THE DUTY OF BUSINESS TO SERVE THE PUBLIC: ANALOGY TO THE INNKEEPER'S OBLIGATION

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> . . . the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public.[1]

That this expression of commercial licence still reverberates as "a resounding tinkle"[2] from the past satisfies a certain longing on the part of society to retain another of its romantic myths. But not only has this principle never had universal application in common law jurisdictions, the passage of recent legislation in Canada, moreover, makes it even far less applicable now. Still, the limitations which imprison these exceptions, both common law and statutory, continue to breathe a substantial amount of life into this apparent aphorism and it is the means by which these exceptions may be expanded and the general doctrine further constricted that I wish to discuss in this article.

I

It would be a zealous proponent of *laissez-faire* indeed who would reject entirely the legislative shield formulated of late as protection against the more patent incidents of inequality practised in the past by the multitude of businesses catering to the public. Much of the provincial activity in this field concentrates upon discrimination in such matters as signs, symbols and notices, the occupancy of commercial and residential property and employment and trade union membership, but it is unequal treatment of persons in hotels, stores, restaurants, theatres and other like places with which I shall be concerned.

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[1] *Christie* v. *York Corporation*, [1940] S.C.R. 139, at p. 142, [1940] 1 D.L.R. 81, at p. 82, followed by the British Columbia Court of Appeal in *Rogers* v. *Clarence Hotel*, [1940] 3 D.L.R. 583, at pp. 584 and 586.

[2] The title of a play by N. F. Simpson.

This last category finds a distinctive recognition in provincial statutes which censure prohibited conduct in "any place to which the public is customarily admitted", a phrase that applies alike to the public institution,[3] be it a museum or beach, and to the place of business. Seven common law provinces have adopted this sweeping language,[4] whereas Quebec has limited its provisions to the owner or keeper of a "hotel, restaurant or camping ground",[5] words which have necessarily limited its experience. On the other hand, the broad phraseology of the statutes of the other provinces has permitted these jurisdictions to proceed not only against hotels, beverage rooms, restaurants, campsites and resorts, but also against a cold storage locker plant, a golf club, a barber shop, a beauty salon and a dance club.

The form or quality that the discrimination must take under these enactments bear marked resemblance to each other, inasmuch outlawed in all are race and colour; in four,[6] nationality; in three,[7] national origin; in four,[8] ethnic origin; in five,[9] place of origin; in five,[10] ancestry; in four,[11] religion; in three,[12] religious creed; in one,[13] religious beliefs; in two,[14] creed; and in one,[15] belief. Moreover, the means by which these statutory prohibitions are enforced appear to lie exclusively within the public sphere and this characteristic is one continually stressed in the various Acts: contravention of any substantive provision is an offence but prosecution may only proceed with the consent of the particular Minister of the Crown charged with the statute's administration; the common law provinces have prescribed in their enactments elaborate administrative machinery to inquire into complaints, to attempt their settlement, to report and make recommendations and to permit the Minister to make orders directly or to apply to the courts for injunctive relief.

[3] See, for example, s. 5a of the Ontario Human Rights Code, S.O., 1961-62, c. 93, as am. by S.O., 1965, c. 85, s. 3, which extends the provisions of the Code to the Crown in right of Ontario.

[4] Alberta: The Human Rights Act, S.A., 1966, c. 39: British Columbia: Public Accommodation Practices Act, S.B.C., 1961, c. 50; Manitoba: The Fair Accommodation Practices Act, S.M., 1960, c. 14; New Brunswick: Human Rights Act, S.N.B., 1967, c. 13; Nova Scotia: Human Rights Act, R.S.N.S., 1967, c. 130; Ontario: Human Rights Code, *ibid.*; Saskatchewan: The Fair Accommodation Practices Act, R.S.S., 1965, c. 379.

[5] Hotels Act, R.S.Q., 1964, c. 205.

[6] British Columbia, New Brunswick, Ontario and Quebec.

[7] Manitoba, Nova Scotia and Saskatchewan.

[8] Manitoba, Nova Scotia, Quebec and Saskatchewan.

[9] Alberta, British Columbia, New Brunswick, Ontario and Quebec.

[10] Alberta, British Columbia, Manitoba, New Brunswick and Ontario.

[11] British Columbia, Manitoba, Nova Scotia and Saskatchewan.

[12] Manitoba, Nova Scotia and Saskatchewan.

[13] Alberta. [14] New Brunswick and Ontario. [15] Quebec.

This very brief survey of the incursion by legislatures into one specific aspect of civil liberties has emphasized three matters. Firstly, to prohibit discrimination in "any place to which the public is customarily admitted" yields little scope to an antagonist's claim that his activities lie beyond the compass of the Act. For example, an Ontario golf club that had private membership but also upon occasion opened its doors to the public was considered a "mixed" establishment and thus within this language in spite of the qualifying effect that might well have been given to "customarily".[16] Next, it is not just any kind of discrimination which the statutes seek to exorcise: they confine themselves to that conduct which distinguishes amongst persons on such bases as colour, race, religion or nationality thereby leaving untouched other equally, if not more, arbitrary criteria. Lastly, the objects of this legislation are effectuated entirely apart from private means of enforcement with the result that remedies are pursued by the Minister and public tribunals rather than by the individual complainant himself. An injured person is not authorized to institute an action in damages and even the power to lay an information or to apply for an injunction has, in effect, been granted to officialdom alone.[17]

II

The common law has not remained silent and inactive in this field. For centuries, the relationship alone of innkeeper and guest signalled the presence of certain obligations and correlative rights accruing to each of the parties, a phenomenon for which one can find specific reference as far back as in the *Year Books*.[18] Since it was their status that clothed these persons with these privileges and liabilities, vital to the issue of their enforceability in any particular case was the threshold question of whether the parties, in fact, satified the requirements of innkeeper and guest. Initially, therefore, a court would be faced with this problem of interpretation.

For an "innkeeper" is one who holds himself out as providing lodging and accommodation to all travellers and sojourners upon their way[19] and thus, this seminal issue claims consideration of

[16] Under the terms of settlement made in 1962 with respect to the complaint against the Lakewood Golf and Country Club of Windsor under the predecessor of the Ontario Code's provisions.

[17] *E.g.*, in Ontario, ss 13(6), 15 and 17 of the Human Rights Code, *supra*, footnote 4.

[18] *E.g.*, Y.B. 39 H. VI 18, pl. 24.

[19] *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, per Bayley and Best JJ.; *Q.R.S. Canadian Corp Ltd.* v. *Coleman* (1930), 65 O.L.R. 462, per

the business which this person in truth holds himself out as transacting.[20] The past discussions of the courts permit one to discern that emphases have been laid on the facilities and services of the alleged hotelkeeper and his history of transacting business. The former signifies that because the house lacks the minimum complement of facilities, it is evident that its keeper could not have intended to extend any invitation to a potential guest; the interest taken by the courts in the latter underlines the public nature of an innkeeper's operations, for only one who has opened his doors to the public and dealt with everyone on an equal footing can subscribe to the status of innkeeper.[21]

This "pigeon-hole" technique has typified the reasoning processes of the court: if X is not an innkeeper, he must be operating instead an ale-house, a lodging-house, a restaurant, or what have you. Each of these has certain distinguishing features that set them apart from an hotel and thus the judges permit themselves oftimes the ease of weighing the facts of their case against the ingredients and composition of each of these niches. So, it has been stated that unlike a lodging-housekeeper who "makes a contract with every man that comes . . . an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price".[22] The presence of a specific contract may mark an important boundary merely because it implies that the lodging-housekeeper, unlike the hotelkeeper, may choose his guests as he wishes.[23] And yet, difficulties seem to abound if one concludes simultaneously that an innkeeper may be defined as one who provides for all and also that he is a person obligated to receive all. To escape from this circle the law wisely looks at other factors in its determination of who an innkeeper is and is influenced by the residential nature of the lodging-house which offers less transient accommodations,[24] lower rates for the longer term and the unavailability of food. Regard is taken of the duration of the visit and the length of time on which the rates are calculated;[25] of the absence of food on the

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Riddell J.A., aff'd on other grounds, [1931] S.C.R. 708; *Gates* v. *Dorchester Hotel Ltd.*, The Times, March 7th, 1953.

[20] *Fraser* v. *McGibbon* (1907), 10 O.W.R. 54, at p. 57 (D.C.).

[21] *Browne* v. *Brandt*, [1902] 1 K.B. 696, at p. 698.

[22] *Thompson* v. *Lacy*, *supra*, footnote 19, at p. 287. See also *Cunningham* v. *Philp* (1896), 12 T.L.R. 352; *Re Chapman* (1894), 11 T.L.R. 92.

[23] *Light* v. *Abel* (1866), 11 N.B.R. 400. But *cf. Lippert* v. *Ford Hotel Ltd.* (1930), 65 O.L.R. 340.

[24] At the other end of the spectrum is the landlord-tenant relationship.

