BUSINESS JURISPRUDENCE

THE law of railroads, shipping, banking, corporations, partnership, brokerage, trade marks, "unfair competition," "restraint of trade," "monopoly," and related subjects has been much discussed, but little attention has been devoted in this country to a study of the thing of which all these particular subjects are commonly but phases, — the doing of business. The most perplexing legal problems of the present time are concerned with business, and a clear conception of how the doing of business differs, if at all, from the other activities of life, as well as of its legal characteristics, becomes important. The laws applicable to business properly form a distinct branch of jurisprudence, and are so recognized in practically all countries except those in which the common law prevails. Most of the nations of Europe [1] and of Latin America, as well as Japan, have formulated codes of commerce, not perfect by any means,[2] and approaching the subject from different angles, but indicative at least, from their very existence, of a consciousness on the part of courts, lawyers, and business men that there is a difference, naturally and legally, between business on the one hand and the other activities and interests of life on the other; so much so as to require distinct treatment in the interest both of the public and of trade.[3]

In the nature of things, different rules are applicable to business than to the more formal, fixed, and personal relations of society, such as estates in land, succession, and domestic relations.

"The affairs of commerce," says Montesquieu,[4] "are but little susceptible of formalities. They are the actions of a day, and are every

[1] Lyon-Caen and Renault, Droit Commercial, vol. 1, p. 46.

[2] The French code, for example, is said to have "had its day," — "a fait son temps." Introduction to French Commercial Code, Commercial Laws of the World, vol. XXI, p. 6.

[3] ". . . I have long entertained the belief" said Mr. Justice Story, deploring the indifference of English lawyers to the study of foreign jurisprudence, "that an enlarged acquaintance with the Continental Jurisprudence, and especially with that of France, would furnish the most solid means of improvement of Commercial Law, as it now is, or hereafter may be, administered in America." Commentaries on the Law of Bailments (1856), — Preface.

[4] Esprit des Lois, bk. 20, ch. 18.

day followed by others of the same nature. Hence it becomes necessary that every day they should be decided. It is otherwise with those actions of life which have a principal influence on futurity, but rarely happen. We seldom marry more than once; deeds and wills are not the work of every day; we are but once of age."

Trade is characterized, moreover, by a certain cosmopolitanism which should be reflected in the laws which relate to it. As observed by the same philosopher:[5]

"Riches consist either in lands or in movable effects. The soil of every country is commonly possessed by the natives. The laws of most states render foreigners unwilling to purchase these lands; and nothing but the presence of the owner improves them: this kind of riches, therefore, belongs to every state in particular; but movable effects, as money, notes, bills of exchange, stocks in companies, vessels, and, in fine, all merchandise, belong to the whole world in general; in this respect, it is composed of but one single state of which all the societies of the earth are members."

Nations have traded with one another from the earliest ages, and a *jus gentium*, a law merchant or business law, was developed and observed at a remote period notwithstanding the fact that foreigners as such were then universally regarded as natural enemies and legitimate objects of spoliation.[6]

It may, therefore, be thought a matter of surprise that the English, "who," observes the writer already quoted, "know better than any other people on earth how to value those three great advantages, — religion, commerce, and liberty," should have so completely neglected this branch of jurisprudence. At the present time it cannot be said that the common law looks upon business as a distinct phenomenon, or that its administration is characterized by that appreciation of the needs of business and of the merchant class that prevails elsewhere. The leading cases, notably those dealing with the law of combination and conspiracy, do not ordinarily differentiate business activities from others not of that character. Prior to the founding of the American colonies, there is scarcely a business decision to be found in the reports, and today

[5] Esprit des Lois, bk. 20, ch. 23.

[6] Boeckh, Public Economy of the Athenians, bk. 1, ch. 9; bk. 2, ch. 11. Maine, Ancient Law, ch. 3. Borough Customs (Selden Society), vol. 2, introd., p. xviii.

the term "Commercial Law" suggests to us merely the law of negotiable instruments, just as it did to Mr. Justice Cranch more than one hundred years ago, when he was struck by this absence of early precedent and attempted to explain it.[7] But I shall point out that this condition of our law has come about through accidental circumstances rather than as the result of natural development. After indicating some of the confusion which has resulted from the failure to deal with business as business, particularly in the field of business regulation, I shall attempt to show, as the main purpose of this paper, that the common law has, in truth, a real potentiality on its business side, which, when fully appreciated and made use of, may be of great service in dealing with business problems at the present time.

The almost total absence of business decisions in the Year Books and for generations afterward loses much of its force as a reflection upon the common law when we understand the reasons for this absence, realize the early activity of the common law on its business side, and note the vigor and intelligence which characterized its administration in the period subsequent to the Norman invasion and prior to the Hundred Years War and Black Death. During this interval, as natural under the social and economic conditions then prevailing, business was carried on at stated periods in fairs and

[7] Dunlop *v.* Silver, Appendix, 1 Cranch (U. S.) 367, 374 (1801). ". . . Before the time of James I., we have scarcely a mercantile case in the books; and yet long before that time, the laws respecting real estates and the criminal code were nearly as well understood as they are at this day. Hence it cannot be a matter of great surprise, that the principles of commercial law which have been developed by the exigencies of modern times, should have been, by some, considered as exceptions from the general principles of the common law. The truth seems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books, is, that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

"Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right that established forms should be respected, yet it must be acknowledged that they have in some measure obstructed that gradual amelioration of the jurisprudence of the country which the progressive improvement of the state of civil society demanded. . . ."

definite market areas, an arrangement admitting of close supervision and accomplishing at the same time many of the results of modern advertising. Forestalling, regrating, and engrossing were prohibited in the interest of fair trade and equal opportunity.[8] To every fair a court of Piepowder was appurtenant.[9] This court, which Blackstone says "was the lowest and at the same time the most expeditious court of justice known to the law of England," [10] but which in his time was already a matter of history, was a court of record, in which the law merchant was administered by the steward of the fair with the assistance of the merchants,[11] and which originally and for a long time had jurisdiction of all matters taking place in the time of the fair, without limitation as to amount, civil as well as criminal,[12] and between denizens as well as foreigners. In the zenith of its power it "was one of the most active and most widespread of all the tribunals formerly existing in England, and formed a separate organic unit in the judicial system of the realm." [13] "As attachments were then returnable and pleas might be adjourned from hour to hour, either there was a continuous session daily from eight or nine A.M., until sunset if necessary, or there might be one session in the morning and one in the afternoon." [14]

Similarly there were also Staple courts attached to certain towns through which the foreign trade in wool, leather, and other standard commodities was carried on, likewise having general

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[8] Stat. 7 & 8 Vict. (1844) purported to "abolish" these offenses. But it is a mistake to suppose that they are obsolete. They were offenses against the market, and it is the extent of the latter and the forms of business that have changed.

