house was lawful, and the timber fell, *me invito*, &c. And so if one assaults me and I cannot escape, and I in self-defense lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my raising my stick was lawful in self-defense, and I hit him, *me invito*, &c.; and so here, &c.

Littleton, J. to the same intent, and if a man is damaged he ought to be recompensed. . . . If your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. . . . And, sir, if this should be law that he might enter and take the thorns, for the same reason, if he cut a large tree, he might come with his wagons and horses to carry the trees off, which is not reason, for perhaps he has corn or other crops growing, &c., and no more here, for the law is all one in great things and small. . . . Choke, C. J. to the same intent, for when the principal thing was not lawful, that which depends upon it was not lawful; for when he cut the thorns and they fell on my land, this falling was not lawful, and therefore his coming to take them out was *not* lawful. As to what was said about their falling in *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep them out.

Forty years later,[7] the Year Books report Rede, J. as adopting the argument of Fairfax in the last case. In trespass, he says, "the intent cannot be construed; but in felony it shall be. As when a man shoots at butts and kills a man, it is not felony *et il ser come n'avoit l'entent de luy tuer*; and so of a tiler on a house who with a stone kills a man unwittingly, it is not felony.[8] But when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."

There is a series of later shooting cases, *Weaver* v. *Ward*,[9] *Dickenson* v. *Watson*,[10] and *Underwood* v. *Hewson*,[11] followed by the Court of Appeals of New York in *Castle* v. *Duryee*,[12] in which defenses to the effect that the damage was done accidentally and by misfortune, and against the will of the defendant, were held insufficient.

In the reign of Queen Elizabeth it was held that where a man with a gun at the door of his house shot at a fowl, and thereby set fire to his own house and to the house of his neighbor, he was liable in an action on the case generally, the declaration not being on the custom of the realm, "viz. for negligently keeping his fire." "For the injury is the same, although this mischance was not by a common negligence, but by misadventure."[13]

The abovementioned instances of the stick and shooting at butts became standard illustrations; they are repeated by Sir Thomas Raymond, in *Bessey* v. *Olliot*,[14] by Sir William Blackstone, in the famous squib case,[15] and by other judges, and have become familiar through the textbooks. Sir T. Raymond, in the above case, also repeats the thought and almost the words of Littleton, J., which have been quoted, and says further: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Sir William Blackstone also adopts a phrase from *Dickenson* v. *Watson*, just cited: "Nothing but inevitable necessity" is a justification. So Lord Ellenborough, in *Leame* v. *Bray*:[16] "If the injury were received from the personal act of another, it was deemed sufficient to make it trespass"; or, according to the more frequently quoted language of Grose, J., in the same case: "Looking into all the cases from the Year Book in the 21 H. VII down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." Further citations are deemed unnecessary.

In spite, however, of all the arguments which may be urged for the rule that a man acts at his peril, it has been rejected by very eminent courts, even under the old forms of action. In view of this fact, and of the further circumstance that, since the old forms have been abolished, the allegation of negligence has spread from the action on the case to all ordinary declarations in tort which do not allege intent, probably many lawyers would be surprised that anyone should think it worth while to go into the present discussion. Such is the natural impression to be derived from daily practice. But even if the doctrine under consideration had no longer any followers, which is not the case, it would be well to have something more than daily practice to sustain our views upon so fundamental a question; as it seems to me at least, the true principle is far from being articulately grasped by all who are interested in it, and can only be arrived at after a careful analysis of what has been thought hitherto.

It might be thought enough to cite the decisions opposed to the rule of absolute responsibility, and to show that such a rule is inconsistent with admitted doctrines and sound policy. But we may go further with profit, and inquire whether there are not strong grounds for thinking that the common law has never known such a rule, unless in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction. Conciliating the attention of those who, contrary to most modern practitioners, still adhere to the strict doctrine, by reminding them once more that there are weighty decisions to be cited adverse to it, and that, if they have involved an innovation, the fact that it has been made by such magistrates as Chief Justice Shaw goes far to prove that the change was politic, I think I may assert that a little reflection will show that it was required not only by policy, but by consistency. I will begin with the latter.

The same reasoning which would make a man answerable in trespass for all damage to another by force directly resulting from his own act, irrespective of negligence or intent, would make him answerable in case for the like damage similarly resulting from the act of his servant, in the course of the latter's employment. The discussions of the company's negligence in many railway cases[17] would therefore be wholly out of place, for although, to be sure, there is a contract which would make the company liable for negligence, that contract cannot be taken to diminish any liability which would otherwise exist for a trespass on the part of its employees.

