C.4/D.38

The Common Law in relation to Crimes and Torts

In all the text-books written for the purpose of imparting to students an introductory knowledge of English law the subject-matter of the reader's inquiry is said to consist of two large and comprehensive divisions, usually called the lex non scripta, or the unwritten, or common law, and the lex scripta, or written, or statute law. But the student who is engaged in acquiring a practical as well as a theoretical ~~knowledge~~ acquaintance with the subject soon discovers that that the phrase "common law" embraces a large number of things that are now fixed by statute, although their classification under that description points to a prior

origin of them in the domain of the lex non scripta, or unwritten law. Such, for example are the matters contained in the three Statutes of this colony called "The Common Law Procedure Acts," which may be described as a selection and renovation and restatement of a number of rules and forms of practice which had been in use in more or less archaic shapes for several centuries; ~~first~~ originally as a series of precedents and modes of procedure and pleading recognised ~~and~~ or established by the courts, and afterwards authorised by a succession of acts of Parliament. ~~Further illustrations into the history of the law of Evidence will elucidate the fact~~. It is ~~also~~ moreover a fact that the larger part of ~~the Common Law~~

~~outside of the~~ portion of the Common Law which consists of substantial principles and doctrines regulating the rights of persons and the formation of contracts and the possession and devolution of property, had their ~~origin~~ authoritative origin or definition in a series of Statutes promulgated by the Saxon and early Norman kings, but ~~all Statutes made before the accession of Richard I in the year 1189 are declared are not~~ the contents of any Statute made previous to the accession of Richard I in the year 1189 are not pleadable in any legal proceedings as ~~the~~ X Statute ~~Law~~ or written Law, because in accordance with the ~~Statute of Westminster~~ provisions of the Statute of Westminster passed in the third year of the

reign of Edward I all ~~acts~~ statutes made before the ~~accession~~ coronation of the first mentioned king are said to be beyond the time of legal memory. "And therefore ~~this case~~ it", says Sir Matthew Hale, in his History of the Common Law, "that those statutes, or acts of parliament that were made before the beginning of the reign of King Richard I and have not since been repealed, or altered, either by contrary usage, or by subsequent acts of parliament, are now accounted part of the lex non scripta, being, as it were incorporated thereinto and become part of the common law."

But the student also soon discovers that the phrase "common law" is ~~generally used as~~ often used to distinguish the larger portion of the law of England as it exists in ~~fact~~ the lex ~~scripta~~ non scripta

and the lex scripta conjointly from that other portion of the ~~body of English law~~ which ~~exists in both~~ English law which exists partly in a written and partly in an unwritten form and which is ~~included in the~~ designated by the distinguishing name of "Equity". Therefore when we say "the Common Law" we use a phrase which has a doubly distinguishing reference, and in order to understand the full import of the double distinction which the phrase implies we must ~~first~~ truly ascertain the origin and primary significance of the phrase itself ~~This can be done only by an inquiry~~ consulting and afterwards proceed to trace the career of the thing denoted by it. I shall therefore attempt to occupy your attention for a while with an inquiry largely

historical and which might at first blush seem to you to have very little connection with your daily study of the principles and practice of the profession which you are preparing yourselves to enter, but ~~which I can assure you from personal experience will prefer to matters that I~~ But I can assure you from personal experience that a knowledge of the matters which I shall ~~briefly refer~~ bring under your notice tonight will prove of immense assistance, if it is not indeed indispensable, to a clear comprehension of many of the maxims and doctrines which the practising lawyer is daily called upon to apply in dealing with the cases in which he is engaged.