[25] *Cf. Thompson* v. *Lacy*, *supra*, footnote 19; *Olley* v. *Marlborough Court Ltd.*, [1949] 1 K.B. 532, at p. 543; *Miller* v. *Federal Coffee Palace*

premises;[26] of a lower rate offered to boarders;[27] and of whether the occupant arrives as a member of the public or rather as one having some other pre-existing relationship with the keeper of the premises.[28] A similar division is drawn between the inn and the ale-house or tavern. The latter may not meet the standards of a hotel through lack of sleeping accommodation,[29] or food.[30] And again, the courts clearly distinguish the hotelier from the restaurateur,[31] the keeper of a coffee-house,[32] the simple motel-keeper[33] and the ordinary merchant.[34]

But that does not end matters, for however incontestably the premises be an inn and that issue answered affirmatively, there remains this hurdle: whether the person entertained is a guest at law. For, as mentioned earlier, the special claims and obligations attaching to the relationship rest on the status of the parties and, consequently, demand both an innkeeper and a guest. To satisfy the latter, a person must be a traveller, a sojourner. But what is that? must a traveller be one who stops at least overnight? who eats a meal? who ordinarily resides in another town? who seeks a room for only a short time? These and related questions were only faced and in anywise resolved a few years ago when the English Court of Appeal was confronted with that well known individual, the man who had a drink after work at an inn very near his own home and who claimed nevertheless to be a guest.[35] The court in unanimously finding the plaintiff to be such laid emphasis on the principle that an inn offered accommodation and refreshment to persons seeking it and since the form of refreshment demanded would not be dependent on whether the

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(1889), 15 V.L.R. 30; *Daniel* v. *Hotel Pacific Pty. Ltd.*, [1953] V.L.R. 447; *Bellairs* v. *Yale Hotel Calgary Ltd.*, [1936] 1 W.W.R. 316 (Alta D.C.); *Whiting* v. *Mills* (1850), 7 U.C.Q.B. 450.

[26] *King* v. *Barclay* (1960), 24 D.L.R. (2d) 418, aff'd (1961), 35 W.W.R. (N.S.) 240 (Alta C.A.); *Parker* v. *Flint* (1699), 12 Mod. 254, per Lord Holt C.J.

[27] *Katz* v. *Noland* (1914), 50 C.L.J. 193 (Ont. D.C.); *Ford* v. *Seligman*, [1954] O.R. 957.

[28] *Railway Assessment Authority* v. *G.W.R. Co.*, [1948] A.C. 234.

[29] *Tinsley* v. *Dudley*, [1951] 2 K.B. 18, at p. 22. But *cf. Pidgeon* v. *Legge* (1857), 21 J.P. 743.

[30] *R.* v. *Zinburg*, [1953] O.W.N. 601.

[31] *Franklin* v. *Evans* (1924), 55 O.L.R. 349; *Orchard* v. *Bush & Co.*, [1898] 2 Q.B. 284.

[32] *Doe d. Pitt* v. *Laming* (1814), 4 Camp. 73, at p. 77; *Q.R.S. Canadian Corp. Ltd.* v. *Coleman, supra*, footnote 19; *Miller* v. *Federal Coffee Palace, supra*, footnote 25.

[33] *King* v. *Barclay, supra*, footnote 26.

[34] *R.* v. *Wells* (1911), 24 O.L.R. 77; *Re Hotel Dunlop*, [1927] S.C.R. 512.

[35] *Williams* v. *Linnitt*, [1951] 1 K.B. 565.

entrant lived without or within the city, it could no more matter whether the visitor from the city resided nearby or in another part of town. Thus, how could an innkeeper concern himself with the address of a visitor to his premises when that person might merely order a meal or only a pint of ale—is the relationship to differ because one patron lived a few miles further away from the hotel than the other? The automobile, the jet and rapid public transportation cannot but make such distinctions manifestly meaningless. Therefore, in following the earlier decision of *Orchard* v. *Bush & Co.*,[36] the court preferred to emphasize the innkeeper's function to receive persons *causa hospitandi*, namely, to offer a person "such accommodation as the innkeeper can give him",[37] rather than become embroiled in attempts to define what is meant by "traveller" and to determine on the facts whether the alleged guest conformed to that definition. In fact, Kennedy J. in this case would have gone so far as to dispose of the necessity that a guest be a traveller,[38] a far from radical conclusion in view of the imaginative results of earlier cases that were still able to classify as travellers persons who had remained at the hotel for quite long periods of time[39] and yet one which most courts, particularly where the facts resembled the situations of *Orchard* v. *Bush & Co.* and *Williams* v. *Linnitt* in which persons dropped into hotels for a meal or drink only, drew back from reaching themselves.[40] In contrast to the recognition in the *Williams* case[41] that the traveller may well be a more difficult concept to apply in this era of ever accelerating mobility and instantaneous communication, the majority in an Australian decision[42] a short while later had difficulty in comprehending how a person telephoning an hotel in advance for reservations during a definite period of time could, in view of the express contract involved, become a guest.[43]

[36] *Supra*, footnote 31. [37] *Ibid.*, at p. 289, per Kennedy J. [38] *Ibid.*

[39] *Chesham Automobile Supply* v. *Beresford Hotel* (1913), 29 T.L.R. 584; *Allen* v. *Smith* (1862), 12 C.B.N.S. 638, aff'd (1863), 1 New R. 404; *Thompson* v. *Lacy*, *supra*, footnote 19. But *cf. Ford* v. *Seligman*, *supra*, footnote 27; *Lamond* v. *Richard*, [1897] 1 Q.B. 541; *Daniel* v. *Hotel Pacific Pty. Ltd.*, *supra*, footnote 25.

[40] *Philp* v. *Hunts Ltd.*, [1947] O.W.N. 529; *Sealey* v. *Tandy*, [1902] 1 K.B. 296; *R.* v. *Higgins*, [1947] 2 All E.R. 619; *R.* v. *Rymer* (1877), 2 Q.B.D. 136; *Pidgeon* v. *Legge*, *supra*, footnote 29; *Hoban* v. *Royal Hibernian Hotel Ltd.* (1945), 80 Ir. L.T.R. 61, aff'd (1946), 80 Ir. L.T. 271.

[41] See criticisms of Murray, Comment, (1951), 29 Can. Bar Rev. 768; James, Comment, (1951), 14 Mod. L. Rev. 352; The Motorist and the Innkeeper (1951), 95 Sol. Jo. 53.

[42] *Daniel* v. *Hotel Pacific Pty. Ltd.*, *supra*, footnote 25.

[43] See also *Parker* v. *Flint*, *supra*, footnote 26, per Lord Holt C.J. and footnotes 22 and 23, *supra*. But *cf. Carriss* v. *Buxton*, [1958] S.C.R. 441, per Rand J.; *Lippert* v. *Ford Hotel Ltd.*, *supra*, footnote 23. The principal case was criticized by G. Sawer (1954), 17 Mod. L. Rev. 272.

This brief description of the ingredients in the hotelkeeper-guest relationship does not pretend to be exhaustive, but it is offered both as the groundwork for the discussion that follows, which analyzes some of the obligations owed by an innkeeper to his guests, and as evidence of an apparent evolution that coincidentally has defined inn and innkeeper rather narrowly but nonetheless has taken a more liberal view of who may qualify as his guest. This change may have proceeded somewhat imperceptibly, an inevitable result perhaps of the dearth of cases appearing of late in this area of the law. But the duties of an hotelkeeper, not a critical investigation of the parties composing the relationship, form the next stage of this article's development.

One of these duties obligates an innkeeper "to supply a traveller with food and lodging, which he cannot refuse without reasonable excuse".[44] Subject to there being some lawful reason for denying accommodation to a guest, an innkeeper cannot refuse to receive, shelter and offer refreshment to him. Two components, at least, are necessarily implied in this duty. The first yokes the innkeeper to an incapacity to pick and choose whom he will receive and whom he will not, for, as we shall see later, the obligation is owed to members of the public generally who happen to qualify as guests and not only to those whom an hotelkeeper personally prefers.[45] Secondly, an innkeeper might well attempt to finesse this responsibility and rid himself of an "undesirable" guest by exacting an exorbitant price from him, but fortunately accompanying this duty is another that restricts the hotelier to taking a reasonable price only.[46]

Once determined that the facts of a particular case disclose an inn, a guest-innkeeper nexus and an alleged refusal to accommodate, a court must then ask itself whether the law will recognize the hotelkeeper's refusal as a reasonable one. This issue is composed realistically of two issues: where he does offer accommodations, are they of an inferior and undesirable quality that must lead a court to conclude that the innkeeper did in fact refuse to receive the complainant without good reason? if he tenders none at all, has he breached the duty which the law imposes on

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[44] *R.* v. *Higgins, supra*, footnote 40, at p. 620.

[45] *Browne* v. *Brandt, supra*, footnote 21, at p. 698; *R.* v. *Ivens* (1835), 7 C. & P. 213; *R.* v. *Higgins, supra*, footnote 40; *Franklin* v. *Evans, supra*, footnote 31; *Rothfield* v. *North British Ry. Co.*, [1920] S.C. 805.

[46] *Crisp* v. *Pratt* (1639), Cro. Car. 549; *Johnson's Case* (1621), Cro. Jac. 610; *Luton* v. *Bigg* (1691), Skin. 291; *Thompson* v. *Lacy, supra*, footnote 19, per Best J.

him, or has he refused his facilities but on grounds which the law considers reasonable?

