Issue the Sixteenth of Matters concerning His Lawful assembly

(From *The Christian Jural Society News*)

What is the Law Merchant?

A Law Review

The following are excerpts from a law review article on 'The Law Merchant,' written by noted jurist John S. Ewart which appeared in The Columbia Law Review, Volume III 135, March 1903. It is a rebuttal to an earlier law review by Professor Francis M. Burdick [Columbia Law Review, Volume II 470, March, 1902], in which Professor Burdick criticized Mr. Ewart's writings on The Law Merchant. We hope you find this information of value for knowing the enemy--as we do. In Issue the Seventeenth next month we will feature noted jurist Frederick Pollock's law review on 'The History of the Law of Nature' and its ties to the Law Merchant.

Let me transcribe the two principal sentences impeached, adding two others from the context, and then make such defence as I can:

"As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers, or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a 'law merchant' of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue. If the custom of merchants as to bills of exchange was recognized by the courts, so also has the custom of financiers as to the negotiability of bonds and scrips been recognized; but no one would think of referring to the 'law financier' in speaking of that negotiability. * * * The rules respecting bills and notes are not traceable to any foreign or extraneous body of law." [Ewart on Estoppel, 373.4.]

Now, I cannot deny that Professor Burdick's authorities are of the most overwhelming and convincing sort. And I admit they establish the following propositions:

1. There were special courts for the administration of what was called the law merchant - courts pepoudrous, staple courts, courts of merchants, etc.

2. That these courts proceeded according to a practice quite different from, and much more expeditious than, the common law courts.

3. That in such courts decisions were regulated by what was called the law merchant-the Statute of the Staple, [27 Ed. 3,2.] providing "that all merchants coming to the Staple shall be ruled by the law merchant * * * and not by the common law of the land."

4. That many authorities declare that this law merchant was so well known that it was practically the same in all European countries.

5. That many authorities point to the law merchant as being the source of many of our present legal ideas.

"It is apparent * * * that for several centuries there was a true body of law in England which was known as the law merchant. It was as distinct from the law administered by the common law courts as was the civil or the canon law.

1. That there was in the Roman law a special court for the administration of the "Law of Nations." [The court of the Praetor Perregrinus.]

2. That the practice in such court differed from that in other courts. (I am not sure that it did, but the point is immaterial.)

3. That in such court decisions were regulated by what was called "the Law of Nations."

4. That Justinian's Institutes declare that private law "is composed of three elements, and consists of precepts belonging to Natural Law, to the Law of Nations, and to the Civil Law;" [Tit. I. S. 4.] and that "the Law of Nations is common to all mankind." [Tit. II. ss. 1,2.]

5. And that Justinian also declared that "by the Law of Nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others." [Tit. s. 2.]

I would admit all this; and yet Professor Burdick would agree with me that when the first praetor (the Lord Mansfield, in some sense, of his day) took up his first case, or issued his first edict, there was no "true body of law" in Rome or elsewhere "that was known" as the Law of Nations.

Changing again, let us ask: "As a matter of fact and not merely of phrase, whether there was ever a body of law known as the Law of Nature"? We must admit, of course, that our law books are full of references to it; that Justinian declares that the laws of nature "which all nations observe alike, being established by a providence, remain ever fixed and immutable ;" [Tit. III, s. 11.] that the Stoics thought that they knew all about these laws of nature; that Rousseau discoursed about them in fashion that moved the world; and that everybody thinks he has some special insight into them. And yet, Professor Burdick will agree that, save in so far as such laws have been done into statutes and decisions, there is no "true body of law" in England or elsewhere that was known as the Law of Nature.

