

THE  
COMMON LAW

BY  
O. W. HOLMES, JR.

BOSTON:  
LITTLE, BROWN, AND COMPANY  
1881

## PREFACE.

---

THIS book is written in pursuance of a plan which I have long had in mind. I had taken a first step in publishing a number of articles in the American Law Review, but I should hardly have attempted the task of writing a connected treatise at the present time, had it not been for the invitation to deliver a course of Lectures at the Lowell Institute in Boston. That invitation encouraged me to do what was in my power to accomplish my wish. The necessity of preparing for the Lectures made it easier to go farther, and to prepare for printing, and accordingly I did so. I have made such use as I thought fit of my articles in the Law Review, but much of what has been taken from that source has been rearranged, rewritten, and enlarged, and the greater part of the work is new. The Lectures as actually delivered were a good deal simplified, and were twelve in number. The twelfth, however, was a summary of the foregoing eleven, and has

been omitted, as not necessary for a reader with the book before him.

The limits of such an undertaking as the present must necessarily be more or less arbitrary. Those to which I have confined myself have been fixed in part by the limits of the course for which the Lectures were written. I have therefore not attempted to deal with Equity, and have even excluded those subjects, like Bills and Notes, or Partnership, which would naturally require an isolated treatment, and which do not promise to throw light on general theory. If, within the bounds which I have set myself, any one should feel inclined to reproach me for a want of greater detail, I can only quote the words of Lehuërou, "*Nous faisons une théorie et non un spicilège.*"

O. W. HOLMES, JR.

Boston, February 8, 1881.

# CONTENTS.

---

## LECTURE I.

### EARLY FORMS OF LIABILITY.

Object of the Book, 1. — Origin of Legal Procedure in the Composition for Vengeance, 2-4. — Subject of this Lecture, Indirect Liability for Servants, Animals, &c., 5. — A. Mosaic Law, 7. — B. Greek Law, 7, 8. — C. Roman Law: (*a.*) *Noxæ deditio*, 8-15; (*b.*) Personal Liability, 15-17. — D. Early German Law, 17, 18. — E. Anglo-Saxon Law, 18, 19. — F. The Common Law: (*a.*) Master and Servant, 19, 20; (*b.*) Animals, 20-24; (*c.*) Inanimate Things, — Deodand, 24, 25; the Ship and the Admiralty Law, 25-34. — G. Conclusion, 34-38.

## LECTURE II.

### THE CRIMINAL LAW.

A. Vengeance: (*a.*) As Source of the Criminal Law, 39, 40; (*b.*) As one Object still, 40, 41. — B. Theories of Punishment: (*a.*) Reformation, 42; (*b.*) Retribution, 42, 43, 45; (*c.*) Prevention, 43-48. — C. Preventive Theory shows Penal Liability not measured by actual Blameworthiness alone, but by Nonconformity to external Standard based on what would be wrong in average Man, 49-51. — D. Murder, 51-60; Malice = Knowledge of Facts making the Conduct dangerous, 52-56; Exceptional Cases where Man must know at his Peril, 58, 59; Murder and Manslaughter, 59, 60. — E. Manslaughter, 59-62; Provocation, 61, 62. — F. Malicious Mischief, why actual Malice, 62-64. — G. Arson, 64, 65. — H. Attempts, 65-70; Intent as making a harmful Result probable from Act otherwise innocent, 66-68; Limit to this, 68-70. — I. Larceny is Attempt to deprive Man of his Property permanently, 70-74. — K. Burglary, 74; Conclusion, 75, 76.

## LECTURE III.

## TORTS.—TRESPASS AND NEGLIGENCE.

A. Introduction, 77-79; The Question, 79; Two Theories: (a.) Liability confined to moral Shortcoming, 79, 81, 82; (b.) A Man acts at his Peril, 80, 82; Neither sound. — B. Latter Theory considered: (a.) Argument for, 83-88;  $\alpha$ . Analogy, 83, 84;  $\beta$ . Theory, 84;  $\gamma$ . Pleading, 84, 85;  $\delta$ . Precedent, 85-88. (b.) Argument against, 89-107;  $\alpha$ . Analogy, 90-94;  $\beta$ . Principle and Policy, 94-96;  $\gamma$ . Trespases upon Land, &c., 96-100;  $\delta$ . Pleading, 100-102;  $\epsilon$ . Precedent, 102-107. — C. Negligence not judged by personal or moral Standard, 107. — D. Liability for unintended Harm is determined by what would be Blameworthy in average Man, 108-110; i. e. by Standard external to the Individual, which tends to become more specific, and to take form of concrete Rules of Conduct, 110-113; (a.) Process of Specification illustrated, 113-119;  $\alpha$ . Statute, 113, 114;  $\beta$ . Decisions, 113-115;  $\gamma$ . Policy apart from Negligence, *Rylands v. Fletcher*, 115-117;  $\delta$ . Cattle, 116-119; (b.) Bailment, 120; (c.) "Evidence of Negligence," 120-126; (d.) Function of Jury, 123-129.