It must be remembered at the outset that the "Common Law" does not

denote such a separate
branch or division of ~~law~~ as
~~these divisions are conventional terms~~
English law as the conventionally
recognized branches of it which
are designated by the terms "contracts"
"torts", "criminal law", "real property" &c
On the contrary it includes a large
amount of the matter embraced
in each of those conventional
divisions of the subject, and I pur-
pose to confine my observations
to that portion of the common
law which covers the two conventional
divisions of "criminal law" and
"torts". If I find sufficient time
at my disposal and if you shall
desire any help from me to prosecute
your investigations further into the
other divisions so far as they come
within the domain of the Common
Law, I shall be pleased to prepare
and deliver to you at some future

X I think that it would be very difficult to give a definition of the Common Law which would be at once concise and comprehensive and indicative of all the distinctive features of the thing defined. But I think that I may venture to describe the Common Law for my purposes to night as that body of fundamental doctrines which the courts and judges based their decisions on all matters not specially provided for by Statute and not specially or exclusively within the jurisdiction of the courts of equity

time a ~~lecture~~ similar lecture on the history of the English law of contracts.

The whole body of the English Common law was always held in great estimation by the English laity and the judges who presided in the courts where it was administered. Bracton, who was one of the ~~not~~ itinerant judges appointed by Henry III and one of the earliest writers upon the English common law describes it as "the ancient judgments of the just" This high admiration of the ~~Common Law of England and~~ judges who administered it and the corresponding affection of the English people for the common law were made prominent by the attempts of the Norman lawyers and ~~the clergy~~ a large section of the clergy, to introduce into England innovations derived from other

systems of jurisprudence particularly the codes of Roman Law compiled by the Emperors Theodosius and Justinian and which were usually known by the name of the Civil Law. ~~All such attempts were always~~ Those codes ultimately became the ~~basis of the legal systems~~ laws of all the western ~~and~~ and northern nations of Europe including Scotland and are the basis of their jurisprudence at the present day. But all attempts to give them authority in England were vigorously resisted by the people and the frequent occasions on which we find the Barons and their tenants demanding a restoration of the Saxon laws of Edward the Confessor are evidences of the aversion in which the Civil Roman Law was held by them and of the struggle they had to maintain to preserve the Common Law of England as the heritage of their Children and their

more remote descendants. But the two systems of law which were respectively contended for so strenuously were growths from the same root. The Anglo Saxon folk who laid the foundations of the Common Law of England and the Roman People who ~~contended~~ built up the Civil Law were descendants from the same Aryan stock that populated the whole of Europe and they both erected their respective systems of law upon the foundations of the ancient customs and moral conceptions which they inherited from their Aryan progenitors. But the different conditions in the midst of which these two branches of the Aryan race worked out their civilization and political development produced two distinct bodies of ~~all~~ law, exhibiting many points of resemblance and contrast yet embodying ~~many~~ respectively

many divergent results.

The earliest laws established by every community emerging from savagery refer to offences against the person and ~~against~~ these are followed by laws dealing with offences against property. We might therefore be disposed to say that the ~~earliest~~ oldest department of all law is that which we now describe as "criminal law". But this would not be an exact statement in the light of modern distinctions in the domain of law, because the modern conception of a crime is ~~that~~ that of an offence against organised society which is punished by society for the general protection of all its members. This seems elementary and fundamental to us, but the offences which we describe as "crimes" and regard as deserving of punishment by the State were in the infancy of law regarded and dealt

with as of the same character as the acts we call "torts". So late in the history of the Roman Law as the time of the compilation of the Twelve Tables, furtum or theft was recognised as a civil wrong and the remedy prescribed for it was an action for damages or compensation. The same conception originally existed with regard to offences against the person, not excepting the very highest of all, that of murder. Under the early Anglo Saxon laws the life of every freeman was assessed at a money value according to his rank in life, and a corresponding sum was fixed as the amount of damages or compensation to be paid for any injury inflicted on him. ~~In all such cases the conception that such an act as [illegible]~~ ~~[illegible]~~ ~~[illegible]~~ by another of the infliction of a previous

wound upon one man by another
~~organisation of society~~ is a an offence
against the foundation and
organisation of society did not arise
until mankind had made con-
siderable progress in civilization
and political development. The
primitive conception in regard to all
such cases was that a wrong had
been done to an individual and
that the injured person ought to have
redress and compensation; and in
the case of a murder the persons who
were considered entitled to redress or
compensation were the relatives of
the murdered person. But the con-
ception of a right to redress or com-
pensation for an injury is an
outgrowth of a yet earlier
sentiment which is the feeling
of vengeance or a desire for retaliation.
This is one of the most primitive
emotions of the uncivilized man
and it survives in a more or

