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himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God. . . . The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." And then he went on to point out that the law was the same in the case of a person who kept a mischievous animal—he must keep it at his peril.[1] It is clear, therefore, that whether we look at the nature of the liability thus imposed, or at the character of the defences permitted,[2] the underlying principle is the same as that which governed civil liability is general in the mediæval common law.[3]

In these two classes of cases, therefore—the case where a man has interfered with his neighbour's possession of or right to possess land or chattels, and cases coming under the rule in *Rylands v. Fletcher*—the mediæval principle of civil liability still holds—but for reasons very different from those on which it rested in the Middle Ages. These cases, therefore, are two of the strongest illustrations of Holmes' aphorism that, "when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and they gradually receive a new content, and at last a new form from the grounds to which they have been transplanted."[4]

We must now turn from these cases, in which the older principles have survived in another form, to the case where a wholly or almost wholly new principle of liability has been introduced into the common law.

(3) The doctrine of Employers' Liability.[5]

Of the principles applied by the mediæval common law to the

[1] L.R. 1 Ex. at p. 281.
[2] See as to this L.Q.R. xxv 321.
[3] Vol. iii 375-377, 378, 380.
[4] The Common Law 36; for another instance of its application in another branch of the law see vol. iii 177.
[5] Much the best account of the history of the law on this topic will be found in Wigmore, op. cit., Essays A.A.L.H. iii 520-537.

master's or employer's liability for the acts of his servant I have spoken in an earlier volume;[1] and we have seen that these principles were applied throughout this period.[2] It is true that in 1676, in the case of *Mitchil v. Alestree*, the court was, on the facts, prepared to presume the existence of a special authority to do the act—bringing unruly horses into Lincoln's Inn Fields—which had caused the damage to the plaintiff.[3] But it is clear from the case of *Kingston v. Booth*[4] in 1685 that, without such special authority, the master could not be made liable for his servant's torts. In that case Withins, Holloway, and Walcot, JJ., resolved, firstly, that, "if I command my servant to do what is lawful, and he misbehave himself or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased"; and, secondly, "if I command my servants to do a lawful act . . . and bid them take care they hurt not the plaintiff; if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding." It is clear, therefore, that, right down to the Revolution, the law on this subject was substantially the same as it was in the Middle Ages.

But we have seen that the seventeenth century had been a century of expansion and change in all branches of commerce and industry. Even in the Middle Ages the law merchant favoured a more extended liability than that recognized by the common law;[5] and we have seen that, in the early days of the seventeenth century, the civil law rules applied by the court of Admiralty exhibited the same characteristic.[6] But, as the result of the Great Rebellion, the common law had absorbed the greater part of the commercial jurisdiction formerly exercised by the court of Admiralty.[7] Both the changed commercial and industrial conditions, and the enlarged commercial jurisdiction of the common law courts, were making it clear that a reconsideration of the mediæval rules which governed this branch of the law was necessary. But the judges of the courts of common law who disgraced the bench in the latter years of Charles II.'s and in James II.'s reigns,[8] were not competent to tackle what was in effect a complicated problem of law and public policy. It was not till after the Revolution, when the quality of the bench had been restored, that any effort was made to deal with it; and fortunately for the common law it found

[1] Vol. iii 382-387.
[2] Above 227-228, 250.
[3] "It shall be intended the master sent the servant to train the horses there," 2 Lev. at p. 173 sub. nom. Michael v. Alestree.
[4] Skinner 228.
[5] Vol. iii 387.
[6] Above 250-253.
[7] Vol. i 556-558, 570-572; vol. v 140-148, 153-154.
[8] Vol. vi 503-511.