[9] Coke Inst., pt. 4, ch. 60.

[10] Commentaries, bk. 3, ch. 4, p. 32.

[11] Coke Inst., Blackstone's Commentaries, *supra*. See Select Cases on the Law Merchant (Selden Society) for many instances of declaration of the law by, and other activity on the part of, merchants at the Fair Court of St. Ives. The following summons issued from this court in 1275, and printed in Select Pleas in Manorial Courts (Selden Society), vol. 1, p. 153, is illustrative: "Let all the merchants of all the commonalties that are in the fair of S. Ives be summoned to come tomorrow before the steward to adjudge and provide that Thomas de Toraux, Ralph Balancer, Robert Pole, and John son of Thomas at Gate, merchants selling canvas, have justice and equity (*justiciam et equitatem*) in the matter of Simon Blake of Bury servant of the said Thomas and his fellows who was found in their booth measuring canvas with a false ell and selling it. Pledge for Thomas's appearance, all his goods. Pledge for the other three, Sir Richard Melbourne to the amount of £20."

[12] See generally Introduction to Select Cases on the Law Merchant, *supra*.

[13] Select Cases, *supra*, introd., p. xiv.

[14] *Ibid.*, p. xxiii.

civil and criminal jurisdiction and administering the law merchant. The court had jurisdiction of all manner of contracts and covenants between merchant and merchant or other, whether the contract was made within the staple or without.[15] A statute passed in the time of Edward the Third [16] in effect codified the law of the Staple towns, and defined the authority and jurisdiction of the court with particularity, but the court itself was far more ancient.[17] None of the King's officers was allowed cognizance of things belonging to the staple nor were his officers allowed to meddle therein. It was enacted "because that merchants cannot often long tarry in one place in hindrance of their business, we will and grant, that speedy right be to them done from day to day and from hour to hour."

There were business decisions, therefore, doubtless in abundance, but they never found their way into the Year Books or early reports as we know them, these being confined to cases arising in the King's courts as distinguished from those involving the law merchant.[18]

This law merchant was the business law of the world, — not merely the law of bills and notes as we think of it today. Its scope may be gathered from Malynes' *Lex Mercatoria*, published in England in 1622, which dealt with such subjects as suretyship and merchants' promises, bills of exchange, letters of credit, banks

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[15] Coke Inst., pt. 4, ch. 46.

[16] 27 Ed. III., Stat. 2 (1353).

[17] Coke Inst., pt. 4, ch. 46.

[18] Zouch, Jurisdiction of the Admiralty of England (A. D. 1663): ". . . The Law Merchant is likewise mentioned and allowed by Sir Edward Coke, in his comment upon Littleton, as a law distinct from the common law of England. And so doth Mr. Selden mention it in his notes upon Fortescue. And Sir John Davis more fully owns it in a manuscript-tract touching impositions; where he affirms, 'That both the common law and the statute laws of England take notice of the Law Merchant, and do leave the causes of merchants to be decided by the rules of that law; which Law Merchant, he saith, as it is part of the law of nature and nations, is universal and one and the same in all countries of the world.' . . . He saith further, 'That until he understood the difference betwixt the Law Merchant and the common law of England, he did not a little marvel that England, entertaining traffick with all nations of the world, having so many ports, and so much good shipping, the King of England also being Lord of the Sea, what should be the cause that, in the books of the common law of England, there are to be found so few cases concerning merchants or ships: But now the reason thereof was apparent, for that the common law of the land did leave those cases to be ruled by another law; namely, the Law Merchant; which is a branch of the law of nations."

and bankers, factors and servants, freighting of ships, charter parties and bills of lading, policies of assurance, contribution or average, shipwreck, partners, bankruptcy, shipping and navigation, and merchants' oppignorations.

No attempt will be made to trace in detail the influences that combined to impair the vitality of the common law on its commercial side and bring it into the condition in which Lord Mansfield found it. By the time that society had recovered from the direct effects of the disasters referred to, the period of discovery had dawned and the main commercial interests of England gradually ceased to be internal.

"The increase of wealth, bringing a permanent and continuous local demand for commodities, together with the improvement of transport facilities and means of communication, due largely to the creation or repair of roads in the eighteenth century, diminished the importance of fairs and periodical markets, and tended to sap the vitality of the old tribunals of justice or rendered many of them wholly obsolete." [19]

Thus weakened, the triumph of the King's courts, always jealous of their commercial rivals, was not long to be postponed, and the administration of business law fell into the hands of judges having no training for or sympathy with the task.[20]

From this review it may be fairly concluded that the present condition of our law is the result of peculiar circumstances rather than of a natural development, and that under a true expression of the spirit of the common law, business would today occupy a distinct place in English law, just as it has continued to do under foreign systems. The failure to make the necessary differentiation has introduced confusion into a department of our law in which above all others clearness is important, and this confusion is conspicuous in the field of regulation.

The courts administering the common law, instead of treating business as business, have divided it into two classes, public and private. The classification pervades all the books, all the statutes, and all discussions. Most of the American states have their public service or public utility commissions dealing for the greater part with and within the class of corporations enjoying franchises or

[19] Select Cases, *supra*, introd., p. xix.

[20] Jenks, A Short History of English Law, pp. 40, 75.

exercising the right of eminent domain. A "public service or *quasi* public corporation" has been defined by a late Massachusetts case as "one private in its ownership but having an appropriate franchise from the state to provide for a necessity or convenience of the general public incapable of being furnished through the ordinary channels of private competitive business and dependent for its exercise upon eminent domain or some agency of the government." [21]

New York has recently passed an act for the control of "private" bankers, by which is meant those bankers doing business without being incorporated. The English Companies Act of 1908 provides for "private companies," such a company being defined as one "which by its articles restricts the right to transfer its shares, limits the number of its members, and prohibits any invitation to the public to subscribe for any shares or debentures of the company."

The doctrine uniformly accepted by our courts as well as by students of the common law today has been succinctly stated as follows:

"The distinction between the private callings — the rule — and the public callings — the exception — is the most consequential division in the law governing our business relations. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. . . . All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. . . ." [22]

But whether viewed as a classification of business for the purpose of measuring the duty of the trader as trader to public, or as furnishing a guide for the assertion of the police power of the state, this division has not been helpful in practice, and it is, I think, theoretically unsound, and the result of a misconstruction

[21] Attorney General *v.* Haverhill Gas Light Co., 215 Mass. 394, 101 N. E. 1061 (1913).

[22] Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 HARV. L. REV. 156.

of the cases upon which it purports to rest as well as of the overlooking of material evidence. The difficulty into which it leads in the field of regulation is aptly illustrated by two recent cases, one involving monopoly but no business, and the other business but no monopoly.