X and it may be said that one of the chief functions of law, in its relation to crimes is to provide regulated and safe methods for the manifestation and satisfaction of this feeling. The feeling is inherent and ineradicable in human nature and if safe and regular methods of satisfying it are not devised it will manifest itself in irregular and dangerous forms.

less subdued state in the mind of the most refined civilization. This sentiment of vengeance or desire for retaliation includes the feeling that the inflicter of the wrong is blameworthy and deserves punishment. This ingredient in the feeling of vengeance is the germ of the ethical or moral conceptions which are embodied in the subsequent developments of the criminal law of England; but the early English law relating to crimes like the early criminal law of Rome, had more regard to the anger and resentment of the person injured than to the blameworthiness of the criminal, and in order to appease this anger and resentment it extended its jurisdiction to animals and inanimate objects as if they were capable of moral delinquency. ~~An illustration of this early aspect of the~~

~~early criminal law of England~~

In the exercise of this ~~jurisdiction~~ extension of its jurisdiction to animals and inanimate objects the early English law directed that the animal or object which had been used or which had been the cause of the injury should be forfeited to the injured party. Thus one of the laws of Alfred the Great provided ~~that~~ "If an ox wound a man let the ox be delivered or compounded for." Another law of the same king says "If at their common work one man slay another unwillfully, let the ~~true~~ be given to the kindred and let them have it ~~of~~ the land within thirty days". ~~When~~ When a man fell into a well and was drowned the law attempted to satisfy the ~~public~~ resentment of the relatives by ~~ordering~~ requiring the well to be filled up. When a

a later stage of legal conceptions was reached and crimes were punished as offences against society, the animal or inanimate object that had been used to commit the offence was forfeited to the king, and it did not make any difference that the weapon with which the crime was committed belonged to an innocent person. Thus we find it written in a book in the time of Henry VIII that "where a man killeth another with the sword of John Stile, the sword shall be forfeit, although there is no fault in the owner." This feature of the early Criminal Law of England survived into the present century and up to the year 1842 it was necessary in all indictments for murder to state the nature and the value of the instrument causing the death. This is a striking illustration

of the necessity of ~~studying~~ tracing the law back to its earliest shapes in order to understand its form in the present day. It is not necessary now in cases of murder to state the nature and value of the instrument that caused the death, and the whole criminal law of England has within the last half century been remodelled by statute and shorn nearly all its archaic appendages. But in one important department of modern English law the ~~attachment of~~ direct-jurisdiction over inanimate objects with the ~~consequent~~ attendant liability & lien (remains and produces some very important consequences. In accordance with the early ~~condition~~ conception of English law which required the forfeiture of a tree or an ox when it had been the medium of death to a man, a ship from which attachment

had fallen
a man ~~and fell~~ and Jew drowned
while it was in motion was
forfeited to the King; and at the
present day if a collision takes
place between two vessels and
the captain or crew of only one of them
is to blame and that vessel is under
lease at the time and the captain and
crew have been engaged by the lessee,
and the owner of the vessel has
no control over them whatever,
it is well settled law that there is
a lien on the vessel for the amount
of damage done although the
owner is not in any way to blame
and cannot be charged with any
personal liability whatever. And
in cases of collision in which the
captain and crew of the vessel
which is solely to blame have
been engaged by the owner and the
voyage is being made for his benefit,
he can discharge himself from

further liability for the wrongful acts of his captain and the crew by surrendering the vessel and the freight she has earned on the voyage up to the time of the collision. This doctrine of the modern Admiralty law of England is a direct outgrowth or descendant of the ancient jurisdiction ~~extended~~ exercised over the ships for the purpose of forfeiting them when they had been instrument of death or injury to any person and which had its origin in the desire to appease the resentment and desire of vengeance on the ~~part~~ part of the injured person or his relatives.