More than this, the same reasoning would make a defendant responsible for all damage, however remote, of which his act could be called the cause. So long, at least, as only physical or irresponsible agencies, however unforeseen, cooperated with the act complained of to produce the result, the argument which would resolve the case of accidentally striking the plaintiff, when lifting a stick in necessary self-defense, adversely to the defendant, would require a decision against him in every case where his act was a factor in the result complained of. The distinction between a direct application of force, and causing damage indirectly, or as a more remote consequence of one's act, although it may determine whether the form of action should be trespass or case, does not touch the theory of responsibility, if that theory be that a man acts at his peril. As was said at the outset, if the strict liability is to be maintained at all, it must be maintained throughout. A principle cannot be stated which would retain the strict liability in trespass while abandoning it in case. It

cannot be said that trespass is for acts alone, and case for consequences of those acts. All actions of trespass are for consequences of acts, not for the acts themselves. And some actions of trespass are for consequences more remote from the defendant's act than in other instances where the remedy would be case.

An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes. An example or two will make this extremely clear.

When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done. Suppose that, instead of firing a pistol, he takes up a hose which is discharging water on the sidewalk, and directs it at the plaintiff, he does not even set in motion the physical causes which must cooperate with his act to make a battery. Not only natural causes, but a living being, may intervene between the act and its effect. *Gibbons* v. *Pepper*,[18] which decided that there was no battery when a man's horse was frightened by accident or a third person and ran away with him, and ran over the plaintiff, takes the distinction that, if the rider by spurring is the cause of the accident, then he is guilty. In *Scott* v. *Shepherd*,[19] already mentioned, trespass was maintained against one who had thrown a squib into a crowd, where it was tossed from hand to hand in self-defense until it burst and injured the plaintiff. Here even human agencies were a part of the chain between the defendant's act and the result, although they were treated as more or less nearly automatic, in order to arrive at the decision.

Now I repeat, that, if principle requires us to charge a man in trespass when his act has brought force to bear on another through a comparatively short train of intervening causes, in spite of his having used all possible care, it requires the same liability, however numerous and unexpected the events between the act and the result. If running a man down is a trespass when the accident can be referred to the rider's act of spurring, why is it not a tort in every case, as was argued in *Vincent* v. *Stinehour*,[20] seeing that it can always be referred more remotely to his act of mounting and taking the horse out?

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of a series of extraordinary,

although natural, events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. It seems to be admitted by the English judges that, even on the question whether the acts of leaving dry trimmings in hot weather by the side of a railroad, and then sending an engine over the track, are negligent, that is, are a ground of liability, the consequences which might reasonably be anticipated are material.[21] Yet these are acts which, under the circumstances, can hardly be called innocent in their natural and obvious effects. The same doctrine has been applied to acts in violation of statute which could not reasonably have been expected to lead to the result complained of.[22]

But there is no difference in principle between the case where a natural cause or physical factor intervenes after the act in some way not to be foreseen, and turns what seemed innocent to harm, and the case where such a cause or factor intervenes, unknown, at the time; as, for the matter of that, it did in the English cases cited. If a man is excused in the one case because he is not to blame, he must be in the other. The difference taken in *Gibbons* v. *Pepper*, cited above, is not between results which are and those which are not the consequences of the defendant's acts: it is between consequences which he was bound as a reasonable man to contemplate, and those which he was not. Hard spurring is just so much more likely to lead to harm than merely riding a horse in the street, that the court thought that the defendant would be bound to look out for the consequences of the one, while it would not hold him liable for those resulting merely from the other; because the possibility of being run away with when riding quietly, though familiar, is comparatively slight. If, however, the horse had been unruly, and had been taken into a frequented place for the purpose of being broken, the owner might have been liable, because "it was his fault to bring a wild horse into a place where mischief might probably be done."[23]

To return to the example of the accidental blow with a stick lifted in self-defense, there is no difference between hitting a person standing in one's rear and hitting one who was pushed by a horse within range of the stick just as it was lifted, provided that it was not possible, under the circumstances, in the one case to have known, in the other to have anticipated, the proximity. In either case there is wanting the only element which distinguishes voluntary acts from spasmodic muscular contractions as a ground of liability. In neither of them, that is to say, has there been an

opportunity of choice with reference to the consequence complained of, a chance to guard against the result which has come to pass. A choice which entails a concealed consequence is as to that consequence no choice.

The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."[24] If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.[25] Here we reach the argument from policy, and I shall accordingly postpone for a moment the discussion of trespasses upon land, and of conversions, and will take up the liability for cattle separately at a later stage.

A man need not, it is true, do this or that act, the term *act* implies a choice, but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance

principle *pro tanto,* and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo.* State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

I must now recur to the conclusions drawn from innocent trespasses upon land, and conversions, and the supposed analogy of those cases to trespasses against the person, lest the law concerning the latter should be supposed to lie between two antinomies, each necessitating with equal cogency an opposite conclusion to the other.