This first query really seeks to discover what "food and lodging" it is that an innkeeper must needs offer to his guest. Is a visitor entitled to demand and receive caviar in an hotel nestling "far from the madding crowd's ignoble strife" in some quaint rustic setting? can he scream for the Royal suite? An innkeeper is bound only to "find for his guests reasonable and proper accommodation" and cannot be faulted when in failing to indulge their caprices he refuses to provide guests with "the precise room the latter may select",[47] or because business expediency demands it he moves the guest from one room to another.[48] Of course, the results will vary if a guest has entered into an express contract with the hotel for a specific room or for one at a particular rate.[49] Again, a guest wishing lunch cannot complain that she was compelled to dine in the parlour bar instead of in the more genteel coffee room.[50] Then too, it may fall that a guest has no recourse where the hotel has no bar, or where having one the innkeeper refuses to permit the guest to patronize it.[51] The facilities, refreshment and food that one is entitled to ask of one's host obviously will vary with the mores and conditions of the times,[52] with the class of hotel one is stopping at, with the hour of the day or night when the request for service is made and with the demands already being levied against its supply.[53] As was stated by Swift J.:

> An innkeeper is only bound to supply such accommodation for his guests and his goods as he in fact possesses. . . . A traveller arriving at a village inn could not complain that he was not lodged in a bedroom heated by radiators or supplied with all the amenities to be found in a first-class hotel in a great city, or that his house and carriage or his motor-car were not placed in stables, coach-houses, or garages of the quality to be found in the most modern and pretentious establishments.[54]

But then a guest may have had his request for food or lodging

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[47] *Fell* v. *Knight* (1841), 8 M. & W. 268.

[48] *Doyle* v. *Walker* (1867), 26 U.C.Q.B. 502.

[49] *Lippert* v. *Ford Hotel Ltd., supra,* footnote 23. *Cf.* footnotes 23, 42 and 43, *supra.*

[50] *R.* v. *Sprague* (1899), 63 J.P. 233, an interesting and quite humorous example of the heated atmosphere generated by England's suffragette movement.

[51] *In re Campbell and Stratford* (1907), 14 O.L.R. 184.

[52] See footnote 50, *supra.* What of a lady's pant-dress attire in an hotel's dining-room? What of her topless formal?

[53] *Re Karry and Chatham* (1909), 20 O.L.R. 178, aff'd (1910), 21 O.L.R. 566; *R.* v. *Higgins, supra,* footnote 40; *R.* v. *Wells, supra,* footnote 34. See also The Liability of Innkeepers (1947), 203 L.T. 287.

[54] *Winkworth* v. *Raven,* [1931] 1 K.B. 652, at p. 660.

met with outright refusal, a rebuff that raises the issue of whether the law will characterize this denial as reasonable or no. Of course, a hotel that is full[55] and perhaps even one which has either run out of food or is hoarding its supply on behalf of its "regular" customers[56] may reasonably refuse to entertain a guest. An innkeeper is able, with impunity, to reject a guest who refuses to pay him either in advance or upon demand after admission to the premises;[57] who is drunk and indulges in "indecent or improper" behaviour;[58] who is in a filthy condition;[59] who insists on bringing his dogs into the hotel;[60] or whose reputation, conduct and manner of doing business reasonably produces embarrassment and repugnance in the other guests.[61] On the other hand, courts have found it unreasonable to refuse to accommodate a person who arrived ill;[62] who arrived at a late hour or refused to disclose his name and address;[63] who because of recent illness and doctor's orders insisted on wearing his overcoat in the hotel's rather chilly dining-room;[64] whom the hotelkeeper personally disliked and no longer wanted as a customer;[65] or who was deemed unacceptable because of colour, race, religion or nationality.[66]

Where the line marking the boundary between a reasonable and an unreasonable refusal is to be drawn may not be productive of that solution which lends itself to expression as a simple, concise formula. More important than discovering such an apothegm

[55] *Browne* v. *Brandt, supra*, footnote 21; *Calye's Case* (1584), 8 Coke 32a; *Rothfield* v. *North British Ry. Co., supra*, footnote 45, at pp. 811 and 835.

[56] *R.* v. *Higgins, supra*, footnote 40; *Kenny* v. *O'Loughlin* (1944), 78 Ir. L.T.R. 116.

[57] *Doyle* v. *Walker, supra*, footnote 47; *Bellairs* v. *Yale Hotel Calgary Ltd., supra*, footnote 25. But *cf. R.* v. *Ivens, supra*, footnote 45, at p. 217.

[58] *R.* v. *Ivens, supra*, footnote 45; *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404, at p. 407.

[59] *Pidgeon* v. *Legge, supra*, footnote 40, per Pollock C.B. and Bramwell B.

[60] *R.* v. *Rymer, supra*, footnote 40.

[61] *Rothfield* v. *North British Ry. Co., supra*, footnote 44, where these feelings were evoked during the First World War in consequence of the pursuer's money-lending activities amongst the military, of newspaper reports of his conviction for fraud with respect to military recruitment and of a general antipathy which this "bird of prey" engendered amongst the other guests of the hotel. See also The Liability of Innkeepers, *op. cit.*, footnote 53.

[62] *R.* v. *Luellin* (1701), 12 Mod. 445.

[63] *R.* v. *Ivens, supra*, footnote 45. *Cf.* The Hotel Registration of Guests Act, R.S.O., 1960, c. 180.

[64] *Lynam* v. *The Central Hotel Ltd.*, unreported, but discussed in Unwarranted Refusal by an Innkeeper (1960), 94 Ir. L.T. 245, at p. 251.

[65] *Kenny* v. *O'Loughlin, supra*, footnote 56.

[66] *Constantine* v. *Imperial Hotels Ltd.*, [1944] K.B. 693; *Franklin* v. *Evans, supra*, footnote 31; *Rothfield* v. *North British Ry. Co., supra*, footnote 45; The Liability of Innkeepers (1947), 203 L.T. 287.

are the competing influences operative here, which pit against one another the philosophy of *laissez-faire* that any man, including an innkeeper, should be permitted to run his business as he sees fit and deal with whomever he pleases, and historical and social realities which in refusing to grant the other full sway have gradually eroded away its authority and dominion in this particular sphere of the law. Although a more comprehensive examination of this arena of conflict will be undertaken below, it does not here seem out of place to draw worthwhile comparisons between this just completed scrutiny of the duty imposed by law on an innkeeper and our earlier survey of statutory norms in this field.

III

The extensive prelude to Part II offers some proof of the narrow dimensions within which the law has confined the legal implications to be found in the hotelkeeper-guest relationship. As it is not every visitor who can claim the privileges and rights of a guest, so similarly it is not every establishment that serves him which the law will countenance as an inn. Therefore, no matter how successfully the courts may have tried to effect some balance between their stringent definition of "inn" and a tendency to discover more liberal criteria of what it is that constitutes a "guest", the various Canadian statutes, without doubt, have expanded enormously upon the relationships which they intend to regulate. Thus, where Negroes have been refused service in restaurants,[67] in taverns[68] and in motels,[69] recourse by counsel for the plaintiffs to innkeeper's liability has elicited only defeat, for the courts merely availed themselves of the definitions operative here to conclude that the defendants' premises were not hotels. On the other hand, those provinces that have actively engaged their legislatures in this area have expanded the protective shield to reach the "hotel, restaurant or camping ground" in Quebec[70] and "any place to which the public is customarily admitted" in the other jurisdictions.[71]

Nevertheless, in one respect at least, the safeguards offered by the statutes establish remarkably narrow limits indeed. All confine themselves to the classical forms of discrimination which distinguish amongst individuals on the basis of religion, nationality, colour, or race[72] and thus they contrast egregiously with the

[67] *Franklin* v. *Evans, supra,* footnote 31.
[68] *Christie* v. *York Corp., supra,* footnote 1; *Rogers* v. *Clarence Hotel, supra,* footnote 1.
[69] *King* v. *Barclay, supra,* footnote 27.
[70] *Supra,* footnote 5. [71] *Supra,* footnote 4. [72] *Supra.*

manner in which the common law of innkeepers confronted the issues of whether and when a guest could be denied entry. Evidently, of those cases concerned with the question of reasonable refusal to accommodate a guest, only a small number contained facts in anywise reminiscent of these statutorily recognized kinds of prejudice. By far the greater proportion founded pleas of reasonable excuse on the far less explosive and charged causes which arose where an innkeeper either desired to preserve and enhance the image of his enterprise to which he considered some guest or customer a threat, or entertained a personal dislike of a particular person or group of which he was member. Whether an innkeeper rejected someone because of his race, colour, filthy condition, clothing, dogs, illness, or impecuniosity, the court in all cases had to measure the true reasons for objection against the duty which the law demands of an innkeeper.[73] Which leads one to ask why this technique of balancing and its concomitant, the need to examine carefully any causes offered for refusing to serve and accommodate a patron, do not extend to "any place to which the public is customarily admitted". In a word, why should not it too, like the inn, be made to answer for declining service to the person with a physical deformity, long hair or eccentric dress? Is narrow-minded behaviour and prejudice of this ilk to be tolerated in such establishments merely because human rights legislation does not reach this far?[74]

Also, the remedies generally available to a complainant under the statutes differ from those which an ostracized guest at common law may raise against an innkeeper. The common law gave him two routes which he might pursue: firstly, he could proceed criminally by indictment[75] and, secondly, he was permitted to sue for damages by an action on the case.[76] On the other hand, under the statutes an aggrieved individual is subjected to extensive ad-

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[73] See *Rothfield* v. *North British Ry. Co., supra*, footnote 31, where a thorough scrutiny of circumstances by the court confirmed that the pursuer had not been turned away because of his German nationality or Jewish ancestry.

[74] For examples, see the reports of discrimination by restaurant-owners and other merchants against persons with long hair, in the Ottawa Citizen, July 26th, 1968, and the Winnipeg Tribune, June 13th, 1968.

