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The Rise of the *lex mercatoria* and Its Absorption by the Common Law of England

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of counsel," it is well to give the nine subjects presented by the "brief," to-wit

I. The reasons for the enactment of the Valuation Act of March 1, 1913. (p. p. 7-32.)

II. Cost of reproduction new (p. p 33-122.)

III. The determination of unit prices. (p. p. 123-142.)

IV. Appreciation and depreciation. (p. p. 143-270.)

V. Land. (p. p. 271-396.)

VI. The meaning of the phrase "owned or used for the purpose of a common carrier." (p. p. 397-420.)

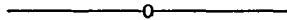
VII. The act requires a valuation of all the property owned or used by each carrier, including therein property the cost of which was charged to expenses or surplus. (p. p. 421-478.)

VIII. The other values and elements of value. (p. p. 479-532.)

IX. The form of the valuation report. (Note What details should be reported to Congress?) (p. p. 533-544.)

The nine subjects covered the questions to which answers from the carriers were called for by Director Prouty

What has been written here is no more than an introduction to this subject. Already the authoritative utterances comprise a large bibliography, and a growing one. And it must be that the subject is one that will demand treatment in the lecture rooms of our law schools, and by the best thought of most learned counsel.



THE RISE OF THE LEX MERCATORIA AND ITS ABSORPTION BY THE COMMON LAW OF ENGLAND.

By President Henry S. Barker.

It is not the purpose of this article to give a minute exposition of the law merchant, but rather to sketch how it arose during the latter period of the middle ages, developed into a world system and was then absorbed into the common law. The main purpose is to show the facility with which the common law adopted a totally foreign system that had originated and developed by its side but was not of it; how the amalgamation was so complete that the legal

profession scarcely realizes that the two were ever separate systems. It is hardly necessary to say that, at this date, nothing new can be written on the subject, or that one who labors here is but a gleaner in a thoroughly harvested field.

During the latter part of the fifth century that mighty Empire which the genius and valor of Rome had established on the banks of the Tiber fell under the repeated blows of her barbarian enemies. In her fall, she carried down with her and seemingly hurled, forever, all that western Europe knew of law and order or of learning and culture. To the superficial view, civilization was dead and hope only gave back an echo to the call of despair. The barbarians settled in vast swarms in all those fair provinces which had constituted Rome's wealth and glory, and there descended over Europe that sombre pall which history calls the dark or medieval ages. But the eye of the more acute observer soon detects under the debris of a ruined empire two immortal principles, the Christian religion and the social instinct of man, whose divine ferment soon began to exhibit in the lives of the barbarian conquerors evidence of that immortal vigor, which was to build on the ruins of the old empire a more splendid civilization than that it superseded.

The new religion, whose promises of a future life, robbed the grave of its terror, was embraced with ardor by those savage warriors whose constant warfare kept them ever in the shadow of death, and it was not long before the Bishop of Rome ascended the throne and exercised more than the power of the emperors whose scepter had passed away. The new church, in whose splendid organization both the conquerors and the conquered found the nexus of a universal brotherhood and in whose promises faith caught the vision of a resurrected hope, received and deserved the love of all her children.

It is of this period of her career that Macaulay wrote "The church has many times been compared by divines to the Ark of which we read in the book of Genesis, but never has the resemblance been more perfect than during the evil times when she alone rode, amidst darkness and tempest, on the deluge, beneath which all the great works of ancient power and wisdom lay entombed, bearing

within her that feeble germ from which a second and more glorious civilization was to spring."

Following hard upon the footsteps of Christianity were those of commerce. Man is essentially a social animal. He cannot rise to his highest in isolation. We have Divine authority for the statement that it is not well for him to be alone, and this statement of the philosophy of life is not confined to the matings of matrimony. It is not good for man to be out of touch with man, he needs intercourse and communion with his brethren everywhere. Civilization began first and advanced fastest where the natural conditions were most favorable to the intermingling of man with man, and for the exchange of the surplus commodities of one tribe for the surplus commodities of other tribes, hence, we find culture, wealth and power developing earliest and flourishing most along the shores of the Mediterranean, whose tideless waves and short voyages were best suited to the needs of primitive navigation. As a rule, the star of civilization follows the waterways best adapted to developing the growing commerce of the world.

The earliest and most serious menace to commerce were the feudal system and piracy. After the fall of Rome, Charlemagne had indeed by his genius, courage and statesmanship organized a Teutonic empire, which almost rivaled in historic splendor that which his ancestors destroyed, but when he died, he left no descendant worthy or able to wield his scepter and he deserved the eulogy of Hallam, that "He stands like a beacon on a waste or a rock in the broad ocean. His scepter was the bow of Ulysses, which could not be drawn by any weaker hand."