## LECTURE IV.

## FRAUD, MALICE, AND INTENT.—THE THEORY OF TORTS.

Preliminaries, 130-132. — A. Moral Element in Wrongs called Intentional: (a.) Deceit, 132-138; (b.) Slander, 138-140; (c.) Malicious Prosecution, 140-142; (d.) Conspiracy, 143; (e.) Trover, 143, 144. — B. Moral Standards adopted only so far as to give Opportunity to avoid inflicting Harm, 144; (a.) Some Harms may be done, 144, 145; Risk of others must be taken, 145, 146; but most Cases between these Extremes, 146; (b.) Common Ground of Liability in Tort: Knowledge of Circumstances making Conduct dangerous, 146-149; (c.) What these Circumstances are, determined by Experience, 147, 149, 150; (d.) Function of the Jury, 150-152. — C. Examples in which the Circumstances which must be known have been worked out: Trespass to Property, 153; Fierce Animals, 154-156; Cattle, &c., 156-158; Slander, &c., 158, 159. — D. Proximity of Choice to Harm complained of, 160, 161. — E. Summary of Law of Torts, 161-163.

## LECTURE V.

## THE BAILEE AT COMMON LAW.

**Law of Bailment is Test of Theory of Possession, 164, 165.** — **A. Early German Law, 165–167.** — **B. English Law after the Conquest closely resembles it, 167–180:** (*a.*) Remedy for converted Chattels is possessory, 168, 169; (*b.*) Transfer by Bailee binds Owner, 169, 170; (*c.*) Inverted Explanation of Bailee's Right of Action, 170, 171; (*d.*) True Explanation that our Law regards him as Possessor, 171–175; (*e.*) Bailee answerable to Bailor if Goods are stolen, 175–180. — **C. Common Carriers. Survival of ancient Law, 180–205:** (*a.*) Under Elizabeth, Carriers like other Bailees, 181, 182; (*b.*) Change from Detinue to Case introduces Allegation of Assumpsit or Common Calling, even where Ground of Liability is Bailment, 183–187; (*c.*) The Custom of the Realm, 187, 188; (*d.*) The Cases examined from *Southcote's Case* (A. D. 1601) to *Coggs v. Bernard* (A. D. 1703), 181, 182, 185, 189–199; (Effect of Assumpsit and Common Calling, 195;) (*e.*) Bailee's Liability diminished one Way, 195, 197, 198; increased another, 199–201; (*f.*) Public Enemy and the Act of God, 201, 202; (*g.*) Meaning of Lord Holt's View as to Public Calling, 203; (*h.*) Later Changes; (*i.*) Conclusion, 202, 204, 205.

## LECTURE VI.

## POSSESSION AND OWNERSHIP.

**A. Why protected, 206–213.** — **B. Fact or Right? 213–215.** — **C. Analysis of, 215–235:** (*a.*) Power over Object, 216–218; (*b.*) Intent, 218–234: *a.* Criteria of Roman Law rejected, 218, 219; *β.* Intent to exclude, 219–226; *γ.* Servants. Digression as to Agents, 226–234; (*c.*) Power as to Third Persons, 234, 235. — **D. Continuance of possessory Rights, 235–238.** — **E. Possession of Rights, 238–241.** — **F. Consequences of Possession (i. e. Nature of possessory Rights), 241–244.** — **G. Ownership, 244–246.**

## LECTURE VII.

## CONTRACT. — I. HISTORY.

**A. Early Forms of Contract, 247–252:** (*a.*) Promissory Oath, 247; (*b.*) Suretyship and Bail, 247–251; (*c.*) Debt; (*d.*) Origin of Action,