Take first the case of trespass upon land attended by actual damage. When a man goes upon his neighbor's land, thinking it is his own, he intends the very act or consequence complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued.[26] Whereas, if he accidentally hits a stranger as he lifts his staff in self-defense, the fact, which is the gist of the action, namely, the contact between the staff and his neighbor's head, was not intended, and could not have been foreseen. It might be answered, to be sure, that it is not for intermeddling with property, but for intermeddling with the plaintiff's property, that a man is sued; and that in the supposed cases, just as much as in that of the accidental blow, the defendant is ignorant of one of the facts making up the total environment, and which must be present to make his action wrong. He is ignorant, that is to say, that the true owner either has or claims any interest in the property in question, and therefore he does not intend a wrongful act, because he does not mean to deal with his neighbor's property. But the answer to this is, that he does intend to do the damage

complained of. One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering that it belonged to his neighbor. It is a very different thing to say that he who intentionally does harm must bear the loss, from saying that one from whose acts harm follows accidentally, as a consequence which could not have been foreseen, must bear it.

Next, suppose the act complained of is an exercise of dominion over the plaintiff's property, such as a merely technical trespass or a conversion. If the defendant thought that the property belonged to himself, there seems to be no abstract injustice in requiring him to know the limits of his own titles, or, if he thought that it belonged to another, in holding him bound to get proof of title before acting. Consider, too, what the defendant's liability amounts to, if the act, whether an entry upon land or a conversion of chattels, has been unattended by damage to the property, and the thing has come back to the hands of the true owner. The sum recovered is merely nominal, and the payment is nothing more than a formal acknowledgment of the owner's title; which, considering the effect of prescription and statutes of limitation upon repeated acts of dominion, is no more than right.[27] All semblance of injustice disappears when the defendant is allowed to avoid the costs of an action by tender or otherwise.

But suppose the property has not come back to the hands of the true owner. If the thing remains in the hands of the defendant, it is clearly right that he should surrender it. And if instead of the thing itself he holds the proceeds of a sale, it is as reasonable to make him pay over its value in trover or assumpsit as it would have been to compel a surrender of the thing. But the question whether the defendant has subsequently paid over the proceeds of the sale of a chattel to a third person, cannot affect the rights of the true owner of the chattel. In the supposed case of an auctioneer, for instance, if he had paid the true owner, it would have been an answer to his bailor's claim. If he has paid his bailor instead, he has paid one whom he was not bound to pay, and no general principle requires that this should be held to divest the plaintiff's right.

Another consideration affecting the argument that the law as to trespasses upon property establishes a general principle, is that the defendant's knowledge or ignorance of the plaintiff's title is likely to lie wholly in his own breast, and therefore hardly admits of satisfactory

proof. Indeed, in many cases it cannot have been open to evidence at all at the time when the law was settled, before parties were permitted to testify. Accordingly, in *Basely* v. *Clarkson*,[28] where the defense set up to an action of trespass *quare clausum* was that the defendant in mowing his own land involuntarily and by mistake mowed down some of the plaintiff's grass, the plaintiff had judgment on demurrer. "For it appears the fact was voluntary, and his intention and knowledge are not traversable; they can't be known."

This language suggests that it would be sufficient to explain the law of trespass upon property historically, without attempting to justify it. For it seems to be admitted that if the defendant's mistake could be proved it might be material.[29] It will be noticed, further, that any general argument from the law of trespass upon land to that governing trespass against the person is shown to be misleading by the law as to cattle. The owner is bound at his peril to keep them off his neighbor's premises, but he is not bound at his peril in all cases to keep them from his neighbor's person.

The objections to such a decision as supposed in the case of an auctioneer do not rest on the general theory of liability, but spring altogether from the special exigencies of commerce. It does not become unjust to hold a person liable for unauthorized intermeddling with another's property, until there arises the practical necessity for rapid dealing. But where this practical necessity exists, it is not surprising to find, and we do find, a different tendency in the law. The absolute protection of property, however natural to a primitive community more occupied in production than in exchange, is hardly consistent with the requirements of modern business. Even when the rules which we have been considering were established, the traffic of the public markets was governed by more liberal principles. On the continent of Europe it was long ago decided that the policy of protecting titles must yield to the policy of protecting trade. Casaregis held that the general principle *nemo plus juris in alium transferre potest quam ipse habet* must give way in mercantile transactions to *possession vaut titre*.[30] In later times, as markets overt have lost their importance, the Factors' Acts and their successive amendments have tended more and more in the direction of adopting the Continental doctrine.

I must preface the argument from precedent with a reference to what has been said already in the first lecture about early forms of liability, and especially about the appeals. It was there shown that the appeals *de pace et plagis* and of mayhem became the action of trespass, and that those

appeals and the early actions of trespass were always, so far as appears, for intentional wrongs.[31]

The *contra pacem* in the writ of trespass was no doubt inserted to lay a foundation for the king's writ; but there seems to be no reason to attribute a similar purpose to *vi et armis*, or *cum vi sua*, as it was often put. Glanvill says that wounds are within the sheriff's jurisdiction, unless the appellor adds a charge of breach of the king's peace.[32] Yet the wounds are given *vi et armis* as much in the one case as in the other. Bracton says that the lesser wrongs described by him belong to the king's jurisdiction, "because they are sometimes against the peace of our lord the king,"[33] while, as has been observed, they were supposed to be always committed intentionally. It might even perhaps be inferred that the allegation *contra pacem* was originally material, and it will be remembered that trespasses formerly involved the liability to pay a fine to the king.[34]

