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Origin and Development of Commercial Law

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ORIGIN AND DEVELOPMENT OF COMMERCIAL LAW

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(Continued from September Issue)

"LORD Mansfield reared a body of special jurymen at guild hall who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in court, but inviting them to dine with him. From them he learned the issues of the trade, and in return he took great pains explaining to them the principles of jurisprudence by which they were to be guided.

"Several of these gentlemen survived when I began to attend guild hall as a student and were esteemed and honored as Lord Mansfield's jurymen. One in particular I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself."

As a result of Lord Mansfield's work an amalgamation to a large extent was effected between the Law Merchant and the Common Law, and the two no longer stand apart with the same distinctness as separate bodies of law. Each operated to modify and complement the other. It is not difficult yet, however, to trace back many principles now accepted as Common Law, to the Law Merchant origin, with the same characteristic features as when, unknown to the Common Law, it was enforced only in Merchant Court. Of this we might instance the doctrine of stoppage in transitu, which according to Lord Justice Brett, in Kendall v. Marshall, 11 Q. B. D. 356, was "not founded on any contract between the parties; it is not founded on any ethical principles; but it is founded upon the custom of merchants. The right to stop in transitu was originally proved in evidence as a part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in equity."

The time that we have thus spent in tracing the early development and administration of commercial law will not have been entirely lost if we can find therefrom lessons for present-day application.

And first we may ask if it is strange that in these ancient times, conspicuous for their great leisure, business required the dispatch of justice of the "dusty-footed" type, and that now, in this modern age of unexampled development in all business and trade, with the powerful adjuncts of communication and transportation, that the business world chafes at the delay still found in our courts in the dispatch of litigation and is found casting about for other alternatives.

And thus we find repeated the old Italian Guilds and English court in the United States Arbitration Act, passed in recent years by Congress, permitting parties to any controversy of which the Federal Court would have jurisdiction, to arbitrate their differences before arbitrators selected from men of their own trade or profession, unhampered by most of the restrictions of a procedural kind, in the way of pleading and evidence, and without the great expense and delay incident to litigation and followed by the same binding force and effect as a judgment.

Similar acts have been passed in many states, including New York, Oregon, California, Massachusetts, Utah, Wyoming, and Pennsylvania, and perhaps other states.

The act is approved by the National Commissioners on Uniform Laws, which is seeking to have it adopted by all states.

To a similar origin may be traced such quasi judicial bodies now functioning in this country as the Interstate Commerce Commission, Federal Trade Commission, the Industrial Relations Commission, of the various states, and the numerous states public utilities commissions, of which Mr. Samuel T. Bush, in a lecture to the Law Students of the University of California in 1928 had the following to say:

"These commissions exercise their powers in many respects like the old guild courts of Northern Italy. Like the guild courts, they exercise jurisdiction over certain definite and limited classes in a community, they function independently of the Common Law courts, their orders and decrees are binding equally with the courts of the land, subject to court review, however, under certain specified conditions and they establish and enforce many rules of law that apply only

to those subject to their jurisdiction. They may, therefore, truly be said to be the progeny of commercial law."

A like spirit is manifested in the development of workman's compensation insurance. Insurance has always been included in the field of commercial law, and was first developed under Lord Mansfield, who has been called the father of insurance laws. The administration of workman's compensation is committed in nearly all the states to administrative boards, not necessarily composed of lawyers, and the great bulk of it never enters the court house.

Under the new Federal Compensation Act, relating to harbor workers and longshoremen, deputy commissioners administer the law, and we find a single deputy commissioner, not required to be lawyer, replacing and dispensing all the functions of the judge and twelve good men and true, in disposing of all law and fact issues, whose award is subject to review only by injunction in the Federal Court and solely on questions of law.

This it is submitted hardly constitutes due process and certainly does not carry the same guarantees of a fair trial and a correct result as the old guilds and courts of Fair, where the merchants and traders disposed of the complaints arising between their fellows, but it does dispatch business and clean up the docket whether it dispenses justice or not.

Whether workman's compensation could have been left to the courts or not, we cannot say. We are rather of the opinion that its administrative details in the mass are better committed to commissions, but we pause to note an article reaching our attention, by an Illinois lawyer belaboring courts and lawyers for not modernizing and simplifying their procedure, and making it more adaptable and responsive to modern economic and social conditions, and asserting that had they done so, workman's compensation could have been better, and just as expeditiously administered by the courts, through special masters or commissioners.