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in Holt, C.J., a lawyer who, by reason both of his technical equipment and his knowledge of the commercial needs and conditions of the day, was eminently qualified to do for this branch of the law what he had done for many other branches of commercial law.[1]

The reports show that it was his decisions that laid the foundations of the modern law. In 1691, in the case of *Boson v. Sandford*,[2] an action on the case was brought by a shipper of goods against the owners of the ship, for damage caused to the goods by the negligence of the master. Eyre, J., gave judgment for the plaintiff on the narrow ground that the owners of the ship were in effect carriers,[3] and were therefore liable by reason of the special liability for the acts of their servants imposed on carriers;[4] and it would seem that some reliance was placed on the mediæval rules which made sheriffs and other agents of the crown liable for the misdeeds of their underlings.[5] But Holt rested his judgment on the broad principle that "whoever employs another is answerable for him, and undertakes for his care to all that make use of him."[6] In 1698, in the case of *Turberville v. Stamp*,[7] the plaintiff complained that, being possessed of a close of heath adjoining that of the defendant, the defendant's servant lit a fire on the defendant's close which consumed the heath on his close. It was held that he had a good cause of action. Here again it was possible to ground the decision on the mediæval rules as to liability for fire;[8] and apparently the majority of the judges rested their decision on this ground.[9] But Holt doubted whether the mediæval rule applied to any fires but those in houses;[10] and he put the liability upon the broader ground that, "if my servant doth anything prejudicial to another, it shall bind me, when it may be presumed that he acts by my authority, being about my business."[11] Similarly in 1699 he ruled at nisi prius that, if A's servants driving A's cart collide with B's cart and cause damage, A is liable;[12] and we have seen that in 1701, in the case of *Lane v. Cotton*,[13] he came to the mis-

[1] For an account of Holt see vol. vi 264-268, 270-272, 516-522.

[2] 2 Salk. 440; S.C. 3 Mod. 321.

[3] "Eyre Justice held there was no difference between a land carrier and a water carrier, and that the master of a ship was no more than a servant to the owners in the eye of the law," 2 Salk. 440.

[4] Vol. iii 386.

[5] 3 Mod. at pp. 323-324; for these rules see vol. iii 387.

[6] 2 Salk. 440.

[7] Skinner 681; S.C. Comb. 459, 1 Ld. Raym. 264.

[8] Vol. iii 385.

[9] 1 Ld. Raym. 264.

[10] According to the report in Comb. 459; but according to the report in 1 Ld. Raym. 264 he agreed with the other judges on this point.

[11] Comb. 459; in 1 Ld. Raym. at pp. 264-265 Holt's ruling is thus stated, "if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

[12] 2 Salk. 441.

[13] 1 Salk. 17.

taken conclusion that the postmaster-general was liable for the loss of a letter occasioned by the negligence of an official in the post office,[1] on the authority of the mediæval rules which made sheriffs bailiffs and others liable for the misdeeds of their deputies.[2] In 1709, in the case of *Hern v. Nichols*,[3] he held that a merchant was liable for the fraud of his factor—"for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."[4] From the first, however, this liability was limited to the case where the servant was about his master's business. In 1698 it was held at nisi prius that "where a servant usually buys for his master upon "tick," and takes up things in his master's name, but for his own use, that the master is liable, but it is not so where the master usually gave him ready money";[5] and in 1699, in the case of *Middleton v. Fowler*,[6] Holt explained the principle to be that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master." The same principle was again enforced in 1704 in the case of *Ward v. Evans*.[7] At the same time other cases laid it down, in conformity with the mediæval principle,[8] that if the master had profited by the act or contract of his servant the master was liable.[9]

It is clear from these cases that the origins of this new principle were very mixed. But I think it probable that two main streams of doctrine contributed to it—firstly a Roman influence which filtered through the court of Admiralty and mercantile custom, and secondly an English influence derived from the mediæval modifications of the general common law principle governing the master's liability.

(i) We have seen that doctrines, ultimately derived from the Roman learning as to quasi-delict, were applied in the court of Admiralty to settle the liability of the master and owner of a ship to the shipper and passengers for the delicts of the crew, and the

[1] Vol. vi 267-268.

[2] Vol. iii 387.

[3] 1 Salk. 289.