251, 252. — B. Consideration, 253–270: (*a.*) Origin in Debt, 253, 254; (*b.*) Started from Procedure, and the Nature of the Cases for which the *Secta* or Witness Proof was provided, 254–263; (*c.*) *Magna Charta* required *Secta* for Parol Debts, and thus forbade Suits for such Debts except within the traditional Limits of the *Secta*, 263–265; (*d.*) *Quid pro quo*, Doctrine invented to fit existing Limits of Parol Debts, but applied to other Parol Contracts and in Equity, 265–270. — C. Covenants, 271–273. — D. Assumpsit, 274–288: (*a.*) Transit from Tort to Contract on Ground of Defendant's having intermeddled, 274–284; (*b.*) New Doctrine of Consideration, 284–287; (*c.*) Later Influence of Assumpsit on the substantive Law, 287, 288.

## LECTURE VIII.

### CONTRACT. — II. ELEMENTS.

A. Consideration, 289–297: (*a.*) What sufficient, 290–293; (*b.*) Consideration and Promise must be reciprocal conventional Inducement each for other, 293–295; (*c.*) Executed Consideration, Request, 295–297. — B. Promise, 297: (*a.*) Assurance that certain State of Things shall come to pass, 297–299; (*b.*) Hence Contract is taking Risk of uncertain State of Things, and the Rule of Damages depends on the Risk taken, 299–303; (*c.*) Acceptance, 303, 304. — C. Bilateral Contract, 304–307: (*a.*) Promises as Consideration; Wager on past Events, 304, 305; (*b.*) Contract by Letter, 305–307.

## LECTURE IX.

### CONTRACT. — III. VOID AND VOIDABLE.

Void Contracts, 308–315. — A. When Contract void, some primary Element wanting: (*a.*) Party, 308, 309; (*b.*) Parties say different Things, 309, 310; (*c.*) Language contradictory in Essentials, 310–313. — B. In general, Contract not void on Grounds outside the Contract itself; if Elements of Contract present, Contract is made, 313–315.

Voidable Contracts, 315–339. — A. Ground of Avoidance is a Condition: (*a.*) If Condition attached to Contract's coming into being, no Contract, 315, 316; (*b.*) Conditions precedent and subsequent, 316–318; (*c.*) Distinction between Conditions and Limitations upon the Scope of a Promise, 318–322. — B. Representations outside

Contracts, 322-326: (*a.*) No implied Condition that they are True, but only that no Fraud, 322-326; (*b.*) Fraud, what? 325; (*c.*) Goes only to Motives; Materiality, 326. — C. Conditions as to making good the Representations or Undertakings contained in the Contract, 327-339: (*a.*) Regarding present Facts; Warranties; Void and Voidable, 327-333; (*b.*) Promises, 333-339.

## LECTURE X.

## SUCCESSIONS. — I. AFTER DEATH. — II. INTER VIVOS.

The Problem, How are Rights or Obligations transferred, when the Facts from which they spring cannot be True of the Transferee (*i. e.* when the Situation of Fact is not a continuing one capable of Possession)? It is by a fictitious Identification of the Transferee with his Transferor. I. Successions after Death. — A. The Executor, 345: (*a.*) The Roman Heir, 344; (*b.*) The Executor a universal Successor, "represents Person of Testator," 344, 345. — B. The Heir, 346-352: (*a.*) At first universal, then singular Successor, "represents Person of Ancestor," 346-350; (*b.*) This *Persona* is the Estate, 350-352.

II. Successions *Inter Vivos*. A. Standing in Seller's Shoes not a necessary Incident of Conveyance, 353-355. — B. Early German and Anglo-Saxon Law; Alienability extended by Analogy of Inheritance, 355-360. — C. Roman Law; Consequences of Identification of Heir with Ancestor extended to Buyer and Seller, to acquire prescriptive Right, 360-366. — D. English Law. Prescription, 366-369. — E. Devise, 369, 370.

