

ADDENDA ET CORRIGENDA xlix

- P. 273, n. 2. Add, early instances of this control over guardians will be found in A. H. Thomas, *Early Mayor's Court Rolls*, 50, 203, 232, 234, 235, 239.
- P. 280, n. 7. Add, with this view of the effect of the statutes of forcible entry Marowe, *De Pace* 347, agrees.
- P. 299, n. 6. Add, but see Bolland, *Manual of Year Book Studies*, 24-25, who says that a man who robbed a church could not claim his clergy.
- P. 302. Delete the last two sentences and substitute as follows: Though Blackstone criticised different parts of both the criminal and other branches of English law¹, and, in particular, the large number of cases in which capital punishment was inflicted², it does not seem to have occurred to him that the corrective administered by the benefit of clergy was absurd and capricious. It was not till 1827 that this obvious fact induced the legislature to abolish it³.
- P. 313, n. 7. Add a reference to Marowe, *De Pace* 333-334, who summarizes the cases where the use of force in self-defence is permissible.
- P. 321, n. 3. Add, we find such actions on the London Mayor's Court Rolls, at pp. 72-73, 91.
- P. 342, l. 14. For the words "never materialized" substitute the words "were later rejected and did not become part of modern law"⁴.
- P. 342, n. 1. Add, it appears from the note from the record, Y.B. 8 Ed. II (S.S.) 137 that issue was taken on the theft; Marowe, *De Pace* 403, says that if goods taken by a sheriff were lost by reason of a sudden tempest or by the action of the king's enemies he was excusable, but not if they had been stolen from him, for he had his remedy against the thief.
- P. 365, n. 2. Add, the law seems to be stated rather more broadly by Marowe, *De Pace* 375.
- P. 369, n. 6. Add, but there is earlier authority, for Marowe, *De Pace* 378, said in 1503 that burglary must be committed by night. It may be that this rule was not quite clearly settled when he wrote—though he states it as if it were.
- P. 373, n. 2. Add, Marowe, *De Pace* 377.
- P. 373, n. 4. Add, Marowe, *De Pace* 379, says that it was *anciently held* that an intent to murder, coupled with a frustrated attempt was murder.
- P. 373, n. 6. Add, Marowe, *De Pace* 375; but it appears at p. 378 that the intent in murder was beginning to be a little artificial—*"Et nota que en mort de home lentent de celui qui fait le mort ne fait le felony come il fait de Theft come est avaunt dit etc. ; qar si home entende de bater ascun person et en cell baterie il tua une autre, ceo est felony nient obstante son entent ne fut de luy occider"*—clearly, the process which will make the malice aforethought required for murder a technical conception, has begun, see vol. viii 435-436.
- P. 380, l. 5. After the word "peril" insert the following note: Professor Winfield in *L.Q.R.* xlii, 37, 184, has criticized this view of the basis of civil liability in the Middle Ages. It is true, as he says, that liability is not absolute, for, as we have seen, several

¹Vol. xii, 728-729.

²Vol. xi, 560-561, 563-564.

³Note 6 in the text.

⁴See Plucknett, *Concise History of the Common Law* (3rd Ed.) 422.

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defences were open to a defendant (above 377-379). It is true also that the liability for negligent acts imposed on those who pursue common callings (below 385-386), or on those who had contracted to act (below 430), show some appreciation of the idea that liability can be based on negligence. But apart from these cases there is little evidence that negligence was a basis of civil liability in the Middle Ages or later. Though it is true that the rules as to criminal liability show that medieval men appreciated the difference between acts done intentionally, negligently, or accidentally, I do not think that the fact that these different states of mind existed in any given case made any difference to civil liability. It may have made some difference to the damages awarded, but not to liability. I contend, not for absolute liability, but for the view that any act forbidden by law, which causes damage and is not justifiable by law, exposes to civil liability even if done accidentally; and, similarly, that an omission to act, if a duty to act is imposed by law, as in the case of the common callings, will expose to liability, even if the omission is accidental. The question what acts are forbidden by law must (apart from statute) be determined by asking whether a writ giving a remedy for the damage was provided. Tried by this test we find liability is imposed for certain classes of acts causing damage, and that if these acts are done, and they are not justifiable by some rule of law, public or private, they can only be justified by proving that the act causing damage was not the act of the defendant, by showing *e.g.* that it was the act of the plaintiff, or the Act of God, or the act of the King's enemies. Neither the youth of the defendant, nor the absence of intent or negligence, made any difference to his liability if the act done was his act.

- P. 381, l. 11. Delete the words "if rule it was at this period", and n. 3.
- P. 381, l. 13. After the word "savage" insert the following sentences: Dr. Glanville Williams has shown that an action thus based on scienter was recognised as early as 1387¹. The reason for its introduction is, I think, that stated by Dr. Williams—"the courts were not prepared to hold that all the acts of animals involved their owners; there had to be some culpability in the owner himself, and of this culpability knowledge of the animal's past was a rough practical test²". It was held that it applied to other animals besides dogs³.
- P. 387, n. 3. Add, Professor Plucknett, Concise History of the Common Law (3rd Ed.) 419 thinks that this clause of the statute applied only to prevent the Crown from forfeiting goods on account of the servants' wrongful act; no doubt it applied to this case, but I think that the language is wide enough also to cover the case of the liability of a master for certain of the torts of his servant.
- P. 388, n. 5. Add, similarly Marowe, De Pace 301, says that, though the king is the principal conservator of the peace, yet he "ne poet prendre recognysaunce pur le peas quar cest recognysaunce serra fait a luy mesme."

¹Liability for Animals 278.

²Ibid. 282.

³Ibid. 278-279; I do not think that the existence of this action affected the principle of civil liability explained above 375-379; this is shown by the argument of Moyle V. B. 28 Hy. VI Pasch pl. 7 cited *ibid.* 282-283, which was followed in later cases, that the scienter was not traversable, because the cause of action was the bite or other act causing damage.

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- P. 392, l. 6 After the words "conviction in law", add, But in Edward I's reign this was not the law¹; and all through the medieval period etc. as in the text.
from bottom.
- P. 394, n. 7. Add, for a good account of the history of the summary punishment of contempts of court see John C. Fox, the Writ of Attachment L.Q.R. xi 43-60.
- P. 395, n. 4. Add a reference to Marowe, De Pace, 381-383.
- P. 395, n. 5. Add a reference to Select Cases in the Court of King's Bench (S.S.) iii *lv-lvii*.
- P. 401, n. 11. Add a reference to Select Cases in the Court of King's Bench (S.S.) iii *lvii-lx*.
- P. 402, l. 19. Delete the word "probably."
- P. 402, n. 4. Add a reference to Select Cases in the Court of King's Bench (S.S.) iii *lx*.
- Pp. 403-404. Delete the last three sentences and substitute as follows: The Year Books and the Abridgments would seem to show that most of the cases brought before the courts were cases of conspiracy to indict or appeal for criminal offences, that a few were cases of abuses of civil procedure, and that there are none of the other cases mentioned in the statute². But the rolls of the King's Bench tell a different story. Much more use was made of the statutes than the Year Books and abridgments indicate—in 1292 there were fifty-three actions in the King's Bench in a single term³; and they included all kinds of conspiracies⁴. But it soon became clear that the writ could be "perverted by the lawless to their own nefarious ends⁵". In particular, it was used against honest indictors and appellors. In 1304 it was settled that it must not be so used⁶; and we shall now see that other limitations placed on its use by the courts had a considerable effect on its development.
- P. 404, n. 8. Add, for other miscellaneous cases in Edward I's reign see Select Cases in the Court of King's Bench (S.S.) iii *lxiv-lxv*.
- P. 406, n. 4. Marowe, De Pace 372-373, states that an agreement between divers persons to do an illegal act is a conventicle which the Justices of the Peace can punish. This statement shows that the common law had already grasped the idea which was later developed by the Star Chamber, vol. v 205.
- P. 408, n. 3. In A. H. Thomas, Early Mayors' Court Rolls, 154 and 262-263, there are two cases of 1303-1304 and 1305; in the former the action is brought for a deceit in the performance of a contract, and in the latter for a breach of warranty of quality.
- P. 460, l. 6 After the word "period" insert the following sentences: Many of these privileges were claimed by the King, and allowed both by the Common Pleas and the King's Bench⁷; and some of the claims put forward in the King's Bench in Edward I's reign almost amounted to a claim that the King was above

¹Select Cases in the Court of King's Bench (S.S.) iii *lxvii-lxxviii*.

²P. 403, n. 6 as in text.

³Select Cases in the Court of King's Bench (S.S.) iii *lxi*.

⁴Ibid. *lxi-lxii, lxiv-lxx*.

⁵Ibid. *lxxi*.

⁶Ibid. *lxiv*.

⁷Select Cases in the Court of King's Bench (S.S.) iii *xliv-l*.