

**INQUIRIES INTO THE CONTRACT OF  
SALE OF GOODS AND MERCHANDISE:  
AS RECOGNISED IN THE JUDICIAL  
DECISIONS AND MERCANTILE  
PRACTICE OF MODERN NATIONS**

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INQUIRIES

INTO

THE CONTRACT OF SALE

OF

GOODS AND MERCHANDISE.

AS RECOGNIZED IN

THE JUDICIAL DECISIONS AND MERCANTILE PRACTICE  
OF MODERN NATIONS.

BY THE LATE

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This Work was composed by Professor Bell, a short time before his death, and was in part printed when he died. He had for some time been engaged in the preparation of a series of similar Treatises on other subjects relative to Commercial Law. But this is the only one which he had finally revised for publication.

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## INTRODUCTION.

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THE regular forms and rigid maxims of Municipal Law are not always well suited to the occasions of mercantile intercourse. The familiar, easy, and confidential modes of doing business in fairs and markets, and amidst the hurry and bustle of commercial cities, will not abide the deliberate ceremonies necessary in ordinary life. In the effect too, of what is agreed on by the parties, merchants are often embarrassed by subtleties and fictions, invented by lawyers, to avoid difficulties in applying the ancient maxims and forms of the Common Law, to the altered manners and habits of intercourse of a commercial age.

There thus arise among merchants, rules and usages which gradually form a system of Mercantile Jurisprudence differing in many respects from the Municipal Law. To gain universal assent, those rules and usages must accord with the great principles of honesty, and the faith of contracts. While the system, thus grounded on the universal principles of justice, is fitted for the adoption of the various nations of the trading world, the rapid settlement of transactions, and the quick succession of engagements, seem practically to afford a safeguard against frauds, which might otherwise arise from relaxed forms.

Under this system, new rules of evidence in the authentication of written instruments, take the place of the solemnities, the attesting, sealing, and delivery of deeds at common law; new instruments of debt and credit are introduced in the form of Bills and Notes, affording a rapid and safe mode of transmitting money from country to country, and a convenient circulating medium among merchants. The laws of Mandate and Society undergo an important change, and, as applied to Agency and Partnership, admit of new relations with third parties formerly unknown. The law of Insurance gradually arises, by which misfortunes, from the dangers of the sea or enemy, are mitigated; and losses, which would otherwise crush a single merchant, are spread among many adventurers, to whom they even become a source of gain, while the merchant immediately concerned is rendered safe.

This system of jurisprudence has been called the **LAW-MERCHANT**; and forms a part of the code of every commercial country: of England, Scotland, France, Holland, and America. If the mercantile law, having thus the character of public jurisprudence, were a matter of convention among commercial nations, like the international rules recognised in Treaties, and were administered in courts of universal jurisdiction, such as those for the decision of questions of prize, greater uniformity might have prevailed than is found in the decisions of courts, and the usages of merchants in different countries. But as the greater number of cases arising between merchants occur in the course of daily traffic in the country where they are to be tried,

the municipal courts are the natural tribunals for their determination. And it is only where the administration in such courts is intrusted to judges of eminence, who are versed in the principles of jurisprudence, and accustomed to extend their views beyond the narrow limits of the municipal law, that the uniformity so much to be desired in commercial cases is studied and preserved.

In some countries, courts are established for the determination of mercantile questions. In others,—and in these mercantile law has been the best matured,—the administration is with the supreme judges,—the most eminent masters of jurisprudence.

In England, the system of Mercantile Law has been gradually improved, and brought to its present state of perfection, under a succession of very eminent judges. From Lord COKE's days to the time of Lord MANSFIELD, many great men are to be found, such as HARDWICK, RAYMOND, STRANGE, RYDER, by whom, in Courts of Equity and of Law, principles of general jurisprudence were applied in liberalizing and adapting to the decision of mercantile cases the severe maxims of the common law. But it was from Lord MANSFIELD's time, chiefly, that the most rapid improvement has been accomplished.

In that brilliant career which has raised to him the name of the Father of the Mercantile Law of England, Lord MANSFIELD uniformly characterized the LAW MERCHANT as a branch of public jurisprudence, not resting for its character and authority on the private institutions or local customs of any particular country, but on the principles and usages of trade, which common convenience, and a universal sense of justice, had recognised as fit to regulate the dealings of merchants and mariners in all the commercial countries of the world.