But ~~you will remember~~ I have said that the feeling of vengeance or desire for retaliation included a conception of blameworthiness on the part of the person who inflicted the injury and that this was the germ of the moral or ethical ~~attitude~~ ingredient of the modern

law of England relating to crimes. This moral or ethical element finds its most direct expression in the doctrine that the essence of all crime is criminal intent or malice. The modern law of England relating to torts also frequently uses the word malice as well as such words as fraud and deceit and intent all of which imply an ethical or moral standard. But it is also a fundamental doctrine of the modern English criminal law that ignorance of the law is no excuse for breaking it. This doctrine is prima facie at variance with the other doctrine that malicious intent is the essence of a crime, because if a man does not know that he is breaking the law he cannot have an intention he said to have a present intention to break it, and we cannot doubt that in a court which judged men solely in accordance with the disposition of their hearts,

complete
~~absolute~~ ignorance of the sinfulness of an act would be regarded as an exculpation of the person who committed it in that state of mind regarding it. But the doctrine that ignorance of the Law shall not excuse a violation of it has been found absolutely necessary for the accomplishment of the purposes for which the Law has been made, and the problem which the authorized exponents of the Law of England, that is the Judges, have been called upon to solve is the reconciliation of the two doctrines. This has been done through the medium of a long series of decisions stretching from the earliest recorded cases down to our own day; and the result is that while the Law continues to use words and phrases that imply an ethical or moral standard and thereby does homage to the principles of morality and gives its sanction

to them as the authoritative guides of men in their daily contact with one another, yet when it is called upon to decide the question of the legal guilt or innocence of any ~~man~~ person, or whether a tort has been committed which incurs liability for damages, it applies an external standard to the conduct of the person charged in order to determine the question. By an external standard I mean a standard that takes cognisance of the outward ~~thereof~~ acts of the person and of the outward consequences of them and not the motive or inward disposition that prompted the doing of them. In other words the law does not demand a pure heart because it has no machinery to discover the inner thoughts of men's souls and to detect evil desires and propensities; but

it demands external conformity with a definite rule of conduct, because it can enforce such a standard by external means.

In regard to the acts which the law regards as crimes and for the doing of which it inflicts punishment the external standard or rule of conduct which it sets up is, that every man shall avoid doing anything which in the midst of a given set of conditions would produce or tend to produce any harm which the law is made to prevent. Take the illustration of the crime of murder which the law regards as the greatest and worst of all crimes and for which it inflicts the highest punishment, and let us take a case in which the murder is committed with a pistol. The purchase of the pistol ~~with the~~ and the gunpowder with the intention of using them

to shoot a person, and the subsequent loading of it and the firing of it, are all in themselves acts in regard to which the law is indifferent, and to it attaches no penalty to them unless they are done in the midst of certain surrounding conditions, because in the absence of those conditions they do not necessarily produce or tend to produce any consequences which the law is made to prevent. But if the pistol is fired into a crowd of people [illegible] an act is then committed which in the midst of the surrounding conditions is almost certain to cause the death of some person or to seriously wound some person, and the law is made to prevent the death or wounding of any person doing any lawful act, and the person firing the pistol would be chargeable with

murder or with an attempt to commit murder according to the results of his act. But if a man fires a pistol into a block of wood thinking it is a man and wishing to kill him it is not murder or an attempt to murder in the estimation of the law, because in firing ~~at~~ into a block of wood is not an act which the law ~~is made to prevent~~ regards as necessary to prevent in order to protect human life, and the law takes notice of the outward act only, and not of the murderous disposition in the heart of the man who fires the pistol. If the law attempted to go behind the outward act and to punish a man for an unfulfilled intention to murder another, it would have to punish a man who went out with a pistol to shoot another man whom he expected to meet

