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ANENT THE STATUTE OF WESTMINSTER I AND LIABILITY

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The recent experience of the United States with the Eighteenth Amendment and the Volstead Act has dramatized a problem of law that has always been present but one that increases in its importance and intensity with the development of that indefinable but nevertheless positive force called public opinion. That problem is the nature of law. Sir Paul Vinagradoff in commenting on this question wrote that law is "a set of rules directing the relations and conduct of their state's members."[1] H. J. Laski writing on the subject added that "Laws as such we discern to be morally neutral; they are merely decisions which get accepted in the presence of social forces."[2] In short, the fundamental question involved is whether statutory enactments are a cause or a resultant of social control; whether they express a condition or a desire. Perhaps the answer is that there exists a twilight zone in juridical development in which both forces, cause and result, are at play. Such a conclusion should not, however, blind us to the necessity that all statutory provisions must conform to Laski's definition of acceptance. It is necessary to realize this essential character of enactments to approach the famous Statute of Westminster I and its effect on the "law" or "custom" of medieval liability.

The latest treatise on medieval English law has closely followed the usual opinion that the famous statute of Westminster I passed in 1275 legislated vicarious liability out of the picture.[3] A reading of the statute fathers such a conclusion.

> It is provided also, that in no city, Borough, town, market or fair, there be no Foreign person (a stranger to the city) which is of this realm distrained from any debt whereof he is not the Debtor or Pledge, and whosoever doth it, shall be

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[1] HISTORICAL JURISPRUDENCE (Oxford University Press, London, 1920) I, 52.

[2] GRAMMAR OF POLITICS (Yale University Press, New Haven, 1925) 275.

[3] Sanborn, F. R., ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW (Century Co., New York, 1930) 354; *cf.* Isaacs, Nathan, *Fault and Liability*, SELECT ESSAYS ON THE LAW OF TORT, 254; Meyer, Erwin F., *English Craft Gilds and Borough Governments of the Later Middle Ages*, UNIVERSITY OF COLORADO STUDIES, XVII, 414-415, February, 1930.

> grievously punished and without delay, the distress shall be delivered by the bailiffs of the place or by the King's Bailiffs if need be.[4]

The statute did not consider alien or foreign merchants. They had to wait until 1351, 1353 for a similar protection.[5] Professor Sanborn's comment on the great Westminster enactment illustrates a failure to grasp the fact that Westminster I may well have been a pronouncement of the law as it ought to have been rather than the law as it was. It was the expression of an ideal, rather than a statement of a universally accepted fact. The statute, to use a modern phrase, was a late thirteenth century "noble experiment." The author, Professor Sanborn, however, looked upon it in his book as a "recognition of a situation already existing to a considerable extent."[6] The extent to which it was accepted can be debated. To be sure some boroughs had received royal charters that abolished the system of reprisals by 1275.[7] But that is only one half of the story.

It might be well to state briefly what the system of reprisals or *withernam* was in the late Middle Ages as it existed in England. Pollock and Maitland have given the classic summary of the general principle of liability involved.

> If a merchant of X owes a trading debt to a merchant of Y, then if other merchants of X go to the town of Y or to some fair where the creditor finds them, they will like enough be held for the debt—at all events if he proves that he had made a fruitless effort to obtain justice in the court of X—they are in *communares* of the principal debtor, they are "his peers and parceners," they are in the "scot and lot" with him, and they and each of them, must answer for the trading debts, for debts, that is, incurred in the exercise of trading privileges which they all enjoy in common.[8]

To illustrate the principle no better case can be cited than that of Roger Blacymouth of Cambridge. In 1270 he was quit of all liability when arrested in the Fair of St. Ives because he proved

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[4] Statutes at Large, I, 52.

[5] 27 Edward III, c. xvii, *ibid.*, I, 351.

[6] Sanborn, *op. cit.* 354; *cf.* Norton, George, COMMENTARIES ON THE HISTORY, CONSTITUTION, CHARTERED FRANCHISES OF THE CITY OF LONDON, (Longmans, Green & Company, London, 1869) 329-330.

[7] Bateson, Mary, *Borough Customs,* II, liv. SELDEN SOCIETY PUBLICATIONS, XXI.

[8] HISTORY OF ENGLISH LAW, I, 683.

that he was not "in scot and lot with the community of Cambridge or a member thereof. . . ." [9]

To guard against such vicarious liability certain boroughs obtained charters from the crown exempting them in part or whole from its effect. But on the other hand there were specific grants made that enabled boroughs to institute this process of vicarious liability known as *withernam*.[10] The evidence at hand proves that the system of reprisals or *withernam* was the accepted method of action for the recovery of damages. With this brief statement of what *withernam* was and what it was that the statute of Westminster I attempted to legislate out of existence in 1275 let us see what that state of affairs was after 1275, that is after the passage of the royal statute that "was only a recognition of a situation already existing to a considerable extent." [11]

On July 7, 1301, some twenty-six years after the enactment of Westminster I, Alexander de Scaylesworth of Northampton "was attached by 10 casks of wine because the Bailiffs of Northampton had arrested the goods and chattels of value 20s. of Richard Poterel, junior, of London, as a forfeit, which goods Richard had bought in Northampton market. The defendant found pledges . . . to restore Richard's goods within eight days and to satisfy the City for the contempt and trespass." [12] It should be noted that the goods seized belonged to an innocent person but a resident of Northampton and hence one that served the purpose.

