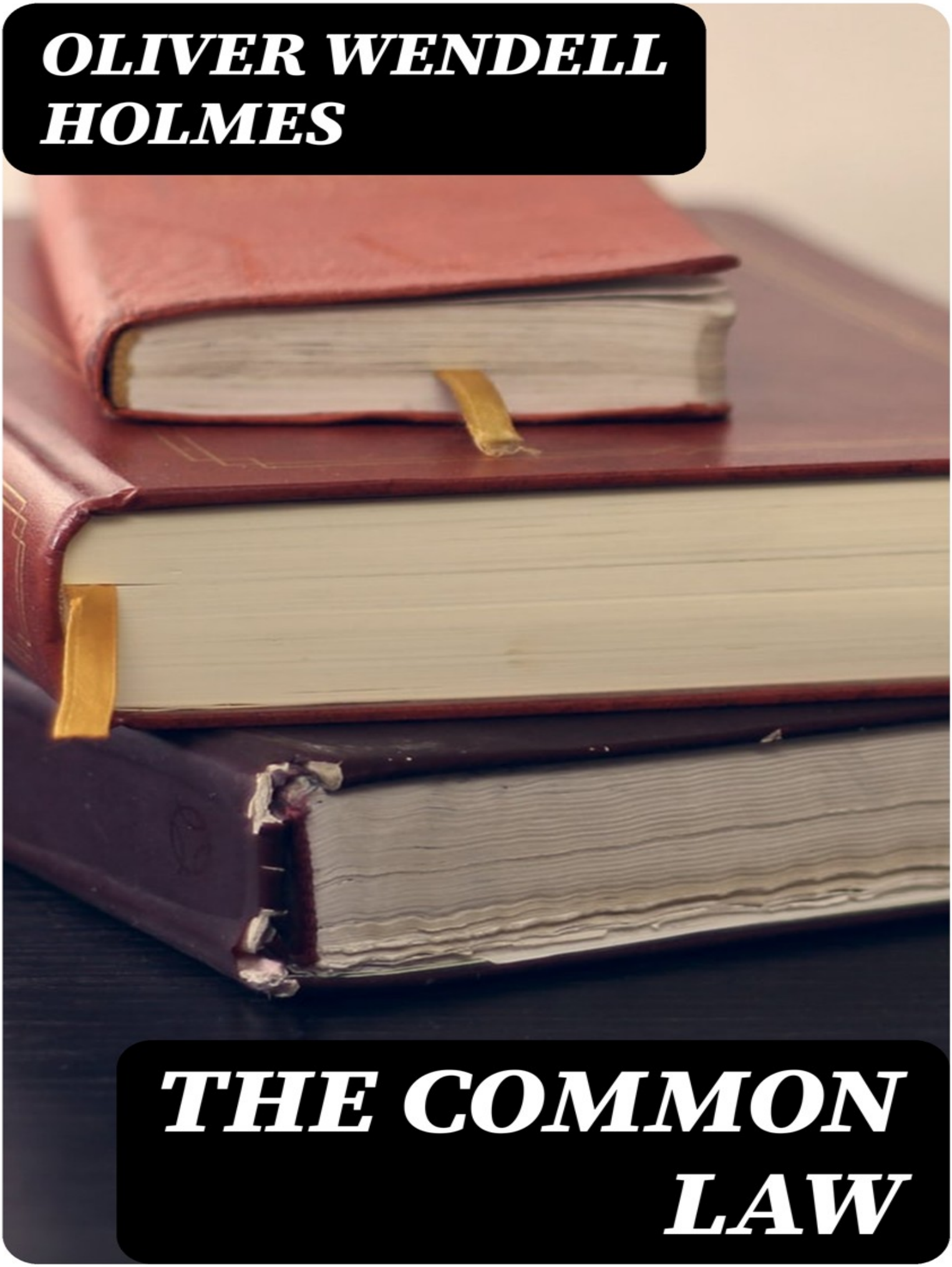
OLIVER WENDELL HOLMES
THE COMMON LAW

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FOOTNOTES

LECTURE I. — EARLY FORMS OF LIABILITY.

