

that none exists, and yet the ordinary question submitted to the jury is, "Was the defendant guilty of negligence causing the plaintiff's injury?" The judge on a non-suit says, "there is no evidence of negligence." Is not this, after all, essentially the question for the jury? The question of negligence being one of degree, the tribunal that draws the line in the first instance must determine a negative, but in order to do so, it strikes one forcibly that the affirmative must be relatively considered before a negative conclusion can be reached.

There must be some criterion as to what is or is not negligence, and by that criterion the judge determines whether there is any evidence of negligence. Much will depend on what his mind adopts as negligence or the test of it. This is an affirmative act, and this would seem to be within the province of the jury. To the jury, the evidence may clearly establish the wrongful act or omission on the part of the defendant. It should be for them to decide. They are surely the judges of what constitutes negligence in fact. But the doctrine contained in the cases leaves it to the judge to fix his standard of what is negligence in fact, and also places on him the responsibility of saying the evidence does not fall within the lines of the standard and therefore is not evidence of negligence at all.

This is not the ordinary case of no evidence and the plaintiff being non-suited in consequence. The action of negligence is peculiar and exceptional. It is impossible to distinguish the evidence from the negligence, because the negligence must be an inherent element of the facts proved. The question then is, "Do these facts show negligence?" This, one would think, ought to be a jury question, but the judge has the power to put the question another way, "Is there any evidence of negligence?" and applying his judgment to the facts before him, may say there is none and thus determine the case.

E. F. B. JOHNSTON.