The decision of mercantile cases in England, proceeds, in the first instance, in the Courts of *Nisi Prius*, where Juries of Merchants, acting under the direction of the Judges of Westminster Hall, contribute their knowledge of usage and convenience to the formation of a judgment consistent at once with commercial experience and the principles of jurisprudence. In those held in London, the Chief-Justices of England preside; and the eminent judicial talents of such men as Lords MANSFIELD, KENYON, ELLENBOROUGH, TENTEDEN, and DENMAN in King's Bench; ROSLYN, EYRE, ELDON, GIBBS, and TINDAL in Common Pleas, have given to the Mercantile Law a degree of authority and weight which is acknowledged throughout the trading world. In the other mercantile cities of England, the verdicts of juries, under the direction of such Judges as BULLER, BAYLEY, LAWRENCE, GROSE, CHAMBERE, PARR, ALDERSON, PATISON and COLERIDGE, maintained the dignity of the Commercial Law of England; while the continual communications of all the Judges, in reviewing the proceedings of the *Nisi Prius* Courts, preserve the uniformity of the system.

Until of late years, the administration of Commercial Law in Scotland may be said to have rested entirely in the supreme civil Court of Session, unassisted by juries. Being a Court of Law and a Court of Equity, and the Scottish law being grounded on the foundation of the Roman, as a system of universal jurisprudence, the Judges of the Court of Session came readily to apply general principles to the determination of mercantile questions; and, in the writings of Lord STAIR, in the end of the seventeenth century, and in

the decisions of the few mercantile cases which the narrow commerce of his country at that time supplied, those principles will be found admirably stated. It was after the middle of the following century, that Commercial Law may be said to have made any progress, or become an object of attention, in Scotland. But, since that time, many decisions on such cases have been pronounced in Scotland, which would do honour to any court, by the clearness and comprehensiveness of the principles on which they have been adjudged. Not more than a quarter of a century has elapsed, since the introduction of jury-trial in Scotland has produced that happy combination of judicial knowledge and authority, with mercantile and practical experience, in which the chief means of improving mercantile jurisprudence is to be found.

The respect which the Judges of England and of Scotland reciprocally pay to the decisions of each other in commercial questions, together with the influence of the Court of Appeal in the House of Lords, common to both, produces a most desirable uniformity of judgment in all the great points of Mercantile Law; but still, with considerable differences, where the Common law of England, and the principles of the Roman law have led to different views in the doctrines applicable to particular contracts.

The state of Mercantile Jurisdiction in America is not greatly different from that of England; thus tending to the extension of the same uniformity of rule and force of precedent in that great portion of the commercial world. The system of American jurisprudence, being grounded on the common law of England, but with such changes as have been found necessary to adapt its rules and institutions to the peculiar circumstances of the Western Nations, the Judges in the Supreme Courts, in determining any unsettled question in mercantile law, have examined with a liberal and learned spirit, the principles of Roman law, the doctrines and precedents of the English and Scottish laws, and the authorities and decisions in Continental Europe; thus setting an example to the whole mercantile world of the liberality and freedom of inquiry which ought to accompany the settling of every important question. In their books of Reports are to be found admirable arguments, delivered from the Judicial Bench, in which the great object is kept in view, of establishing, on a sure footing, and in conformity with what is found to be just in other countries, and consistent with the principles of universal jurisprudence, the rule which the decision of the particular case tends to fix.

In the countries which have been mentioned, no peculiar courts have been instituted for the trial of commercial cases. But in France and in Holland, a system has been arranged in the "Tribunaux de Commerce" for the decision of such causes, with the despatch and economy particularly necessary in such transactions; and a right of appeal is given, under restrictions in point of time, to the "Cours Royales." Thus, the decision is at last reviewed by eminent Judges, and the great principles of Mercantile Law fully secured.

Amidst those different tribunals in different countries, no perfect uniformity has prevailed in the rules and usages which regulate the dealings of trading nations. While some follow the principles of the Roman law (which come nearest, perhaps, of any code of written law, to those of universal jurisprudence,) others have admitted, into the administration of mercantile contracts, some of the peculiar forms and narrower maxims of their municipal law.

A concise view of the differences which have thus arisen, and which