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Jacob M. Goodyear

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The Romance of the Law Merchant

Law is a code of principles adopted by the majority for the regulation of human conduct. So accustomed has the mind become to its very existence that in the bustle and rush of our modern life scarcely a thought is given to its development from small beginnings centuries ago. Whether it be the famed Code of Justinian, the French Civil Code or the practices of Teutonic tribes in northern Germany that gave it birth, this much is true—that the major portion of American law found its origin in continental Europe and has come to us in its present form through many and varied changes. International law in recent years has been the subject of much discussion, the so-called crime wave has focused attention upon the jury trial and criminal procedure and the ever increasing number of accident cases arising from the fact that nearly every home boasts a motor car has compelled consideration to be given to the principles of the law of torts. Despite all this little notice has been given apparently to that vast body of the law which regulates and acts as a balance wheel to business and commercial life.

About the origin and development of this particular field of the law, first known as the law merchant, there is a glamor and a romance that exists about no other. The law merchant reflects the fundamental ideas of man regarding his relations with his fellowmen in business life and because of this fact is more human in every aspect and more attractive to the inquiring student. It is not a term applied to the vendor of laws but rather one used to designate the law of merchants and commercial activities.

The origin of the law merchant is found in the middle ages, just at the time when the Church began to lose its grip upon the commerce of the world and trade routes were opened up and developed by families or individuals. To appreciate the exact situation one must bear in mind that in the middle ages the realm of the temporal power of the Church was universal. Not only did the Church usher an individual into the world and bless his passing

from it but it also regulated virtually all his human activities. Vital statistics were compiled by the Church, she administered the affairs of men in ecclesiastical courts and when one died, she distributed his estate by virtue of her jurisdiction over the probating of wills. Many elements later conspired to reduce the influence of the Church in temporal affairs.

For more than two hundred years the Saracens were masters of the Mediterranean and northern Africa—in fact from the defeat by Charles Martel in the eighth century until expelled by the Normans from Sicily in the eleventh century. During all this period, while trade was not wholly in their hands, yet it was in a large measure under the domination of the infidels. It is really impossible for us to comprehend the extent of the vast business that developed during this period of time. Caravans visited all the great cities of Messopotamia, Persia, Egypt and even farther afield, for we know they followed the course of the Volga and Don Rivers in southern Russia. The merchandise gathered by these far-flung caravans was vended to European traders who had acquired privileges through a commercial treaty made by Charlemagne and later another compact negotiated by Frederic the Second.

But Italians and Sicilians cast envious eyes on these rich trade routes and the victories of the early Crusades and the kladesopic changes in political affairs afforded them the opportunity to seize these routes for themselves. Soon the traders of the world and the owners of the caravans were the wealthy families of the Adriatic ports. A large and profitable connection was made with Trebizond in Persia. The Euphrates Valley, Alexandria and even India were called upon for rich and costly merchandise for Italian courts. Even Phoenician influences and the last remnants of the earliest of trading nations had their effects upon these trade routes. Soon Venice outstripped other Italian cities and became the center of the world's trade. As her power in trade and commerce grew the power of the Church in business life declined in the same proportion.

There are authorities who seek to claim for Italy the

birthplace of the law merchant. All such lay their major premise in the period of Venice's greatest prosperity and influence and at the same time overlook the corresponding era of decadence. We must ever bear in mind as we consider the sources of the law that law is not like an inn—a place to be attained—but that it rather is like a public road that ever and anon leads on and on as it progresses and turns to suit the common need. It is true, Italian influences were brought to bear on the development of the law merchant, but Italian influences did not produce the law merchant in the same sense that Rome produced the Code of Justinian.

Another change in the commercial life of the world occurred with the development of the Hanseatic League for this owed its existence in a large measure, and certainly its great prosperity, to the trade it drew from the south. Soon the German and Flemish cities stepped to the front as the commercial centers of the world and the golden age of Venice's prosperity ended. No longer did Venice rule the world's markets, but the succeeding Crusades and the knights of Prussia and Lithuania brought the heart of the business world north.

We cannot tarry to dwell at length on either the supremacy of Venice or of the German cities for our investigation into the sources of the law merchant must yet go far afield. However, we must remember that while Venice and Prussia ruled, the lords of commerce were heads of families and trade centered in knights and nobles or a few men of wealth. A class of traders or group of business men had not yet developed—that awaited the advent of yet another influence in the development of the law merchant.

Human nature is fundamentally gregarious and the formation of the state in a large measure rests upon this characteristic. As soon as wealthy merchants had developed in the genial Flemish towns, a movement was set afoot for the promotion and development of great public fairs or assemblies. It is not to be doubted that the crafty merchants sought by this means to increase their markets

and thereby attain greater profits. The fairs of Champagne were of universal importance from the twelfth to fourteenth centuries and the movement of wealth associated with them exercised a colossal influence on the trade and commerce of the world. Among the visiting foreigners, the Italians were most numerous and these were soon generically termed Lombards, but in addition to these were Jews, traders from England and Scotland, and even from the far east. No such concourse of people as visited these fairs has ever been assembled in modern times for purely commercial purposes. Literally thousands of traders and merchants with their wares, employees and even families travelled miles to attend these vast events. Nor must it be inferred the Champagne was the only locality where such fairs were held. Many of the leading commercial cities of the continent caught the idea and soon Europe was dotted with these international expositions while merchants travelled from one to the other throughout the course of the year.