The first case, *Prairie Oil & Gas Co.* v. *United States*,[23] arose under the amendment to the Interstate Commerce Act[24] declaring that pipe lines should "be considered and held to be common carriers within the meaning and purpose" of that act. The company carried only its own oil, and the other facts are stated as follows:

"None of the petitioning corporations is organized or derives any of its corporate powers from laws of the state of its creation under which common carrier or other public service corporations are organized, but each of them was formed and has always conducted its operations under and in compliance with state laws which relate to private as distinguished from public business. With certain alleged exceptions, which will be hereafter noticed, it is not claimed that either of the petitioners is under any statutory or legal obligation, other than the amendment in question, to perform the duties or otherwise act in the capacity of a common carrier. None of the petitioners possesses the right of eminent domain or has acquired any part of its property or rights of way by condemnation; nor has either of them received a franchise from any state, municipal, or local government, though each of them has in many instances laid its pipe lines across or along public streets and highways by permission or consent of the local authorities. None of them has ever held itself out as a common carrier or in fact carried oil for others, but each of them has carried only such oil as it produced from its own wells or purchased from other producers, and which it owned when the transportation took place. The pipe lines of petitioners are laid on private rights of way secured by purchase or lease, except that some of them for short distances, and one of them for a distance of some 300 miles, are laid upon and along the rights of way of certain railroads under some contract arrangement with such railroads."

These facts clearly did not bring the case within *Munn* v. *Illinois*,[25] as the court had little difficulty in demonstrating.

[23] 204 Fed. 798, 803, 810 (Commerce Court, 1913).

[24] 24 STAT. AT L. 379 (1887), ch. 104, as amended by 34 STAT. AT L. 584 (1906), ch. 3591.

[25] 94 U. S. 113 (1876).

The court says, however:

"It is not necessary in these cases to consider the circumstances under which or the extent to which business activities, whether public or private, may be regulated by public authority. That is not the point in dispute. That the business of these petitioners, as it is and has been carried on, may be subjected to regulation need not be in any wise questioned. But it is one thing to exercise public control of a private business which *as such* should be placed under public supervision; it is quite another thing to require that business to be changed from private to public and compel those who are engaged in it to assume the responsibilities of a public calling."

In other words, the business here consisted in buying oil, not in carrying it, but it was the latter that the statute assumed to regulate. The court was at a loss to see how this could be done in the absence of a public profession of carriage. When the case reached the Supreme Court, however,[26] Mr. Justice Holmes made a quick disposition of the difficulties. After premising that the transportation, though of oil belonging to the owner of the pipe line, was commerce within the meaning of the Constitution, he said:

"The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form."

The notion of an inseparable connection between the public character of the calling and regulation is plain, and to satisfy the requirement it became necessary to convert into a common carrier an activity which was not of that character under any accepted definition of the term.

The second case, *German Alliance Ins. Co.* v. *Kansas*,[27] involved the power of the state to regulate insurance rates. Monopoly as such was not involved.

"The business of fire insurance," it was claimed, "is private, with which the State has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly either legally or actually; it may not be legally conducted by the National Government or by the State of

[26] The Pipe Line Cases, 234 U. S. 548 (June 22, 1914).
[27] 233 U. S. 389, 397, 406, 428 (1914).

Kansas, or other States under their respective constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the State of Kansas, or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

Mr. Justice McKenna, delivering the opinion of the court, said:

". . . We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property — business of common carriers — is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied'; or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It

is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank* v. *Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated. . . ."

It is plain that the court regarded the business as private, but subject nevertheless to regulation.

Mr. Justice Lamar, dissenting, with whom the Chief Justice and Mr. Justice Van Devanter concurred, said:

". . . The fundamental idea of a public business, as well declared by the Supreme Court of Kansas, 77 Kans. 608, is that 'all of the public has a right to demand and share in' it. That means that each member of the public on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been convicted of arson. But if an insurance company is indeed public it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity, or known to be careless in their handling of property, the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal, where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes — whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate-regulation, which is but another method of exercising the same power."

The majority escaped the difficulty of defining the word "public" with the observation that they could "best explain by examples," followed by a list of particular businesses commonly spoken of as public. The whole difference between the two branches of the court is to be explained by the fact that one looks wholly at the supposed public or private nature of the business, and the other at the power of governmental regulation, these things being assumed to have some necessary interrelation. The case is but an instance of the vicious circle which permeates the reasoning of most of the decisions dealing with business regulation. You may regulate a business if it is public, and it is public if it may be regulated. Or, it is public "if all the public have a right to demand and share in it," and if the public have not this right it is not public.

The fundamental difficulty lies in the conception that business is of two classes, public and private, and that the latter is subject to no duties to the individual and none to the state. This conception was developed and has been perpetuated largely through the law of common carriers. "Common" in this connection was assumed to mean "public," — public in the sense of "subject to control by the state." It was recognized that originally there were other "common" employments, but it was stated that they also were under peculiar public duties and this was explained on the basis of some *exceptional* relation to the public. It has been said:

"From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a 'common' or public occupation; and for a similar reason public officers were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers. Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfullness or improper preparation for the business." [28]

But no evidence of such *exceptional* relation has been produced. It was the duty of *every* artificer "to exercise his art rightly and

[28] Beale, The Carrier's Liability: Its History, 11 HARV. L. REV. 163. This also seems to have been the view of Professor Ames (History of Assumpsit, 2 HARV. L. REV. 1, 3) and of Mr. Justice Holmes (The Common Law, Lecture V, Bailments).

truly as he ought." [29] The Statute of Labourers,[30] so called, included "those that make carriage by land or water" as well as innkeepers, shoemakers, saddlers, goldsmiths, horsesmiths, spurriers, and all manner of artificers and laborers. In such a general enumeration we should expect some differentiation between exceptional employments and others, but we find none. There is, in fact, nothing exceptional in the occupation of carriage or peculiar to it except the fact that the relative position of carriers in society has advanced enormously in importance.[31] The carrier solicits public favor and professes to deal with all who come, but so does the ordinary trader. Bailment is incidental to the business of carriers and innkeepers, but no more so than to the business of the keeper of a warehouse, a garage, or a repair shop. The carrier is now an insurer, but four hundred years elapsed between the first mention of common carriers in our books and the formulation of this rule.

This theory of the exceptional nature and responsibility of stated common employments naturally required an explanation of

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[29] Fitz-Herbert, Natura Brevium, Hale's ed., p. 214.