If it be true that trespass was originally confined to intentional wrongs, it is hardly necessary to consider the argument drawn from the scope of the general issue. In form it was a mitigation of the strict denial *de verbo in verbum* of the ancient procedure, to which the inquest given by the king's writ was unknown.[35] The strict form seems to have lasted in England sometime after the trial of the issue by recognition was introduced.[36] When a recognition was granted, the inquest was, of course, only competent to speak to the facts, as has been said above.[37] When the general issue was introduced, trespass was still confined to intentional wrongs.

We may now take up the authorities. It will be remembered that the earlier precedents are of a date when the assize and *jurata* had not given place to the modern jury. These bodies spoke from their own knowledge to an issue defined by the writ, or to certain familiar questions of fact arising in the trial of a cause, but did not hear the whole case upon evidence adduced. Their function was more limited than that which has been gained by the jury, and it naturally happened that, when they had declared what the defendant had done, the judges laid down the standard by which those acts were to be measured without their assistance. Hence the question in the Year Books is not a loose or general inquiry of the jury whether they think the alleged trespasser was negligent on such facts as they may find, but a well-defined issue of law, to be determined by the court, whether certain acts set forth upon the record are a ground of liability. It is possible that the judges may have dealt pretty strictly with defendants, and it is quite easy to pass from the premise that

defendants have been held trespassers for a variety of acts, without mention of neglect, to the conclusion that any act by which another was damaged will make the actor chargeable. But a more exact scrutiny of the early books will show that liability in general, then as later, was founded on the opinion of the tribunal that the defendant ought to have acted otherwise, or, in other words, that he was to blame.

Returning first to the case of the thorns in the Year Book,[38] it will be seen that the falling of the thorns into the plaintiff's close, although a result not wished by the defendant, was in no other sense against his will. When he cut the thorns, he did an act which obviously and necessarily would have that consequence, and he must be taken to have foreseen and not to have prevented it. Choke, C. J. says, "As to what was said about their falling in, *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all in his power to keep them out"; and both the judges put the unlawfulness of the entry upon the plaintiff's land as a consequence of the unlawfulness of dropping the thorns there. Choke admits that, if the thorns or a tree had been blown over upon the plaintiff's land, the defendant might have entered to get them. Chief Justice Crew says of this case, in *Millen* v. *Fawdry*,[39] that the opinion was that "trespass lies, because he did not plead that he did his best endeavor to hinder their falling there; yet this was a hard case." The statements of law by counsel in argument may be left on one side, although Brian is quoted and mistaken for one of the judges by Sir William Blackstone, in *Scott* v. *Shepherd*.

The principal authorities are the shooting cases, and, as shooting is an extra-hazardous act, it would not be surprising if it should be held that men do it at their peril in public places. The liability has been put on the general ground of fault, however, wherever the line of necessary precaution may be drawn. In *Weaver* v. *Ward*,[40] the defendant set up that the plaintiff and he were skirmishing in a trainband, and that when discharging his piece he wounded the plaintiff by accident and misfortune, and against his own will. On demurrer, the court says that "no man shall be excused of a trespass, . . . except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant *had committed no negligence* to give occasion to the hurt." The later cases simply follow *Weaver* v. *Ward*.

The quotations which were made above in favor of the strict doctrine from Sir T. Raymond, in *Bessey* v. *Olliot*, and from Sir William Blackstone, in *Scott* v. *Shepherd*, are both taken from dissenting opinions. In the latter case it is pretty clear that the majority of the court considered that to repel personal danger by instantaneously tossing away a squib thrown by another upon one's stall was not a trespass, although a new motion was thereby imparted to the squib, and the plaintiff's eye was put out in consequence. The last case cited above, in stating the arguments for absolute responsibility, was *Leame* v. *Bray*.[41] The question under discussion was whether the action (for running down the plaintiff) should not have been case rather than trespass, the defendant founding his objection to trespass on the ground that the injury happened through his neglect, but was not done willfully. There was therefore no question of absolute responsibility for one's acts before the court, as negligence was admitted; and the language used is all directed simply to the proposition that the damage need not have been done intentionally.

In *Wakeman* v. *Robinson*,[42] another runaway case, there was evidence that the defendant pulled the wrong rein, and that he ought to have kept a straight course. The jury were instructed that, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether the act was willful or accidental. On motion for a new trial, Dallas, C. J. said,

> . . . If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie. . . . The accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground, that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do.

This language may have been inapposite under the defendant's plea (the general issue), but the pleadings were not adverted to, and the doctrine is believed to be sound.