## LECTURE XI.

## SUCCESSIONS. — II. INTER VIVOS.

A. Warranty, 371-380: (*a.*) Direct Benefit of, extended to Assign by Fiction that Assign was *quasi Heres*, 372-377; (*b.*) Analogy of, extended to modern Covenants for Title, 378-380. — B. Easement, 381-386: (*a.*) Roman Law, 382-385; (*b.*) English Law, 385, 386, (393, 394, 396, 397, 399, 402, 404, 405); (*c.*) The Type of Rights which pass, irrespective of Succession, upon a conflicting Principle, 386, 387. — C. Rents, 388-391; (*a.*) When Parcel of a Manor, like Easement, 388-390; (*b.*) But contractual Remedies for, only



passed by Succession, 390, 391. — D. Prescriptive Rights analogous to Contract, which followed Law of Easement, 392-394. — E. Land bound to Warranty, 394, 395. — F. Necessary Meeting and Conflict between Principle of B, C, D, and E, and that of A (Succession), illustrated by the Cases, 395-399. — G. Modern Law; (*a.*) The Confusion as to "Covenants running with the Land" due to losing Sight of the Conflict, and to the Attempt to apply both Principles, 400, 404; (*b.*) Results, 404, 406. — H. Other Cases of Successions : Uses, and Trusts, 407-409.

## TABLE OF CASES.

	PAGE		PAGE
Adams v. Jones	233	Bolles v. Nyseham	391
Andrew v. Pearce	380	Bonomi v. Backhouse	98
Andrew Baker's Case	119	Boorman v. Brown	195
Anglo-Egyptian Navigation Co. v. Rennie	334	Bosden v. Thinne	286, 297
Anonymous (1 Bulstr. 45)	250	Boson v. Sandford	187, 195, 196, 230
(Cro. Eliz. 10)	88	Boyer v. Rivet	345, 349, 371
(Dyer, 24 a)	392	Braunstein v. Accidental Death Ins. Co.	316
(“ 369)	409	Brett v. Cumberland	399, 403
(Moore, 248)	227	Bridges v. Hawkesworth	221
(1 Sid. 236)	31	British Columbia Saw-Mill Co. v. Nettleship	301, 302
Ards v. Watkin	370	Bronson v. Coffin	394
Armory v. Delamirie	242	Brooker's Case	349, 352
Arnold v. Jefferson	243	Brown v. Collins	107
Asher v. Whitlock	215, 244, 368	v. Foster	316
		v. Kendall	105, 106
Back v. Stacey	128	Browne v. Dawson	235
Bain v. Cooper	345, 349, 352	Brucker v. Fromont	230
Bainbridge v. Firmstone	291	Burgess v. Wheate	408
Bally v. Wells	402	Burr v. Wilcox	292
Barker v. Bates	223	Burton v. Fulton	143
v. Halifax	297	v. Hughes	174
Barnett v. Brandao	151	Bush v. Steinman	231
Barron v. Mason	142	Buskin v. Edmunds	391
Barwick v. English Joint Stock Bank	230	Buster v. Newkirk	217
Basely v. Clarkson	99	Buxendin v. Sharp	119
Basset v. Maynard	235	Byne and Playne's Case	291
Bayntine v. Sharp	119	Byrne v. Boadle	125
Beadel v. Perry	128		
Behn v. Burness	328, 329, 331, 336	Callahan v. Bean	128
Berndtson v. Strang	233	Calye's Case	151
Besozzi v. Harris	119	Canham v. Barry	298
Bessey v. Olliot	88, 104	Card v. Case	117, 119, 155
Bird v. Astcock	202	Carter v. Towne	128
Bizzel v. Booker	107	Cartwright v. Green	225
Blades v. Higgs	223	Castle v. Duryee	87
Blundell v. Catterall	387	Chamberlain v. Cooke	189, 196
Blyth v. Birmingham Water- works Co.	107	Chambers v. Taylor	115
Bolingbroke v. Swindon Local Board	230	Chanter v. Hopkins	336
		Cheale v. Kenward	804
		China, The	27