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[1] 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 [2] 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 today, 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 [3] have thought that the Roman law started from the blood feud, and all the authorities agree that the German law begun in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws, /1/ and the feud was pretty well broken up, though not extinguished, by the time of William the Conqueror. The killings and house-burnings of an earlier day became the appeals of mayhem and arson. The appeals de pace et plagis and of mayhem became, or rather were in substance, the action of trespass which is still familiar to lawyers. /2/ But as the compensation recovered in the appeal was the alternative of vengeance, we might expect to find its scope limited to the scope of vengeance. Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked.

Whether for this cause or another, the early English appeals for personal violence seem to have been confined to intentional wrongs. Glanvill /3/ mentions melees, blows, and wounds,—all forms of intentional violence. In the fuller description of such appeals given by Bracton /4/ it is made quite clear that they were based on intentional assaults. The appeal de pace et plagis laid an intentional assault, described the nature of the arms used, and the length and depth of the wound. The appellor also had [4] to show that

he immediately raised the hue and cry. So when Bracton speaks of the lesser offences, which were not sued by way of appeal, he instances only intentional wrongs, such as blows with the fist, flogging, wounding, insults, and so forth. /1/ The cause of action in the cases of trespass reported in the earlier Year Books and in the Abbreviatio Plaeitorum is always an intentional wrong. It was only at a later day, and after argument, that trespass was extended so as to embrace harms which were foreseen, but which were not the intended consequence of the defendant's act. /2/ Thence again it extended to unforeseen injuries. /3/

It will be seen that this order of development is not quite consistent with an opinion which has been held, that it was a characteristic of early law not to penetrate beyond the external visible fact, the damnum corpore corpori datum. It has been thought that an inquiry into the internal condition of the defendant, his culpability or innocence, implies a refinement of juridical conception equally foreign to Rome before the Lex Aquilia, and to England when trespass took its shape. I do not know any very satisfactory evidence that a man was generally held liable either in Rome /4/ or England for the accidental consequences even of his own act. But whatever may have been the early law, the foregoing account shows the starting-point of the system with which we have to deal. Our system of private liability for the consequences of a man's own acts, that is, for his trespasses, started from the notion of actual intent and actual personal culpability.

The original principles of liability for harm inflicted by [5] another person or thing have been less carefully considered

hitherto than those which governed trespass, and I shall therefore devote the rest of this Lecture to discussing them. I shall try to show that this liability also had its root in the passion of revenge, and to point out the changes by which it reached its present form. But I shall not confine myself strictly to what is needful for that purpose, because it is not only most interesting to trace the transformation throughout its whole extent, but the story will also afford an instructive example of the mode in which the law has grown, without a break, from barbarism to civilization. Furthermore, it will throw much light upon some important and peculiar doctrines which cannot be returned to later.

A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received. The subject under consideration illustrates this course of events very clearly.

I will begin by taking a medley of examples embodying as many distinct rules, each with its plausible and seemingly sufficient ground of policy to explain it.

[6] A man has an animal of known ferocious habits, which escapes and does his neighbor damage. He can prove that the animal escaped through no negligence of his, but still he is held liable. Why? It is, says the analytical jurist, because, although he was not negligent at the moment of escape, he was guilty of remote heedlessness, or negligence, or fault, in having such a creature at all. And one by whose fault damage is done ought to pay for it.

A baker's man, while driving his master's cart to deliver hot rolls of a morning, runs another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin, that it is because he was to blame for employing an improper person. If he answers, that he used the greatest possible care in choosing his driver, he is told that that is no excuse; and then perhaps the reason is shifted, and it is said that there ought to be a remedy against some one who can pay the damages, or that such wrongful acts as by ordinary human laws are likely to happen in the course of the service are imputable to the service.

Next, take a case where a limit has been set to liability which had previously been unlimited. In 1851, Congress passed a law, which is still in force, and by which the owners of ships in all the more common cases of maritime loss can surrender the vessel and her freight then pending to the losers; and it is provided that, thereupon, further proceedings against the owners shall cease. The legislators to whom we owe this act argued that, if a merchant embark

a portion of his property upon a hazardous venture, it is reasonable that his stake should be confined to what [7] he puts at risk,—a principle similar to that on which corporations have been so largely created in America during the last fifty years.