The decline of the fairs in Europe was parallel to their rise in England and before long the famous fair at Stourbridge was instituted. What a singular medley of persons there was to attend this—the Jew expelled from England had given place to the Lombard as money changer—while Venetian and Sicilian merchants attended with their stock of eastern products, rich silks and delicate glass. The Flemish weaver brought his linens from Liege and Ghent; the Spaniard his iron; the Norwegian his tar and pitch; the German merchants furs; the French winegrowers their rarest vintage—indeed it is not unlikely that rare and costly porcelain from the far east reached by devious ways some of the booths. For one month all these diversified businesses were set up in separate booths while men of every race and clime fraternized and exchanged opinions. One can scarcely estimate the influence that such a vast concourse of merchant princes had upon the sources of English law. For one month and in some instances even for a longer period opinions were exchanged and trade customs and usages of the world were discussed and then applied to

the affairs of men.

The passing of the great fairs witnessed the rise of another influence in business life. Trade guilds, which were organizations of skilled workmen, soon were formed with the purpose of training apprentices and also for setting standards of workmanship for each particular trade. Soon every trade and vocation was represented by its own particular guild. The practice was for a man to join a guild and learn his trade and then as a master workman travel where he wished to earn his living. We will pass by a consideration of the political advantages that accrued to the guild members and content ourselves with the observation that the influence of these trade guilds in every part of England soon produced a substantial middle class of citizens.

The rise of the courts in England has been subjected to many varied influences and we must now turn aside from the rise of tradesmen and a business class to consider the courts. While it is true the trial by jury was of Teutonic origin, yet fundamentally the English courts represented in the main the ideas of the feudal system and Norman law. Much of the law and procedure used in early English courts was derived from the religious or church courts of the continent. Mention has been made of the decline of the ecclesiastical courts and the rise of civil courts but the latter were not comparable to the judicial tribunals of today. In the forum only certain limited classes of causes could be pleaded and the system of pleading itself was both involved and intricate. Brave indeed was he who faced the formidable array of rejoinders, replications, rebuttals and demurrers with which the legal practice abounded. Certainly such a judicial system was not attractive to guild members or the merchants as a method of settling honest differences. Just as true was it that the ecclesiastical courts with their ever decreasing jurisdiction did not prove a ready means for adjusting business differences.

History records that whenever a real and honest need arises the fertile brain of man rushes to fill that need even as nature, with swift flowing currents of air, hastens to fill

the vacuum she so abhors. The situation that presented itself was that there existed a business and trading class with no forum in which to plead its causes and no scales of justice with which to weigh the respective rights of individuals. Not only did the difficulties we have discussed exist but the common law courts in the cases brought before them refused to recognize certain well defined ideas of the guild members. What more natural consequence could there be than that the guild members should constitute courts for themselves? Soon membership in the guild involved the doctrine of compulsory arbitration for the members were bound to take their disputes to guild courts for settlement and to abide by such adjudication.

Rapid indeed was the rise of the guild courts with an ever increasing body of litigants to draw from and large was the number of cases brought to such centers for adjudication. But if the guild courts were to serve the purpose for which they were formed they had to formulate a code of principles and practices by which their judges could be guided in determining controversies. Such principles were not in the statute law because as we have seen their very absence caused the constitution of the guild courts. So the hardy Anglo-Saxon traders and merchants took the trade customs and practices of all the world as they had been gathered together at the great fairs and handed them down to the guilds and from these evolved the law for merchants. Phoenecia, the cradle of shipping, Venice, the trader and banker whose glory had faded, the Flemish burghers, the Norman lords and even the Moslems who guarded the gateway to the east, all contributed their full share to the body of business law that was thus formulated for English merchants. Nor was this all done in a day but bit by bit it was accumulated and woven into the web and woof of the decisions of the guild courts. This body of the law, therefore, once actually developed and put into practice, became what is truly termed the law merchant.

Let us for a moment examine this code of laws to ascertain its essential characteristics or innovations to Eng-

lishmen. Take for example, the law of contracts. The law merchant held the theory that the risk in a contract of sale rests on the buyer and while it is true the Roman theory was "caveat emptor" yet the law merchant more nearly paralleled that of Spain and France than it did that of Italy. In the last two countries the Arab influence in buying and selling was markedly manifest so that the principles of the law merchant followed closely the Arab customs. The modern term "hand money" and the practice of paying a valuable consideration to bind a contract is directly attributable to the law merchant which received this principle from the Hebrews or Babylonians by way of the Phoenecians. The market overt and a score of other principles and doctrines familiar to the modern lawyer found their first expression in the law merchant. Not only business and contracts but the whole structure of financial and commercial law including private banks, money exchanges, interest and usury, obligatory contracts payable to the bearer, the use of paper money, bankruptcy and insurance was first given articulate expression by the voice of the law merchant.

This may seem a far cry from any practical application and yet I cannot close without rounding out the history of the law merchant. Soon common law courts founded by Parliament saw all the lucrative litigation slipping away from them to the guild courts which rendered such efficient service and met the real needs of business men. What could be more natural than that the law courts should adopt the principles of the law merchant and administer them? Such indeed was the result as little by little the law courts applied the principles of the law merchant to litigation before them. In a century or two, and a century is but a brief period in the development of a judicial system, the law courts had adopted and made their own the principles of the law merchant. Then when in the fullness of time the guilds and their courts disintegrated and passed into history the doctrines of the law merchant survived in new and lasting form in the law courts.

Today motor busses and lorries thread their devious but steady way over the trade routes of the Moslems and Sicilians; huge ocean liners cut the main where once Phoenician galleys glided; the Hanseatic League and the castles of sturdy Rhenish knights no longer rule the world's markets; international fairs are but a memory and a tradition; while the guilds and their methods remain only a fountain head for the inquiring student of history; and yet despite all these mutations there survives the law merchant—a monument to the mind of man for generations. Like the beautiful coral, it grows and appears ever new and fresh, drawing its life from the surging tides of life about it and supported by the substantial precedents of the generations that gave it birth.

JACOB M. GOODYEAR