[30] 25 Ed. III., Stat. 1, A. D. 1350: ". . . Wherefore be ordained and established the things underwritten; that is to say . . . that they that make carriage by land or by water, shall take no more for such carriage to be made, than they were wont the said twentieth year and four years before: also that cordwainers nor shoemakers shall not sell boots nor shoes, nor none other thing touching their trade, in any other manner than they were wont the said twentieth year. And that goldsmiths, saddlers, horsesmiths, spurriers, tanners, curriers, tawers of leather, taylors, and all other workmen, artificers and labourers, and all other servants not specified, shall be sworn before the said justices, to do and sue their crafts and offices in the manner as they were wont to do the said twentieth year, and in the time before, without refusing the same because of this ordinance. And if any of the said servants, labourers, workmen, or artificers, after such oath made, do contrary to this ordinance, he shall be punished by fine, ransom, and imprisonment, according to the discretion of the said justices. . . . And that the said justices have power to enquire and make due punishment of the said ministers, labourers, workmen, and other servants whatever, and also of hostlers, herbergers, and of those that sell victual by retail, and other things not specified, as well at the suit of the party, as by presentment, and to hear and determine, and put these things in execution by exigent after the first *capias*, if need be, and to depute other under them, so many and such as they shall see best for the keeping of this present ordinance. . . ."

[31] The earliest carriers were porters, boatmen, and the like. See Beverley Town Documents (Selden Society), p. 22, dealing with the period 1300–1600, where there is a reference to the reading of "the old order of porters, and creelmen and other common carriers," — "*aliis communibus cariatoribus*." This is one of the earliest instances of the use of the precise term "common carrier."

why, for example, smiths, farriers, and the like are not now engaged in a common or public employment, and this has been attempted on the basis of monopoly,[32] — economic changes having altered the position of the smith and farrier in society, while that of the carrier and innkeeper has remained the same. But the theory does not bear analysis. It seems reasonable that a modern apartment house should be under different responsibilities from an ordinary hotel. One can understand also that a tap line or a railroad built on private property to carry freight from one building to another of a manufacturing plant should be under different responsibilities and duties from a road between Buffalo and New York. But one is not necessarily more of a monopoly than the other, and it is therefore difficult to see why, on that ground, one should be classed as public or common and the other as private. The essence of privacy is monopoly. The explanation is even less satisfactory if we go farther back. No distinction based upon monopoly between a private and a common carrier prior to the year 1600 has been set forth, and no explanation has been offered as to why an innkeeper should choose the monopoly (if any) of a common inn in preference to a private inn, free from the duties of a common innkeeper,[33] and certainly no evidence is at hand of the existence of

[32] Beale & Wyman, Railroad Rate Regulation, chap. 1, § 12. "It will be noticed that the principle of law which permits the regulation of these callings has not been abandoned in the smallest degree, though the conditions calling for its application in modern times have greatly changed. Whenever the public is subjected to a monopoly, either because of legal grant, as in the case of the medieval guilds and markets, or because of the actual conditions of life, as in the case of the village surgeon or smith, the power of oppression inherent in a monopoly is restricted by law — whether by the common law, applied by the courts or by special legislation. Whenever on the other hand competition becomes free, both in law and in fact, the need of governmental regulation ceases; public opinion ceases to demand such regulation, and the law withdraws it. In this way certain of the trades and classes of trades just enumerated having become competitive, the law has ceased to regulate them, not because of a change of legal principle but because of a change in actual economic conditions."

[33] It was only the common innkeeper who was subject to peculiar duties. See Anon., Palmer 367 (21 Jac.), being an indictment for putting up a sign and keeping an inn, on the ground of nuisance. It was resolved "that it is lawful for any subject to erect a common inn and sign; and for this reason that he who erects a sign, '*charge luy mesme al republique*'"; and it was held that "every one who comes if he requires lodging shall have action on the case if this is denied." It was also held "that if the hostler pulls down his sign he is not bound to 'herberger,'" unless as Lee, Chief Justice, said, "he keeps and continues a common inn after the sign is destroyed."

luxurious hotels where people of wealth made their homes in 1600, — the basis of the distinction at present made between common and private inns.

When we consider the principle of monopoly as producing in the early days the supposed distinction between classes of callings, its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or that innkeepers were fewer than carpenters, or barbers than weavers. Tailors were no less numerous than fullers, so far as the evidence goes, and they were, in 1400, numerous enough in Beverley to have a guild of their own.[34] So were the barbers and surgeons, and it is noteworthy that the guild at that time provided for a tax upon itinerant surgeons who were in the town over eight days. Monopoly, therefore, cannot be accepted as an explanation of the distinction between public and private callings, either at present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors, and such as carpenters and brewers, and it fails to account for the present-day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or state.

The reason for this failure is neglect of the facts. Common carriers were not anciently contrasted with carpenters or mercers or drapers. It is a mistake to suppose that the instances of the innkeeper, victualler, taverner, smith, farrier, tailor, carrier, and ferryman are in any way exceptional as regards their public character. From the earliest times one who was engaged in a given occupation as a business was described as being in a common employment, otherwise the employment was private. In Leet Jurisdiction of Norwich [35] during the period 1374 to 1391 are to be found instances of the common purchaser, common merchant, common huckster, common brewer, common fripperer, common cooker-up, common touter. In the Year Books we have the common inn or innkeeper,[36] common merchant,[37] common mareshal,[38] common

[34] See Beverley Town Documents, *supra*, pp. 45, 75, 100, 102.

[35] Selden Society Pub.

[36] Y. B. 2 Hen. IV. 7, pl. 31; Y. B. 9 Hen. IV. 45, pl. 18; Y. B. 22 Hen. VI. 21, pl. 38; Y. B. 5 Ed. IV. 2, pl. 20.

[37] Y. B. 7 Hen. IV. 44, pl. 11.

[38] Y. B. 19 Hen. VI. 49, pl. 5.

school-master,[39] common tavern,[40] common surgeon.[41] In the Beverley Town Documents [42] are to be found the common shaver, common bellman, and common makers and venders. In the later books we find the common farrier,[43] common carrier,[44] common hoy-

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[39] Y. B. 9 Ed. IV. 32, pl. 4.

[40] Y. B. 21 Ed. IV. 19, pl. 22.

[41] Y. B. 9 Ed. IV. 32, pl. 4. The meaning of the term is aptly illustrated by the Statute 34 & 35 Hen. VIII. (1542–3), ch. 8, entitled,

"An Act that Persons, being no common Surgeons, may administer outward Medicines.