It has been a rule of criminal pleading in England down into the present century, that an indictment for homicide must set forth the value of the instrument causing the death, in order that the king or his grantee might claim forfeiture of the deodand, "as an accursed thing," in the language of Blackstone.

I might go on multiplying examples; but these are enough to show the remoteness of the points to be brought together.—As a first step towards a generalization, it will be necessary to consider what is to be found in ancient and independent systems of law.

There is a well-known passage in Exodus, /1/ which we shall have to remember later: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." When we turn from the Jews to the Greeks, we find the principle of the passage just quoted erected into a system. Plutarch, in his Solon, tells us that a dog that had bitten a man was to be delivered up bound to a log four cubits long. Plato made elaborate provisions in his Laws for many such cases. If a slave killed a man, he was to be given up to the relatives of the deceased. /2/ If he wounded a man, he was to be given up to the injured party to use him as he pleased. /3/ So if he did damage to which the injured party did not contribute as a joint cause. In either case, if

the owner [8] failed to surrender the slave, he was bound to make good the loss. /1/ If a beast killed a man, it was to be slain and cast beyond the borders. If an inanimate thing caused death, it was to be cast beyond the borders in like manner, and expiation was to be made. /2/ Nor was all this an ideal creation of merely imagined law, for it was said in one of the speeches of Aeschines, that "we banish beyond our borders stocks and stones and steel, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from its body." This is mentioned quite as an every-day matter, evidently without thinking it at all extraordinary, only to point an antithesis to the honors heaped upon Demosthenes. /3/ As late as the second century after Christ the traveller Pausanias observed with some surprise that they still sat in judgment on inanimate things in the Prytaneum. /4/ Plutarch attributes the institution to Draco. /5/

In the Roman law we find the similar principles of the noxoe deditio gradually leading to further results. The Twelve Tables (451 B.C.) provided that, if an animal had done damage, either the animal was to be surrendered or the damage paid for. /6/ We learn from Gains that the same rule was applied to the torts of children or slaves, /7/ and there is some trace of it with regard to inanimate things.

The Roman lawyers, not looking beyond their own [9] system or their own time, drew on their wits for an explanation which would show that the law as they found it was reasonable. Gaius said that it was unjust that the fault of children or slaves should be a source of loss to their

parents or owners beyond their own bodies, and Ulpian reasoned that a fortiori this was true of things devoid of life, and therefore incapable of fault. /1/ This way of approaching the question seems to deal with the right of surrender as if it were a limitation of a liability incurred by a parent or owner, which would naturally and in the first instance be unlimited. But if that is what was meant, it puts the cart before the horse. The right of surrender was not introduced as a limitation of liability, but, in Rome and Greece alike, payment was introduced as the alternative of a failure to surrender.

The action was not based, as it would be nowadays, on the fault of the parent or owner. If it had been, it would always have been brought against the person who had control of the slave or animal at the time it did the harm complained of, and who, if any one, was to blame for not preventing the injury. So far from this being the course, the person to be sued was the owner at the time of suing. The action followed the guilty thing into whosesoever hands it came. /2/ And in curious contrast with the principle as inverted to meet still more modern views of public policy, if the animal was of a wild nature, that is, in the very case of the most ferocious animals, the owner ceased to be liable the moment it escaped, because at that moment he ceased to be owner. /3/ There [10] seems to have been no other or more extensive liability by the old law, even where a slave was guilty with his master's knowledge, unless perhaps he was a mere tool in his master's hands. /1/ Gains and Ulpian showed an inclination to cut the noxoe deditio down to a privilege of the owner in case of misdeeds committed

without his knowledge; but Ulpian is obliged to admit, that by the ancient law, according to Celsus, the action was noxal where a slave was guilty even with the privity of his master. /2/

All this shows very clearly that the liability of the owner was merely a way of getting at the slave or animal which was the immediate cause of offence. In other words, vengeance on the immediate offender was the object of the Greek and early Roman process, not indemnity from the master or owner. The liability of the owner was simply a liability of the offending thing. In the primitive customs of Greece it was enforced by a judicial process expressly directed against the object, animate or inanimate. The Roman Twelve Tables made the owner, instead of the thing itself, the defendant, but did not in any way change the ground of liability, or affect its limit. The change was simply a device to allow the owner to protect his interest. /3/