[4] He gave a similar explanation of the rule in Sir Robert Wayland's Case, 3 Salk. 234—"the master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers."

[5] Boulton v. Arlsden 3 Salk. 234; so it was said, ibid at p. 235, that, "a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master's use. But where he is not allowed or accustomed to deliver out notes, then his note shall not bind the master, unless the money is applied to the master's use."

[6] 1 Salk. 282.

[7] Ibid 442.

[8] Vol. iii 528.

[9] "Where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys goods upon 'tick,' yet the master is liable, so as the goods come to his own use, otherwise not," Boulton v. Arlsden (1698) 3 Salk. 324.

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liability of the owner to the same persons for the delicts of the master.[1] It is certainly significant that the case of *Boson v. Sandford*[2]—the earliest case in which the doctrine appears in a common law court—was an action by a shipper against the owner for damage suffered by the master's negligence. Moreover it is not unlikely that, as the necessities arising from a larger commerce were felt in the court of Admiralty at an earlier date than in the courts of common law, the court of Admiralty should introduce ideas which helped to establish the new principle which was demanded by those necessities. But it is clear that this was only one of the influences which went to the making of the modern principle. If it had been the only influence, probably the doctrine would have taken the form which the author of a recent work on this subject would like to have seen it take. It would have made an employer liable for his servants' torts only to those who were in some sort of contractual relation with the employer.[3] But the cases of this period show that it was not so limited by Holt. Here again it is just possible that the Roman rules as to the actions de effusis aut dejectis had some slight influence;[4] but I think that it is clear that the influences which made for this more extended rule came mainly from the mediæval common law.

(ii) The rule which made householders liable for damage by fire caused by their servants, appears in *Turberville v. Stamp*;[5] and the rule as to common carriers in *Boson v. Sandford*.[6] The rule that a man might be liable if he had undertaken to do something, and, through his servant, had done it badly,[7] appears in *Wayland's Case*;[8] and the rule that a master might be liable if property acquired by his servant came to his use appears in *Boulton v. Arlesden*.[9] Moreover the influence of this rule was long felt in the idea, which appears in *Turberville v. Stamp*, that the fact that the act was for his master's benefit was a reason for holding the master liable[10]—an idea the effects of which were not wholly eliminated till 1912.[11] The mediæval rule as to the liability of sheriffs and

[1] Above 250-253.
[2] (1691) 2 Salk. 440.
[3] This is the main argument of Dr. Baty's ingenious book on Vicarious Liability.
[4] In Noy's Maxims c. 44 it is said that "we shall be charged if any of our family lay or cast anything into the highway to the nuisance of his Majesty's liege people"; and Holt, C.J., in Tuberville v. Stamp (1698) 1 Ld. Raym. at p. 264 ruled that "if my servant throws dirt into the highway I am indictable"; this rule is stated by Blackstone, Comm. i 419, like Noy stated it, as a rule which made a master liable for the acts of his family; Blackstone compares it to the Roman rule set out in Institutes 4. 5. 1; and it is just possible that that may be its origin; on the other hand it may be a solitary survival of the liability of the householder for his "mainpast," vol. iii 383.
[5] (1698) 1 Ld. Raym. 264; above 474.
[6] (1691) 2 Salk. 440; above 474.
[7] Vol. iii 386-387.
[8] "If a smith's man pricks my horse, the master is liable," 3 Salk. 234.
[9] Ibid; above 475 n. 9.
[10] Above 474 n. 11.
[11] Lloyd v. Grace Smith and Co. [1912] A.C. 716.

bailiffs and other officers of the crown for the misdeeds of their underlings, appears in the case of *Boson v. Sandford*;[1] and we have seen that it was the basis on which Holt rested his dissenting judgment in the case of *Lane v. Cotton*.[2]