"Where in the Parliament holden at Westminster in the third year of the King's most gracious reign, amongst other things, for the avoiding of sorceries witchcrafts and other inconveniences, it was enacted, that no person within the city of London, nor within seven miles of the same, should take upon him to exercise and occupy as physician or surgeon, except he be first examined approved and admitted by the Bishop of London and other, under and upon certain pains and penalties in the same act mentioned; sithence the making of which said act, the Company and Fellowship of Surgeons of London, minding only their own lucres, and nothing the profit or ease of the diseased or patient, have sued troubled and vexed divers honest persons, as well men as women, whom God hath endued with the knowledge of the nature kind and operation of certain herbs roots and waters, and the using and ministring of them to such as been pained with customable diseases, . . . and yet the said persons have not taken any thing for their pains or cunning, but have ministred the same to poor people only for neighborhood and God's sake, and of pity and charity. And it is now well known, that the surgeons admitted will do no cure to any person, but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto; . . . for although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients, rather than do them good:

"In consideration whereof, . . . be it ordained established and enacted, by authority of this present Parliament, That at all time from henceforth it shall be lawful to every person being the King's subject, having knowledge and experience of the nature of herbs roots and waters, or of the operation of the same, by or within any other the King's dominions, to practice use and minister in and to any outward sore uncome wound apostemations outward swelling or disease, any herb or herbs, ointments baths pultess and emplaisters, according to their cunning experience and knowledge in any of the diseases sores and maladies beforesaid, and all other like to the same, or drinks for the stone strangury or agues, without suit vexation trouble penalty or loss of their goods; . . ."

[42] Selden Society Pub.

[43] Fitz-Herbert, Natura Brevium, Hale's ed., p. 214.

[44] Rogers *v.* Head, Cro. Jac. 262 (1611); Matthews *v.* Carrier, etc., 1 Keb. 852 (1663); Owen *v.* Lewis, 3 Keb. 39 (1673); Sparrow *v.* Neal, 3 Keb. 278 (1674); Anon., 12 Mod. 3 (1691); Darlston *v.* Hianson, Comb. 333 (1696); Tyly *v.* Morrice, Holt 9 (1700); Skinner *v.* Upshaw, 2 Ld. Raym. 752 (1702); Coggs *v.* Bernard, 2 Ld. Raym. 909 (1704).

man,[45] common kidder,[46] common chyrurgeon,[47] common baker,[48] common brewhouse,[49] common lighterman,[50] common mill,[51] common glasshouse,[52] common oven,[53] common boat-man,[54] common ferryboat,[55] common badger,[56] common distiller,[57] common porter,[58] common grist-mill,[59] common drover,[60] common table-keeper,[61] common ale-house,[62] common cook,[63] common tipler,[64] common balance,[65] common builder.[66] This list would suggest either that the range of common employments must be greatly extended beyond that generally accepted,—and the subsequent shrinkage explained,—or that "common" does not have the significance usually ascribed to it, as characterizing and distinguishing one occupation from another. Not monopoly, or bailment, or necessity will be found differentiating all these employments from the few not

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[45] Rich *v.* Kneeland, Hob. 17 (1614).
[46] Bray *v.* Hayne, Hob. 76 (1615).
[47] Everard *v.* Hopkins, Bulst., pt. 3, p. 332 (1615).
[48] Wilton *v.* Hardingham, Hob. 129 *a* (1617).
[49] Jones *v.* Powell, Palmer 536 (1628).
[50] Symons *v.* Darknoll, Palmer 523 (1629); 1 Strange 690 (1726).
[51] Kemp *v.* Gord, Style 421 (1654).
[52] King *v.* Norris, 2 Keb. 500 (1670).
[53] Lloyd *v.* Goffe, 2 Keb. 880 (1672).
[54] King *v.* Roberts, 4 Mod. 101 (1693).
[55] Rex *v.* Roberts, Comb. 193 (1693).
[56] Bray *v.* Hayne, *supra.*
[57] King *v.* Lamnos, Skinner 562 (1695).
[58] Coggs *v.* Bernard, *supra.*
[59] Rex *v.* Channell, 2 Strange 793 (1727).
[60] Fitz-Herbert, Loffice et Auctoritie de Justices de Peace (London, 1617), p. 79.
[61] *Ibid.*, p. 17. [62] *Ibid.*, p. 77.
[63] *Ibid.*, p. 17. [64] *Ibid.*, p. 17. [65] *Ibid.*, p. 94.
[66] Sir William Jones, The Law of Bailment, p. 100. The context is instructive. The learned author says:

". . . In regard to the distinction before mentioned between the *non*-fesance and the *mis*-fesance of a workman, it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly implied; of which Blackstone gives the following instance: 'If a *builder* promises, undertakes or assumes to *Caius*, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay.' The learned author meaned, I presume, a *common* builder, or supposed a consideration to be given; and for this reason I forbore to cite his doctrine as in point as the subject of an action for the *non* performance of a *mandatary*." (Italics in original.)

somewhere called common. The list is so long and contains such different callings that we are led to the conclusion that the term "common" did not serve to distinguish one employment from another and that all occupations could be common.

What, then, did "common" mean? Simply "business," — business carrier, business tailor, business barber. A common surgeon was one who made a business of surgery, who practiced it commonly; a common tailor was one who was in the business of tailoring. In 1367 an order was made for porters and creelmen "who then exercised that craft commonly" *qui tunc communiter utebantur illa arte*, — a perfect illustration of the true meaning of the word "common." [67]

The distinction granted to exist between common and private carriers is, therefore, wholly sound, — the word "common" describes the nature of the undertaking and marks off the carrier not from other classes of business men but from that carrier who carries, not as a trade or business, not for everybody, but for himself or some particular employer. He is in a common employment who is in it as a business; the word defines his *profession*, his undertaking. The word is used in exactly the same sense as in common harlot, common thief, common scold; that is, in an adverbial sense rather than an adjectival sense.[68] That the distinction was so easily recognized, was so much a part of the thought of the time, as to make the use of the word "common," meaning "in business," unnecessary is at least suggested by the frequently cited case against the innkeeper, who was not specifically described as a "common" innkeeper,[69] and is made plain by *Mason* v. *Grafton*,[70] where in an action for goods stolen from an inn it was moved in arrest of judgment "that he had not alleged to be in

[67] Beverley Town Documents, p. 21.

[68] Compare the phrase "common prayer" in the following passage from Fitz-Herbert, Loffice et Auctoritie de Justices de Peace, p. 14: "Item vous enquiera si tiel Ecclesiastical person que doit dire common praier . . . nad . . . dit et use . . . touts lour common et ouvert praieres, en tiel order et forme come est mencion en le liuer del Common prayer authorized per parliament, et nul auter au autrement . . . ." Compare also the expressions "common market," "common prison," "common proclamation," "common expenses," "common highway," "common policie," "mercatrix publica" (business woman), "commene bieres," "common wealth," and the like.

[69] Y. B. 11 Hen. IV. 45, pl. 18. See also Y. B. 2 Hen. IV. 7, pl. 31. Y. B. 9 Hen. IV. 45, pl. 18.

[70] Hobart 245 *b*.

communi hospitio. . . . Yet because the declaration laid in the custom for common inns, and then laid that he *Hospitabus in Hospitio*, the plaintiff had judgment. For it shall be intended (and it is) *Domus non Hospitium* if it be not *commune*."

