

## WHAT IS THE COMMON LAW?

Answering Professor Burdick's contention that for several centuries prior to the time of Lord Coke "there was a true body of law in England which was known as the Law Merchant," (a) I pointed out (b) that he himself had stated that in Coke's time

"The Law Merchant was proved, as foreign law now is. It was a question of *fact* (c). Merchants spoke to the existence of their customs, as foreign lawyers speak to the existence of laws abroad. When so proved a custom was part of the law of the land. This condition of things existed for about a century and a half, prior to the time of Mansfield."

And I asked if there was ever "a true body of law in England or elsewhere, the existence of which had to be *proved*; law which the *judges* had never heard of; law which "was part of the law" only *after evidence to that effect* had been adduced? In a short commenting note the professor said, "I do not see that it calls for a serious reply."

I pointed out, too, that during the 150 years between Coke and Mansfield (during which, as the professor contends, the term law merchant "loses much of the definiteness which characterized it" prior to that period) so little progress was made in the development of "a true body of (merchant) law" that Buller, J., (Mansfield's colleague) declared that

"Before Lord Mansfield's time we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle" (d), and that Professor Burdick himself quoted Scrutton to the same effect:—

As a result little was done towards building up any system of mercantile law in England."

The question presents itself, therefore, in this fashion: Prior to Coke "there was a true body of law in England which was known as the Law Merchant"; after a further century and a half

(a) Prof. Burdick of Columbia University, New York, a lecturer and writer upon the law of Bills and Notes, challenged some sentences in the present writer's book upon Estoppel, wherein was questioned the existence of "a law of merchants in any other sense than there is a law of financiers or a law of tailors. . . . Judge-made law (not merchant-made), with Lord Mansfield as chief builder, is what we have here." The Professor's article was published in 2 Columbia Law Rev. 470.

(b) 3 Col. L.R., 135.

(c) All italics are those of the present writer.

(d) *Lickbarrow v. Mason* (1787) 2 T.R. 63.