But it may be asked how inanimate objects came to be [11] pursued in this way, if the object of the procedure was to gratify the passion of revenge. Learned men have been ready to find a reason in the personification of inanimate nature common to savages and children, and there is much to confirm this view. Without such a personification, anger towards lifeless things would have been transitory, at most. It is noticeable that the commonest example in the most primitive customs and laws is that of a tree which falls upon a man, or from which he falls and is killed. We can conceive with comparative ease how a tree might have been put on the same footing with animals. It certainly was treated like

them, and was delivered to the relatives, or chopped to pieces for the gratification of a real or simulated passion. /1/

In the Athenian process there is also, no doubt, to be traced a different thought. Expiation is one of the ends most insisted on by Plato, and appears to have been the purpose of the procedure mentioned by Aeschines. Some passages in the Roman historians which will be mentioned again seem to point in the same direction. /2/

Another peculiarity to be noticed is, that the liability seems to have been regarded as attached to the body doing the damage, in an almost physical sense. An untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation. The hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger, is embodied in the noxoe deditio and [12] other kindred doctrines of early Roman law. There is a defective passage in Gaius, which seems to say that liability may sometimes be escaped by giving up even the dead body of the offender. /1/ So Livy relates that, Brutulus Papins having caused a breach of truce with the Romans, the Samnites determined to surrender him, and that, upon his avoiding disgrace and punishment by suicide, they sent his lifeless body. It is noticeable that the surrender seems to be regarded as the natural expiation for the breach of treaty, /2/ and that it is equally a matter of course to send the body when the wrong-doer has perished. /3/

The most curious examples of this sort occur in the region of what we should now call contract. Livy again

furnishes an example, if, indeed, the last is not one. The Roman Consul Postumius concluded the disgraceful peace of the Caudine Forks (per sponsionem, as Livy says, denying the common story that it was per feedus), and he was sent to Rome to obtain the sanction of the people. When there however, he proposed that the persons who had made the [13] contract, including himself, should be given up in satisfaction of it. For, he said, the Roman people not having sanctioned the agreement, who is so ignorant of the jus fetialium as not to know that they are released from obligation by surrendering us? The formula of surrender seems to bring the case within the noxoe deditio. /1/ Cicero narrates a similar surrender of Mancinus by the pater-patratus to the Numantines, who, however, like the Samnites in the former case, refused to receive him. /2/

It might be asked what analogy could have been found between a breach of contract and those wrongs which excite the desire for vengeance. But it must be remembered that the distinction between tort and breaches of contract, and especially between the remedies for the two, is not found ready made. It is conceivable that a procedure adapted to redress for violence was extended to other cases as they arose. Slaves were surrendered for theft as well as [14] for assault; /1/ and it is said that a debtor who did not pay his debts, or a seller who failed to deliver an article for which he had been paid, was dealt with on the same footing as a thief. /2/ This line of thought, together with the quasi material conception of legal obligations as binding the offending body, which has been noticed, would perhaps explain the well-known law of the Twelve Tables as to

insolvent debtors. According to that law, if a man was indebted to several creditors and insolvent, after certain formalities they might cut up his body and divide it among them. If there was a single creditor, he might put his debtor to death or sell him as a slave. /3/

If no other right were given but to reduce a debtor to slavery, the law might be taken to look only to compensation, and to be modelled on the natural working of self-redress. /4/ The principle of our own law, that taking a man's body on execution satisfies the debt, although he is not detained an hour, seems to be explained in that way. But the right to put to death looks like vengeance, and the division of the body shows that the debt was conceived very literally to inhere in or bind the body with a vinculum juris.