Changing once more, "As a matter of fact and not merely of phrases, may we not even ask whether there is a Common Law or an Equity"? Of course, there are, or were, courts for the administration of what goes by these names; and their practices are different, and so on; but when these courts were first established was there, or was there not, "a true body of law in England which was known as" Common Law or Equity? We have now statutes, and decisions, and *responsa prudentium* (as we may call our text books - or some of them); but these are not the common law. These are tangible, legible, concrete things - at best ascertainments of what is called the Common Law. [They are not even that. Nor as has been said, are they evidence of what the Common Law was; for no one imagines that they are results of actual inquiry into what law was common to all Englishmen.] The Common Law is, and always was, in the air. Put it into authoritative, legible shape, and it has changed its character. It has become Judiciary Law. Bentham made that all clear to us, long enough ago. ["Common Law, as it styles itself in England, judiciary law as it might be styled everywhere." *Principles of Morals and Legislation, Preface, p. 8*. And see *Jenks' Law and Politics in the Middle Ages, p. 39*.] In the same way the Law of Nations became Praetorian law as soon as it appeared in the Praetor's edict. ["Praetorian obligations are those which the praetor has established by his own authority."

Justinian's Inst. Lib. III, tit. XIII, s. 1.] If you are in doubt about it ask yourself the meaning of the phrase "derived from the common law." Does it mean, derived from some statute, or decision, or code, or other portable document? Not at all. Or does it mean derived from some investigation into what was the law common to all persons, or to all English persons? No, not in the slightest.

And may we not fairly ask, if there was "a true body of law in England which was known as the law merchant," that we may have a look at it; or if it has been lost, that we may be furnished with a statement from somebody who at some time did see it, or knew somebody who had heard that any body had ever seen it? It "is easier longed for than found," said the great Judge Willes. [*Lloyd. Buibert (1865) L. R. 1 Q. B. 125.*]

Professor Burdick claims that the "ancient law merchant * * * was a body of substantive law;" that it existed "for several centuries" prior to the time of Coke; that between the time of Coke and Mansfield (1606-1756) the term 'law merchant' "loses much of the definiteness which characterized it" prior to that period; and that since Mansfield's date "these two bodies of rules (Law Merchant and Common Law) no longer stand apart as they did three centuries ago." As against this I contend that there was no body of Law Merchant before Mansfield; that prior to that time there was nothing but a heterogeneous lot of loose un-digested customs, which it is impossible to dignify with the name of a body of law; that Mansfield (principally) formulated, developed and declared what is called the Law Merchant, and that its "rules are not traceable to any foreign or extraneous body of laws." For settlement of the question I am now going to appeal to Professor Burdick's article.

He divides the English history of the subject into three periods: [Following here and elsewhere the Introduction to Smith's Mercantile Law.]

(1) Prior to Coke (1606), when the old pepoudrous and staple courts were in full activity, and the "body" was no doubt in robustest condition.

(2) Between Coke and Mansfield (1606-1756), when the jurisdiction was passing from the old courts to the regular tribunals, during which, "the term law merchant loses much of its definiteness."

(3) Lord Mansfield and subsequently.

Remembering that we are in search of 'a true body of law," and not a mere set of customs, at the time when Coke's court was acquiring jurisdiction in merchants' cases, let us see how Coke and the other judges proceeded. Did they get a look at the "true body of law," or even know anything of its existence? Professor Burdick supplies the only possible answer. He says that evidence was called in each case, and:

"The law merchant was proved as foreign law now is. It was a question of fact. [Italics here and elsewhere are those of the present writer.] 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." (1606-1756).

This procedure is very familiar to all of us. We have, for example, a grain case: The grain men have certain customs applicable to the point in dispute; we give evidence of that custom; and the court decides with reference to it. But we should never make the mistake of saying that prior

to such evidence there was "a true body of law" upon the subject known as the law-grain-dealer, a law never theretofore heard of by the judges.

I do not wish unduly to press for a rigid or technical meaning of the words "a body of law," and get myself into dispute with the advocates and opponents of Austin's definition. But attaching almost any significance to the term, may I not fairly say that there never was "a true body of law" in England, the existence of which had to be proved as a fact? And yet that was what had to be done before Coke would recognize the "law merchant."

And it will be observed that what was proved was not law at all, but, as Professor Burdick says, customs. "Merchants testified to the existence of their customs." Just as financiers or tailors would testify as to theirs. When so proved (not before) "a custom was part of the law of the land."