[75] *R.* v. *Higgins, supra*, footnote 40; *R.* v. *Rymer, supra*, footnote 40; *R.* v. *Ivens, supra*, footnote 45; *R.* v. *Sprague, supra*, footnote 50; *R.* v. *Luellin, supra*, footnote 62.

[76] *Constantine* v. *Imperial Hotels Ltd., supra*, footnote 66; *Kenny* v. *O'Loughlin, supra*, footnote 56; *Whiting* v. *Mills, supra*, footnote 25. *Cf. Carriss* v. *Buxton, supra*, footnote 43, where Rand J. discusses an innkeeper's liability and opines that he may be sued in either tort or contract, and *Lippert* v. *Ford Hotel Ltd., supra*, footnote 23.

ministrative procedures which, except in the case of Quebec, provide for investigation and attempts at settlement by officials, inquiries by tribunals given wide inquisitorial powers and the presentation of recommendations to Ministers of the Crown, before any civil or criminal sanctions may be brought to bear against the offending party. Even then, any orders, injunctions or criminal prosecutions against that offender under the Acts lie beyond the immediate influence of the aggrieved person and under the exclusive control of the Minister's administrative jurisdiction. This is also true in Quebec where the one remedy of prosecution requires first the Minister's consent.[77] Therefore, in the case of innkeepers, the only remedial coincidence lies within the realm of the criminal process, by way of indictment at common law and summary conviction under the quasi-criminal provisions of the provincial statutes. Canada has abolished common law offences[78] and in so doing, the Dominion government may, substantively, have surrendered this means of redress to the provinces, but, constitutionally, have changed nothing. However, this latter aspect falls beyond the intended ambit of this article.[79]

The orders a Minister may make and the injunctive relief he may apply for under the statutes in nowise impinge upon the action for damages which an individual guest may institute on his own volition. Where the statutory machinery is thrown into motion only by administrative agencies and officials, the common law action, active within the private sphere alone, must be impelled and pursued by the individual claiming injury. Then too, the statutes focus on the behaviour and attitudes of the person found to have infringed their provisions and it is that conduct primarily which the legislative antidotes of investigation, inquiry, threat of prosecution, Ministerial order and injunctive relief are designed to remold and amend; the complainant who sparked the

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[77] Hotels Act, *supra*, footnote 5, s. 15.

[78] Criminal Code, S.C., 1953-54, c. 51, s. 8(a).

[79] Much of England's criminal law remained in force in Canada until the present Code was enacted with the result that though it was introduced into the various jurisdictions at different dates, common law offences, including an innkeeper's refusal to receive a guest, did remain extant here (*Union Colliery Co.* v. *The Queen* (1900), 31 S.C.R. 81, at p. 87). That being so, then the effect of s. 8(2) of the present Code is merely to excise all purely common law offences from any present applicability in Canada (*Lord's Day Alliance* v. *Attorney General of British Columbia*, [1959] S.C.R. 497), but not to alter their characterization as "criminal law" for purposes of s. 91(27) of the British North America Act, 30 & 31 Vict., c. 3, as am. Briefly then, may a province constitutionally apply the criminal aspects of its legislation against an hotelkeeper whose alleged offence is one for which he would have been indictable at common law?

initiation of the statute's procedures apparently is felt to have garnered sufficient satisfaction and amends by seeing the guilty party punished, publicly renouncing his former conduct and undertaking to remedy his past defects and in future follow the Act's precepts.[80] But the embarrassment, humiliation, indignity and distress which the complainant may well have been subjected to in the past remain uncompensated and unredeemed, in striking contrast to the relief offered to one similarly wounded by defamatory language or by certain instances of assault and battery.[81] And the possibility of an action in tort being constructed on a breach of these statutory duties seems, in view of the many remedies expressly set forth in each Act and the unique administrative machinery established to police and enforce its provisions, an uncommonly remote one. On the other hand, the right given guests by the common law to be received and served by innkeepers is enforceable by an action for its breach. This cause of action has been traditionally framed in case,[82] which has led to some speculation that its viability may well rest on a plaintiff's first alleging and proving special damage. However, the courts have not favoured this submission, but, on the basis of *Ashby* v. *White*,[83] have reasoned rather that an infringement of this right imports damage which the law will take cognizance of and therefore special damage need not be proved at this point.[84] Nevertheless, it may well be wondered whether a court will vouchsafe recovery of more than merely nominal damages; Mr. Constantine,

[80] See, for example, the terms of settlement reached in inquiries under the Ontario legislation in *Re Davis and Pleasant View Camp* (October 31st, 1962); *Re Ladd and Mitchell's Bay Sportsman's Camp* (August 15th, 1963); *Re Maurice's Barber Shop* (October 9th, 1963); *Re El Mocambo Dance Club* (August 1st, 1963); *Re Lee Ann Beauty Salon* (May 10th, 1963); under the British Columbia statute in a letter to the writer from the Director, dated February 13th, 1968; under the Alberta enactment in a letter to the writer from the Administrator, dated February 20th, 1968; and under the Saskatchewan statute in a letter to the writer from the Crown Solicitor, dated February 28th, 1968. Nevertheless, none of the foregoing is intended to conceal the very wide discretion in the making of orders and recommendations given by the various statutes, a result recently exemplified in an Ontario case under the housing provisions of its Code where the terms of settlement, in addition to the usual apology, posting of the Code and undertaking as to future conduct, also included reimbursement paid to the complainants by the offenders in respect of expenses incurred in seeking alternative accommodations elsewhere after the latter's unlawful refusal (*Re Squitti* reported in the Toronto Globe and Mail, July 13th, 1968, and the Ottawa Citizen, July 13th, 1968). As for similar results following in the wake of a successful action against an hotel in contract or tort, see *Lippert* v. *Ford Hotel Ltd., supra*, footnote 23.

[81] See *infra*. [82] See *supra*, footnote 76.

[83] (1703), 2 Ld. Raym. 938.

[84] *Constantine* v. *Imperial Hotels Ltd., supra*, footnote 66; *Kenny* v. *O'Loughlin, supra*, footnote 56.

who suffered "much unjustifiable humiliation and distress", was awarded only five guineas and Mr. Kenny given only two pounds for being subjected to the "humiliation and indignity in the presence and hearing of other customers and members of the defendant's staff".[85] And yet, it cannot be gainsaid that these are descriptions of injuries that bear a striking resemblance to the very damage for which far more substantial recompense than this is granted to the plaintiffs in a defamation suit and in certain assault and battery actions.[86] Moreover, some cases may further provide suitably fertile soil for valid awards of punitive damages, now apparently a firmly ensconced head of damages despite the decision of *Rookes* v. *Barnard*.[87] In any event, readily discernible is the stark contrast between the private nature of the common law's remedy of damages which permits a thwarted guest to have his humiliation and injured feelings salved by money compensation, and the application of procedures under the statutes which in focusing most of their attention on the offender may do so often at the expense of the indignity and mental anguish that his victim may have undergone.

In recapitulation, I have endeavoured to measure the purposes and effects of the various examples of human rights legislation enacted by the provinces against the consequences that follow upon the general obligation of innkeepers to receive and offer refreshment to their guests. In the region of remedies, the common law, as it remains applicable in Canada, offers the one of damages attainable by private suit, whereas the statutes employ criminal and administrative measures operative only in the public realm. Although I never wished to enter into a discussion of the relative merits and defects of each approach, in assessing the value of each one cannot ignore either the educational and conciliatory benefits which the latter technique promotes, or the former's attributes, including compensation, that characterize the *raison d'être* of such torts as defamation, assault and battery, which give

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[85] See *Lippert* v. *Ford Hotel Ltd., supra*, footnote 23, where the action had been framed exclusively in contract and where there is some brief mention of damages in tort for being rudely turned away from an hotel, at pp. 346 and 348-350.

[86] *Golnik* v. *Geissinger* (1967), 64 D.L.R. (2d) 754 (B.C.S.C.); *Loudon* v. *Ryder*, [1953] 2 Q.B. 202; *Stewart* v. *Stonehouse*, [1926] 2 D.L.R. 683 (Sask. C.A.).

[87] [1964] A.C. 1129. See *Australian Consolidated Press Ltd.* v. *Uren*, [1967] Argus L.R. 54, aff'd [1967] 3 All E.R. 523 (P.C.); *McElroy* v. *Cowper-Smith*, [1967] S.C.R. 425, per Spence J. dissenting on another point; *Gouzenko* v. *Lefolii*, [1967] 2 O.R. 262, rev'd in part by the Supreme Court of Canada, Oct. 1st, 1968, but not on this point.

damages under heads in some ways very much akin to the ones claimed under this particular cause of action. The advantage of the statutes lies in their more universal applicability, not just to hotels and innkeepers as at common law, but, save in Quebec's case, to all places usually resorted to by the public. However, mitigating against this expansive quality of the statutes are the limited grounds on which a person may file complaints under them and the greater rigidity and narrowness which, in contrast with the common law's tack, attend this legislation.

IV

If, therefore, the statutes entertain a far too limited perspective of what constitute reprehensible reasons for denying service and facilities to the public and the common law apparently confines its far broader grounds and perhaps more efficacious cure of damages to the innkeeper-guest relationship, it certainly must be worthy of attention to inquire into the opportunities offered by the common law for expanding its borders to reach other relationships. Are there other enterprises that are already subject to these common law obligations? Are the inclusion of these callings supported by certain legally acknowledged rationales which may in turn be validly extended to apply to other relationships?