Whatever may be the true explanation of surrender in connection with contracts, for the present purpose we need not go further than the common case of noxoe deditio for wrongs. Neither is the seeming adhesion of liability to the very body which did the harm of the first importance. [15] The Roman law dealt mainly with living creatures,—with animals and slaves. If a man was run over, it did not surrender the wagon which crushed him, but the ox which drew the wagon. /1/ At this stage the notion is easy to understand. The desire for vengeance may be felt as strongly against a slave as against a freeman, and it is not without example nowadays that a like passion should be felt against an animal. The surrender of the slave or beast empowered the injured party to do his will upon them. Payment by the owner was merely a privilege in case he wanted to buy the vengeance off.

It will readily be imagined that such a system as has been described could not last when civilization had advanced to any considerable height. What had been the privilege of buying off vengeance by agreement, of paying the damage instead of surrendering the body of the offender, no doubt became a general custom. The Aquilian law, passed about a couple of centuries later than the date of the Twelve Tables, enlarged the sphere of compensation for bodily injuries. Interpretation enlarged the Aquilian law. Masters became personally liable for certain wrongs committed by their slaves with their knowledge, where previously they were only bound to surrender the slave. /2/ If a pack-mule threw off his burden upon a passer-by because he had been improperly overloaded, or a dog which might have been restrained escaped from his master and bit any one, the old noxal action, as it was called, gave way to an action under the new law to enforce a general personal liability. /3/ Still later, ship-owners and innkeepers were made liable [16] as if they were wrong-doers for wrongs committed by those in their employ on board ship or in the tavern, although of course committed without their knowledge. The true reason for this exceptional responsibility was the exceptional confidence which was necessarily reposed in carriers and innkeepers. /1/ But some of the jurists, who regarded the surrender of children and slaves as a privilege intended to limit liability, explained this new liability on the ground that the innkeeper or ship-owner was to a certain degree guilty of negligence in having employed the services of bad men? This was the first instance of a master being made unconditionally liable for

the wrongs of his servant. The reason given for it was of general application, and the principle expanded to the scope of the reason.

The law as to ship-owners and innkeepers introduced another and more startling innovation. It made them responsible when those whom they employed were free, as well as when they were slaves. /3/ For the first time one man was made answerable for the wrongs of another who was also answerable himself, and who had a standing before the law. This was a great change from the bare permission to ransom one's slave as a privilege. But here we have the history of the whole modern doctrine of master and servant, and principal and agent. All servants are now as free and as liable to a suit as their masters. Yet the principle introduced on special grounds in a special case, when servants were slaves, is now the general law of this country and England, and under it men daily have to pay large sums for other people's acts, in which they had no part and [17] for which they are in no sense to blame. And to this day the reason offered by the Roman jurists for an exceptional rule is made to justify this universal and unlimited responsibility. /1/

So much for one of the parents of our common law. Now let us turn for a moment to the Teutonic side. The Salic Law embodies usages which in all probability are of too early a date to have been influenced either by Rome or the Old Testament. The thirty-sixth chapter of the ancient text provides that, if a man is killed by a domestic animal, the owner of the animal shall pay half the composition (which he would have had to pay to buy off the blood feud had he

killed the man himself), and for the other half give up the beast to the complainant. /2/ So, by chapter thirty-five, if a slave killed a freeman, he was to be surrendered for one half of the composition to the relatives of the slain man, and the master was to pay the other half. But according to the gloss, if the slave or his master had been maltreated by the slain man or his relatives, the master had only to surrender the slave. /3/ It is interesting to notice that those Northern sources which Wilda takes to represent a more primitive stage of German law confine liability for animals to surrender alone. /4/ There is also a trace of the master's having been able to free himself in some cases, at a later date, by showing that the slave was no longer in [18] his possession. /1/ There are later provisions making a master liable for the wrongs committed by his slave by his command. /2/ In the laws adapted by the Thuringians from the earlier sources, it is provided in terms that the master is to pay for all damage done by his slaves. /4/

In short, so far as I am able to trace the order of development in the customs of the German tribes, it seems to have been entirely similar to that which we have already followed in the growth of Roman law. The earlier liability for slaves and animals was mainly confined to surrender; the later became personal, as at Rome.

The reader may begin to ask for the proof that all this has any bearing on our law of today. So far as concerns the influence of the Roman law upon our own, especially the Roman law of master and servant, the evidence of it is to be found in every book which has been written for the last five hundred years. It has been stated already that we still

repeat the reasoning of the Roman lawyers, empty as it is, to the present day. It will be seen directly whether the German folk-laws can also be followed into England.

