VICARIOUS LIABILITY. A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS, WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES

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A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES

BY

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PREFACE

THE present-day discussion of the question of the liability of Trade Unions is hampered by the constant and unwarranted implication that liability on the part of principals and employers for the wrongful acts of those who are employed by them is a sort of natural law.

The further attempt to incorporate loose associations of people who happen to be acting together, by treating them as liable for the wrongful acts of the most prominent of their number, turns on the same mistaken idea.

It has therefore been thought well to examine with some care the history and limits of the doctrine thus elevated to the pedestal of an axiom.

The result is to show that it is, on the contrary, a principle dubious in origin, and unjust in operation—one, moreover, which eminent judges have stated is certainly not to be extended, and for which little or no theoretical justification is even to be found advanced.

The society-member's asserted liability is only an illogical inference from that of shareholders; the shareholder's liability is only a variety of the liability of the partner; the partner's liability is only *qua* principal, and began in 1833; the principal's liability is only *qua* master;[1] and the master's liability is based on a tissue of misapprehensions and began in 1692.

It may be fancied that the views maintained in this volume are retrogressive, and fail to take account of the

[1] 'The liability of a principal for the acts, negligence, misfeasances, &c., of an agent is confined to those cases where the agent is a servant': Wright on Agency, p. 277. Pollock, Torts, p. 81.

great increase and importance of organizations of various kinds at the present day. But the importance and the variety of organizations is no greater than it was in the era of religious orders and town guilds. I do not for a moment deny the reality of organizations. I only assert that their existence has not as yet superseded the primary responsibility of natural human beings: and that their joys and sorrows, their rights and duties, are as yet not a matter of very keen interest to anybody, nor of any but a nebulous and undefined nature.

I have endeavoured to seize on the salient features of reported cases, leaving the reader to consult the sources for their details; none of which can safely be disregarded, and which it would be impossible to print in full.

Decisions are criticized with a freedom that may appear excessive. But in the hurried conditions of modern life the Courts can never have opportunity for minute research and for prolonged experiments in the mental laboratory. The necessary time and opportunity for precise investigation is the privilege of those in a humbler sphere. They will not be grudged the freedom of stating with scientific candour what appears to them to be its results.

T. B.

3 Paper Buildings,
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January, 1916.

CONTENTS

CHAPTER I

VICARIOUS LIABILITY

'Qui facit per alium facit per se.' 'Respondeat superior.' These are phrases which roll trippingly off the tongue. But are they more? Whatever they are, they are not arguments.

One may venture, not improperly, to characterize the modern doctrine of vicarious responsibility for the acts of others as a veritable upas-tree. Unknown to the classical jurisprudence of Rome, unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy, and it cannot but operate to check enterprise and to penalize commerce. The extension of joint-stock enterprise with limited liability alone makes the consequences of the doctrine tolerable. One unjuridical institution is inelegantly cured by another. 'Two blacks' make a dirty grey: and the jurist sighs in vain for white.

Clearly, 'Qui facit per alium facit per se' is a simple untruth, except so far as it expresses the truism that one who deliberately carries out a design through the instrumentality of another is the active agent throughout. It certainly is not true that what your agents do you do yourself. Neither in law nor in morals are the unauthorized acts of employees attributable to the employer. 'Respondeat superior' is the maxim which has really done the mischief. It is here proposed to examine how.

The investigation of the topic has three branches: the position of Servants, Agents, and Co-adjutors. It is almost impossible to separate them in discussion: and

this root-idea is common to them all, that *A* is doing work in concert with *B*, whether on equal terms or on terms of subordination. In each case the persons concerned are carrying on an undertaking in common and in concert: and indeed, it is not quite easy to see why the employees in a business are not literally within the definition of partnership contained in the Partnership Act of 1890. They are engaged in 'carrying on a business in common [with the proprietor] with a view to [his] profit': and the Act is not very particular or specific as to whose profit it need be. At any rate, we are safe in assuming that servants, agents, and coadjutors such as partners, are engaged in carrying out a concerted plan, whether they have a greater or lesser share in determining the modes of its detailed execution.

Now we are familiar with the *brocard* attributed to one of the later and less credible post-glossators, that 'If two men are walking up the street, and one of them steals a pair of boots from a shop window, they are both equally guilty.' And it is true that the criminal law of England evinces a hatred of concerted action—the hate of terror. The penalties of conspiracy and maintenance are standing witness to this. But the law never carried its hate and its terror into the calm region of civil process until late in its history. Joint tort-feasors were jointly liable for what they all intended. But they were not liable in tort for what they did not intend: the extravagances of some of their number. Such a liability, if it exists to-day, must exist by artificial imitation of the liabilities which have been imposed on commercial partners. And these liabilities, in their turn, have, we hope to show, been imposed in imitation of those imposed on the employers of servants.

Dr. Holdsworth tells us of sporadic cases of responsibility, in very early times, for the acts of children (antici-