While such views appear now to be in the category of locked doors after horses are gone, they can still bear fruit, as to inciting us to expedite that part of workman's compensation still left to the courts, because the tendency will be, and is throughout the country, to broaden rather than curtail the

powers of the commission, and let this curtailment be applied toward the court.

Just what simplification shall consist of is a debatable question, but we merely state, that so much of our procedure or practice or rules of court as tend to make the trial of a lawsuit a battle of wits between opposing attorneys, and as permit the client to suffer because of an oversight by his attorney of some technical procedure or point, to a preclusion of a consideration of the merits of his case, is in our judgment, hardly worthy of the middle ages and should be discarded.

Personally, we feel, when told that the lawyer is being eliminated by legislation and business organizations, in writing wills and guaranteeing titles, and in many other lines, very much like Emerson who when advised by his contemporary, Cassandra, that the world was coming to an end, said "Let it come; it has my permission".

If the time ever comes in the complexity of human affairs and the clash of conflicting interest rising out of them, when the lawyer is not needed in their solution, we will welcome it as the millennium, and gladly resign the profession whose toil, drudgery, and responsibility often far outweigh any material consideration or compensation coming from it, and whose chief compensating features to many, lie in the opportunity it affords for the exercise of intellectual faculties, with the consequent liberalizing spirit and philosophical outlook flowing therefrom, and the fellowship among the members of the profession.

Like Othello, we will have lost our occupation, but without his accompanying despair.

Anything that tends to bring about uniformity of state laws, is obviously in the interest of expedition. The National Bankruptcy Act is a fair specimen of the advantages of the commercial law working uniformly throughout all of the states. With forty-eight sovereign states maintaining separate jurisdictions, each construing its own statutes and establishing and following its own precedents, the business of the world is seriously hampered and retarded by the uncertainty attendant upon it, and arising on crossing states lines and becoming subject to the various statutes and judicial construction thereof in so many jurisdictions. The work of the National Commis-

sioners of Uniform State Laws, acting in conjunction with the American Bar Association and the Commercial Law League of America, as well as the State Bar Associations of the different states, in seeking to bring about such uniformity, is of great interest to the profession.

Already there has been secured the passage, in many states, of uniform laws which are mostly of a commercial nature, and including such well-known laws as the Uniform Negotiable Instruments Law, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts act, the Uniform Chattel Mortgage Act, the Uniform Bulk Sales Law, The Uniform Conditional Sales Law, and the Uniform Arbitration Act.

A uniform law that is now being recommended, and which would have a notable tendency to expedite litigation and the progress thereof through the courts, is the Uniform Summary Judgment Act which has for its purpose the bringing to a prompt issue all cases of a commercial nature, including actions for real estate, and the rental therefrom. When no proper defense is shown, by affidavits setting up the same, judgment follows promptly, and if there exists a defense to a part of the cause of action, then judgment follows promptly for such part as to which there is no defense.

We would urge the importance of taking the matter of bringing about the uniformity of state laws more to heart by the profession and assisting in every way in bringing about the adoption of these uniform laws as they are recommended by the national agencies promulgating them.

The work is not without its difficulty and burdens being carried on by the unselfish and unremunerated activities of members of the legal profession.

President Coolidge made a remark that the business of the nation is business, and to this we might add that the business of the nation must be transacted according to principles of commercial law. As to its importance, we quote again from Bush's article above referred to: "Commercial Law today is the life-blood of all law affecting private or property rights. Because of its vitality, universality, and adaptability to the rapid changes that have taken place in the social and economic conditions in the past few generations, all other branches of the common or civil law, such as the law of real property, the

law of the administration of estates, the law of corporations, equity jurisprudence, and other branches, have been able to sustain life and function."

This commentator then proceeds to point out the anathema in which the word "collection" has been accustomed to be held by the profession, and that under modern evolution of the practice, many of the large law firms were furnishing facilities for handling the collections of their clients. We might merely add that the law itself consists largely of the "collection" business, and revolves around money.

In your later practice, you will probably find that the bulk of business comes from one of three sources: those who desire advice as to how to get money; or having got it, as to how to retain it, and keep others from taking it away from them; and third, having lost it, how to get it back from those who have wrongfully got its possession.

Furthermore, the same principles in interesting questions of commercial law as would apply to the collection of a million dollars, have like application to the settling of a dispute involving the collection of only a few dollars. The firmament above us loses none of its majestic grandeur, in that it covers the peasants hut alongside of the King's palace. Finally since commercial law is peculiarly at home in the domain of private and property rights, and since Balzac says "The lawyer is a statesman in charge of private affairs" we are one and all commercial lawyers.