on the road, but who had passed the place where the intending ~~murder~~ murderer expected to meet him before the latter arrived there. It would be the same if the man whom the other intended to kill had been already killed by a fall from his horse ~~before to it~~ at the very spot where the intending murderer expected to meet him but before the latter arrived there. But the law does not inflict any punishment in such cases because purchasing a pistol and gunpowder and loading the pistol and the going out with it to meet the expected victim cannot produce the death of the expected victim or tend to produce it unless the intending murderer meets the other man alive, and if he never meets him alive the necessary set of conditions to make the act

X He may be guilty of a misdemeanour similar to a common assault, but not of larceny.

criminal are not complete.
Take again the crime of larceny.
If a man puts his hand into the
pocket of another man with
the intention of stealing a pocket
handkerchief which he believes
to be there, but finds the pocket
empty, he cannot be charged
with larceny although he certainly
had the intention of stealing, because
the necessary conditions to allow him
to carry out his intention were
not present*. On the other hand
if a man goes to a haystack
with a box of matches in his pocket
and with the intention of setting
fire to the haystack, ~~but upon~~
and upon coming close to it
he ~~strikes~~ lights a match ~~and lights it~~
but then seeing another man
watching him he blows the match
out, ~~yet~~ can he be charged and
convicted of an attempt to burn

X No necessary condition ~~was~~ to enable him to carry out his intention was absent—

the haystack, because he did an act which in the surrounding set of conditions had every tendency to produce consequences which the law aims to prevent. X and his desistance from completing his intention was due to ~~any repentance of that intention the absence of any of the conditions necessary to complete~~ ~~his attempt but~~ to the intrusion of ~~an antagonistic and preventing force~~ another person whose presence acted as a preventing force in a similar ~~manner~~ in its operation to which the active interference of a third person who might turn aside a pistol aimed by one man at another at the very moment it was fired. In the latter case the intention of the man who fired the pistol is not fulfilled and the impending murder is not committed, but the attempt ~~was~~ to commit murder ~~was~~ is complete and

I ~~and~~ There is ~~was~~ no additional act left undone which the intending murderer could do in order fulfil his criminal intent and the surrounding conditions up to the moment the pistol ~~was~~ is fired make the crime immediately possible. The type of a criminal act in the estimation of the law therefore is an act done under circumstances in which it will certainly, or ~~most~~ probably, produce some consequence which the law aims to prevent. But there is another doctrine of the criminal law which I must mention in order make my account of the conditions in which a crime may be committed complete. The doctrine I refer to is ~~that~~ every man is supposed to intend the natural and probable consequences of his acts. Here the ~~law~~ guilty intention is recognised, and the question that

now confronts us & whether we can reconcile this doctrine with the statement I have made that the law does not attempt to look into a man's mind and takes notice of outward actions. The reconciliation is found in the fact that the law presumes in every man an average amount of intelligence and capability of foresight. Therefore when the law says that a certain act done in a certain set of conditions is a crime it includes the presumption that the doer of the act had sufficient intelligence and capability of foresight to foresee that his act if done in the particular set of conditions then surrounding him would produce the consequences which the law forbids. If a man is an idiot or insane and therefore devoid of the average amount of intelligence

and capability of foresight which the law presumes to be possessed by every man & an act committed by him in circumstances certainly probable to produce results which the laws seeks to prevent is not a crime. This supplementary doctrine of the as I may call it that the law presumes the possession by every man of an average amount of intelligence and for capability of foresight will appear more prominently in the consideration of the law of torts, to which I now ask your attention for a short time.