In America there have been several decisions to the point. In *Brown* v. *Kendall*,[43] Chief Justice Shaw settled the question for Massachusetts. That was trespass for assault and battery, and it appeared that the defendant,

while trying to separate two fighting dogs, had raised his stick over his shoulder in the act of striking, and had accidentally hit the plaintiff in the eye, inflicting upon him a severe injury. The case was stronger for the plaintiff than if the defendant had been acting in self-defense; but the court held that, although the defendant was bound by no duty to separate the dogs, yet, if he was doing a lawful act, he was not liable unless he was wanting in the care which men of ordinary prudence would use under the circumstances, and that the burden was on the plaintiff to prove the want of such care.

In such a matter no authority is more deserving of respect than that of Chief Justice Shaw, for the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced.

Brown v. *Kendall* has been followed in Connecticut,[44] in a case where a man fired a pistol, in lawful self-defense as he alleged, and hit a bystander. The court was strongly of opinion that the defendant was not answerable on the general principles of trespass, unless there was a failure to use such care as was practicable under the circumstances. The foundation of liability in trespass as well as case was said to be negligence. The Supreme Court of the United States has given the sanction of its approval to the same doctrine.[45] The language of *Harvey* v. *Dunlop*[46] has been quoted, and there is a case in Vermont which tends in the same direction.[47]

Supposing it now to be conceded that the general notion upon which liability to an action is founded is fault or blameworthiness in some sense, the question arises, whether it is so in the sense of personal moral shortcoming, as would practically result from Austin's teaching. The language of Rede, J., which has been quoted from the Year Book, gives a sufficient answer. "In trespass the intent" (we may say more broadly, the defendant's state of mind) "cannot be construed." Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's

negligence judged by a moral standard which would take his personal characteristics into account. But supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.[48]

Some middle point must be found between the horns of this dilemma.

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable

for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant.[49] Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

Taking the qualification last established in connection with the general proposition previously laid down, it will now be assumed that, on the one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown; but that, on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did. The next question is, whether this vague test is all that the law has to say upon the matter, and the same question in another form, by whom this test is to be applied.

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.

Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, or at the whim of anybody of men. The standard, that is, must be fixed. In practice, no doubt, one man may have to pay and another may escape, according to the different feelings of different juries. But this merely shows that the law does not perfectly accomplish its ends. The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion. They are supposed to leave their idiosyncrasies on one side, and to represent the feeling of the community. The ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.

Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither courts nor legislatures have ever stopped at that point.

From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions.

The fundamental thought is still the same, that the way prescribed is that in which prudent men are in the habit of acting, or else is one laid down for cases where prudent men might otherwise be in doubt.

It will be observed that the existence of the external tests of liability which will be mentioned, while it illustrates the tendency of the law of torts to become more and more concrete by judicial decision and by statute, does not interfere with the general doctrine maintained as to the grounds of liability. The argument of this lecture, although opposed to the doctrine that a man acts or exerts force at his peril, is by no means opposed to the doctrine that he does certain particular acts at his peril. It is the coarseness, not the nature, of the standard which is objected to. If, when the question of the defendant's negligence is left to a jury, negligence does not mean the actual state of the defendant's mind, but a failure to act as a prudent man of average intelligence would have done, he is required to conform to an objective standard at his peril, even in that case. When a more exact and specific rule has been arrived at, he must obey that rule at his peril to the same extent. But, further, if the law is wholly a standard of external conduct, a man must always comply with that standard at his peril.

Some examples of the process of specification will be useful. In LL. Alfred, 36,[50] providing for the case of a man's staking himself on a spear carried by another, we read, "Let this (liability) be if the point be three fingers higher than the hindmost part of the shaft; if they be both on a level . . . be that without danger."

The rule of the road and the sailing rules adopted by Congress from England are modern examples of such statutes. By the former rule, the question has been narrowed from the vague one, Was the party negligent? To the precise one, Was he on the right or left of the road? To avoid a possible misconception, it may be observed that, of course, this question does not necessarily and under all circumstances decide that of liability; a plaintiff may have been on the wrong side of the road, as he may have been negligent, and yet the conduct of the defendant may have been unjustifiable, and a ground of liability.[51] So, no doubt, a defendant could justify or excuse being on the wrong side, under some circumstances. The difference between alleging that a defendant was on the wrong side of the road, and that he was negligent, is the difference between an allegation of facts requiring to be excused by a counter-allegation of further facts to prevent their being a ground of liability, and an allegation which involves a conclusion of law, and denies in advance

the existence of an excuse. Whether the former allegation ought not to be enough, and whether the establishment of the fact ought not to shift the burden of proof, are questions which belong to the theory of pleading and evidence, and could be answered either way consistently with analogy. I should have no difficulty in saying that the allegation of facts which are ordinarily a ground of liability, and which would be so unless excused, ought to be sufficient. But the forms of the law, especially the forms of pleading, do not change with every change of its substance, and a prudent lawyer would use the broader and safer phrase.