The importance of the early distinction between common (or public) and private, is easily comprehended with a little consideration of social conditions. The reader need scarcely be reminded that in regions remote from settled communities and in primitive societies many occupations, such as blacksmithing, weaving, brewing, and milling, are carried on privately, without the slightest reference to the public at large. In Mexico today the traveller into remote regions reaches *haciendas* quite as complete in their appointments as small villages, where he may expect to receive food and lodging for the night. But a blacksmith, weaver, brewer, or miller working under such conditions would not be a common blacksmith, common weaver, common brewer, or common miller, and the proprietor extending hospitality in such circumstances, though for reward, would not be a common innkeeper. In medieval times merchant strangers were arbitrarily assigned to "hosts" who were responsible for their good behavior.[71] Travelling nobles often lodged in the religious houses without invitation,[72] but these houses were not common inns. "One lodges with me or in the house of a husbandman, which is not a common inn, although his goods are taken from his possession, his action fails." [73] The servant buying for his lord was a private not a common merchant. Swinfield in the thirteenth century had his farrier,—an illustration of a private not a common farrier.[74]

[71] Compare 3 Rot. Parl. 553 (6 Hen. IV.): "39 Item, come en le darrein Parlement estoit ordeignez, que les ditz marchantz ne soient demurantz en autre lieu sinoun ovesque hostes a eux assigners, en graunde arerissement de lour estates: Pleise a votre dite Hautesse d'ordigner en ycest present Parlement qu'ils purront prendre lour hostes par lour mesmes, & tenir lour hostell en le manere come ils ont fait devant ces heures.

"Soit l'Estaut eut fait tenez & gardez."

[72] Social England, vol. 2, p. 358. Stat. 3 Ed. I. was aimed at the redress of this practice.

[73] Y. B. 22 Hen. VI. 21, pl. 38. It is to be observed generally that the word "inn" formerly had the well-defined meaning of "house," "residence," like its Latin and Norman French equivalents "*hospitium*" and "*hospicium*." "Common inn," therefore, was equivalent to "public house."

[74] Cunningham, History of English Industry and Commerce, Early and Middle Ages, p. 245. See also pp. 575, 653.

That the word "common," thus seen to be associated with all kinds of employment and to make a natural division within the employment, was used in the meaning here given it, is further evidenced by the early cases discussed below.[75]

It is scarcely open to dispute, therefore, that all trades mentioned in the books were on occasion called "common," that the private was distinguished from the public exercise of a trade, and it is difficult to see how "common," in the earliest uses as applied to all trades, can have any significance other than the one at the present time limited to a few trades, — that is, profession to serve all. As applied to innkeepers and carriers, the sense is uniformly the same even back to the earliest cases. Unless "common" was used in one sense for carriers and in another for other occupations, it follows that "common" means, and meant in this connection, "open to public service." This view does not, as a matter of fact, contradict the cases on which the modern distinction between carriers and other businesses is rested, for the error that has been made has been due rather to a wrongly placed emphasis in the

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[75] In Bray *v.* Hayne, *supra*, in an action on the case for slander, there was a verdict for the plaintiff. "And yet judgment was given against him that those words bear no action: For every falsehood charged upon a man in his private dealings will not bear action; But if a man of a publick occupation or trade be charged with deceit in that it will bear action. And, therefore if this man had been a common kidder or badger, and had been charged with selling by false measure, it would have born action. . . ." The only possible meaning in "common" here is "public," and "public" can signify here nothing but serving the public, in the business of.

The same distinction within trades is made clear in the frequent actions under the Statute of Labourers, 5 Eliz., as in Hobbs *v.* Young, Comb. 179, and Ipswich Taylors' Case, 6 Coke, pt. 11, p. 53, where the private cook, tailor, brewer, etc., is distinguished from him who makes a public use and exercise of any of those trades to all who will come. It is true that this statute is different from a rule of law establishing definite responsibilities for such trades as are called common, but though it does not establish for such trades such a duty as that of serving all indifferently, it does emphasize the difference between a private tradesman and one exercising the same kind of trade publicly.

In Jones *v.* Powell, *supra*, in an action on the case for maintaining a brewhouse as a nuisance, the words "common," in the sense of public, and "private" are contrasted. It was objected "that the action does not lie because it is a private brewhouse which is erected." To this it was answered "that the cause of the action is the insalubrity and unwholesomeness that arises on account of the building, not the public or private 'cause' of its erection. . . ." "And it was agreed by the whole Court that the erecting of a common or a private (*common ou private*) brewhouse is not a nuisance per se."

phrases "common carrier," etc., than to a mistake in the cases which are discussed in the footnote.[76]

[76] To begin with the frequently cited case of the veterinary surgeon, Y. B. 19 Hen. VI. 49, pl. 5. The court decided that it was necessary to prove one a common horse surgeon to charge him for loss of a horse placed under his care. This case has been treated without any attention to the word "common," as showing the public character of the curing of man or beast, and the public element is based upon the scarcity of practitioners. As to the latter, it is sufficient to point out that no evidence in support of the assumption is adduced, and that, on the other hand, in Beverley about this time barbers and surgeons were numerous enough to have a guild, which taxed strangers of these professions who remained in the town over eight days. The true meaning of the case would seem to be that without an express assumpsit charged, you could not hold a surgeon for his work unless he were a common surgeon, that is, one in that business. This gives point to "common," not to "surgeon," allows for the existence of non-common surgeons, and avoids any necessity of looking for a difference marking surgeons as a class.

The tailor was, by the remark in Y. B. 22 Ed. IV. 49, pl. 15, bound to serve all, that is, he was in the same class as the *common* innkeeper and the *common* smith. The statement is only to the effect that he was, as they were, a bailee, and the parenthetical "he is compelled by law to do it" measures the obligation under which the tailor worked as a common tailor. For there is no reason why innkeepers and smiths should be common or private and tailors all common. Such a conclusion, on the theory of monopoly, could be reached only on the ground that tailors were scarcer than doctors or smiths. Brian plainly is speaking of a common tailor, just as plainly as in the Anon. case, Keilw. 50, pl. 4, it is a common smith and a common inn that are discussed, though "common" is omitted. There is never any doubt of the two classes, — private and common, — in these two employments.

The latter case sets off the builder who bargains to build a house from the smith and innkeeper, and again that distinction is explained as due to monopoly. The case, rightly viewed, illuminates the whole question. Taking a common innkeeper as the one who is in the innkeeping business, and the smith under peculiar duties as the one who runs a smithy as a business, it is easy to see the difference in the builder in the case supposed. The others, when they do exercise their trades privately, are not in business, are not serving the public. Likewise, the builder, when he undertook privately on the basis, — as the court says, — of an agreement. The important element was not that the employer, because of supposed competitive conditions existing in that occupation as distinguished from others, had time to bargain, but that the builder's time was hired for a stated period. The contract took him out of the position of making a continuing offer of services to any newcomer, whereas the surgeon or innkeeper or barber or smith is always ready for the next customer and is at least tacitly offering to serve him. See also n. 61, *supra*.