As to the law practice, whether commercial or otherwise, there is no such thing as an ideal one. Just as, individually, we are all haunted by the ghosts of ideal selves, we may dream of such a practice, but it does not exist. There is not even such a thing as an ideal lawsuit, *at least not for both sides of it.* Every lawsuit has to go through the laboratory of analysis and definition, the workshop of preparation, the ordeal of trial, and the crucible of appeal, and the variability and uncertainty of law is such, that we are suffering suspense until the tribunal to which is committed the last guess, confides to us for the first time in the history of the case, what the law of it really is.

Balzac truly says "there is no such thing as absolute law, there are only circumstances".

Like all activities, this field presents the opportunity for choice which must be exercised by the beginner early in his career, and his goal, ambition, and ideals must indicate the pathway which he will pursue. The subject naturally branches into two channels, broad in scope, one of which might be termed the business and the other the professional.

Debate and discussion in conventions of the Commercial Law League of America, which may very fairly be called the clearing house for the consideration of commercial law practice, has very clearly indicated a well-defined line of demarcation or division between those who consider the commercial law practice distinctly confined within the same channels of ethics and procedure as the other forms of law practice, and those on the other hand who seek clearly to find reasons why it should not be limited within the strict bounds of a profession, but should be expanded so as to partake of and be governed by the most strict rules of purely non-professional business activity.

The justification for the position of either or both diverse forms should be considered in so far as they enlarge or narrow the scope, and therefore the possibilities of commercial law practice.

From whatever standpoint considered, the commercial law practice presents the most alluring attractions, particularly to the young man just entering upon his career, and eager not only to make rapid progress, but to make his way financially, as he progresses, either professionally or in a business way.

In the first place the commercial law practice offers to the young man the fulfillment of his first desire; that is, opportunity to have business and in it to demonstrate his capacity and ability; secondly as a corollary thereto, it opens for him an opportunity almost immediately to obtain that actual practice and experience, which is the most necessary equipment for rounding out the theoretical knowledge obtained in the Law School; thirdly, it offers immediate financial returns; and last but not least, as the preliminary experience of the young lawyer, it opens the possibilities of contact with the business of his country as contrasted with the ordinary limitations of his local practice.

To these advantages might be added the opportunity particularly emphasized and made possible through membership in the Commercial Law League of America, for meeting and becoming acquainted with hundreds of lawyers throughout the United States, all of which can constitute a most valuable asset not only from the financial and professional standpoint, but also from the personal side, for the acquaintances and friendships thus obtained in the experience of the older practitioners have become valuable beyond price.

Concretely, the scope of commercial law practice is almost as extensive as the law itself because its practice enters into practically all human activities so far as they are governed by the practices of law.

Specifically we may further say that contained in the commercial law practice is every branch of the law with only the possible exception of that of domestic relations, patents, and copyrights, criminal law, admiralty, and the purely technical limited real estate law. Into all of these fields the commercial lawyer finds occasion to enter sometime or other in his practice.

The ramifications of his practice therefore extend into practically every field of the law, and thus he cannot be said to specialize in the sense that he limits his practice to particular lines in the profession, altho in a broader sense he is really a specialist.

Opportunity knocks at his door from all directions. What on its face may seem to be only an ordinary collection may take him into the Bankruptcy Court in which he may find himself in the most varied practice, as that of attorney for the petitioning creditors in which he becomes involved in all of the intricacies of the bankruptcy practice which raises the interesting questions of pleading, fraudulent conveyances, concealment of property, preferences, Federal jurisdiction and procedure, and may culminate in the actual trial practice necessary for an adjudication, which lines must bring out skill and ability equal to that necessary in the best conducted trials of cases in litigation in any court.

He may be the attorney for the debtor, in which case his skill would be demanded in the defense of his client against involuntary petition, and against claims of fraud. Possibly he

ultimately, either as attorney for debtor or creditor, will be called in to the criminal court for the conduct of or defense against prosecution under that branch of the bankruptcy law.

As attorney for the trustee he may be brought into both the common law or the equity side of the court in actions to recover moneys due the estate, actions to set aside preferences, and fraudulent conveyances, actions to determine titles as between the trustee and creditors claiming to have prior right to property involved in the bankrupt's estate, questions of exemptions under the state law, rights of creditors occupying inconsistent positions, the question of validity or priority, of securities, liens, or other encumbrance rights, and practically the whole gamut of legal questions which will test both his ingenuity and his technical knowledge in almost every branch of the law.