The same course of specification which has been illustrated from the statute-book ought also to be taking place in the growth of judicial decisions. That this should happen is in accordance with the past history of the law. It has been suggested already that in the days of the assize and *jurata* the court decided whether the facts constituted a ground of liability in all ordinary cases. A question of negligence might, no doubt, have gone to the jury. Common sense and common knowledge are as often sufficient to determine whether proper care has been taken of an animal, as they are to say whether A or B owns it. The cases which first arose were not of a kind to suggest analysis, and negligence was used as a proximately simple element for a long time before the need or possibility of analysis was felt. Still, when an issue of this sort is found, the dispute is rather what the acts or omissions of the defendant were than on the standard of conduct.[52] The distinction between the functions of court and jury does not come in question until the parties differ as to the standard of conduct. Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts (conduct), and also the consequence (liability) which the law attaches to those facts. In most cases the question is upon the facts, and it is only occasionally that one arises on the consequence.

It will have been noticed how the judges pass on the defendant's acts (on grounds of fault and public policy) in the case of the thorns, and that in *Weaver* v. *Ward*[53] it is said that the facts constituting an excuse, and showing that the defendant was free from negligence, should have been spread upon the record, in order that the court might judge. A similar requirement was laid down with regard to the defense of probable cause in an action for malicious prosecution.[54] And to this day the question of probable cause is always passed on by the court. Later evidence will be found in what follows.

There is, however, an important consideration, which has not yet been adverted to. It is undoubtedly possible that those who have the making of the law should deem it wise to put the mark higher in some cases than the point established by common practice at which blameworthiness begins. For instance, in *Morris* v. *Platt*,[55] the court, while declaring in the strongest terms that, in general, negligence is the foundation of liability for accidental trespasses, nevertheless hints that, if a decision of the point were necessary, it might hold a defendant to a stricter rule where the damage was caused by a pistol, in view of the danger to the public of the growing habit of carrying deadly weapons. Again, it might well seem that to enter a man's house for the purpose of carrying a present, or inquiring after his health when he was ill, was a harmless and rather praiseworthy act, although crossing the owner's boundary was intentional. It is not supposed that an action would lie at the present day for such a cause, unless the defendant had been forbidden the house. Yet in the time of Henry VIII it was said to be actionable if without license, "for then under that color my enemy might be in my house and kill me."[56] There is a clear case where public policy establishes a standard of overt acts without regard to fault in any sense. In like manner, policy established exceptions to the general prohibition against entering another's premises, as in the instance put by Chief Justice Choke in the Year Book, of a tree being blown over upon them, or when the highway became impassable, or for the purpose of keeping the peace.[57]

Another example may perhaps be found in the shape which has been given in modern times to the liability for animals, and in the derivative principle of *Rylands* v. *Fletcher*,[58] that when a person brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, he must keep it in at his peril; and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Cases of this sort do not stand on the notion that it is wrong to keep cattle, or to have a reservoir of water, as might have been thought with more plausibility when fierce and useless animals only were in question.[59] It may even be very much for the public good that the dangerous accumulation should be made (a consideration which might influence the decision in some instances, and differently in different jurisdictions); but as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken. The liability for trespasses of cattle seems to lie on the boundary line between

rules based on policy irrespective of fault, and requirements intended to formulate the conduct of a prudent man.

It has been shown in the first lecture how this liability for cattle arose in the early law, and how far the influence of early notions might be traced in the law of today. Subject to what is there said, it is evident that the early discussions turn on the general consideration whether the owner is or is not to blame.[60] But they do not stop there: they go on to take practical distinctions, based on common experience. Thus, when the defendant chased sheep out of his land with a dog, and as soon as the sheep were out called in his dog, but the dog pursued them into adjoining land, the chasing of the sheep beyond the defendant's line was held no trespass, because "the nature of a dog is such that he cannot be ruled suddenly."[61]

It was lawful in ploughing to turn the horses on adjoining land, and if while so turning the beasts took a mouthful of grass, or subverted the soil with the plough, against the will of the driver, he had a good justification, because the law will recognize that a man cannot at every instant govern his cattle as he will.[62] So it was said that, if a man be driving cattle through a town, and one of them goes into another man's house, and he follows him, trespass does not lie for this.[63] So it was said by Doderidge, J., in the same case, that if deer come into my land out of the forest, and I chase them with dogs, it is excuse enough for me to wind my horn to recall the dogs, because by this the warden of the forest has notice that a deer is being chased.[64]

The very case of *Mason* v. *Keeling*,[65] which is referred to in the first lecture for its echo of primitive notions, shows that the working rules of the law had long been founded on good sense. With regard to animals not then treated as property, which in the main were the wilder animals, the law was settled that, "if they are of a tame nature, there must be notice of the ill quality; and the law takes notice, that a dog is not of a fierce nature, but rather the contrary."[66] If the animals "are such as are naturally mischievous in their kind, he shall answer for hurt done by them, without any notice."[67] The latter principle has been applied to the case of a bear,[68] and amply accounts for the liability of the owner of such animals as horses and oxen in respect of trespasses upon land, although, as has been seen, it was at one time thought to stand upon his ownership. It is said to be the universal nature of cattle to stray, and, when straying in cultivated land, to do damage by trampling down and eating the crops, whereas a dog does no harm. It is also said to be usual and easy

to restrain them.[69] If, as has been suggested, the historical origin of the rule was different, it does not matter.