Both these streams of doctrine thus joined to create the modern doctrine of employers' liability; and, as the technical reasons assigned for the decisions which established it were very various, it followed that the basis on which it rested was not at first clearly perceived. It was sometimes put on the ground that the master by implication undertakes to answer for his servant's tort—which is clearly not true. Sometimes it was put on the ground that the servant had an implied authority so to act—which again is clearly not true. Sometimes it was grounded on the fiction that the wrong of the servant is the wrong of the master,[3] from which the conclusion was drawn that the master must be liable "because no man shall be allowed to make any advantage of his own wrong";[4] and sometimes on the ground that the master who chooses a careless servant is liable for making a careless choice.[5] Blackstone gives all these reasons for this principle. In addition, he deals with the totally different case where a master has actually authorized the commission of a tort; and cites most of the mediæval cases of vicarious liability with the special reasons for each of them.[6] It is not surprising that he should take refuge in the maxim "qui facit per alium facit per se,"[7] or that others should have used in a similar way the maxim "respondeat superior."[8] His treatment of the matter illustrates the confusion of the authorities; and it is noteworthy that he does not allude to the true reason for the rule—the reason of public policy—which Holt, C.J., gave in *Hern v. Nichols* and in *Wayland's Case*.[9]

That this was the true reason for the rule was only gradually perceived. As Professor Wigmore has pointed out, the judges at first relied mainly on the theory of implied command,[10] sometimes classing the liability as quasi-contractual;[11] and, considering the

[1] 3 Mod. at pp. 323-324; above 474.
[2] Vol. vi 267.
[3] Viscount Canterbury v. the Queen (1842) 4 S.T. N.S. at p. 778 *per* Lord Lyndhurst; Tobin v. the Queen (1864) 16 C.B. N.S. at p. 350.
[4] Wigmore, op. cit. Essays, A.A.L.H. iii 531-532.
[5] Viscount Canterbury v. the Queen (1842) 4 S.T. N.S. at p. 778.
[6] Comm. i 417-420.
[7] "As for those things which a servant may do on behalf of his master, they all seem to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium facit per se*," ibid 417.
[8] See e.g. Bartonshill Coal Co. v. Reid (1858) 3 Macqueen at p. 283, where both these Latin tags are introduced by Lord Cranworth; as Professor Wigmore says, Essays A.A.L.H. iii 532, both have been used "to evade giving a clear reason."
[9] Above 475 and n. 4.
[10] Essays, A.A.L.H. iii 527.
[11] Thus it was said in Boson v. Sandford (1691) 3 Mod. at p. 323 that, "though the neglect in this case was in the servant, the action may be brought against all the

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character of the older rule which this modern rule had superseded,[1] this was only natural. The notion of a liability resting on an implied command could easily be represented as a development of the notion of a liability resting upon an express command. But, at the end of the eighteenth and the beginning of the nineteenth centuries, it began to be more plainly seen that this liability did not depend on agency at all. It followed that these phrases about implied commands were out of place. Therefore the phrases "scope or course of employment or authority" take their place.[2] This development helped the judges at length to see that the rule rested ultimately on grounds of public policy. "The rule of liability," said Lord Brougham in 1839,[3] "and its reason I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." It was put on the same grounds by Chief Justice Shaw of Massachusetts: "This rule," he said,[4] "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. . . . The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security." But both in Lord Brougham's and in Chief Justice Shaw's statements we can see traces of the old theories. Lord Brougham introduces a phrase about the thing done being for the benefit of the master; and Chief Justice Shaw introduces words which are reminiscent of agency. A little later Lord Cranworth, though he makes use of the same phrases, stated the principle quite clearly as an absolute duty to guarantee third persons against hurt arising from the conduct of a business.[5] This truly describes the

owners, for it is grounded *quasi ex contractu*, though there was no actual agreement between the plaintiff and them."

[1] Vol. iii 382-385.

[2] Wigmore, Essays A.A.L.H. iii 533—"the Command phrase disappears as a regular one, and the Scope of Employment phrase, with its congeners, come into full control."

[3] Duncan v. Finlater (1839) 6 Cl. and Fin. at p. 910.