In the first place we notice that all the various torts recognised by the law of England as incurring liability may be divided into three classes. Firstly there is the class coming within the general category of trespass, which includes all direct applications of force either

infinitely greater. The whole of the official services of America, National State and Municipal in all their branches and departments except the Judiciary are ~~steeped~~ saturated in Corruption, bribery, falsehood and maladministration; and the judiciary is tainted. The great cities reek with respectable as much as non respectable robbery and scoundrelism". ~~I have [illegible] [illegible]~~ Yet the same critic tells us that "the movements of the late Secession war and their results to any sense ~~that~~ studies well and comprehends them show that Popular Democracy whatever its faults and dangers practically justifies itself beyond the ~~[illegible]~~ proudest claims and wildest hopes

x which includes all cases of consequential injury flowing indirectly from the act of the ~~[illegible]~~ defendant.

to property or the person; secondly those coming within the category of negligence; and thirdly those which lie outside these two categories, and which are either acts ~~or omissions~~ which infringe some right, ~~or more than one duty towards him~~ which the law recognises and protects, or omissions which ~~are~~ more than one duty towards another which the law recognises and aims to secure. The law recognises a man's reputation as a right to be protected and holds any person injuring it by defamatory writing liable in damages. But defamation is neither a trespass nor an act of negligence. Deceit ~~or fraudulent misrepresentation~~ ~~is one of the third class and it is in reference to~~ and ~~malicious~~ prosecution, (preferment of a criminal charge) are other torts of the third class; and it is in reference

In torts of this class that the law ~~uses~~ uses most directly the phraseology of morals when it declares that the essential ingredient in them which makes them a source of liability is malice. But the object of the law in recognising this class of torts is the same object that it has in recognising torts of trespass and torts of negligence, which is the protection of certain rights and the prevention of certain injuries; and in every case it declares that liability shall arise only when the act or the omission is committed or allowed in a given set of conditions. In the case of a man's reputation words may be spoken or written that are injurious to it, but in circumstances which the law declares to be privileged, and the act that would otherwise be a

and incur liability
a tort is not then regarded as such
and does not incur liability.
In other words, the law does
not aim at protecting the repu-
tations of a man in such circum-
stances as are described as privileged.
So also in regard to the acts which
in ordinary circumstances are
declared by the law to be trespasses
and to be actionable. Some
of them may be done under
conditions in which they are
not trespasses and not actionable.
The law aims at the protection
of ~~every man's~~ the personal liberty
of every man who is not guilty
of a crime and declares that the
imprisonment of an innocent
man shall incur liability as
a tort. But a policeman may
arrest a man upon a reasonable
suspicion that he has committed
a felony, if a felony has been

~~committed~~, and the policeman will not be regarded as having committed a tort and will not incur any liability for its although it afterwards proved that the arrested man is innocent. The law also aims at the protection of every man's property, and if one man pulls down another's ~~fence~~ house or fence when ~~the law declares~~ the surrounding circumstances are such as the law declares to entitle the owner to the free possession and enjoyment of the house or the fence, a tort is committed and the doer incurs liability. But if a fire is raging in the street where the house is situate and it becomes necessary to pull down the house to prevent the fire consuming all the houses in the same block, it may be pulled down and no tort will be

committed and no liability incurred by the fireman who does it because the law does not aim at the ~~temporary~~ protection of a house in ~~such~~ circumstances in which its presence becomes a certain medium of imminent destruction to many other houses. A tort therefore is an act for which the law ~~forbids~~ ~~the doing~~ ~~in a given set of~~ ~~circumstances~~ bestows a right of action upon the person who suffers any damage from ~~the breach~~ to his personal or proprietary rights when it is committed in circumstances ~~not~~ legal and so an offence ~~be~~ in which the law declares that those ~~damages~~ ~~in the commission of~~ ~~which~~ ~~punishment~~ is to be inflicted upon the doer ~~but~~ ~~property~~ shall be protected against all interference ~~by other~~ ~~persons~~ and for the ~~damage~~ ~~of which~~ it suffers ~~for which~~ it will order damages to be paid ~~to~~ ~~the~~ sufferer by the doer.