In the Kentish laws of Hlothhaere and Eadrie (A.D. 680) [19] it is said, "If any one's slave slay a freeman, whoever it be, let the owner pay with a hundred shillings, give up the slayer," &c. /1/ There are several other similar provisions. In the nearly contemporaneous laws of Ine, the surrender and payment are simple alternatives. "If a Wessex slave slay an Englishman, then shall he who owns him deliver him up to the lord and the kindred, or give sixty shillings for his life." /2/ Alfred's laws (A.D. 871-901) have a like provision as to cattle. "If a neat wound a man, let the neat be delivered up or compounded for." /3/ And Alfred, although two hundred years later than the first English lawgivers who have been quoted, seems to have gone back to more primitive notions than we find before his time. For the same principle is extended to the case of a tree by which a man is killed. "If, at their common work, one man slay another unwilfully, let the tree be given to the kindred, and let them have it off the land within thirty nights. Or let him take possession of it who owns the wood." /4/

It is not inapposite to compare what Mr. Tylor has mentioned concerning the rude Kukis of Southern Asia. "If a tiger killed a Kuki, his family were in disgrace till they had retaliated by killing and eating this tiger, or another; but further, if a man was killed by a fall from a tree, his relatives would take their revenge by cutting the tree down, and scattering it in chips." /5/

To return to the English, the later laws, from about a hundred years after Alfred down to the collection known as the laws of Henry I, compiled long after the Conquest, [20] increase the lord's liability for his household, and make him surety for his men's good conduct. If they incur a fine to the king and run away, the lord has to pay it unless he can clear himself of complicity. But I cannot say that I find until a later period the unlimited liability of master for servant which was worked out on the Continent, both by the German tribes and at Rome. Whether the principle when established was an indigenous growth, or whether the last step was taken under the influence of the Roman law, of which Bracton made great use, I cannot say. It is enough that the soil was ready for it, and that it took root at an early day. /1/ This is all that need be said here with regard to the liability of a master for the misdeeds of his servants.

It is next to be shown what became of the principle as applied to animals. Nowadays a man is bound at his peril to keep his cattle from trespassing, and he is liable for damage done by his dog or by any fierce animal, if he has notice of a tendency in the brute to do the harm complained of. The question is whether any connection can be established between these very sensible and intelligible rules of modern law and the surrender directed by King Alfred.

Let us turn to one of the old books of the Scotch law, where the old principle still appears in full force and is stated with its reasons as then understood, /2/

"Gif ane wylde or head-strang horse, carries ane man [21] against his will over an craig, or heuch, or to the water,

and the man happin to drowne, the horse sall perteine to the king as escheit.

"Bot it is otherwise of ane tame and dantoned horse; gif any man fulishlie rides, and be sharp spurres compelles his horse to take the water, and the man drownes, the horse sould not be escheit, for that comes be the mans fault or trespasse, and not of the horse, and the man has receaved his punishment, in sa farre as he is perished and dead; and the horse quha did na fault, sould not be escheit.

"The like reason is of all other beastes, quhilk slayes anie man, [it is added in a later work, "of the quhilk slaughter they haue gilt,"] for all these beasts sould be escheit." /1/

"The Forme and Maner of Baron Courts" continues as follows:—

"It is to witt, that this question is asked in the law, Gif ane lord hes ane milne, and any man fall in the damne, and be borne down with the water quhill he comes to the quheill, and there be slaine to death with the quheill; quhither aught the milne to be eseheir or not? The law sayes thereto nay, and be this reason, For it is ane dead thing, and ane dead thing may do na fellony, nor be made escheit throw their gilt. Swa the milne in this case is not culpable, and in the law it is lawfull to the lord of the land to haue ane mylne on his awin water quhere best likes him." /2/

The reader will see in this passage, as has been remarked already of the Roman law, that a distinction is taken between things which are capable of guilt and those which [22] are not,—between living and dead things; but he will also see that no difficulty was felt in treating animals as guilty.

