

"have incorporated it (usage) in what is called the law merchant, and have made it part of the common law of the country" (*m*).

Is it not true that

"The proper idea of a rule of law (*n*) is that it is an attempt to sum up current opinion upon a class of cases?" (*o*).

an attempt (oftimes a poor effort) to sum up current opinion as to what is justice in relation to the class of case in hand.

"Law is declared, it is not made; it is a discovery, a statement of the conditions under which, as wise men have shewn, life can be lived" (*p*).

Customs, usages, notions there are, no doubt, in abundance prior to the decisions, but was there any law except "in crudest condition and regulative of simplest transactions" (*q*)—was there "a true body of law in England known as the Common Law," a body of law which not merely furnished enlightenment for the courts, but which, being a *true* body of law, was binding upon the courts? And was that "true body of law" something which the judges had never officially heard of, something which they had to ascertain as best they could from the mouths of contradictory witnesses?

There is a very short way of settling such questions. If any one says that there was or is "a true body of law known as Common Law" (apart from the decisions) let him quote for us, or otherwise authoritatively refer us to, a single item of it. The *Leges Barbarorum* we know; the laws of Justinian we know; the laws of the Twelve Tables (B.C. 500) we know; even the laws of Hammurabi of Babylon (B.C., say, 2250) we know, and can quote from. Will somebody please furnish us with an extract from the Common Law of England?

Surely this can easily be done. Go to the law reports and read to us. The judges, if they were deciding according to this "true body of law" will undoubtedly so indicate. No, these modern judges seem to know nothing of it. Open, then, these musty old Year Books; thumb them all. No? Try the Rolls—

(*m*) *Edelstein v. Schuler*, 1902, 2 K.B., 144.

(*n*) A judicial rule of law.

(*o*) Lightwood: *The Nature of Positive Law*, 226. And see the whole chapter Ch. X.

(*p*) Jenks: *Law and Politics in the Middle Ages*, 301-2.

(*q*) 3 Col. L.R. 144; Note.