A common carrier, unlike a private carrier,[88] subjected himself to the common law obligation, where this was his business, to receive and carry goods,[89] unless as with innkeepers he had reasonable grounds for not doing so. A similar duty rested on the carrier of persons.[90] Accompanying this stricture was the one which anticipated a likely source of escape and required the rates charged by a common carrier to be reasonable: at common law, though permitted to vary his rates amongst his customers, not only did the law prescribe "that he should not charge any one more than was reasonable",[91] it also entertained an action which, in restoring to a plaintiff the excess of any unreasonable tolls charged, compelled a court to declare what the reasonable and proper toll should have been.[92] As if to emphasize the similarities

[88] *Tri-City Drilling Co. Ltd.* v. *Velie* (1959), 22 D.L.R. (2d) 341, at p. 344, aff'd (1960), 25 D.L.R. (2d) 773 (Alta C.A.).

[89] *Jackson* v. *Rogers* (1683), 2 Show. 327; *Leonard* v. *American Express Co.* (1867), 26 U.C.Q.B. 533, at p. 537.

[90] *Clarke* v. *West Ham Corp.*, [1909] 2 K.B. 858, at pp. 877-878 and 881-882; but *cf. Ludditt* v. *Ginger Coote Airways Ltd.*, [1947] 1 All E.R. 328, at p. 332.

[91] *Great Western Ry. Co.* v. *Sutton* (1869), L.R. 4 H.L. 226, at p. 237, per Blackburn J.

[92] *Greene* v. *The St. John and Maine Ry. Co.* (1882), 22 N.B.R. 252.

in duties that constrained both innkeeper and common carrier to serve the public, subject only to reasonable excuse, this attendant obligation which denies to the carrier the privilege of charging what the market will bear and confines him to a reasonable price applied equally, as we have already noticed, to the innkeeper.[93]

References to other professions also are occasionally to be observed running through the reports. Without having to resort to the *Year Books,* one can discover statements in the later literature that suggest that other trades were subject to this same obligation to serve the public when called upon to do so. In *Jackson* v. *Rogers*,[94] though the facts concerned an innkeeper, Jefferies C.J., found case to be the proper form of action against an hotelkeeper "or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same". Similarly, in Keilwey,[95] one finds the statement that "it was agreed upon by the whole Court, that when a Smith refuses to shoe my horse, or an Innkeeper refuses to give me food in his inn, I will have an Action on the case, notwithstanding that there is no act done, for this does not sound in contract".[96] It may even be that "the trade of a livery stable is sufficiently 'public' ".[97] In some instances too, a ferryman is obligated to carry any member of the public at a reasonable toll.[98]

The *Year Books* do reveal a vaster and more variegated array of professions which the law then subjected to these general obligations, but, as others have shown in far greater detail, their members gradually diminished with England's entry into a happier economic era.[99] But why in the distant past was the law demanding of so many more callings that it required all those professing to practise them to offer their services to the public at a reasonable price? Why did their numbers later contract? What reasons had the courts for retaining this public burden on the part of a few

[93] *Supra*, footnote 46.
[94] *Supra*, footnote 89.
[95] Keilwey 50, pl. 4 (1503), 72 E.R. 208.
[96] See also Fitzherbert, Natura Brevium (9th ed., 1794), Vol. I, p. 94D; *Lane* v. *Cotton* (1702), 12 Mod. 472, at p. 484; *Johnson* v. *Midland Ry. Co.* (1849), 4 Ex. 367, at pp. 372-373.
[97] *Parsons* v. *Gingell* (1847), 4 C.B. 545, at p. 561, per Coltman and Maule JJ.
[98] *Hammerton* v. *Earl of Dysart*, [1916] 1 A.C. 57, per Lord Parker; *Nyali Ltd.* v. *A.G.*, [1955] 1 All E.R. 646, at p. 651.
[99] Wyman, Public Callings and the Trust Problem (1904), 17 Harv. L. Rev. 156, at pp. 156-162; Burdick, The Origin of the Peculiar Duties of Public Service Companies (1911), 11 Col. L. Rev. 514, at pp. 515-524; Arterburn, The Origin and First Test of Public Callings (1927), 75 U. Pa. L. Rev. 411, at pp. 418-428; Adler, Business Jurisprudence (1914), 28 Harv. L. Rev. 135, at pp. 146-152.

occupations and apparently relieving others of it? Given the rationales and bases which supported both the state of the law in the *Year Books* and its metamorphosis to one more consonant with principles of a free market economy, have we entered an epoch in which our own society, again very dissimilar to its antecedents, and its distinctively new conditions are casting forth arguments and demands for having the present position of the law that I have discussed above evolve into a structure with norms more representative of the values of the community?

Without entering upon a discussion of legal and economic history and the critical effects which the Great Plague and the consequent scarcity of manpower must have had on the economy of mediaeval England,[100] I do think the writers in this field agree that *assumpsit*, the foundation of contract law and hence a salient fact indeed in the incorporation of *laissez-faire* into the law, began its significant development only after this time.[101] Earlier it was mentioned that case, not contract, generally has provided the form of attack made by a guest on an innkeeper and the cases have continued to repeat the language of the old writ in their formulation of the basis of an innkeeper's duties, liabilities and rights as being founded "upon the custom of the realm",[102] a phrase "which meant simply the general custom, *i.e.*, the common law".[103] Similarly, the basis for an action against a common carrier is also this general custom of the realm.[104]

As *assumpsit* grew in esteem and popularity, the callings associated with the duty to receive and serve "upon the custom of the realm" shrunk in number. Where formerly a refusal to practise one's profession without reasonable cause might well be in breach of this custom, subsequent developments found the courts requiring a contract or bargain to warrant the institution of a successful action against such a person. So, Keilwey[105] was able to declare that in contrast to the status of the innkeeper and the

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[100] Arterburn, *op. cit., ibid.*, pp. 421-424; Adler, *op. cit., ibid.*, pp. 137-138.

[101] Ames, The History of Assumpsit (1888), 2 Harv. L. Rev. 1; Arterburn, *op. cit., ibid.*, p. 415; Burdick, *op. cit.*, footnote 99, pp. 515-524.

[102] *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 501, at p. 503; *White's Case* (1558), Dyer 158b; *Calye's Case*, *supra*, footnote 55; *Shacklock* v. *Ethorpe Ltd.*, [1939] 3 All E.R. 372, at p. 373, per Lord Macmillan; *Carriss* v. *Buxton*, *supra*, footnote 43, per Rand J. But *cf.* the situation in Scotland: *Rothfield* v. *North British Ry. Co.*, *supra*, footnote 44.

[103] *Carris* v. *Buxton*, *supra*, footnote 43, at p. 446.

[104] *Harrison* v. *Green* (1723), 8 Mod. 178. *Cf.* Pollock, The Law of Torts (15th ed., 1951), pp. 415-416.

[105] *Op. cit.*, footnote 95.

smith, "where a Carpenter makes a contract to build a house and does nothing, the action against him lies not on the case but it sounds in contract". However, any of these professions subject to an action on the case for offending against this custom of the realm, whether they be the greater array of earlier days or the smaller numbers of a more modern age, the courts have invariably described as being "common". Why reference was always made to the "common innkeeper", the "common carrier", the "common surgeon" has given rise to the theory that "common" was merely a synonym for "business" and therefore a linguistic means of distinguishing those in the general business of, and holding themselves out as, practising a specific calling, from those who only casually, intermittently and under special contract performed any of the functions that fell within the compass of that trade or profession.[106] This distinction between one trading publicly and the other acting privately still holds true and thus the courts must still be aware of where to draw the line that divides the common carrier from the private one.[107] Like the carpenter and other tradesmen who no longer find themselves exposed to duties based on the custom of the realm, whether a private carrier must provide services or no will also remain a question of contractual liability. Therefore, in attempting to discover what it is that has led courts to continue to delineate the exclusively contractual obligations of most callings from those which the common law imposes *proprio vigore* on just a few, I must canvass rationales proposed over the years by the courts and then analyze their cogency in the context of the mid-twentieth century.

(a) The common law has tended to abhor "all monopolies, which prohibit any from working in any lawful trade",[108] chiefly because of the fear of the rising prices that would result. On the other hand, in the absence of a monopoly a person might carry on his business in any manner he thought best and, in consequence, he could contract with whomsoever he wished and exact whatever prices he pleased. Why, some courts asked themselves, has the law made exceptions to this general rule and ordered that certain businesses serve all members of the public and charge these customers only a reasonable price? We have already noticed that in their manner of doing business carriers are subordinated to these

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[106] Arterburn, *op. cit.*, footnote 99, pp. 418-428; Adler, *op. cit.*, footnote 99, pp. 152-158.

[107] *Tri-City Drilling Co. Ltd.* v. *Velie, supra*, footnote 88.

[108] *Ipswich Tailors' Case* (1614), 11 Coke 53a, at p. 53b; *A.G. Australia* v. *Adelaide Steamship Co. Ltd.*, [1913] A.C. 781, at pp. 793-797.

common law restrictions,[109] as are innkeepers[110] and ferrymen.[111] Moreover, the courts have extended these obligations to other callings and, thereby, have welded them, for example, to certain wharfingers and warehousemen,[112] owners of locks[113] and public utilities.[114] But if the presence of a monopoly does give rise to the related duties to serve all and to take only a reasonable toll, it does not necessarily follow that a trade has been encumbered with these duties because of its monopolistic position within the economy.