Take next an early passage of the English law, a report of what was laid down by one of the English judges. In 1333 it was stated for law, that, "if my dog kills your sheep, and I, freshly after the fact, tender you the dog, you are without recovery against me." /1/ More than three centuries later, in 1676, it was said by Twisden, J. that, "if one hath kept a tame fox, which gets loose and grows wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature." /2/ It is at least doubtful whether that sentence ever would have been written but for the lingering influence of the notion that the ground of the owner's liability was his ownership of the offending: thing and his failure to surrender it. When the fox escaped, by another principle of law the ownership was at an end. In fact, that very consideration was seriously pressed in England as late as 1846, with regard to a monkey which escaped and bit the plaintiff, /3/ So it seems to be a reasonable conjecture, that it was this way of thinking which led Lord Holt, near the beginning of the last century, to intimate that one ground on which a man is bound at his peril to restrain cattle from trespassing is that he has valuable property in such animals, whereas he has not dogs, for which his responsibility is less. /4/ To this day, in fact, cautious judges state the law as to cattle to be, that, "if I am the owner of an animal in which by law the [23] right of property can exist, I am bound to take care that it does not stray into the land of my neighbor." /1/

I do not mean that our modern law on this subject is only a survival, and that the only change from primitive notions

was to substitute the owner for the offending animal. For although it is probable that the early law was one of the causes which led to the modern doctrine, there has been too much good sense in every stage of our law to adopt any such sweeping consequences as would follow from the wholesale transfer of liability supposed. An owner is not bound at his peril to keep his cattle from harming his neighbor's person. /2/ And in some of the earliest instances of personal liability, even for trespass on a neighbor's land, the ground seems to have been the owner's negligence. /3/

It is the nature of those animals which the common law recognizes as the subject of ownership to stray, and when straying to do damage by trampling down and eating crops. At the same time it is usual and easy to restrain them. On the other hand, a dog, which is not the subject of property, does no harm by simply crossing the land of others than its owner. Hence to this extent the new law might have followed the old. The right of property in the [24] offending animal, which was the ancient ground of responsibility, might have been adopted safely enough as the test of a liability based on the fault of the owner. But the responsibility for damage of a kind not to be expected from such animals is determined on grounds of policy comparatively little disturbed by tradition. The development of personal liability for fierce wild animals at Rome has been explained. Our law seems to have followed the Roman.

We will now follow the history of that branch of the primitive notion which was least likely to survive,—the liability of inanimate things.

It will be remembered that King Alfred ordained the surrender of a tree, but that the later Scotch law refused it because a dead thing could not have guilt. It will be remembered, also, that the animals which the Scotch law forfeited were escheat to the king. The same thing has remained true in England until well into this century, with regard even to inanimate objects. As long ago as Bracton, /1/ in case a man was slain, the coroner was to value the object causing the death, and that was to be forfeited sa deodand "pro rege." It was to be given to God, that is to say to the Church, for the king, to be expended for the good of his soul. A man's death had ceased to be the private affair of his friends as in the time of the barbarian folk-laws. The king, who furnished the court, now sued for the penalty. He supplanted the family in the claim on the guilty thing, and the Church supplanted him.

In Edward the First's time some of the cases remind of the barbarian laws at their rudest stage. If a man fell from a tree, the tree was deodand. /2/ If he drowned in a [25] well, the well was to be filled up. /1/ It did not matter that the forfeited instrument belonged to an innocent person. "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." /2/ That is from a book written in the reign of Henry VIII., about 1530. And it has been repeated from Queen Elizabeth's time /3/ to within one hundred years, /4/ that if my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited. Hence it is, that, in all indictments for homicide, until very lately it has been necessary to state the

instrument causing the death and its value, as that the stroke was given by a certain penknife, value sixpence, so as to secure the forfeiture. It is said that a steam-engine has been forfeited in this way.

I now come to what I regard as the most remarkable transformation of this principle, and one which is a most important factor in our law as it is today. I must for the moment leave the common law and take up the doctrines of the Admiralty. In the early books which have just been referred to, and long afterwards, the fact of motion is adverted to as of much importance. A maxim of Henry Spigurnel, a judge in the time of Edward I., is reported, that "where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand." /5/ So it was [26] said in the next reign that "oinne illud quod mover cum eo quod occidit homines deodandum domino Regi erit, vel feodo clerici." /1/ The reader sees how motion gives life to the object forfeited.

