THE HISTORY OF THE LAW MERCHANT AND NEGOTIABILITY

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BY

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PREFACE.

IN the following pages I have endeavoured to produce a short but continuous story of the rise and growth of the Law Merchant. The first five chapters are, for the most part, taken up with tracing the development of this law, and with a consideration of the courts by which its administration has from time to time been undertaken; while chapters VI. and VII. deal shortly with the question of negotiability,—a doctrine which is perhaps the most important outcome of the efforts of the merchants, continued through centuries, towards a general acknowledgment of their customs.

My indebtedness to the various learned authorities whose writings I have consulted, is but inadequately expressed by the references which appear throughout the work.

P. W. T.

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The Law Merchant.

CHAPTER I.

The Early Basis of the Law Merchant.

Although the actual origin of the Law Merchant is enveloped in obscurity, this much may be said with certainty, it existed in its early stages as a body of varying customs obtaining among a certain class of the population—the class of merchants. As the number of the merchants increased, so the existence of these customs became more pronounced, with the result that they gradually became of sufficient importance to be generally recognised by the king's court, and finally to be included in the general law of the land.

A notable peculiarity of the Law Merchant in its earlier stages was its international character combined with its administration as purely local custom, at the same time it partook of the nature of the widest and of almost the narrowest system of law.

According to Blackstone, the English common law consisted of general customs, particular customs, and customs recognised by special jurisdictions—such as that of the Admiralty courts. In the earlier stages of our legal history particular customs, where they occurred, formed a kind of local common law, which was recognised, determined, and administered by purely local courts, but it is a historical fact that the king's courts gradually extended their own jurisdiction by encroaching upon that of the local courts, and consequently the king's judges became well acquainted with many of the more important local customs, and afterwards were prepared to accord them full judicial recognition. One of the most striking illustrations of this is to be found in the final and complete judicial recognition of the custom of gavelkind.

With regard to those customs above mentioned which were the peculiarity of special jurisdictions, certain tests, such as certainty, reasonableness, and immemoriality, were applied by the king's courts with a view to deciding upon their validity or invalidity, but these tests were never applied in the case of general customs. A case in point is reported in the Year Books during the reign of Henry IV., where the plaintiff and defendant lived respectively in adjoining

houses; the defendant's house was so negligently maintained as to take fire and cause the burning of the plaintiff's house, whereupon the plaintiff brought his action, and based it upon the common custom of the realm. To this the defence was raised that the declaration failed to show immemoriality, but it was overruled—"car comen ley de c'est Realme est comen custome de Realme." [a]

From the Year Books it is clear that the original writs formed an exception to the rule whereby it was necessary to specially plead the custom of the realm, but the reason for this was that such original writs dealt with matters so obviously wrong that no such basis was really needed. When a plaintiff sued in debt, detinue, or trespass, there was no necessity to refer to some charter or to the custom of England as being the basis of the claim; but when a plaintiff sued upon a matter which was altogether outside the scope of the original writ the basis of the claim was invariably stated. Later on, however, there was a tendency to drop this; for example, it was originally necessary, in an action against a common carrier, for the plaintiff to specially plead "custom of the realm," but in time the courts took judicial notice of this "custom of the realm," and it thereupon became sufficient to say that the defendant was a "common carrier." In this way did the English Law become uniform, unlike, as Hallam remarks, the French Law, which is a multitude of local customs.

It does not follow, however, from the foregoing that the custom of the realm thus made the common law was fixed and stereotyped, for there is a considerable amount of evidence to show that custom, or perhaps usage, could, for particular cases, vary the rules of the common law. Thus, at the present day, in cases where a man contracts in relation to the Stock Exchange, he is impliedly bound by the usages of that body, but it is a question of fact whether or not custom is an implied term in the contract, and a question of law whether that custom creates duties independent of contract. It is here then that the custom of Merchants came in touch with the common law. This custom of Merchants consisted of a body of mercantile usages affecting a comparatively large class of the community who had no existing legal relations with one another by privity of contract. As a matter of fact there is evidence that the custom of merchants or Law Merchant has been in existence for many centuries, but as a matter of actual law it is of modern origin.

There are well-known economic reasons for the growth of various sets of custom existing side by side with the custom of the realm or common law; and the history of this growth affords an illustration to the late Sir Henry Maine's famous remark that "the movement of all progressive societies has hitherto been from status to contract." Commencing with the formation of sub-classes of men, there is a tendency to confine their customs to the particular localities in which

[a] Y.B. 2 Hen. IV. 18.

they live. Trade is confined to the great towns, and it is from the charters of these that we may properly expect to derive much of our information with regard to the early stages of the Law Merchant.

But in addition to the influence of these towns, a much stronger factor in the development of a general Law Merchant is to be found in the existence and popularity of the great fairs which were held, not only in England, but also in almost every part of the then civilised world, and to which traders from every nation resorted. This being so, a short consideration of a few of these fairs will not be out of place.

Fairs.

Most of our information respecting these is derived from the Hundred Rolls. The Doomsday Book refers to markets as being profitable rights belonging to, and forming, a franchise, as part of a lord's seignory, but fairs are rarely mentioned. The inference, then, to be drawn from this is that, at least as a general rule, they were places in which men could meet, for the purposes of commerce, free from the payment of any of those tolls which always accrued to the privileged owner of a market. It would also seem that these fairs belonged by charter, either to a monastery or some great town.

One of the greatest English commercial towns of the time was Cambridge. It was a natural trade centre owing to its position at the junction of several of the trunk roads, whilst its situation upon a navigable river from King's Lynn rendered it easy of access for English and Continental Merchants whose ships sailed the North Sea. We are told that even before the Norman Conquest, Irish merchants were in the habit of visiting Cambridge with cloth, and it is interesting to note that the Oxford Colleges obtained from Cambridge their stock of salted eels and other fish for Lenten consumption.

At or near this town then, there were four annual fairs of considerable importance. One, called nowadays "Midsummer Fair," was held for a period of four days from the vigil of St. John the Baptist onward, this belonged to the prior of Barnwell and for it he paid a silver mark. Another was the Garlic Fair lasting for two days from the feast of the Assumption of the Virgin; this belonged to the prioress and nuns of St. Rhadegund. A third belonged to the burgesses of Cambridge and was held during Rogation days, while a fourth was held on Holy Cross Vigil and was the franchise of the lepers' hospital; this still survives in Stourbridge fair, which was the largest and most important of all the English fairs. Another fair of importance was held at St. Ives (in Huntingdonshire), but although this institution is (for it still exists) also one of considerable antiquity, there can be no doubt that it did not come into being before the year 1002—the date of the discovery of the supposed relics at the town. This fair was noted for the quality of the clothes sold there. [b]

[b] Reules Seynt Robert.