Following the same line of thought, the owner of cattle is not held absolutely answerable for all damage which they may do the person. According to Lord Holt in the above opinion, these animals, "which are not so familiar to mankind" as dogs, "the owner ought to confine, and take all reasonable caution that they do no mischief. . . . But . . . if the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise, if he had notice that they had done such a thing before."

Perhaps the most striking authority for the position that the judge's duties are not at an end when the question of negligence is reached, is shown by the discussions concerning the law of bailment. Consider the judgment in *Coggs* v. *Bernard*,[70] the treatises of Sir William Jones and Story, and the chapter of Kent upon the subject. They are so many attempts to state the duty of the bailee specifically, according to the nature of the bailment and of the object bailed. Those attempts, to be sure, were not successful, partly because they were attempts to engraft upon the native stock a branch of the Roman law which was too large to survive the process, but more especially because the distinctions attempted were purely qualitative, and were therefore useless when dealing with a jury.[71] To instruct a jury that they must find the defendant guilty of gross negligence before he can be charged, is open to the reproach that for such a body the word "gross" is only a vituperative epithet. But it would not be so with a judge sitting in admiralty without a jury. The Roman law and the Supreme Court of the United States agree that the word means something.[72] Successful or not, it is enough for the present argument that the attempt has been made.

The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. Thus, in *Crafton* v. *Metropolitan Railway Co.*,[73] the plaintiff slipped on the

defendant's stairs and was severely hurt. The cause of his slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe by reason of this circumstance and the absence of a handrail. There was nothing to contradict this except that great numbers of persons had passed over the stairs and that no accident had happened there, and the plaintiff had a verdict. The court set the verdict aside, and ordered a nonsuit. The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and did in fact mean, that the railroad company had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will be found in the textbooks.

On the other hand, if the court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability,[74] or prevented a recovery, as the case might be. Thus it is said to be actionable negligence to let a house for a dwelling knowing it to be so infected with smallpox as to be dangerous to health, and concealing the knowledge.[75] To explain the acts or omissions in such a case would be to prove different conduct from that ruled upon, or to show that they were not, juridically speaking, the cause of the damage complained of. The ruling assumes, for the purposes of the ruling, that the facts in evidence are all the facts.

The cases which have raised difficulties needing explanation are those in which the court has ruled that there was *prima facie* evidence of negligence, or some evidence of negligence to go to the jury.

Many have noticed the confusion of thought implied in speaking of such cases as presenting mixed questions of law and fact. No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply on the first half, the whole complex averment is plain matter for the jury without special instructions, just as a question of ownership would be where the only dispute was as to the fact upon which the legal conclusion was founded.[76] But when a controversy arises on the second half, the question whether the court or the jury ought to judge of the defendant's conduct is wholly unaffected by the accident, whether there is or is not

also a dispute as to what that conduct was. If there is such a dispute, it is entirely possible to give a series of hypothetical instructions adapted to every state of facts which it is open to the jury to find. If there is no such dispute, the court may still take their opinion as to the standard. The problem is to explain the relative functions of court and jury with regard to the latter.

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of torts has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment.[77] Therefore it aids its conscience by taking the opinion of the jury.

But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself. There is no reason why any other such question should not be settled, as well as that of liability for stairs with smooth strips of brass upon their edges. The exceptions would mainly be found where the standard was rapidly changing, as, for instance, in some questions of medical treatment.[78]

If this be the proper conclusion in plain cases, further consequences ensue. Facts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do. A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.

It has often been said, that negligence is pure matter of fact, or that, after the court has declared the evidence to be such that negligence *may* be inferred from it, the jury are always to decide whether the inference shall be drawn.[79] But it is believed that the courts, when they lay down this broad proposition, are thinking of cases where the conduct to be passed upon is not proved directly, and the main or only question is what that conduct was, not what standard shall be applied to it after it is established.