After the death of the great Frank, his empire crumbled into fragments and "chaos had come again." As a remedy for the almost universal lawlessness which prevailed, there was gradually introduced all over western Europe what is called the feudal system, under which land was allotted by the king or ruler to the greater nobles or warriors on condition that the grantees should render some designated service or services—generally military—to the grantors, these grantees in turn granted a part of their holdings to lesser nobles or warriors on the same conditions as those upon which they received it. Out of this comparatively simple arrange-

ment, the ingenious lawyers of the middle ages developed the most intricate and subtle system ever devised by human ingenuity. The feudal law is supposed, by some, to have been modeled from a somewhat similar system called Emphyteusis by which large tracts of vacant land lying between Rome and the barbarians, were settled by soldiers who had been discharged from the service of the Empire on condition that they would render certain military service in case of need, but, as a matter of fact, it grew out of the needs of the times, and was as old as the necessity for military government. We now know that a land system, in all essentials the same as that of the middle ages, prevailed in Egypt thousands of years before the Christian era. The feudal law was, in essence and in practice, opposed to commerce, and the merchant class arose to wealth and power in spite of the feudal lords. The spirit of trade did more to undermine and finally to overthrow the feudal system than perhaps any other one influence. The great feudal lords built their castles on the hilltops and in mountain fastnesses, from which points of vantage they, with their armed retainers, made war on each other and on everybody else from whom there was a hope to obtain anything of value. They levied a tariff or toll on every merchant or trader bold enough to take a commercial journey and unfortunate enough to come within their "sphere of influence." Finally, however, under the inspiration of manufacture and commerce, cities began to grow which either purchased or won, by force, from their feudal overlords charters which protected them in their municipal rights to carry on trade and manufactures without molestation from their warlike masters. Thus there sprung up and finally flourished that great middle or burgher class which fostered commerce and trade and laid the foundation for a government and civilization based on the arts of peace rather than the arts of war.

Piracy flourished on every sea from the Mediterranean to the Arctic Circle. The fierce Northmen, under their raven flags, roamed the seas in their swift warboats and captured every sail which they could overhaul. Perhaps nothing will so aptly portray the dread in which the people generally held these pirates as the favorite prayer which survived in their litanies long after the cause for it

had passed away, "From the fury of the Northmen, oh, Lord, deliver us."

The inhabitants along the Baltic coast regarded wrecking as a legitimate business and called the property from the wrecked vessels, cast by the waves on the shore, "strandgut" (property of the shore), and deemed it a gift from heaven. In their prayers, they naively petitioned God to grant them a rich harvest of "strandgut."

But in spite of feudal barons, pirates and wreckers, such was the enterprise of the early traders that they grew and flourished until every sea was whitened by their sails and every port was enriched by their wares and traffic. They, by far reaching and statesmanlike combinations, established great trading leagues and supported fleets of warships and armies. These leagues made war on kings and dictated terms of peace, they swept the sea of pirates and awed feudal barons into terms consistent with the safety of both trade and traders. The greatest of these trading companies was the Hanseatic League, composed of the large German cities along the Baltic shore. This league early established trade relations with England and maintained a great depot in London called the "Steelyard," probably from the large public balances which were at or near the place. These Baltic traders were held in high esteem by our English ancestors, who, in their quaint language, called them the "Easterlings" (men from the East), which was finally abbreviated into the "Sterlings," and the goods of the league were known as the goods of the "Sterlings" and their money as the money of the "Sterlings." Such was the English esteem of the money and wares of these ancient traders that the pound sterling remains the English measure of value and "sterling silver" is the hall mark which indicates the purity of all standard silverware sold by English and American merchants.

The kings of England recognized the value of foreign trade, and we find in the year 978, Ethelred, the Unready, enacting a law providing that "The people of the Emperor have been judged worthy of the good laws like to ourselves." "The people of the Emperor" being the German merchants who had long before established trade relations with the people of England, and in the

beginning of the tenth century, Athelstane passed a law for the encouragement of commerce, providing that any merchant making three long sea voyages on his own account should be admitted into the rank of a Thane or gentleman. Richard I. introduced the judgments of Oleron into England for the benefit of commerce, and in 1215 we find the Barons forcing into Magna Charta the following provisions for the benefit and protection of the merchant class "All merchants shall have safe and secure exist from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls." * * * These examples show the early appreciation of the interests of the merchants by those in authority in England.