One may comprehend with little difficulty that waterworks, telephone and telegraph systems, ferries and locks might well be the subjects of natural monopolies and that they, like monopolies granted by charter or statute, must needs have imposed on them, as consideration for their privileged position, special obligations to the public who, it is thought, would otherwise be protected by the competition prevailing in a completely unrestricted market. This latter premise might lead one to conclude that the law had good reason for disengaging from these public duties the many callings which, though equally subject to them at one time, found themselves as conditions changed competing freely in the open market. Thus, it could not be truly said of a carpenter practising his trade in a particular geographical area that he necessarily held a monopolistic or oligopolistic position within that region; if he had to compete in the free market, so should those who might be seeking the services of a carpenter. And so, some have sought to vindicate these public duties to serve all and charge reasonable rates on the ground of the alleged monopoly, legal or actual, present in a particular profession and to that end would have a business examined closely to determine whether it has "attained such control of its market as to become of the class of public employments".[115]

But can it be fairly stated, as was done by one Ontario judge, that, unlike an innkeeper or hotelkeeper, "a restaurant-keeper is not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves

[109] *Supra*, footnotes 89-92.
[110] *Doyle* v. *Walker*, *supra*, footnote 48; *Re Karry and Chatham*, *supra*, footnote 53. See *supra*.
[111] *Supra*, footnote 98.
[112] *Allnutt* v. *Inglis* (1810), 12 East 527.
[113] *Simpson* v. *A.G.*, [1901] 2 Ch. 671, rev'd on other grounds, [1904] A.C. 476.
[114] *Attorney General of Canada* v. *Toronto* (1893), 23 S.C.R. 514, at p. 520.
[115] *Wyman, op. cit.*, footnote 99, p. 167.

definite obligations, such as supply accommodation of a certain character, within certain limits, and subject to recognized qualifications, to all who apply"?[116] Briefly, this facile declaration assumes that an innkeeper has been granted, in law or in fact, a monopoly or oligopoly status within the economy. Since carriers have analogous obligations imposed upon them, the imposition of these duties would again take as its premise the grant to common carriers of "a monopoly or quasi-monopoly". But nowhere does Lennox J. explain why an hotel or a carrier possesses any greater monopolistic status than a restaurant, department store or tavern. The latter seems no less liable to municipal and provincial licensing requirements than the former and, in fact, the stringent controls exercised over taverns and ale-houses by provincial licensing tribunals would seem to submit these to as much, if not greater, eligibility for the status of virtual monopolies as that of hotels and common carriers.[117] Moreover, these last-cited callings cannot claim the quality of natural monopolies, nor are exceptional legal or actual limits, not pertaining to other purely "private" callings, placed upon their numbers. Nothing, therefore, seems to support the conclusion that the peculiar public obligations of hotelkeeper and common carrier are grounded upon the concurrent liabilities that they must purchase in consideration for retaining a monopolistic position in an allegedly free-market economy.[118]

As if further to emphasize the irrelevancy of the status of monopoly to the public duties imposed on certain trades, certain judicial statements in cases where this concept might well have been applicable have tended to forswear this as the basis of their judgments. In *Allnutt* v. *Inglis*,[119] although the majority of the court were able to conclude as one of their reasons for judgment that the London Dock Company held a "virtual monopoly" in respect of bonded warehouses for wines, Le Blanc J. gave a wider one for his conclusion. He, like Lord Ellenborough C.J.,[120] referred to Lord Hale's *De Portibus Maris* that in certain instances businesses are "affected with a public interest, and they cease to be iuris privati only"[121] and then followed *Bolt* v. *Stennett*[122] which also applied this statement to the case of a crane on a public quay. In this latter case, Lord Hale's treatise again appeared, but this time analogizing the crane and wharf to a public street. The plea of monopoly had not, as of course, to be resorted to as the basis

[116] *Franklin* v. *Evans, supra*, footnote 31, at p. 350. [117] See *infra*.
[118] Adler, *op. cit.*, footnote 99, pp. 147-152. [119] *Supra*, footnote 112.
[120] *Ibid.*, at pp. 539-540. [121] *Ibid.*, at p. 542.
[122] (1800), 8 T.R. 606.

for conclusions that the warehouseman and the wharfinger must take only reasonable tolls. Again, in *Attorney-General of Canada* v. *City of Toronto*,[123] Sir Henry Strong C.J. found that the City was obliged by law to furnish water to all applicants and to do so at reasonable rates, but his reasons for this holding referred, not to the monopoly retained by the City over the supply of water, but rather to the Municipal Act which, in requiring that water be supplied to all who might apply for it, disclosed an intention that "some fixed and uniform scale of rates" alone was to be exacted and that the respondent was to be "in a sense a trustee of the water-works, not for the body of rate-payers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city".[124] A line of American cases[125] has been forced to consider the constitutionality of the laws of some states, which purported to prescribe maximum rates and licences for specified industries and which were challenged as offending against the power of Congress under the United States Constitution "to regulate commerce"[126] and that part of the Fourteenth Amendment of its Bill of Rights which forbids a state from depriving any person of "property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws". Of concern to us only is the latter, an argument that harkened back to the common law on which this constitutional right to *private* property was allegedly based and that proceeded to be met within the context of Lord Hale's statement which presents a formula for transforming purely private property into property "affected with a public interest".[127]

The valid legislative interferences with what ostensibly appears to be private property was, with respect to this issue, justified on the basis of its having become affected with a public interest and ceased to be *iuris privati* only, but again the question that raised its head asked if this metamorphosis occurred because of the industry's monopolistic position, or for some other reason. The *Munn* decision discussed at length both the English authorities and the applicable analogies of carrier and innkeeper[128] and it then examined its own facts to rule that, on the basis of Chicago's fourteen grain warehouses which though owned by thirty persons were in fact controlled by only nine firms who also agreed upon

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[123] *Supra*, footnote 114. [124] *Ibid.*, at p. 520.
[125] Hamilton, Affectation with Public Interest (1930), 39 Yale L.J. 1089.
[126] Art. I, s. 8.
[127] *Munn* v. *Illinois* (1876), 94 U.S. 113, at pp. 125-126.
[128] *Ibid.*, at pp. 126-130.

and published annually the charges for warehousing, "all the elevating facilities . . . may be a 'virtual' monopoly".[129] And yet, Waite C.J. does not rest his analysis at this point. He proceeds:

> Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office", these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce", and take toll from all who pass[130]

and thus uses language and reasoning that finds no need to rely on the plea of monopoly. Subsequent decisions that followed *Munn* continued to attenuate the value of having a monopoly present. In *Budd* v. *New York*,[131] the Supreme Court approved its earlier opinion[132] and expressly affirmed the judgment of the New York Court of Appeals[133] which, though conceding that a franchise or monopoly did yield an interest to the public,[134] advanced beyond this to examine the status of the common carrier, a calling that was plied in an atmosphere generally untouched by franchise or monopoly. And yet the law had imposed extraordinary obligations upon him.[135] When this same contention was submitted in *Brass* v. *North Dakota*,[136] another case questioning the constitutionality of state legislation that purported to regulate grain storage within the state, and it was argued that in monopoly lay the hallmark of distinction of the *Munn* and *Budd* cases, Shiras J. refused to attach any significance to whether a practical or "virtual" monopoly was or was not present.[137]

I think enough has been written to sustain the conclusion that on whatever ground the obligation of certain businesses to serve the public generally and to charge its members reasonable prices rests, it is not the monopolistic standing occupied by such trades. This position has been underscored by the continual references made herein to the duties of the common carrier and innkeeper, and particularly the latter, callings which today still remain by far the most important obligees of these public duties.[138]

(b) A second rationale which sometimes has been mooted as the basis for the innkeeper's obligation depends on the unique rank

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[129] *Ibid.*, at p. 131.
[130] *Ibid.*, at pp. 131-132.
[131] (1891), 143 U.S. 517.
[132] *Ibid.*, at p. 534.
[133] (1889), 22 N.E. 670 (N.Y.C.A.).
[134] *Ibid.*, at p. 675.
[135] *Ibid.*, at pp. 676-677.
[136] (1894), 153 U.S. 391.
[137] *Ibid.*, at pp. 403-404.
[138] See also Burdick, *op. cit.*, footnote 99; Adler, *op. cit.*, footnote 99; Tobriner and Grodin, The Individual and the Public Service Enterprise in the New Industrial State (1967), 55 Cal. L. Rev. 1247.

always enjoyed by him vis-à-vis the traveller and the safety for whom he was responsible. Such a rationale, if true, may avowedly not fully explain why the common carrier and other callings remain encumbered by these public responsibilities, but it would suggest the tentative assessment that perhaps the obligations of each are explicable only on their own individual grounds which bear little relation to those of the others.

The rights and liabilities of an innkeeper at law are rooted in this, that his guest is a traveller who requires food, shelter and protection while on his journey and the risk of non-payment which the innkeeper would otherwise have to sustain is ameliorated by his lien on the guest's goods.[139] This premise was developed out of the historical necessity of mediaeval England, a land in which bad roads, the ubiquity of thieves along them and poor communications made travel a dangerous pastime indeed. Inns were intended as a haven for the traveller, his horse and belongings against robbery and murder, hunger, thirst and exhaustion and thus it was that an innkeeper undertook the duty "to provide for travellers, and to protect and secure their goods: ". . . the recompense he receives, is for care and pains, and for protection and security".[140] It followed from this that ale-houses and restaurants, which succoured the neighbourhood and turned its patrons out at the very hour when inns were fulfilling their purposes of protecting their guests from the evils of the night, would not have been frequented by the traveller and thus have had any need of the inn's special legal position. Similarly, the lodging-house offered accommodation, not to the traveller, but to the more permanent resident. Therefore, it is understandable, perhaps, why the inn, innkeeper and traveller occupied a unique legal niche in the days of "Merrie England".