Most cases which go to the jury on a ruling that there is evidence from which they may find negligence, do not go to them principally on account of a doubt as to the standard, but of a doubt as to the conduct. Take the case where the fact in proof is an event such as the dropping of a brick from a railway bridge over a highway upon the plaintiff, the fact must be inferred that the dropping was due, not to a sudden operation of weather, but to a gradual falling out of repair which it was physically possible for the defendant to have prevented, before there can be any question as to the standard of conduct.[80]

So, in the case of a barrel falling from a warehouse window, it must be found that the defendant or his servants were in charge of it, before any question of standard can arise.[81] It will be seen that in each of these well-known cases the court assumed a rule which would make the defendant liable if his conduct was such as the evidence tended to prove. When there is no question as to the conduct established by the evidence, as in the case of a collision between two trains belonging to the same company, the jury have, sometimes at least, been told in effect that, if they believed the evidence, the defendant was liable.[82]

The principal argument that is urged in favor of the view that a more extended function belongs to the jury as matter of right, is the necessity of continually conforming our standards to experience. No doubt the general foundation of legal liability in blameworthiness, as determined by the existing average standards of the community, should always be kept in mind, for the purpose of keeping such concrete rules as from time to time may be laid down conformable to daily life. No doubt this conformity is the practical justification for requiring a man to know the civil law, as the fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law. But these considerations only lead to the conclusion that precedents should be overruled when they become inconsistent with present conditions; and this has generally happened, except with regard to the construction of

deeds and wills. On the other hand, it is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment, and, moreover, the standards for a very large part of human conduct do not vary from century to century.

The considerations urged in this lecture are of peculiar importance in this country, or at least in States where the law is as it stands in Massachusetts. In England, the judges at *nisi prius* express their opinions freely on the value and weight of the evidence, and the judges *in banc*, by consent of parties, constantly draw inferences of fact. Hence nice distinctions as to the province of court and jury are not of the first necessity. But when judges are forbidden by statute to charge the jury with respect to matters of fact, and when the court *in banc* will never hear a case calling for inferences of fact, it becomes of vital importance to understand that, when standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so. Were this not so, the almost universal acceptance of the first proposition in this lecture, that the general foundation of liability for unintentional wrongs is conduct different from that of a prudent man under the circumstances, would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury.

It is perfectly consistent with the views maintained in this lecture that the courts have been very slow to withdraw questions of negligence from the jury, without distinguishing nicely whether the doubt concerned the facts or the standard to be applied. Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land. This is the region of the jury, and only cases falling on this doubtful border are likely to be carried far in court. Still, the tendency of the law must always be to narrow the field of uncertainty. That is what analogy, as well as the decisions on this very subject, would lead us to expect.

The growth of the law is very apt to take place in this way. Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions,

which is so far arbitrary that it might equally well have been drawn a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood of where it falls.[83]

In this way exact distinctions have been worked out upon questions in which the elements to be considered are few. For instance, what is a reasonable time for presenting negotiable paper, or what is a difference in kind and what a difference only in quality, or the rule against perpetuities.

An example of the approach of decisions towards each other from the opposite poles, and of the function of the jury midway, is to be found in the Massachusetts adjudications, that, if a child of two years and four months is unnecessarily sent unattended across and down a street in a large city, he cannot recover for a negligent injury;[84] that to allow a boy of eight to be abroad alone is not necessarily negligent;[85] and that the effect of permitting a boy of ten to be abroad after dark is for the jury;[86] coupled with the statement, which may be ventured on without authority, that such a permission to a young man of twenty possessed of common intelligence has no effect whatever.

Take again the law of ancient lights in England. An obstruction to be actionable must be substantial. Under ordinary circumstances the erection of a structure a hundred yards off, and one foot above the ground, would not be actionable. One within a foot of the window, and covering it, would be, without any finding of a jury beyond these facts. In doubtful cases midway, the question whether the interference was substantial has been left to the jury.[87] But as the elements are few and permanent, an inclination has been shown to lay down a definite rule, that, in ordinary cases, the building complained of must not be higher than the distance of its base from the dominant windows. And although this attempt to work out an exact line requires much caution, it is entirely philosophical in spirit.[88]

The same principle applies to negligence. If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation.

The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury's determination.

I reserve the relation between negligent and other torts for the next lecture.

→ LECTURE FOUR ←

FRAUD, MALICE, AND INTENT— THE THEORY OF TORTS

THE NEXT SUBJECTS TO BE CONSIDERED ARE FRAUD, MALICE, AND INTENT. In the discussion of unintentional wrongs, the greatest difficulty to be overcome was found to be the doctrine that a man acts always at his peril. In what follows, on the other hand, the difficulty will be to prove that actual wickedness of the kind described by the several words just mentioned is not an element in the civil wrongs to which those words are applied.

It has been shown, in dealing with the criminal law, that, when we call an act malicious in common speech, we mean that harm to another person was intended to come of it, and that such harm was desired for its own sake as an end in itself. For the purposes of the criminal law, however, intent alone was found to be important, and to have the same consequences as intent with malevolence superadded. Pursuing the analysis, intent was found to be made up of foresight of the harm as a consequence, coupled with a desire to bring it about, the latter being conceived as the motive for the act in question. Of these, again, foresight only seemed material. As a last step, foresight was reduced to its lowest term, and it was concluded that, subject to exceptions which were explained, the general basis of criminal liability was knowledge, at the time of action, of facts from which common experience showed that certain harmful results were likely to follow.

It remains to be seen whether a similar reduction is possible on the civil side of the law, and whether thus fraudulent, malicious, intentional, and negligent wrongs can be brought into a philosophically continuous series.