

THE
COMMON LAW.

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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.

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