On the other hand, if the claim in his hands does not become involved in the bankruptcy court, it may present interesting questions either in or out of court involving a knowledge of both fundamental principles and procedure and practice of law in nearly every one of its branches. The three large branches of the law—contracts, negotiable instruments, and sales—coupled with real estate and chattel mortgages, conditional sales, liens, bailments, and agency, fall naturally into the lines of commercial practice.

The present tendency toward the concentration of business and the tremendous activity of corporations and business life necessarily brings the commercial law into very intimate and close contact with corporations, and the necessity of being cognizant of and proficient in the practice governing corporations and the procedure therewith.

The adjustment of business items brings the commercial law necessarily into relations with those problems which must constantly arise in the adjustment of accounts and otherwise, involving conveyances, settlement of estates, and other matters which very naturally come within the purview of the commercial law practice, the laws relating to real property, probate of estates, and even oftentimes indirectly domestic relations and other branches of law which at first blush seem totally unrelated to commercial law practice.

In other words therefore the commercial law practice may be deemed the most heterogeneous and cosmopolitan branch of legal practice, being practically all-embracing and all-inclusive.

In addition to the strictly technical lines, it branches out still further, taking in the matter of adjustments, compromise, arbitration, bookkeeping, accounting, scientific management of business, reorganization of corporations, in fact, the commercial law stands in relation to the legal practice much in the same position held by the old family physician who needed to be equipped to take care of every ill.

From the foregoing it might be assumed that the wide scope of commercial practice must necessarily limit the expectations of the practitioner along the lines of development of real legal talent and the upbuilding of a desirable legal practice.

It is in connection with this phase of the subject that the line of demarcation of choice rests entirely with the commercial lawyer. The commercial law practice offers opportunities without limit. Where those opportunities will lead depends on the lines of advantage taken thereof. The lawyer must determine whether he desires simply to make a living or more than that—a competence out of the practice as his only aim, or whether in addition thereto he desires to attain a position of standing in his profession and to be recognized as a lawyer as well as a business man. It is purely a question of ideals—if one is satisfied simply with the question of making money, he can do so in the commercial practice probably much easier than in other lines of practice, and with quicker personal results.

In that event, however, he must be content to be permanently recorded as merely a collection lawyer, divorced from the honor and standing which so many members of bar have attained in their professional and public life.

On the other hand, if he desires to choose the better course of maintaining his professional ideals and standards, but at the same time obtain the advantages that adhere to commercial law practice, the way is just as open—altho somewhat narrower and not quite as quickly run. In other words, the choice lies between choosing the commercial practice as a

business or as a profession—the former limits itself, the latter combines the two in a broader and wider field.

In this larger vision, the lawyer gains all the advantages of the commercial practice, but subordinates the details of the business portion to his professional ideals and standards. The working out of the practice makes the professional ideals primary and the matter of business incidental altho the latter necessarily follows the former.

The lawyer who becomes merely a drudge and slave to business details seldom rises above the level of the hum-drum routine features and never obtains eminence in the professional sphere—the lawyer however, who conducts his practice so that the routine matters are subordinate and devotes his time to the supervision and working out of the professional questions and matters which come before him, keeps himself removed from the danger of becoming lodged in a rut and retains his professional ideals and possibilities and makes himself eligible to attain to those honors and distinctions which fall to the legal profession.

At the same time he is opening the avenues for a most extensive and lucrative practice. Not only do the opportunities in the practice of commercial law give almost unlimited scope to the lawyers activities in a professional way, but they likewise offer the means for a general, all-round liberal education particularly along business, economic, and political lines. The points of contact instead of being limited to a localized narrow horizon, may be made practically national if not world wide, and thru the channels formed, bring to the lawyer the streams not only of business and the emoluments thereof, but the much desired asset of wide acquaintanceship, which when properly cultivated, makes possible the formation of many lasting friendships as the direct result thereof.

To epitomize them, the commercial law practice offers an almost unlimited field for the exercise of business and professional ability and capacity, limited only by the choice of the individual. In addition thereto and beyond the scope of any other field of legal practice, it affords unlimited opportunities for legitimate publicity and wide acquaintanceship; the work is always interesting and full of diversified activity; for the young man it is a stepping-stone to the widest fields his ambition desires.