[4] Farwell v. Boston and Worcester Rly. Corp. (1842) 4 Met. 49, 3 Macqueen 316.

[5] "In all these cases the person injured has a right to treat the wrongful or careless act as the act of the master: Qui facit per alium facit per se. If the master himself

nature of the liability. As Sir F. Pollock puts it,[1] "the liability of an employer to the public for injuries caused by the acts and defaults of his servants, is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others."

We shall see in the next chapter that the older theory as to the basis of the liability of the employer, which grounded it upon some negligence in the employer, either because the act of the servant was imputed to him or because he was negligent in employing an inefficient servant, has had some very unfortunate consequences in the rules applied to the liability of the crown for the acts of its servants. We shall see that, if the true view of the nature of the employer's liability had been reached at an earlier date, these consequences might have been avoided.[2]

But what, if any, are the limits to this absolute duty? We have seen that, from its first appearance, the courts wisely refused to limit it by confining it to a duty to compensate only those who were in some sort of contractual relation with the employer;[3] and, in consequence, a doctrine laid down at the end of the seventeenth century, has proved capable of regulating satisfactorily the relations of employers to the public at large under the changed industrial conditions of this twentieth century. But, at the beginning of the nineteenth century, the question of the extent of the employer's liability was raised in two classes of cases. The first class of these cases centres round the question, Who is a servant? The second class of these cases centres round the question, What is the employer's liability if the person injured is not an outsider but a fellow-servant of the tortfeasor?

(i) The question who is a servant for the purposes of this rule does not seem to have been raised till the end of the eighteenth century. In the case of *Bush v. Steinman*[4] the court held, in effect, that an employer was liable for the acts of an independent contractor. But Eyre, C.J., had considerable doubts as to the justice of imposing such a liability, because the actual tortfeasor was very remotely connected with the defendant.[5] The later

had driven his carriage improperly . . . he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business," Bartonshill Coal Co. v. Reid (1858) 3 Macqueen at p. 283 *per* Lord Cranworth.

[1] Essays in Jurisprudence and Ethics 128.

[2] Vol. ix c. 6 § 1.

[3] Above 476.

[4] (1799) 1 Bos. and Pull. 404.

[5] "At the trial I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate

cases of *Laughter v. Pointer*[1] and *Reedie v. L.N.W.R.*[2] have justified these doubts, and established the modern rule that a master, though liable for the acts of his servant, is not as a general rule liable for the acts of an independent contractor.[3] But that rule is not without exceptions;[4] and this rule, as mitigated by these exceptions, has been found to be a fair qualification of the employer's liability to the public.

(ii) It is far otherwise with the rule applied by the common law in the case where the person injured by a servant is a fellow-servant. It is curious that no case, in which an action was brought against an employer for an injury caused by one of his servants to another, is known to have occurred till the case of *Priestley v. Fowler.*[5] In 1837 the court in that case were unanimous that no such action would lie. To a large extent they grounded their judgment on the injustice of imposing a new, and apparently indefinite series of liabilities, upon masters.[6] So far as the judgment was based on technical reasons it proceeded on three grounds: firstly, from the relation of master and servant there cannot be implied an obligation on the part of the master to take more care of the servant than he takes of himself; and any obligation of this kind, which he is under, is satisfied if he uses his best endeavours to safeguard his servant. Secondly, the servant, by entering on and continuing in the employment has chosen to abide the risk, of which he is likely to know as much if not more than the master. Thirdly, to allow such actions would be a direct incentive "to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who

author in the relation of master, that to allow him to be charged for the injury sustained by the plaintiff seemed to render a circuity of action necessary. . . . I hesitated therefore in carrying the responsibility beyond the immediate master of the person who committed the injury," at p. 406.

[1] (1826) 5 B. and C. 547. [2] (1849) 4 Ex. 244.

[3] Pollock, Torts (12th ed.) 79-81.

[4] These exceptional rules are well summarized by Underhill, Torts (9th ed.) 63-64.