So of the victualler. The existence of bakers' guilds and the importance of the assizes of bread and ale show the absence of monopoly, of the existence of which, indeed, no evidence is offered. The important fact is the selling, the dealing as a business man, and only when so dealing was the baker common or public and under these duties of general service. The regulations such as the assize were not grounded upon the monopoly of the manorial baker or of the bakers' guild, but upon the public or

The carrier cases are all cases of common carriage, and the distinction within the occupation is everywhere manifest. Nowhere is monopoly suggested as the distinguishing characteristic. A distinction based on monopoly would require proof that the common carrier had some kind of a monopoly which the private carrier did not have, or that "common" was synonymous with "monopoly." The plain meaning of the cases is the simplest solution of all the difficulties, — the common was the public, the professional, the business carrier or other trader.

We may reasonably conclude, therefore, that, so far as the carrier's *business* is concerned, it is no different from any other business. The carrier, like every other business man, purports to serve and to deal with the public. Business is impersonal; in ordinary course it is merely a question of merchandise or other exchangeable value on the one hand and money on the other. A man is engaged in business when he solicits the favor of and undertakes to deal with persons *indifferently* for profit. This is the common characteristic of all business and at once its identification and definition.

The disappearance of this conception from our law in the case of all ordinary businesses and its retention in the case of carriers is to be explained partly by economic and social changes and partly by judicial misinterpretation of the early cases. That the disappearance did not take place suddenly is evidenced by the frequently cited cases of *Gisbourn* v. *Hurst*, *Lane* v. *Cotton*, and *Coggs* v. *Bernard*, decided at the beginning of the eighteenth century and discussed in the note,[77] which still assert the ancient doctrine.

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business nature of the employment, and the duty of indiscriminate service was a business or common duty, not a duty of the baker as a baker.

The innkeeper was not from time immemorial regarded as a public servant. The common innkeeper was so regarded. See n. 33, *supra*. Nothing in the early cases suggests a basis for the contention that the occupation itself was peculiar or public or otherwise differentiated. If common it was peculiar and public, that is if one proposed to serve the public he must serve it; if he purported to be in business he was in a public employment, whatever that employment was, and was a "common" servant.

The miller may, on occasion, have had a monopoly affecting the public; but no case is cited which ascribes the public character to a mill on the ground of monopoly, and there are many indications that mills were numerous. In Borough Customs, p. 37, a penalty is prescribed against bakers who hired mills. A favorite example of *damnum absque injuria* in the Year Books was where one erects a mill on his own land to the prejudice of a mill on his neighbor's land.

[77] In Gisbourn *v.* Hurst, 1 Salk. 249 (1710), the court still retained the ancient con-

But with the inventions of Arkwright, the writings of Adam Smith, and the spread of the idea of *free* trade, a great change took place in business conditions toward the close of the eighteenth century.[78] In ordinary trades there ceased to be any need for a distinction between the *common* and the private exercise of a trade. With the repeal of the Statute of Apprentices in 1814 the distinction made in such a statement as "To make a man of a trade, he must be apprentice to him who did openly, commonly, and by publick

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ception. This was an action in trover for goods taken by distress in a barn from the wagon of one who carried cheese to London, and usually loaded back with goods for all persons indifferently.

". . . It was agreed *per curiam*, that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employment, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is as to this privilege, a common carrier; for the law has given the privilege in respect of the trader and not in respect of the carrier. . . ."

But this case was misinterpreted in the first sentence of the earliest text-book (Jeremy) on the law of carriers, which read: "The law has avowedly given the privilege of its special protection in respect of the trader, and not the carrier," and was the center of much discussion by writers, courts, and lawyers in the past century. The meaning of "privilege" in the case referred to is the freedom from distraint. By the term "in respect of the trader" the court meant that the privilege existed, not because the plaintiff was a *carrier*, but because he was a *common* carrier, that is, because he was a *trader*, or in the business of *carriage*.

Even the language of Chief Justice Holt in Lane *v.* Cotton (1701) seems quite plain. He says:

"If a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse. Keilw. 50. Against an inn-keeper refusing a guest, when he has room. Dier. 158, pl. 32. Against a carrier refusing to carry goods when he has convenience, his wagon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the post-master, for refusing to receive a letter, etc." 1 Ld. Raym. 646, 654 (1701).

The same is true of his language in Coggs *v.* Bernard, 2 Ld. Raym. 909, 912 (1714), where he said:

"The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. . . . There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is chargeable by his trade, and a private person cannot be charged in an action without a reward. . . ."

[78] Cunningham, *supra*, Laissez Faire, p. 609.

profession sell, and not privately by stealth," [79] would cease to be necessary and would be gradually dropped as meaningless.

In the case of the carrier's trade, however, there were peculiar internal characteristics which brought it constantly before the courts. In the early history of carriage before the advent of railroads, the special feature that had to be dealt with was bailment, and the liability for loss of goods, which was finally developed into a so-called insurer's liability. In the course of time, with the introduction of railroads, other special and peculiar features, such as the enjoyment of peculiar privileges, franchises, and rights of way, became characteristic of carriage, and the relative importance of the carrier's calling was greatly accentuated. There was nothing more natural than that the word "common," still retained by carriers and absent from most other occupations, should be assumed to be indicative of peculiar duties and of peculiar subjectability to state control.

But as we have seen, this view is erroneous, and not supported by the cases upon which it purports to rest. Under a true interpretation of the common law all business is public, and the phrase "private business" is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profession and a public calling. The parties to business are the merchants on the one hand and the public on the other. The merchant or trader opens his doors into the public street and invites all who pass to enter. By public advertisement and circularizing he solicits patronage from all who read. He extends an invitation or makes a continuing offer to all indifferently. He seeks credit, employs the machinery of credit, and by so doing involves the fortunes of the community at large. He floats his securities in the public market. His good-will, always a principal asset, consists entirely of the likelihood that the people in general will avail themselves of the inducements which he has offered. Reason and authority alike show the soundness of this view.[80]

[79] Shepherd, Office of Justice of the Peace (1652), vol. 1, ch. 20.

[80] The German Commercial Code recognizes this practically by requiring the registration of traders as such. Staub's Kommentar zum Handelsgesetzbuch, vol. 1, §§ 8–16. See also Gadsby, Commercial Registration in Japan, 28 L. QUART. REV. 305 (1912); Pallares, Derecho Mercantil (Mexico, 1891), p. 910; Lyon-Caen and Renault, Droit Commercial, vol. 1, § 10.