However, it offers no explanation of why these persons have retained since then this exceptional status. The law no longer is able to rely on the critical need for protecting the traveller and his goods: present forms of travel and communication and the services and facilities offered to travellers along whichever means they happen to choose utterly destroy this as the basis for imposing this obligation on innkeepers. Moreover, highway thieves, not to

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[139] *Daniel* v. *Hotel Pacific Pty. Ltd.*, *supra*, footnote 25, per Sholl J., dissenting on another point.

[140] *Newton* v. *Trigg* (1691), 1 Show. 268, at p. 269. See generally, Beale, The Law of Innkeepers and Hotels (1906), pp. 1-9; *Holder* v. *Soulby* (1860), 8 C.B.N.S. 254, per Erle C.J.; *Nance* v. *Mayflower Tavern* (1944), 150 P. 2d 773 (S.C. Utah).

mention train and stagecoach robbers, remain phenomena of the past[141] and surely no longer reason for offering any greater protection to the traveller than to others. Besides, as we have already observed, a traveller has become so broadly defined that this personage now reaches out to include the tippler on his way home[142] and the diner merely stopping by for a meal;[143] consequently, there is little distinction left between the "guest" at an inn and the man seeking food or drink whose appetites may—and in fact are—equally served by hotel, tavern or restaurant. How then may a court ingenuously continue to reiterate that an inn bears no resemblance to a restaurant, that as at any ordinary store "one eats, perhaps drinks, in a restaurant, pays for what is served, and goes away".[144] Then too, one cannot but perceive that in response to the conundrum of why a lodging-housekeeper should not be as responsible as an innkeeper for his guest's goods, a court's reply that such a result would promote "mischief"[145] and cast upon him "a frightful amount of liability"[146] smacks of rationalization, if not guile; if, as this case states, lodgers consist of all "classes" of persons and the habits of a keeper vary from place to place, do these pretexts of inconvenience markedly set a lodging-housekeeper's position apart from an innkeeper's? If the protection and security of the traveller is of paramount consideration, a lodging-house could as ably fulfil this function as any hotel. Motels in fact do so and because most of these happen to be situate along highways they, in fact, satisfy the alleged purposes of the innkeeper-guest relationship more happily today than many hotels—and yet, motels have been held not to be "inns".[147] Again, the purported *point d'appui* of refreshment and succour for the traveller rings hollow and insincere when this character then finds his rights protected only so long as he eats and drinks in a proper inn;[148] to deny these claims to this same individual because he happens to seek some restorative nourishment in premises that contain no beds[149] or offer no meals[150] ignores what the courts initially held themselves out as seeking to accomplish.

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[141] But *cf.* the recent spate of pirated airplanes.
[142] *Supra*, footnote 35.
[143] *Orchard* v. *Bush & Co.*, *supra*, footnote 36; *Fraser* v. *McGibbon*, *supra*, footnote 20.
[144] *Nance* v. *Mayflower Tavern*, *supra*, footnote 140. See also *Re Karry and Chatham*, *supra*, footnote 53.
[145] *Holder* v. *Soulby*, *supra*, footnote 140, at p. 265.
[146] *Ibid.*, at p. 268.
[147] *King* v. *Barclay*, *supra*, footnote 26. [148] *Supra*.
[149] *Tinsley* v. *Dudley*, *supra*, footnote 29.
[150] *R.* v. *Zinburg*, *supra*. footnote 30.

Or is all this merely cogent evidence of a rationalization of long duration. If a radically different modern age has rendered the once expounded foundation of the innkeeper's responsibilities hopelessly archaic, a court's willingness to acknowledge the circumstances of a new era will leave it with the following paths to pursue. A court may have regard for this basis only, determine that as this *raison d'être* bears no relation to reality it cannot influence the decision and then treat innkeepers in the *laissez-faire* manner in which it has ministered to publicans and ordinary shopkeepers in the past.[151] On the other hand, a court may find that the law has deservedly clothed innkeepers with this special status, but that its basis for doing so in the past and discussed in this sub-section no longer represent the true one. It is the fruits of this latter one, with all its ramifications, that I wish to harvest.

(c) The innkeeper cases do have this one thread of jurisprudential consensus, that "the carrying on of an inn is a business largely for the benefit of the public";[152] that an innkeeper "is in the nature of a publick person";[153] that innkeepers carry on "their business as public servants";[154] that "innkeepers are a sort of public servants";[155] and that his calling or business is "public" or "quasi public" in nature.[156]

The courts espied this characterization by their remarkable appreciation of the rights conferred and the duties cast upon the innkeeper by the common law. The obligations to receive guests and provide them with shelter and refreshment, to offer his services to these guests at a reasonable price and not to misgovern his inn, and the privilege given him to have a lien on the goods of a non-paying guest, all point to this public or quasi-public nature of his calling.[157] Similarly, a common carrier has been described as the holder of a "public office" and engaged in "public employment", again because of the general obligations and rights to which the common law subjects him.[158] And, of course, these

[151] See, for example, the Comment of R. G. Murray, *op. cit.*, footnote 41; Comment of P.S. James, *op. cit.*, footnote 41; The Motorist and the Innkeeper, *op. cit.*, footnote 41.

[152] *Ex. p. Coulson* (1947), 48 S.R. (N.S.W.) 178, at p. 199.

[153] *Luton* v. *Bigg, supra*, footnote 46, at p. 291.

[154] *Re Karry and Chatham, supra*, footnote 53, at p. 181.

[155] *R.* v. *Ivens, supra*, footnote 45, at p. 217.

[156] *Mowers* v. *Fethers* (1874), 61 N.Y. 34, at p. 37; *De Wolf* v. *Ford* (1908), 86 N.E. 527, at p. 531 (N.Y.C.A.); *Alpaugh* v. *Wolverton* (1946), 36 S. E. 2d 906, at p. 908 (Va. C.A.); *Clemons* v. *Meadows* (1906), 123 Ky. 178, at p. 182. See also Street, The Foundations of Legal Liability (1906), Vol. I, pp. 184-186.

[157] *Luton* v. *Bigg, supra*, footnote 46; *R.* v. *Ivens, supra*, footnote 45.

[158] *McDuffee* v. *The Portland and Rochester Railroad* (1873), 52 N.H. 430, at pp. 447-454, per Doe J.

"public" callings are meant to be contrasted with the "private" ones governed by contract. But then it may be wondered whether the boundary between the two has not been fixed too firmly with too little regard being paid to the manner in which statute law has rudely entrenched itself in the market-place and excised so many of the components of free enterprise, contract and *laissez-faire* from the enterprises and trades allegedly operating in this non-public sphere. A modern illustration of this evolutionary process recently has held the attention of the courts. At common law, trade unions were illegal associations to which the courts refused recognition or legal standing, but the envelopping effects of legislative enactments began to invest these bodies with specific obligations, duties, rights, privileges, and so on. The law thereby acknowledged the personality of these groups to the degree necessary to grant them standing in the courts.[159]

It is this catalyst of statutory responsibilities and privileges that transmuted this association from one considered unlawful and having no legal standing into one of legitimacy and capable of appearing before a court of law, which has the power of transposing professions and callings from the private sphere to the public or quasi-public one. The courts already place the innkeeper and common carrier in this category and because such a person "takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him".[160] Similarly, I believe that other vocations, for some of the same limited purposes for which the carrier and hotelier have been found to be exercising a "public employment", namely, to offer their services indiscriminately and at reasonable prices to the public subject only to reasonable excuse, can now be characterized as quasi-public in nature.

It may be challenged whether such a conclusion does not demand that these callings possess all the common law obligations and rights, such as the privilege of lien, which form some of the

[159] *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; *International Brotherhood of Teamsters* v. *Therien*, [1960] S.C.R. 265; *Nipissing Hotel Ltd.* v. *Hotel & Restaurant Employees and Bartenders International Union et al.*, [1963] 2 O.R. 169; *Contractors Equipment and Supply (1965) Ltd.* v. *Building Material Drivers, etc. Local 914* (1965), 53 W.W.R. (N.S.) 702 (Man. C.A.); *Senkiw* v. *Utility Glove (1961) Ltd.* (1967), 62 D.L.R. (2d) 48 (Man. C.A.).