Chudleigh's Case	393, 399, 408	Fitch v. Snedaker	294
City of London Brewery Co. v. Tennant	128	Fleming v. Manchester, Sheffield, & Lincolnshire Railway Co.	195
Clapp v. Kemp	230	Fletcher v. Rylands	88, 116, 119, 156, 158
Clark v. Chambers	92, 93	Forward v. Pittard	200, 204
v. Maloney	237	Fouldes v. Willoughby	144
Clay v. Snelgrave	31	Freeman v. Roshier	230
Cocker v. Crompton	309	Gardiner v. Thibodeau	239
Cockson v. Cock	403	Gardner v. Lane	310
Coggs v. Bernard	120, 176, 179, 183, 187, 188, 196-199, 204, 284, 290	Gateward's Case	367
Cole v. Turner	107	Gauntlett v. King	230
Collet v. Foster	230	Gee v. Lancashire & Yorkshire Railway Co.	301
Commonwealth v. Hallet	59	George v. Wiburn	189
v. Sawin	43	Gibbons v. Pepper	91, 93
v. Walden	63	Gibson v. Stevens	151
Conan v. Kemise	402	Gilbert v. Stone	148, 149
Cornfoot v. Fowke	231	Gillet v. Ball	232
Cort v. Ambergate, Nottingham & Boston & Eastern Junction Railway Co.	319	Goddard v. Monitor Ins. Co.	311
Coward v. Baddeley	107	Goodman v. Pocock	320
Cox v. Burbidge	23, 119	Gordon v. Harper	173
Crabbe v. Moxey	293	Gorham v. Gross	121, 157
Crafton v. Metropolitan Railway Co.	121	Graham v. Peat	244
Craig v. Gilbreth	232	Graves v. Legg	339
Crouch v. London & N. W. R. Co.	151	Gray's Case	60
Cundy v. Lindsay	313	Grill v. General Iron Screw Collier Co.	120
Daintry v. Brockhurst	390	Hackett v. Baiss	128
Dale v. Hall	201, n. 1	Haigh v. Brooks	291
Dalston v. Janson	192	Hall v. Fearnley	85, 107
Dean of Windsor's Case	402	Halliday v. Holgate	224
Detroit & Milwaukee R. R. Co. v. Van Steinburg	123	Hammack v. White	94, 125, 158
Dickenson v. Watson	87, 88	Harbidge v. Warwick	406
Dillon v. Fraine	399, 408	Harper v. Bird	379, 391
Dimech v. Corlett	328	Hart v. Miles	291
Doe v. Barnard	368	Harvey v. Dunlop	95, 106
v. Dyball	244	Haseler v. Lemoyne	230
Drake v. Royman	180, 184	Hawkins v. Cardy	151
Drope v. Theyar	227	Heyworth v. Hutchinson	336
Durfee v. Jones	225	Hill v. Ellard	367
Ellen v. Topp	334, 337	v. Morey	230
Ellis v. Clark	294	Hobart v. Haggett	97
Ellis v. Loftus Iron Co.	119	Hogarth v. Jackson	212
Evans v. Yeoman	185	Holiday v. Hicks	227, 228
Ewre v. Strickland	403	Holmes v. Mather	107
Farina v. Home	234	Holms v. Seller	394
Fennings v. Lord Grenville	212	Horne v. Midland Railway Co.	301
Fisher v. Mellen	325	Horne's Case	398
		Hunt v. Bate	286, 296
		v. Livermore	316
		Hyde v. Dean of Windsor	401, 402
		Hydraulic Engineering Co. v. McHaffie	301