But the question which im-

immediately confronts us upon this statement is what are the conditions or circumstances ~~in~~ which make an act done in the ~~them~~ a tort? I think the answer is ~~that~~ the conditions are such as make it certain that the act will cause ~~a loss or injury~~ another person to suffer a loss or an injury which the law aims to prevent and ~~which was~~ that such loss was avoidable without any greater loss or injury being inflicted on anyone else. If the avoidance or omission to do the act would entail loss or injury on another, the question of the wrongfulness of the act is then decided by the estimation placed by the law upon the respective losses or injuries suffered ~~or~~ and avoided. If the law regards the loss or injury which the ~~second~~ ~~third~~ person will suffer as

first person concerned will suffer as a strong hand prevented in preference of the loss or injury which the second person concerned will suffer if the act is not done, then the act must not be done although the object of doing it would be to prevent the impending loss to the second party. No riparian proprietor has a justified in damming up the river in flood time so that it shall overflow the properties above him in order to save his own and all the properties lower down. The river from suffering damage from the water, because the law aims at the equal protection of all the proprietors. But in some extraordinary contingency such as the bursting of a reservoir or the floods that occurred last year in the County of Bourke in New South Wales if the water could be diverted across one property

only into the sea or a large river capable of receiving it and by so doing the ~~lives and~~ people ~~in a neighbouring~~ and houses of a neighbouring town would be saved from certain death and destruction the diversion would be justifiable because the law estimates the lives and property of a large number of persons at a higher value than the loss that would be suffered by the owners of the one property across which the water was diverted.

But the law does not aim at preventing loss or harm of every kind to every man, or in other words, it does not attempt to indemnify a man ~~from~~ against all possible loss or injury from the conduct of other men. There are certain things the law permits a man to do although they entail loss or inconvenience

on another. I may establish myself in business in the next shop to another person carrying on the same kind of business trade and so reduce the amount of business done by him and consequently lessen his profits. Or I may drain my land and so take the water out of the well on my neighbour's land which he requires for his own use. In these cases the conditions within which the law says my act shall be a tort do not exist and therefore no tort is committed and no liability incurred by me.

But the answer that I have given to the question What is a tort? immediately suggests another question, What amount of knowledge does the law require from every person as to the existence or not of the set of conditions within

which an act will be a tort or not? Or, in other words, how is a man to determine that any act will certainly or probably entail loss or injury to another and that such loss or injury was avoidable without causing to ~~him~~ ~~a third person~~ one or more third persons a loss or injury the prevention of which the law preferred to the first injury? The answer is that the law requires that amount of knowledge and foresight which is possessed by a man of average intelligence and prudence. We know that men differ very much in intelligence and mental capacity and in the knowledge and attainments acquired by education, but the law cannot take account of these differences in men because if it did it would completely fail to have a separate rule of conduct

for every man in the community. It therefore fixes upon a standard of conduct which the man of average intelligence and prudence can conform to, and it requires all men who are not placed by ~~by~~ out of this category of ordinary men by a congenital or accidental defect to conform to that rule. If a man is blind the law does not hold him responsible for not acting in a manner that requires sight, and if a man is insane he is not held responsible for any of his acts. But the man who cannot prove that he is out of the category of ordinary men must conform to the rule of conduct which the law prescribes. This is the doctrine that we find in all the decisions in cases of negligence in which it is said that a man is bound to use such care as an ordinarily

prudent man would use in the particular circumstances. We well known phrases, proper and reasonable care, proper and reasonable diligence, and all such like phrases embody the same doctrine and the rule to be derived from all the decisions in which such phrases are used as describing what the law requires is that in a given set of conditions every man is supposed to foresee that certain consequences would result from a certain act, and if those consequences are such as the law wants to prevent the man who does that particular act will be held liable for the consequences.