The importance of this principle in dealing with present-day problems is far reaching, and to the fact that business as such throughout the course of its modern development has been suffered to be, as it were, without law unless it could be brought into some exceptional class, is to be attributed much of the difficulty which now prevails. This distinct doctrine of the common law,—the doctrine of common employment,—needs to be vitalized and intelligently applied. How remote this conception lies from our modern thinking is well illustrated by the dissenting opinions in *Munn* v. *Illinois*[81] and *Budd* v. *New York*,[82] and by the opinion of the court in *State* v. *Edwards*.[83] In the first case Mr. Justice Field, dissenting, said:

". . . There is no magic of the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. . . . The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control. . . ."

It is indeed true that legislative fiat cannot change the essential nature of things, and it is fortunately true that with a live recognition of the nature of business on the part of the courts and business men, a minimum of legislation will be either attempted or necessary. Passing by the subject of regulation as not being confined or peculiar to the phenomenon now under investigation, we may briefly advert to the duties generally conceded to be incident to common employments as such at common law, for these duties, as we now see, are not peculiar to common carriers, but are incident to businesses of every kind.

It is said, and the accepted view is, that in a so-called private business "a person has an absolute right to refuse to have business

[81] 94 U. S. 113, 138 (1876). [82] 143 U. S. 517 (1892).
[83] 86 Maine 102, 29 Atl. 947 (1893).

relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property." [84] It is scarcely to be presumed that such statements have, as a rule, been made advisedly after a full investigation of the materials, many of which have in fact only recently been made available through the publications of the Selden Society. The right to refuse to have business relations is one thing; the right to continue in business and have business relations with some and not with others in equal circumstances is a wholly different thing.

It is beyond dispute that arbitrary discrimination and refusal to deal are wholly repugnant to the profession of common employment. As said by Mr. Justice Doe in a case involving common carriers: [85]

"A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. . . . He is under a legal obligation; others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. . . . A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such power, he would be a carrier, — a special, private carrier, — but not a common, public one. . . ."

Opposed as the supposed right of discrimination and of refusal to deal is to reason, it is no less so to that long line of cases the application of which has heretofore been confined to the supposedly

[84] Delz *v.* Winfree, 80 Tex. 400, 402, 165 S. W. 111 (1891).

[85] McDuffee *v.* Portland & Rochester R. R., 52 N. H. 430, 447 (1873).

exceptional employments.[86] A rational and courageous extension of this great body of thought and experience to business generally should contribute much to the solution of modern trade problems.[87]

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[86] Shepherd, writing in 1652 (Office of Justice of the Peace), summarizes the law of trade as follows: "There are many laws that concern trading and traffique, which may be thus reduced. 1. None may exercise some trades before they have been trained up in them. 2. Tradesmen must sell true, not false and sophisticall commodities, especially provision. 3. They must sell at reasonable prices, and for moderate gain. 4. Bakers, brewers, and such like tradesmen must keep the assizes. 5. All tradesmen must sell by just weights and measures." Duty to sell at a reasonable price cannot co-exist with a right to refuse to sell at any price.

The idea of service was inseparable from the idea of business in the early law. The term "office" is used in the Year Books with reference to the most ordinary occupations. "Mystery" in the phrase "art and mystery" is not, as often asserted, equivalent to *maistrie*, a mastery of a craft, but is a corruption of a word meaning, not "mastery," but "ministry," "service." Beverley Town Documents, Selden Society Pub., introd., p. xlvii.

It is worthy of note that the Statute of Labourers, *supra*, refers to tradesmen as "ministers."

The following cases from the Year Books are of particular interest. Y. B. 21 Hen. VI. 55, pl. 12: "Paston, J., If I come riding along the highway to a town where a smith lives who has sufficient stuff to shoe my horse supposing it has lost a shoe, and I request him at a proper time to shoe it and offer him enough for his labor and he refuses so that my horse is later lost for want of shoes, because of his default, I say in such event I shall have action of trespass on the case." Y. B. 9 Ed. IV. 32, pl. 4: "Needham . . . and Sir in trespass against a man for taking a servant it is a good plea for the defendant to allege that he is a common school-master, and the father of the said servant brought him to the defendant to be instructed, wherefore . . . Littleton. In trespass for taking a servant it is a good plea for the defendant to allege that he is a common surgeon and the servant had broken his leg so that he could not walk and came to him to be cured etc. wherefore he etc."

[87] In the Court Baron (Selden Society), p. 31, may be found a precedent taken from a thirteenth century book of forms or instructions to the steward of the lord's court, to be used "when brewer or breweress refuseth to sell beer to the lord." It is as follows:

"Sir steward, the bailiff R(obert) by name, who is here, complaineth of Ellis Atte Well, who is there, that wrongfully and to the lord's despite he refused to sell beer to the use of the lord on such day he at such an hour in the year that was, whereas on the said day he had in his brewery sold beer new and old to his neighbours and to strangers; and wrongfully for this reason, that he, (Robert) prayed him debonairely and earnestly for the love of his lord that he would sell him of his beer in return for present and ready payment according to the assize which is provided and established; but this Ellis neither for prayer nor for admonishment nor yet for present and ready payment would confess that he had beer for sale, new or old, in secret or in public, for gift or sale to his lord or any of his folk, to the lord's damage for 40 s. or the shame for 20 s. by reason of the strangers that were there assembled. If confess etc.

"Tort and force and the damage of the lord of 40 s. and the shame of 20 s. and every penny thereof and all that is in the lord's despite, defendeth Ellis, who is here, against

Effective as this basic principle of the common law can be made by the courts in the administration of justice and the prevention of business abuses, its recognition should be scarcely less serviceable as a helpful guide to business men and an aid to legislators in the framing of constructive laws. The problem of holding companies and industrial combinations, for example, which in recent years has been much discussed in the United States, becomes simplified, for, with a positive duty of service to all resting on each subsidiary or business unit, the opportunity and temptation for oppressive conduct are lessened, and the importance of ultimate ownership and control is minimized. A commercial code based on the common law would differ from the French, German, and Japanese codes, which treat business empirically from the standpoint of its mechanism or of determinate classes of actors therein, by presenting a rational system dealing with business itself as a public profession.

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the sworn bailiff R(obert) by name, who is there, and against his suit and all that he surmiseth against him; and well he showeth thee that on that day which the bailiff surmiseth nor at that hour nor within four days afterwards was any manner of beer, new or old, within his power, in barrell or out, to give or to sell even had one given him ten shillings. Again, sir, as to what he surmiseth, that on the same day he sold beer, new and old, to his neighbours and to strangers, privately and publicly, we answer and say right fully that he talketh idly, and we offer thee a besant of gold that lawfully it may be inquired of these good folk of the vill and if thou findest by good inquest of good folk of the vill that he had beer at that hour or within four days afterwards, at any hour of the said days, beer new or old, to give or sell, he obligeth himself in all his goods moveable and immoveable to do whatever thou seest fit.

"Therefore be this inquired"