In order that commerce should grow, it was essential that there should be established some general principles of law regulating it by which merchants everywhere should be protected in their substantial rights, and which should afford not only ample but speedy justice. The very nature of the case required that this law should be international in its character and applicable to all merchants alike. In this, it must resemble the "Jus gentium" of the Romans. What man urgently needs, he creates or invents if it is not furnished him in some easier manner. The merchants or traders of the middle ages created the law merchant (*Lex Mercatoria*). These laws were of necessity gradually developed. Very early in the growth of commerce, it was confined to large periodical fairs or markets, which being established were patronized by merchants from every point of the compass. These fairs frequently had features or points of difference from others, for instance, the great fair held annually in the city of Troyes, France, had a system of weights peculiar to itself. This system still exists and is carried in our school arithmetics as "Troy weight." There were other peculiarities of these fairs or markets, in England, if one bought merchandise or live stock in the open market or "Market Overt," as it was called, and was free from bad faith, he obtained a valid title against the real owner, although the property might have been stolen. Again, any merchant standing by when a sale was made, say of an ox or other beast, had the legal right to participate

in the purchase price by offering to pay a part of the purchase price, and this right of participation was enforceable in the courts having jurisdiction of the law merchant. But it must not be forgotten that it was limited to merchants and was not open to other classes or guilds.

In the course of the development of commerce, certain towns were either by custom or statute designated as market towns and received many privileges not enjoyed by others. Among these were the Cinque Ports and the staple towns or markets. The Cinque Ports were five towns on the southern coast of England, having to do with furnishing the English fleet with provisions. Their number was subsequently increased, but it would be more tedious than useful to enter further into their rights and privileges here.

The staple towns, or Markets of the Staple, were markets established by the Statute Staple (27, Edward III) and perhaps subsequent statutes, not only for the encouragement of trade, but for the more efficient collection of the Royal revenues. Only in these staple markets could the principal articles of exports be sold. These were wool, leather, lead, woolfels and such like substantial articles, which were soon known as the staples of England. In these staple towns were created or established courts of jurisdiction to enforce the law merchant only, and which, therefore, had nothing to do with the common law, nor had the common law courts jurisdiction of the law merchant in staple towns.

The effect the inspection had on commodities under the provisions of the staple statute was to highly improve those things manufactured from them, this is well illustrated by an excerpt from an old book on the subject published in the latter part of the sixteenth century. In a dialogue between a city clothier and a country clothier on the subject of the deterioration of English cloth, the country clothier in the quaint vernacular of the times, said. "In times paste, we had clothes made that would contynue a man's lyfe, where now yf yt be worne two or three yeares yt is so thryd bare as a lowse can have no coverte." We of the twentieth century would be very glad if the clothes we buy now would

measure up to the condemned standard of excellence contained in the above confabulation of the two ancient cronies.

Among the courts in which the law merchant was enforced were those of the fairs or the Piepoudre courts. There is some contrariety of opinion as to the origin of the name, although there is no doubt that piepoudre means something like "dusty feet." Coke said that they were so called because the justice administered therein was as swift as the dust falls from the feet, whereas, Blackstone derives it from a Norman French word meaning pedlar; but as pedlars by reason of much walking in the dusty roads, generally had dusty feet, the two definitions may not be so far apart after all. This, however, is a very immaterial question; the main and important point is that swift and efficient justice was dealt out to the merchant under a system of law with which he was familiar. The merchant was a traveler; in order that he could make a livelihood it was necessary that he should be able to go from place to place as his business demanded. It would have been ruinous if these itinerent merchants should have been detained for weeks and months waiting for the slow-footed justice of the common law and its courts of justice. To so require would have been practically a denial of justice, for the merchant could as a rule better afford to sacrifice the case than to await the decision. The statute staple recognized the need for speedy justice to the foreign merchant in the provision that ordained it was to be done to him from day to day and from hour to hour according to the law merchant and not according to the common law. The law merchant was a system of substantive law different from the common law, enforced by organized courts differing from the common law courts.

One of the remedies of the law merchant was that of stoppage in transitu, whereby in cases of bad faith in the purchase, the goods could be stopped in transit and reclaimed by the seller. This remedy was supposed at one time to have been an equitable remedy, but we now know that it was the gift of the *lex mercatoria*.

Another of the differences between the law merchant and that of England, was that in partnership there was no survivorship, if one of the partners died, the share of the dead man went to his personal representatives, whereas, when one of the joint owners of

personalty died, by the rules of the common law, the whole went to the surviving owner.

The ancient law merchant grew and developed with the maritime law and was a part of it, as must, of necessity, have been the case, since international trade or commerce was carried on by ocean ships. There were several codes of these sea laws, some of them being modeled on others, and, while differing in some minor particulars, in the main, adhering to the great and substantial principles which made an international system of mercantile law possible. Perhaps the oldest of these codes was that of the *Consolata del Mare*, the date of which is not known, but it was a code of rules compiled by the merchants of the Italian cities, such as Venice, Pisa, Genoa and others in conjunction with certain Spanish and French cities, such as Barcelona, Marseilles, &c. These laws were the foundation of much of the *lex mercatoria*.

The judgment of Oleron was a very early system of maritime law, said to have been compiled by Eleanor, Duchess of Guenne, mother of Richard Coeur de Lion, of England. This code is supposed to have been introduced into England during the reign of Richard.

The laws of Wisby was a third book of maritime or merchant law, it was compiled in Wisby, a city of Gotland, Sweden, and was the law governing the merchants of the Hanseatic League. None of these laws were created by statute but rested on their merits as a fair and correct exposition of those customs which the merchants of the world had by long experience and usage proved to be best adapted to their needs and circumstances. The maritime and the law merchant, as said above, grew and developed together as practically one system and both were enforced in the admiralty courts until Lord Coke and his fellow common law judges made war on the jurisdiction of the courts of the admiralty and succeeded in very much abridging it. The law merchant was still enforced in the staple courts and the Piepoudre courts, although Coke and his fellow common law judges took jurisdiction of it as a system of customs which had to be proved as facts like any other foreign laws. When Lord Mansfield was appointed Chief Justice in 1756, he took jurisdiction of it as a part of the common law of England

and from that time on it has been enforced in the common law courts as a part of the law of the land.

Mansfield was a very great judge, he saw and appreciated the value of these mercantile rules, which experience had tried and found good, and he was big enough, strong enough and wise enough to adopt them as a most valuable addition to the common law. It is said that he made the personal acquaintance of many of the merchants of London and learned the law merchant from them, that he trained up a set of jurors from among their number for the purpose of using them in the trial of cases involving the law merchant in his court.

The development of the law merchant is divided into three periods by the writers on the subject, first, that period from the beginning of commerce to the time of Chief Justice Holt—during which it was enforced only in the special courts I have above described, second, Chief Justice Holt took jurisdiction of it and he and the other common law judges enforced it as a system of customs to be proved as any other facts, third, after the appointment of Lord Mansfield as Chief Justice, it was enforced as a part of the common law of England.

The adoption of the law merchant into the common law was no mere accident, it was the result of the Anglo-Saxon habit of adding whatever is found to be good to whatever it will make better, without tearing down the old. The Englishman seldom tears down an old house to build a new one, he simply adds the new structure to the old and uses so much of the whole as he desires. As in his architecture, so in his law, when he desired to round out his system of judicature by the addition of equity, he joined the equitable jurisdiction of the chancery court to his general system of jurisprudence. When he felt the need of the law merchant and found it built to his hand, he added it to his common law and thus perfected the old without revolution and almost without notice on the part of the public of what had been done. When King John violated the rights of Englishmen, the barons met him at Runnymede, forced him to sign the Magna Charta and then contemptuously left him on the throne. When James I., in fright, abdicated the throne of England, parliament placed his daughter and her hus-

band on the vacant throne, required of them to subscribe to the Bill of Rights and thus exorcised forever the fetish of the Divine right of kings to rule from the constitution of England. By this racial trait of construction instead of destruction, the Anglo-Saxon has drawn that luminous line across the history of England that marks the pathway of her legal growth from the absolutism of the Plantagenets and the Tudors to the constitutional government of the Houses of Orange and Hanover, and from the wager of battle and trial by fire and water to that splendid system of jurisprudence that safeguards the life, the liberty and the property of every Englishman.

He who would understand the history of a nation must ever bear in mind that its present is the result of all its past. Our ancestors bequeathed to us not only their physical beauty or deformity, but their mental and moral vices or virtues as well. Rome has been in her grave for nearly fifteen hundred years, yet she rules the civilized world, today, through her corpus juris. The ancient merchants whose courage, enterprise and public spirit built up the *Lex Mercatoria* have long since passed to that "Bourne from whence no traveler hath returned," but they crystallized their good name in that splendid word "sterling" and set it sparkling, like a gem, in the coronet of our language, they endowed mankind with a system of mercantile law richer than all their freighted argosies and more enduring than their jewels or gold. They indeed have perished from the earth but their good name and their good deeds are immortal, they can never die.

COMPARATIVE SCHOOL LAW

Edited by Prof. George M. Baker, Department of Education,
University of Kentucky

The purpose of this series of papers is emphatically not to find fault nor to focus on the weak points in the school law of this or any other State. On the contrary, it is to call attention to the advisedly superior points in the school laws of several of the leading states