This may seem a very plain and simple doctrine when once stated and illustrated with cases, but it took a succession of judicial decisions stretching over a period of several centuries to deduce it.

At one time quite another doctrine appeared to find favour with some of the Judges and to be about to be established as the basis of the common law in regard to torts. That doctrine ~~was~~ was that every man acted continually at his peril, and if any loss or injury which the law sought to prevent came to any person either directly or indirectly through the act of another that other was liable to make compensation for such loss or injury however innocent in itself his act may have been or however impossible any foresight of the injury or loss may have been. This doctrine is plainly enunciated in the dissenting judgment of Judge Blackstone in the well known case of Scott v Shepherd in which he held that the three persons who subsequently

handled the squib after it was thrown by Shepherd were bound to see that in protecting themselves and their property, they did not injure the property or persons of others, ~~whatever~~ ~~[illegible]~~ ~~circumstances~~ in which they found themselves. ~~persons of other people were injured was originally due to the act of the defendant.~~ "They were free agents" he said "and acted on their own judgment", which was the same thing as saying that they acted at their peril even in self defence. But the majority of the court decided against Blackstone and maintained that the three men who subsequently threw the squib in self protection were blameless and that Shepherd the man who first threw the squib was liable for all the subsequent mischief. The court did not

in that case however enunciate fully the opposite doctrine that I have stated to you as the ~~no~~ actual theory of ~~liability~~ the law of England in regard to the incurring of liability for torts, and I know of no decision in the English Reports ~~that does~~ that states the doctrine unreservedly. The decision ~~that~~ approaches ~~the nearest~~ most nearly to a direct statement of the doctrine that conduct such as a man of ordinary intelligence and prudence would follow is blameless whatever may be the consequence to others, is the Judgment in the case of Holmes v Mather which was decided in 1875. The defendant was in a vehicle drawn by two horses which were being driven by his groom. The horses ran away and the groom being unable

to stop them, guided them as best he could, but he failed to get clear around a corner and they knocked down the plaintiff. If the driver had not attempted to take the horses around the corner they would have run straight into a shop front. The jury found that there was no negligence and the court refused a new trial and declared in its judgment "For the convenience of mankind in carrying on the affairs of life people as they go along must expect or put up with such mischief as reasonable care on the part of others cannot avoid."

In America the doctrine that the conduct to be expected from the ordinarily intelligent and prudent man is blameless in spite of consequences was unreservedly laid down by Chief Justice

of Massachusetts in the
~~Cooley~~ case of Brown v Kendall.
In that case the defendant was
endeavouring to separate two dogs
that were fighting in the street and
in the act of lifting his stick to
strike them he accidently hit
the plaintiff's eye and injured it.
The court held ~~that~~ in that case
~~that~~ although the defendant
was not bound by any legal duty
to separate the dogs yet if he was
~~not~~ doing a lawful act he was
not liable for any consequences
accidental
so long as he used the care which
men of ordinary prudence would
use ~~in~~ under the circumstances.
This ~~case~~ case is not authoritative
in the English or Australian courts
but it embodies the doctrine to
which a long series of English
decisions have been directly tending
and which I venture to say maybe

regarded as ~~but~~ being substantially the principle on which our all cases of negligence are now decided by English ~~&~~ and Australian Judges.

I will now conclude by saying ~~that~~ the hasty review which I have attempted to make of the development of the Common Law of England in regard to crimes and torts shows us that if we wish to know exactly what the law in any branch of it is at the present time, we must learn what it was and what it is tending to become, because ~~the~~ our Law being as it is a living ~~persons will never~~ ~~Case to grow and to change as~~ organ of a people's daily life will continue to grow and change in order to adapt itself to the successive moral, social and political and industrial conceptions and exigences of society and even as the child is father of the

Man so is the modern law of England the ~~child~~ and descendant and outgrowth of the laws and moral conceptions of our Aryan and Anglo Saxon progenitors and bears upon its forms marks and indications of its origin and descent.