## TABLE OF CASES.

xiii

Isaack v. Clark	169, 183, 275, n. 1	M'Manus v. Crickett	90, 230
Jefferies v. Great Western Rail- way Co.	242	M'Pherson's Case	69
Jones v. How	298	Mears v. London & South-west- ern Railway Co.	173
Justin v. Ballam	32	Merry v. Green	224, 225
Kearney v. London, Brighton, & S. Coast Railway Co.	125	Metropolitan Railway Co. v. Jackson	90, 124
Keighley's Case	202	Middlemore v. Goodale	374, 379
Kennedy v. Panama, &c. Mail Co.	330	Middleton v. Fowler	196
Kenrig v. Eggleston	191, 194	Millen v. Fawdry	93, n. 2, 103, 117, 118
Kincaid v. Eaton	223	Milman v. Dolwell	85
King v. Viscount Hertford	195	Minor v. Sharon	121, 123
Knapp v. Salisbury	85	Minshull v. Oakes	401
Knight v. Jermin	115, 141	Mitchell v. Jenkins	141, 142
Kyle v. Kavanagh	309	Mitchil v. Alestree	22, 94, 158
Lamplough v. Brathwait	122, 297	Mitten v. Fandrye	93, n. 2, 103, 117, 118
Lane v. Cotton	186, n. 1, 196, 203	Moran v. Portland S. P. Co.	174
Lawrence v. Jenkins	392	Mores v. Conham	244
Leame v. Bray	88, 104	Morgan v. Ide	173
Leather v. Simpson	136	Morris v. Platt	106, 115
Lee v. Riley	119	Morse v. Slue	33, n. 3, 176, 186, 189, 192, 198, 228
Lewis v. Campbell	378	Mosley v. Fosset	184, 185
v. The State	68	Mouse's Case	202
Lipson v. Harrison	32	Muggridge v. Eveleth	173
Little v. Fosset	173	Mulgrave v. Ogden	183
Littledale v. Scaith	212	Murray v. Currie	230
Lord v. Price	173, 175	Neal v. Gillet	109
Lord North v. Butts	345	Nicholls v. Moore	191
Losee v. Buchanan	106	Nickolson v. Knowles	232
Lotan v. Cross	173, 174	Nicolls v. Bastard	173, 174
Louisa Jane, The	32	Nitroglycerine Case	106
Lovett v. Hobbs	196	Noke v. Awder	378
v. Salem & South Dan- vers R. R. Co.	128	Nowel v. Smith	392
Lucas v. Mason	231	Nugent v. Smith	180, 199, n. 1
Lyle v. Barker	171	Oates v. Frith	349
Lyon v. Bertram	330	Overton v. Syddall	345, 349
Mackay v. Commercial Bank of New Brunswick	231	Pakenham's Case	392, 393, 395, 397
Malek Adhel, The	29	Parrot v. Wells	106
Manders v. Williams	173, 174	Patten v. Rea	230
Marsh v. Kavenford	287	Pawashick, The	151
v. Rainsford	287	Pearcy v. Walter	85
Marshall v. Welwood	156	People v. Shearer	215
Marvin v. Wallis	233	Pickas v. Guile	287, 290
Mason v. Keeling	22, 23, 118	Pickering v. Barkley	151, 176
Matthews v. Hopkins	192	Pierson v. Post	217
May v. Burdett	9, 22, 119	Pillans v. Van Mierop	259
McAvoy v. Medina	222	Pincome v. Rudge	378
McGahey v. Moore	235	Porter v. Swetnam	391
		Powtuary v. Walton	197, 284, 290

Price v. Jenkins	293	Sharp v. Powell	93
Printing and Numerical Registering Co. v. Sampson	205	Sharpe v. Waterhouse	395
Prior of Woburn's Case	392, 394	Sidenham v. Worlington	285, 286, 297
Proctor v. Adams	223	Sir Henry Nevill's Case	393, 403
Raffles v. Wichelhaus	309	Skinner v. Chapman	212
Railroad Co. v. Lockwood	120	v. London, Brighton, & S. Coast Ry. Co.	125
Ratcliff v. Davis	176, 244	Slipper v. Mason	392
Read v. Baxter	287	Smith v. Hughes	310
v. Edwards	23, 118, 119	v. Kendall	151
Reader v. Moody	235	v. London & Southwestern Railway Co.	93, 107
Regina v. Davies	313	v. Pelah	119
v. Dilworth	66	Smith and Smith's Case	223, 287
v. Hibbert	58	Southcot v. Bennett	176, 178, 179
v. Hicklin	147	Southcote's Case	180-182, 184, 185, 187, 189-199, 202, 203, 228, 244
v. Jacobs	313	Southcote v. Stanley	227
v. Jones	66	Southern v. How	228, 230
v. Middleton	224, 313	Spencer's Case	393, 398, 399, 401, 406
v. Prince	59	Spofford v. Harlow	113
v. Roberts	67	Star v. Rookesby	392
v. Rowe	223, 225	Stockport Waterworks v. Potter	241
v. Swindall	60	Stockwell v. Hunter	388
v. Taylor	67	Strong v. Adams	173
Rex v. Cabbage	74	Sutton v. Buck	174
v. Dixon	147	Swift v. Gifford	212, 218
v. Furnival	75	v. Jewsbury	231
v. Hayward	62	v. Winterbotham	231
v. Hertford, Sheriff	195	Symonds v. Darknoll	185, 186, 187, 191, 199
v. Holland	408		
v. Mastin	60		
v. Mucklow	313		
v. Oney	62, 122		
v. Shaw	62		
Rich v. Kneeland	184, 189, 196	Theed v. Debenham	128
Richards and Bartlet's Case	287	Thomas v. Cadwallader	336
Riches and Briggs	287, 290	v. Thomas	292, 293
Roberts v. Brett	337	Ticonderoga, The	27
Roe v. Hayley	370	Tuberville v. Stampe	230
Rogers v. Head	184, 185	Turner v. Ambler	141
v. Spence	212		
Rooth v. Wilson	174	Udell v. Atherton	231
Rowbotham v. Wilson	394, 403, 406	Underwood v. Hewson	87
Rylands v. Fletcher	88, 116, 119, 156, 158	United States v. Holmes	47
		Upshare v. Aidee	196
Safe Deposit & Trust Co. of Pittsburgh v. Pollock	203	Vincent v. Stinehour	92, 107
Sale v. Kitchingham	403	Vyryan v. Arthur	395
Sands v. Trevilian	285		
Sawyer v. Kendall	368	Wakeman v. Robinson	105
Scott v. Shepherd	88, 92, 103, 104, 149, 240	Ward v. Macaulay	233
		Way v. Hearne	313
Shadwell v. Shadwell	292	Weaver v. Ward	87, 104, 115
Sharington v. Strotton	259, 286	Webb v. Fox	212
		Wegerstoffe v. Keene	151