[160] *Lane* v. *Cotton, supra*, footnote 96, at p. 484, per Lord Holt C.J., dissenting on another point, a statement approved by Parke B., in *Johnson* v. *Midland Ry. Co., supra*, footnote 96, at pp. 372-373.

components of the innkeeper's trade. And yet, however similar the duties of the common carrier and innkeeper may be,[161] they are not perfectly coincident: for example, when delivery must be made and the route to be taken by a common carrier have no analogues in the innkeeper's situation. For, to repeat a phrase from *Lane* v. *Cotton,* any person in a profession branded as quasi-public "is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office" and thus the general obligation "to serve" all is specifically defined and illuminated by the particular calling of which it is part. Then too, does it follow necessarily from the fact that a calling has become public in nature that there always arises a duty to offer its services to the public, or may, in some circumstances, this obligation be one outside the "reach and comprehension of such an office"? However, this "duty to serve the subject" is the one that has been singled out as the very cornerstone of all callings that the common law has denoted as public and the authorities cited above bear out this.[162]

But to return to the vital issue: the imposition of which statutory obligations, privileges and liabilities will render a business or vocation subject to the stamp of "quasi public"? Some insights on this point may be gleaned from cases which themselves have distinguished the private calling from the public one. In *Bowlin* v. *Lyon*,[163] the court held that a skating rink, unlike a hotel, remained private because the plaintiff failed to aver that "it is carried on under a license or privilege granted by the state, or the municipal corporation in which it is conducted, or that it is in any manner regulated or governed by any of the police regulations of the city";[164] in *Clemons* v. *Meadows*,[165] a hotel was referred to as a "quasi public institution" because its keepers "must first obtain a license from the commonwealth allowing them"[166] to be one; and in *Reitman* v. *Mulkey*,[167] the concurring opinion of Douglas J. found urban housing "affected with a public interest in the historical and classical sense"[168] because of "zoning problems" and vast public financing poured into this area of the economy by state and federal governments.[169]

Against this background, certain trades, which courts in the

[161] See *supra.*
[162] For example, *Lane* v. *Cotton, supra,* footnote 96; *Allnutt* v. *Inglis, supra,* footnote 112; Keilwey, *supra,* footnote 95.
[163] (1885), 25 N.W. 766 (Iowa S.C.).
[164] *Ibid.*, at p. 767.
[165] *Supra,* footnote 156.
[166] *Ibid.*, at pp. 182-183.
[167] (1967), 387 U.S. 369.
[168] *Ibid.*, at p. 386.
[169] *Ibid.*, at p. 385.

past have held capable of refusing, without reason, service to members of the public,[170] ought to be as inherently public as that of innkeeper and thereby be as liable as he to serve the public "within the reach and comprehension" of their offices. Determinative of these callings will be factors, both *de facto* and *de iure*, that underscore that role and status in society consistent only with marked de-emphases of their once private nature and its concomitant, the freely negotiated contract.[171] We have already examined some factors sufficient of themselves to bridge the chasm and translate the private calling into a public one: the legal monopoly,[172] the natural monopoly and public utility,[173] and the "virtual" monopoly or oligopoly.[174] Some courts have suggested that a business licensed by the state or the municipality assumes thereby a quasi-public role;[175] such an enterprise, though not a monopoly or oligopoly as defined by the degree of competition that exists in its industry, still cannot operate within the law until it receives this governmental sanction or mandate. To fail to obtain a permit subjects it to the criminal process. Moreover, the supremacy of these public regulations over the private aspects of an enterprise becomes readily apparent when it is realized that a trader who fails to obtain his licence risks his contracts being declared illegal and unenforceable.[176] The purpose of requiring licences of specified callings is a public one, dictated by the desire of various levels of government to protect members of the community against the unskilled, the unclean, the dishonest. As was said of the common carrier, this characterization "was made because public policy was deemed to require that it should be under public regulation".[177]

More specifically, certain commercial enterprises possess the dual quality both of being more dependent upon and open to the general public and of finding themselves very much circumscribed

[170] For example, motels (*King* v. *Barclay, supra*, footnote 26), taverns (*Christie* v. *York Corp., supra*, footnote 1, and *Rogers* v. *Clarence Hotel, supra*, footnote 1) and restaurants (*Franklin* v. *Evans, supra*, footnote 31).

[171] Tobriner and Grodin, *op. cit.*, footnote 138, pp. 1253-1254.

[172] *Simpson* v. *A.G.*, [1904] A.C. 476, at p. 490; *A.G. Australia* v. *Adelaide Steamship Co. Ltd., supra*, footnote 108.

[173] *A.G. Canada* v. *Toronto, supra*, footnote 114, at pp. 519-520 and 526-527; *Inter-Ocean Publishing Co.* v. *Associated Press* (1900), 56 N.E. 822, at pp. 824-826 (Ill. S.C.).

[174] *Allnutt* v. *Inglis, supra*, footnote 112; *Munn* v. *Illinois, supra*, footnote 127.

[175] *Bowlin* v. *Lyon, supra*, footnote 163; *The Civil Rights Cases* (1883), 109 U.S. 3, at p. 43, per Harlan J. dissenting; *Christie* v. *York Corp., supra*, footnote 1, at pp. 150-153 per Davis J. dissenting.

[176] *Kocotis* v. *D'Angelo*, [1958] O.R. 104.

[177] *New York* v. *Budd, supra*, footnote 133.

by governmental regulation. Taverns, for example, are fiercely controlled, not only by licensing legislation, but by enactments that dictate, often in minute detail, the very manner in which the licensed premises must do business.[178] Who they may and shall not serve, the manner in which they must accommodate and serve their patrons, their hours, what they are permitted to sell on the premises are examples that afford some indication of the controls exercised over this calling on the alleged grounds of "public interest". To these burdens may be added the onerous licensing requirements which also inhibit the number of establishments within a province, a situation well removed from the economically free market and one perhaps more closely resembling the "virtual" oligopoly of *Munn* v. *Illinois*.[179] Restaurants too are heavily licensed: not only will they generally have to purchase one as a purveyor of foods for consumption on the premises,[180] but additional licences may be required before they are permitted to sell tobacco products[181] or alcoholic beverages.[182] Other legislation[183] further confines their methods of doing business, including the food they serve, the sanitary facilities they contain and their general hygienic condition. Similarly, theatres are subject both to municipal licensing[184] and to additional legislation which blankets this industry with controls far beyond the incidents of a mere licence. One need only examine, as an example, the Theatres Act[185] of Ontario in order to discover that its public regulations limit the manner in which theatres may screen films, construct their premises and advertise, and also restrict their hours. Other retail trades and professions may be more[186] or less regulated than these, but generally all find themselves publicly recognized and controlled by licensing legislation, by safety and health requirements,[187] by restrictions on their hours and days of carrying on

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[178] *E.g.*, Liquor Control Act, R.S.O., 1960, c. 217; Liquor Licence Act, R.S.O., 1960, c. 218.

[179] *Supra*, footnote 129.

[180] *E.g.*, Municipal Act, R.S.O., 1960, c. 240, s. 399(1), pgh 5.

[181] *Ibid.*, s. 400, pgh 2.

[182] *E.g.*, Liquor Licence Act, *supra*, footnote 178.

[183] *E.g.*, Industrial Safety Act, S.O., 1964, c. 45; Game and Fish Act, R.S.O., 1960, c. 158; Oleomargarine Act, R.S.O., 1960, c. 268.

[184] *E.g.*, Municipal Act, *supra*, footnote 180, s. 401, pgh 6.

[185] R.S.O., 1960, c. 396.

[186] *E.g.*, Pharmacy Act, R.S.O., 1960, c. 295; Used Car Dealers Act, S.O., 1964, c. 121.

[187] Contravention of these usually leads to prosecution, but unlike the grave consequences following upon the failure of the trade itself to obtain a licence (*Kocotis* v. *D'Angelo, supra*, footnote 176), the illegality here generally will have no effect at all on that trade's contracts (*One Hundred Simcoe St. Ltd.* v. *Frank Burger Contractors Ltd.*, [1968] 1 O.R. 452;

business, by labour legislation, and so on. By such legislation public authorities have, as they accomplished in the case of trade unions, altered the character of various callings: the imposition of duties and liabilities and the bestowal of benefits on these enterprises reflect their distinctively public role and flavour.

Superadded to this deeply etched public quality is the very nature and *raison d'être* of these retail trades, namely, to profit from those very people, the public at large, to whom they hold themselves out as serving. One is therefore led to inquire, as Mr. Justice O'Halloran did a few years ago,[188] if innkeepers and common carriers are considered public callings, why also are not other tradesmen who equally profess to be "holding themselves out" to the public and who are as constrained, if not more so, by the law in respect of the manner in which they must pursue their vocations.

V

What all of the foregoing wished to accomplish was to challenge the wisdom and validity of the quotation that heralded in this article. That a business can simply arrogate to itself and to its premises the immunity which reputedly shelters the private individual in his home and permits him the security of his metaphorical "castle" is belied by the recognition already given by common law and statute to the businessman's more vulnerable position vis-à-vis potential patrons: they are invitees, not trespassers.[189] And the intrusion of the law upon the sanctity of a trader's business and the property where he carries it on has passed far beyond this and other instances of the availability of nominate torts to the physically injured visitor. We have already observed how the presence of innkeeper's liability, human rights legislation, licensing requirements and other prohibitory and regulatory enactments closely constrict the manner in which so many persons must run their businesses. These controls were born out of concern for the public and they continue to live and grow for the benefit of this very segment of society which these trades hold themselves out as serving. It is the confluence of these two qualities, on the one hand, the conduct and demeanour of certain callings which emphasize their own focus and dependence on the public, and, on the

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Maschinenfabrik Seydelmann K-G. v. *Presswood Bros. Ltd.*, [1966] 1 O.R. 316).

[188] *Rogers* v. *Clarence Hotel, supra*, footnote 1, at pp. 594-600.

[189] *Chaytor* v. *London, New York & Paris Association* (1961), 30 D.L.R. (2d) 527, at p. 534 (Nfld S.C.).

other, the recognition by courts and legislation of the pervasive interest and concern that the public has in them, which reflects the quasi-public status now appropriated to these callings. And it is this status under which they assume public responsibilities that demands of them fair and equal treatment of every prospective patron, of every member of the public.