It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 124. Is the rule different in trespass, where the injury is the immediate and direct, though undesigned and accidental result of a lawful act?

In respect of this question there is some confusion in the books, arising from two causes. First, the decided cases directly involving the point are few, but the question has been very frequently adverted to by way of illustration or argument, in cases where the point was whether case or trespass was the appropriate form of action. Such, with a single exception, were all the cases which the plaintiff has cited on his brief from our own or other reports in which the dicta originated. In all that large class of cases the dicta are thus thrown out *obiter*, and assume the fact without determining it, that the party is liable in one or the other form of action. (See on this subject the remarks of Shaw, C. J., in *Brown* v. *Kendall*, 6 Cushing, 395.) And in the second place, accidents (cognizable in actions at law, and distinguished from those peculiarly regarded in equitable proceedings) resulting from lawful acts, differ in character, and the distinctions and the right use of terms to characterize them have not always been sufficiently appreciated or regarded. A careful attention to those distinctions and the authorities will, I think, enable us to determine the question in hand with entire satisfaction.

An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made.

In the first class are all those which are *inevitable*, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were *unavoidable under the circumstances;* and in the third class, those which were *avoidable* because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A burn his own house, and thereby the house of B. he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable: the accident belongs to the first class, and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge. and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances, and belong to the second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate.

And so, to apply these principles to this case, if the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result; or if his aim was perfect, but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol; and in either case the ball, by reason of the diversion, had hit the plaintiff, the accident would have been so affected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And, in the second place, if, while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what has been correctly termed "unavoidable under the circumstances," and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.

In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential, and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate. and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority.

If the question is to be settled upon principle, it seems very clear that the form of the action