## TABLE OF CASES.

xv

Weir v. Bell	136, 231	Williams v. Pott	232
Western Bank of Scotland v. Addie	231	Williamson v. Allison	135
Wheatley v. Low	291	Winsmore v. Greenbank	122
White v. Webb	171	Withers v. Iseham	367
Wilbraham v. Snow	170, 174, 242	Woodlife's Case	176, 181, 182, 190, 195, 228
Wilkinson v. Oliveira	291	Worcester (Earl) v. Finch (4th Inst. 85)	409
Williams's Case	392		
Williams v. Carwardine	294		
v. Hide	185, 191, 202	Yielding v. Fay	392
v. Jones	107	Young v. Hichens	217

## YEAR BOOKS AND EARLY CASES.

	PAGE		PAGE
6 Ric. I. (Abbr. Plac.)	102	17 Ed. III. 48, pl. 14	257, 263, 265, 267
8 Joh. " "	272	18 " 13, pl. 7	264
— (Bract.)	377	21 " 2, pl. 5	394
19 Ed. I. (Abbr. Plac.)	272	22 Ass. 94, pl. 41	275
20 " 200	350	22 " 101, pl. 70	254, 266
" " 226	350	24 Ed. III. (Molloy)	20
" " 232	349, 357, 401	27 Ass. 135, pl. 25	39, 359
" " 304	262, 263	27 " 141, pl. 56	23, 114, 119
" " 360	395	29 Ed. III. 25, 26	264, 267
" " 426	367	29 Ass. 163, pl. 28	176, 244
21 " 456	257	30 Ed. III. 25, 26	188
22 " 466-468	169, 242	33 " (Fitz. Mainprise, pl. 12)	250
" " 494, 496	400	40 " 5, 6, pl. 11	202
30 " 106	102	" " 24, pl. 27	270
" " 158	272	41 " 3, pl. 8	200
" " 524, 525	25	" " 7, pl. 15	267, 272
32 " 516	263, 395	42 " 3, pl. 14	378, 392, 393, 395, 397
33 " 70	389	" " 11, pl. 13	200
" " 354, 356	272	42 Ass. pl. 17	200
" " 430	394	43 Ed. III. 2, pl. 5	270
34 " 150, 152	262	" " 11, pl. 1	264
" " 205	367	" " 30, pl. 15	275
35 " 452	272	" " 33, pl. 38	114, 276, 281
" " 454	270	44 " 21, pl. 23	264, 272
" " 455	272	45 " 11, 12	389, 396
" " 545	262	" " 24, pl. 30	266, 272
7 Ed. II. 242	257, 260, 272	46 " 6, pl. 16	267
8 " 275	176, 224	" " 19, pl. 19	275, 290
" " (Fitz. Corone, pl. 389)	21	" " 25, pl. 10	270
12 " 375	269, 270	48 " 2, pl. 4	345
13 " 403	267	" " 3, pl. 6	267
18 " 582	257, 263	" " 6, pl. 11	264, 280, 281, 283
19 " 624	188		
4 Ed. III. 57, pl. 71	400		
7 " 65, pl. 67	400		
" " (Fitz. Barre, pl. 290)	22		

