A HISTORY OF ENGLISH LAW

IN SIXTEEN VOLUMES

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To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

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property law. In 1674 it was held that, where the defendants were bound by prescription to maintain a fence, and by reason of their negligence they failed to maintain it, so that the plaintiff's mare got through the gap and was drowned, the plaintiff could recover in an action on the case.[1]

We have seen, however, that the law made certain bailees, to whom possession of goods had been entrusted, liable, even though they had not been negligent. These rules were, as we have seen, due mainly to the position which the law attributed to possessors as such, and partly to the fact that they had become fixed before the common law had attained the conception of negligence.[2] But it is clear from *Southcote's Case*[3] that the court, in the light of the new conception that liability should be founded on negligence, was beginning to think that they were hard rules.[4] They were not extended to the newer varieties of bailees;[5] and we have seen that Coke advised that they should be evaded by making special contracts as to the measure of liability.[6] The manner in which Holt, C.J., in the case of *Coggs v. Bernard*,[7] put the law as to bailees on its modern basis, and applied to their liabilities the Roman rules as to negligence, which he had taken from Bracton, is the best proof that, at the beginning of the eighteenth century, the judges were coming to the conclusion that negligence should generally be regarded as a basis of liability; and that, in the absence of negligence, no liability should as a rule be imputed. In fact, that decision gave effect to a tendency in this direction, which had been felt in different ways throughout the sixteenth and seventeenth centuries.[8] But even then two survivals of the older law were still left—the innkeeper and the common carrier. The innkeeper is still absolutely liable, as he was liable in the Middle Ages,[9] by the common custom of the realm, for the safe custody of the goods of his guests.[10] The common carrier,[11] common hoyman, or master of a ship, being persons "that exercise a public employment," were bound to "answer for the goods at all events," except as against acts of God and the king's enemies.[12] But the

[1] Anon. 1 Vent. 264-265; Star v. Rookesby (1711) 1 Salk. 335.
[2] Vol. vii 450-451.
[3] (1601) 4 Co. Rep. 83b.
[4] Note that in Gelley v. Clerk (1607) Cro. Jac. 188 the innkeeper's liability as a bailee of his guests' goods was limited to those who were actually staying in his inn as guests.
[5] "If a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged . . . but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged, if they are stolen by thieves," 4 Co. Rep. at f. 84a.
[6] Ibid; above 259.
[7] (1704) 2 Ld. Raym. 909; vol. vii 453.
[8] Above 452-453.
[9] Vol. iii 385-386.
[10] Cayle's Case (1584) 8 Co. Rep. 32a; (1624) Hutton at p. 100; Robins and Co. v. Gray [1895] 2 Q.B. at p. 504 *per* Lord Esher, M.R.
[11] For the detailed history see Holmes, Common Law 197-205.
[12] 2 Ld. Raym. at pp. 917-918.

exemption of other bailees entrusted with the possession of goods from this absolute liability, had destroyed the older reasons for the rule;[1] and its application to these persons, as an exceptional rule, was based by Holt, C.J., on public policy.[2] As applied to common carriers, it was accepted by Lord Mansfield;[3] and it is still part of the law. But even in Holt's day it was clearly regarded as an exceptional rule which required to be justified.

Since the law had reached this stage by the end of the seventeenth century, it is not surprising to find that a further step was then taken. "The conception," as Mr. Street puts it,[4] "of common law liability for negligence was so extended as to make one liable, in an action on the case, for damage flowing from the negligent performance of his own projects and undertakings, unconnected with the duty arising from statute, public calling, bailment, or prescription." This extension was certainly made in 1676 in the case of *Mitchil v. Alestree*.[5] In that case the defendant had brought an unruly horse into Lincoln's Inn Fields for the purpose of breaking him. The horse escaped from the defendant, and damaged the plaintiff. The court held that the plaintiff could recover. "It was the defendant's fault to bring a wild horse into such a place, where mischief might probably be done, by reason of the concourse of people. Lately, in this Court, an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning him." And Wylde, J., said, "if a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief; an action lies against the master."

But, just as it was difficult to apply this new conception of negligence to certain kinds of bailees, whose position had been defined by older rules of law, so it was difficult to apply it in cases where the act complained of was a direct act of violence. Such an act was generally a trespass, and therefore an unlawful act; and if it was an unlawful act, there could be no question of the defendant's liability. But such an act may be the result of a perfectly lawful act done purely accidentally; and we have seen that, as late as the end of the sixteenth century, Bacon restated the mediæval rule that, even in such a case, the person doing the

[1] Vol. vii 452-453.
[2] "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered," 2 Ld. Raym. at p. 918.
[3] Forward v. Pittard (1785) 1 T.R. 27.
[4] Foundations of Legal Liability i 189.
[5] 1 Vent. 295.