An even more pointed case that denied the acceptance of the principle of Westminster I is that of *London v. Dunwich* in 1319.[13] A writ was sent by the crown to the mayor and bailiffs of Dunwich reminding them that London had addressed letters to them requesting that justice be done to two Londoners and inasmuch as Dunwich had failed to do justice the crown wished to remind them that "according to the custom of the city (of

[9] Gross, C., editor, *Select Cases on the Law Merchant*, 3, SELDEN SOCIETY PUBLICATIONS, XXIII.

[10] Bateson, M., *op. cit.*, II, liv. iv. For an example of such grants see Appendix A; *cf.* CALENDAR OF PATENT ROLLS, 1327-1330, 29.

[11] Sańborn, *op. cit.* 354.

[12] Thomas, A. H., editor, CALENDAR OF EARLY MAYOR'S COURT ROLLS OF THE CITY OF LONDON, 1298-1307, 115.

[13] Sharpe, R. R., editor, CALENDAR OF LETTER BOOKS OF THE CITY OF LONDON, E, 32-33; *cf. ibid.* E, 42, 178.

London) in matters of this kind, the mayor and commonalty (of London) could take *withernam* of the goods of such peers and commoners (*parium et communariorum*) as were found in the city." If 1275 was the date that marked the death of vicarious liability, its ghost was still haunting the chancery of the realm and the local courts. Perhaps another type of action will give additional proof of the vitality or reality of the ghostly principle of *withernam* for Englishmen after 1275.

On August 26, 1327, fifty-two years after Westminster I, the London officialdom was in receipt of communications from the officers of Rye and Winchelsea relating to toll charges that had been "illegally exacted from the merchandise of Adam Lucas." Rye assured London that justice would be done Adam if he would but sue those who had "tolled" him in their borough. A similar answer came from Winchelsea. The Londoners, however, were not satisfied.

Let the entry tell the story:

> The above answers not being deemed satisfactory the mayor, aldermen and commonalty unanimously agreed that *Withernam* should be taken from the men of Winchelsea and Rye, and their goods, as occasion served. . . . Note that thirteen casks and two pipes of red wine and one cask of white wine, belonging to Richard Selern of Winchelsea were seized as *withernam*. As he did not sue for their return, they were valued as 123 6s. 8d. and delivered to the above Adam Lucas upon his giving security to answer thereof *quo et quando*.[14]

If the above examples do not serve to qualify Professor Sanborn's statement that *withernam* was non-existent "to a considerable extent" by 1275, then one last example. In 1327 Edward III granted the mayor, bailiffs and men of Bishop's Lynn a charter that "for five years no one whether foreigner or townsman in the same town or part thereof be mollested, or his good and merchandise arrested, for any debt whereof he is not the principal debtor or surety or for any trespass by any other person whatsoever, unless the said debt or trespass be known to concern the king especially."[15]

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[14] Thomas, A. H., editor, CALENDAR OF PLEA AND MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364, 26; *cf. ibid.* 90, 180-181.

[15] CALENDAR OF PATENT ROLLS, 1327-1330, 29. The grant when finally made was made for two years. *Ibid.* 1327-1330, 30.

Of course, one could argue that this patent anticipated that statute of 27 Edward III and its purpose was to extend the protection of Westminster I to all persons. But the opposite conclusion is also valid, *i. e.*, that the burgesses of Bishop's Lynn had not had the benefits of Westminster I. In the light of the examples given such a conclusion seems sound.

The examples of evident repudiation of the principle of limited liability may not be many in numbers as far as records go, still their character is such as to warrant the conclusion that 1275 cannot be assigned as the date for the disappearance of either the principle or practice of vicarious liability. To say that London was an exception demands proof particularly in view of the wording of the Statute and also in view of the case of the burgers of Bishop's Lynn. Perhaps the problem resolves itself again into that suggested by Laski's definition as to the nature of law. Because of the examples cited that flatly denied the acceptance of the principle of Westminster I, it would appear that the statute at the time of its enactment was in the nature of a thirteenth century noble experiment which in the course of the next century and a half became accepted as a condition, but certainly such an accepted condition did not exist when Westminster I was enacted in 1275.

APPENDIX

Charter Provisions concerning *Withernam* granted to London[16]

HENRY I	HENRY II
Et omnes debitores qui civibus debita debent eis reddant vel in London' se disrationent quod non debent.	Et de omnibut debitis suisque accommodata fuerint apud London' et de vadimoniis ibedem factis placita (sint) apud London'.
Quod si reddere noluerint neque ad disrationandum venire, tunc cives quibus debita sua debent, capiant intra civitatem namia sua, vel de communitate (?) in qua manet qui debitum debet.	
Et si quis thelonium vel consuetudinem a civibus London' ceperit, cives London' capiant de burgo vel de villa ubi thelonium vel consuetudo capta fuit, quantum homo London' pro thelonio dedet et proinde damno ceperit.	Et si quis in tota Anglia thelonium et consuetudinem ab hominibus London' ceperit, postquam ipse a recto defecerit, vicomes London' namium inde apud London' capiat.

[16] Bateson, *op. cit.* II, iv; *cf. ibid.* I, 119-125 for other charter provision of like character.