48 Ed. III. 20, pl. 8	171, 174, 242	9 Ed. IV. 40, pl. 22	178
50 " 5, pl. 11	270	10 " 1	242
" " 12, 13, pl. 2	378, 396	12 " 13, pl. 9	171, 173, 184
Ed. III. (Keilway, 145, 146)	393	13 " 9, 10, pl. 5	176, 224, 226
11 Ric. II. (Fitz. <i>Acc. s. l. Case</i> , pl. 37)	281	14 " 6, pl. 3	266, 269
19 " (Fitz. <i>Dett</i> , pl. 166)	266, 267, 296	15 " 32, pl. 14	266, 269
2 Hen. IV. 3, pl. 9	277, 280, 282	17 " 4, pl. 4, 5	269
" " 6, pl. 25	398	19 " 10, pl. 18	266
" " 14, pl. 5	378	20 " 3, pl. 17	266
" " 18, pl. 6	188, 227, 230	" " 10, 11, pl. 10	118, 119, 178
" " 18, pl. 8	87	22 " 5, pl. 6	172
7 " 14, pl. 18	184, 200, 228	" " 6, pl. 18	407
11 " 17, pl. 39	242, 243	" " 8, pl. 24	99, 118
" " 23, 24	170, 174, 178, 242	" " 26, pl. 6	298
" " 33, pl. 60	277, 280, 282	2 Hen. VII. 11, pl. 9	184, 200, 280, 284
" " 45	184	3 " 4, pl. 16	170, 178
12 " 7	367	" " 12, pl. 9	226
" " 17, pl. 13	267	5 " 18, pl. 12	349, 370, 390, 391
14 " 5, 6	375	6 " 9, pl. 4	210
9 Hen. V. 14, pl. 23	264, 267	" " 12, pl. 9	171, 178
3 Hen. VI. 36, pl. 33	254, 267, 268, 269, 277, 280, 282, 284, 285	" " 14, pl. 2	389
7 " 22, pl. 3	169	" " 18, pl. 2	390
9 " 16, pl. 7	391	10 " 25, 26, pl. 3	178
10 " 21, pl. 69	178	12 " (Keilway, 2)	389
14 " 18, pl. 58	281, 283, 284	" " ( " 3)	23, 119
" " 26, pl. 77	391	13 " 10	243
19 " 49	183, 184	" " 15, pl. 10	119
" " 49, pl. 5	279, 283, 290	17 " (Keilway, 42)	407
20 " 25, pl. 11	283	" " ( " 44)	345
" " 34, pl. 4	280, 284	18 " ( " 46)	116, 407
21 " 8, 9, pl. 19	240	" " ( " 50)	203
" " 55	203	20 " 1, pl. 11	170, 243
22 " 21, pl. 38	188, 190	" " 5, pl. 15	172
" " 46, pl. 36	392, 394	21 " 14	242
33 " 1, pl. 3	176, 178, 182, 193, 200, 201	" " 14, pl. 23	170, 174, 226, 243
" " 26, 27	169	" " 27, pl. 5	4, 87
37 " 8, pl. 18	266, 268, 269	" " 30, pl. 5	285
" " 8, pl. 33	254	" " 39, pl. 49	169, 172
" " 13, pl. 3	254, 269	" " 41, pl. 66	284, 285
" " 37, pl. 26	149	" " (Keilway, 77)	182, 184, 199, 200
39 " 34, pl. 46	272	2 Hen. VIII. (Keilway, 160)	182, 184, 197, 199, 200, 224, 284, 290
2 Ed. IV. 4, 5, pl. 9	169	12 " 2, pl. 2	116
" " 15, pl. 7	178, 226	14 " 6, pl. 5	408
5 " 7, pl. 16	407	" " 16, pl. 5	349
6 " 7, pl. 18	4, 85, 103	27 " 24, 25, pl. 3	264,
8 " 5, 6, pl. 1	345, 350, 407		285, 287
" " 6, pl. 5	170	Incerti temporis (Keilway, 113,	
" " 11, pl. 9	229	130)	389
9 " 34, pl. 9	170, 178		

# THE COMMON LAW.

---

## LECTURE I.

### EARLY FORMS OF LIABILITY.

THE object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly



corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.

I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further. In doing so there are two errors equally to be avoided both by writer and reader. One is that of supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times. The other mistake is the opposite one of asking too much of history. We start with man full grown. It may be assumed that the earliest barbarian whose practices are to be considered, had a good many of the same feelings and passions as ourselves.

The first subject to be discussed is the general theory of liability civil and criminal. The Common Law has changed a good deal since the beginning of our series of reports, and the search after a theory which may now be said to prevail is very much a study of tendencies. I believe that it will be instructive to go back to the early forms of liability, and to start from them.

It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers