

Washington University Law Review

Volume 2 | Issue 3

January 1917

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Recommended Citation

The Law Merchant as a Distinct Body of Law, 2 ST. LOUIS L. REV. 190 (1917).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol2/iss3/7

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THE LAW MERCHANT AS A DISTINCT BODY OF LAW

There has been considerable discussion during recent years among the students of jurisprudence of the country concerning uniformity of law, particularly of commercial law. They have sought to establish this uniformity not only by legislation but through more uniform interpretation on the part of lawyers and judges. Without pausing here to review what has been accomplished by organizations for this purpose, I wish to call attention to some of the difficulties which they have encountered. We live in a great commercial country composed of fifty jurisdictions, through which commerce flows uninterrupted by state lines, custom barriers, and local prejudices, save insofar as business may be hampered or intimidated by the lack of uniformity in the body of law now known as commercial law.

There is some significance in the history of the origin of the law embraced in the law merchant in its bearing upon the present situation. The law merchant or the *lex mercatoria* was a system of laws governing merchants and mercantile transactions, which were in force during the latter half of the Medieval Period of history, not only in England but also in all the countries of western continental Europe. The principal subjects covered were insurance, bottomry, charter parties, sailors' wages and factors and agents. This law was administered in special courts, which were in the main conducted by the merchants themselves. The effect of this was to harmonize the *lex mercatoria* in the different countries. The merchant traders traveling from fair to fair might form part of a court at St. Ives today and in a few weeks they might be found in one of the European marts forming a part of one of the market courts there. It would be preposterous to imagine that courts so constituted should enforce one principle at Bristol and another at Ypres. The same questions were constantly arising and they were doubtless decided in the same way in all places, whether at Lyons, Antwerp, Winchester or St. Ives, to which places the merchants flocked from afar in the season of the fairs. There were impressed upon the commercial rules growing out of the custom of merchants certain international characteristics. These rules bore a peculiar relation to the respective systems of law existing in the several countries in which the law merchant, by virtue of the customs of merchants prevailed. During the middle ages, these

merchants engaged in international commerce, being much more enlightened than most of their countrymen and better capable of governing their own trade, were naturally unwilling to leave the determination of their rights with respect to such trade to the crude forms of law and rude courts that administered the local laws of continental Europe. These informal tribunals were nothing more than committees of arbitration, and it was not until the courts of the various countries had arisen to a higher level of education that these informal mercantile courts were superseded by them.

The law merchant is said to be a part of international law, but it is international only in the sense that the principles applicable are those that are recognized in all civilized nations. That is the law merchant is a portion of the *jus gentium*, but not of the *jus inter gentes*.

I have not attempted in the above remarks to make a complete statement of the development of the law merchant, but to set forth a few facts which tend to show its development as a body of law separate and distinct from other systems.

We sometimes hear or read of the absorption of the law merchant by the common law. No one should be misled by such statements into believing that the law merchant, after the so-called absorption by the common law, lost its identity as a distinct system of law. More specifically, the term absorption has meant the taking over the whole body of law and administering it in the common law courts. Thus we may trace the history of this taking over by the common law courts by dividing it into three stages, the first prior to the time of Coke, when it was a special kind of law administered in a special court for a special class of the community, the merchants. The second stage was one of transition, the law merchant being administered in the common law courts, but as a body of customs to be proved as a fact in each individual case of doubt. The third stage, as continued to the present day, dates from the presidency of the King's Bench by Lord Mansfield, under whom it is said to have been moulded into the mercantile law of today.

It seems there has been a failure on the part of some of our jurists to fully appreciate the fact that the law merchant is a separate and distinct body of law as truly as is equity, common law and admiralty. This failure to so regard it has led to no inconsiderable amount of confusion, and is one of the chief obstacles in the way of

securing uniform commercial laws in this country. For instance, many of our states have adopted the Uniform Negotiable Instruments Law, but as long as the courts of each jurisdiction place their own interpretation upon them according to common law principles and others interpret them in the light of the law merchant, any effort to secure uniform laws might as well be abandoned; for what use are uniform laws if they are not to be uniformly construed in the courts of the land? I know of no better illustration of the confusion of these two systems of law than that given in a report to the American Bar Association on The Uniformity of Judicial Decisions, in which they said concerning decisions under the Uniform Negotiable Instruments Law, "that many of the counsel and many of the judges in their opinions are more imbued with the spirit of the common law than with the spirit of the 'Law Merchants.'" The word "surety" is not to be found even once in the uniform statute under consideration, yet counsel, in their briefs and arguments, as well as judges in their opinions, speak constantly of certain parties to the cases as being sureties. It is a common law term, unknown to the "Law Merchant." This carrying over into the field of the "Law Merchant" the use of the terms of the common law shows that the lawyers and judges have not learned to think in the terms of the "Law Merchant" when dealing with questions under the "Law Merchant," but think, and therefore, reason as if they were still dealing with questions under the common law. It is this obliteration or ignoring of the distinction between two different systems that leads the judges in many cases to speak of the "common law of negotiable instruments," meaning the "Law Merchant." We do not speak of the common law of equity, nor of the common law of admiralty. The "Law Merchant," like equity, is not a part of the common law; it is a separate system of law. As Bigelow says in "The Law of Bills, Notes and Cheques," page 5: "The mischief lies in the mistaken notion implied, that the 'Law Merchant' is a sort of poor relation of the common law, or rather that it is a dependent of the common law, subject to it wherever its own language is not plain. Such instances, in other words, overlook the fact that the 'Law Merchant' is an independent parallel system of law, like equity or admiralty. The 'Law Merchant' is not even a modification of the common law; it occupies a field over which the common law does not and never did extend."

"While generally speaking, our federal courts regard the laws of

the several states and their construction by the state courts, this is not necessarily true in case of questions of general commercial law. Here is recognition by the federal courts, including the Supreme Court of the United States, that the law of negotiable instruments is not a part of the common law of the states.

“Before legislatures enacted statutes and the courts decided cases which became a part of the written law, the necessities of business and the usages of trade produced a system controlling absolutely commercial intercourse.—Eaton & Gilbert on Commercial Paper, 52.”

“Only mischief can arise or has arisen from undertaking to superimpose common law rules and reasoning upon the law of negotiable instruments, instead of following the rules established by the custom of merchants.”

C. R. T.