[5] 3 M. and W. 1.

[6] "It is admitted that there is no precedent for the present action by a servant against a master. We are therefore at liberty to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or other. If the master be liable to his servant in this action the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. . . . The footman who rides behind the carriage may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harness maker, or for drunkenness neglect or want of skill in the coachman," at pp. 5-6; the reasoning is to some extent fallacious, as the coachmaker and the harness maker would obviously be independent contractors.

serve him."[1] This judgment was followed a few years later by Chief Justice Shaw of Massachusetts.[2] His judgment is admitted to be the best exposition of this doctrine, generally called the doctrine of common employment, which had been first laid down in the case of *Priestley v. Fowler.* He adopted some of the reasoning of that case;[3] but he put the doctrine on a very much firmer technical ground. He pointed out that the duties existing as between the employer and his servant were purely contractual. They were governed entirely by the contract. The contract contained no express clause by which the master undertook to indemnify the servant against the act of his fellow-servant, and no such term could be implied. On the other hand, the duties existing as between the employer and the public were not contractual, and the law had determined that a duty to indemnify the public for the torts committed by his servant in the course of his employment did exist.[4] There was thus a good technical reason for drawing this distinction between liability for wrongs committed by servants against fellow-servants, and wrongs committed by servants against outsiders; for, in the former case, the rights of the master and servant, having been fully settled by their contract, no place was left for any other liabilities not contemplated by the contract. Moreover, this reasoning answered the objection that, in a large undertaking, a servant has no more means of control over a fellow-servant than any other member of the public—"the master in the case supposed is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."[5]

But, after all, these decisions to a large extent ignored the conditions of modern industry. However good the technical reasons which could be adduced for the doctrine, it was quite clear that, in a great undertaking like a railway, a servant has as little opportunity of guarding against the negligence of many of his fellow-servants as a member of the public; and he could hardly be said to have consented to abide risks of which he had neither knowledge nor means of knowledge. The limitation thus imposed on the liability of employers was far too strict—a truth which is

[1] At p. 7.

[2] Farwell v. Boston and Worcester Rly. Corp. (1842) 4 Met. 49, 3 Macqueen 316.

[3] 3 Macqueen at pp. 317-319. [4] Ibid at p. 317. [5] Ibid at p. 320.

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emphasized by the fact that no other country in Europe has adopted any similar doctrine.[1] In these latter days the result of this over-strictness has been that the Legislature has imposed a liability on employers, which errs almost as much in the direction of liberality. For under the modern Workmen's Compensation Act[2] a workman, though he has voluntarily entered the particular business, is better protected from the risks incident to its conduct than a member of the public—an extravagant degree of protection, which obviously removes one of the chief incentives to carefulness on the part of the servant.

It is obvious that the development of the law of crime and tort, during this period and in the succeeding centuries, has been affected, almost as much as the law of contract, by the new influences which began to be felt during this period. The new territorial state and its larger control over the actions of its subjects, the new relations between church and state, the growth of industry and commerce—all had a large influence in shaping these branches of the law. Much that was mediæval was retained, and more was made the foundation of an elaborate superstructure of rules, which, in many cases, have in effect created entirely new bodies of law. Much that was admittedly wholly new was added to meet new needs and new problems. Though in the criminal law too many antiquated rules both of substantive and adjective law were retained, yet, on the whole, the professional developments of this period in the law both of crime and of tort are a credit to the common law. As we can see from the later history of many of the branches of law which I have sketched in this chapter, they have resulted in the creation of a body of principles which has proved to be at once flexible and permanent—a body of principles, which, on the whole, has met adequately the constantly new needs of a progressive and expanding state.

At this point, to adapt the phraseology of the Roman Institutes, I leave the history of the technical development of the law of Things, and turn to the corresponding development of the law of Persons.

[1] Pollock, Torts (12th ed.) 101, and see 93 n. (f).
[2] 6 Edward VII. c. 58.

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