The most striking example of this sort is a ship. And accordingly the old books say that, if a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, and the ship is forfeited,—provided, however, that this happens in fresh water. /2/ For if the death took place on the high seas, that was outside the ordinary jurisdiction. This proviso has been supposed to mean that ships at sea were not forfeited; /3/ but there is a long series of petitions to the king in Parliament that such forfeitures may be done away with, which tell a different story. /4/ The truth seems to be that the forfeiture took

place, but in a different court. A manuscript of the reign of Henry VI., only recently printed, discloses the fact that, if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the admiral upon a proceeding in the admiral's court, and subject to release by favor of the admiral or the king. /5/

A ship is the most living of inanimate things. Servants sometimes say "she" of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing [27] the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.

By way of seeing what those peculiarities are, take first a case of collision at sea. A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, /1/ and this means that that vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer,

who runs a man down by careless driving, no one would think of claiming a right to seize the horse and wagon. It would be seen that the only property which could be sold to pay for a wrong was the property of the wrong-doer.

But, again, suppose that the vessel, instead of being under lease, is in charge of a pilot whose employment is made compulsory by the laws of the port which she is just entering. The Supreme Court of the United States holds the ship liable in this instance also. /2/ The English courts would probably have decided otherwise, and the matter is settled in England by legislation. But there the court of appeal, the Privy Council, has been largely composed of common-law [28]lawyers, and it has shown a marked tendency to assimilate common-law doctrine. At common law one who could not impose a personal liability on the owner could not bind a particular chattel to answer for a wrong of which it had been the instrument. But our Supreme Court has long recognized that a person may bind a ship, when he could not bind the owners personally, because he was not the agent.

It may be admitted that, if this doctrine were not supported by an appearance of good sense, it would not have survived. The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able. I dare say some such thought has helped to keep the practice alive, but I believe the true historic foundation is elsewhere. The ship no doubt, like a sword

would have been forfeited for causing death, in whosesoever hands it might have been. So, if the master and mariners of a ship, furnished with letters of reprisal, committed piracy against a friend of the king, the owner lost his ship by the admiralty law, although the crime was committed without his knowledge or assent. /2/ It seems most likely that the principle by which the ship was forfeited to the king for causing death, or for piracy, was the same as that by which it was bound to private sufferers for other damage, in whose hands soever it might have been when it did the harm.

If we should say to an uneducated man today, "She did it and she ought to pay for it," it may be doubted [29] whether he would see the fallacy, or be ready to explain that the ship was only property, and that to say, "The ship has to pay for it," /1/ was simply a dramatic way of saying that somebody's property was to be sold, and the proceeds applied to pay for a wrong committed by somebody else.

It would seem that a similar form of words has been enough to satisfy the minds of great lawyers. The following is a passage from a judgment by Chief Justice Marshall, which is quoted with approval by Judge Story in giving the opinion of the Supreme Court of the United States: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by

the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable that the vessel should be affected by this report." And again Judge Story quotes from another case: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing." /2/

In other words, those great judges, although of course aware that a ship is no more alive than a mill-wheel, thought that not only the law did in fact deal with it as if it were alive, but that it was reasonable that the law should do so. The reader will observe that they do not say simply that it is reasonable on grounds of policy to [30] sacrifice justice to the owner to security for somebody else but that it is reasonable to deal with the vessel as an offending thing. Whatever the hidden ground of policy may be, their thought still clothes itself in personifying language.

Let us now go on to follow the peculiarities of the maritime law in other directions. For the cases which have been stated are only parts of a larger whole.

By the maritime law of the Middle Ages the ship was not only the source, but the limit, of liability. The rule already prevailed, which has been borrowed and adopted by the English statutes and by our own act of Congress of 1851, according to which the owner is discharged from responsibility for wrongful acts of a master appointed by himself upon surrendering his interest in the vessel and the freight which she had earned. By the doctrines of agency he would be personally liable for the whole damage. If the origin of the system of limited liability which is believed to be so essential to modern commerce is to be attributed to