We may say then that there was not much that looks like "a body of Law" when Coke commenced his duties; that is, when there was a law merchant if ever there was one. Let Professor Burdick (quoting from Scrutton) now tell us to what extent it materialized during the succeeding 150 years:

"As the law merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in the point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the customs from the facts; as a result little was done towards building up any system of mercantile law in England."

And Scrutton was right, for Buller, J. (Mansfield's colleague) tells us 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." *[Lickbarrow v. Mason (1787), 2 T. R. 63.]*

But we are now a full century and a half after the time when "a true body of law" had existed; when it had been administered by special courts, and with special practices; when it was so well known that it had come to be practically the same in all European countries (so it is said); when it had commenced shedding offspring in the way of peculiar laws as to partnership, *jus accrescendi*, stoppage *in transitu*, etc. (so we are told). And we have thus the very peculiar situation of "a true body of law" in robustest condition in 1606, but so unknown to the judges from that time on, that its existence had to be proven to them; and a law always so jumbled up with the facts that after the regular courts had been at it for a century and a half all we can say is that little had been done "towards building up any system of mercantile law in England;" that "no established principle had been produced."

Professor Burdick tells us, what indeed we might have expected, that "Lord Mansfield was dissatisfied with this condition of the law and devoted his great abilities to its improvement." And watching for a little the methods of that great judge, [Observe what he himself said in *Luke v. Lyde (1750) 2 Burr. 887*, about his methods.] we shall be able to see whether he thought that he had in hand "a true body of law" which he was endeavoring to administer, or whether he was really formulating, developing, and declaring something of his own, or nearly so. Professor Burdick shall again help us:

"We are told that he reared a special body of jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principal's of jurisprudence by which they were to be guided. * * * When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it * * * The great study has been to find some general principle, not only to rule the particular case under consideration, but serve as a guide for the future * * It was from such sources, [The rhodian laws; the Consolate del Mare; the laws of Oleron and Wisly; the Ordinances of Louis XIV, etc., of which most probably Lord Mansfield's guests had never heard.] and from the current usages of merchants, that he undertook to develop a body of legal rules which should be free from the technicality of the common law, and whose principles shall be so broad, and sound, and just as to commend themselves to all courts in all countries."

But why all this bother if 150 years before there was in existence "a true body of law in England which was known as the law merchant;" if during those 150 years Coke and others had been administering that law; and if, as Professor Burdick tells us, Lord Mansfield had theretofore "discovered that the usages and customs of merchants were in the main the same throughout Europe"?

Here my defense might end. But I should be misunderstood if I did not explain myself more fully. I must vindicate my view, of the phrases, The Law of Nature, The Law of Nations, Equity, The Law Merchant. Here, too, I may take the liberty of diverging from current methods of thought and expression; but I shall not be without some solid support for my notions. I have not space for many citations. Let the student refer to the books mentioned below. [Sir Henry Maine's works, principally his *Ancient Law*; Sir Frederick Pollock's *Essays in Jurisprudence and Ethics, Cap. 2 & 12*; and his articles in *1 Columbia Law Review, 11*, and *2 Columbia Law Review, 131*; James Bryce's *Studies in Hist. And Jur. Essays XI and XuIV*; Holmes' *The common Law*; Lightwood's *The Nature of Positive Law*; Jenks' *Law and Politics in the Middle Ages*.]

The human mind craves generalizations and unifications, and it will play many dishonest tricks with itself in order that it may enjoy the gratification of these seeming requisites of intellectual satisfaction. See what it has done with our legal history:

"The Law of Nature:! What a fine, mouth filing soul-satisfying *nonentity*. Follow it through Greeks, Stoics, Roman Lawyers, Medieval Ecclesiastics, Grotius, Hobbes, Rousseau, Bentham, and make an entity "a true body" of it, if you can. In metaphorical and figurative sense we may speak of the laws of nature, meaning some observed physical sequences. But this "Law of Nature," was it ever anything but an empty abstraction or even hallucination? A sort of a shadow of some "lost code" that never existed? An underlying principle [See Maine's *Ancient Law, 77*.] which, could we but find it (fire, air, water, etc., have all been advocated and rejected), would, we may fancy, correlate and explain everything; but which still unfortunately for us underlies and is for the present at least plainly not capable of being got out of that? It is said that it is that "Ultimate principle of fitness, in regard to the nature of man as a rational and social being, which is, or ought be, the justification of every form of law." [Sir Frederick in *1 Columbia Law Review, 11*.] but that sort of a principle is, of course, a little difficult to look at quite steadily. In truth we only call it a principle, as we call God a spirit because we don't know what a spirit is, and must say something. If, too, we are told that it is "The rules of conduct deducible by reason from the general conditions of human society" [*Ibid., 14*.] may we not humbly ask that some able reasoner will deduce them, and once for all and forthwith print them?

We are more inclined to the suggestion that the Law of Nature is "The ideal to which actual law and custom could only approximate." [*Ibid., 14*. And see Maine's *Ancient Law, 77*.] but we must add that it is an ideal of very vague, fluctuating, and uncertain character, swinging according to times and persons from the heroisms of savagery to the beatitudes of the Sermon on the Mount; and that no clearheaded man will undertake to put it in type. It no doubt has its uses if left as "A mental vision of a type of perfect law." [Maine's *Ancient Law, 77ff.*] but, on the whole, it will do better if left there than if photographed by some spiritualistic or other occult apparatus. Austin rejects altogether "the appellation 'Law of Nature,' as ambiguous and misleading." He calls it "the Divine Law or the Law of God," which, he says, makes everything clear in this fashion:

"There are human actions which all mankind approve; human actions which all men disapprove. * * * Being common to all mankind and inseparable from the thoughts of those actions, these sentiments are marks or signs of the Divine pleasure. * * * The rectitude or pravity of human conduct * * * is instantly inferred from these sentiments without the possibility of mistake."[Austin's *Lectures on Jurisprudence, 105 f.*]

This Common Law of England is the most impudent pretender of all these phantom laws. For unquestionably a very large part of it was not law of England at all (common or special) but simply Roman law, smuggled in by Bracton [Maine's *Ancient Law, 82*], openly introduced by Holt, [*Law of Bailments in Coggs v. Bernard (1703), Ld. Raymond, 909*.] consciously and unconsciously adopted by many others. And perhaps the idea that the Common Law of England was "the law of the royal court," as opposed to the local laws of the old seigniorial courts - a sort of *jus gentium* imposed by a Praetor Peregrinus - is the real meaning of the term. [*Jenks' Law 3 & Pol. Of the Middle Ages, 35-6*.] Maine thinks that by its earliest expositors "it was regarded as existing somewhere in the form of a symmetrical body of express rules, adjusted to definite principles. The knowledge of the system however in its full amplitude and proportions was supposed to be confined to the breasts of the judges; and the lay public and the mass of the legal profession were only permitted to discern its canons intertwined with the facts of the adjudged cases. Many traces of this ancient theory remain in the language of our judgments and forensic arguments." [*Village Communities, 335*.]

Equity has never had such a concrete look as this Common Law (the adjective of which might have kept us right if we had not forgotten its significance). Equity, we admit, is an unwritten and inexpressible aspiration. But have you observed (as hinted at above) that as the Roman Civil law, built of common sense, became caked and afterwards yielded to a new infusion of more common sense (insidiously introduced under the name of the Law of Nations); so the Common Law of England, builded of reason and caked by custom (precedents and forms)[Bryce's Studies in Hist. & Jur. 697.], succumbed to more reason through the fiction of the King's conscience ["It is the special business of Equity to reintroduce those considerations which have been dropped in arriving at the rules of law," Lightwood's The Nature of Positive law, 40; and see p. 300.]?

Æquitas (the meeting point of Law of Nature and Law of Nations) played in the Roman Reformation of law very much the same part as Equity in the English.[See Maine's *Ancient Law, cap. 3*.] Mr. Bryce's description of it would answer for both Systems. He says "Equity means, to the Romans, fairness, right feeling, the regard for substantial, as opposed to formal, and technical, justice, the kind of conduct which would approve itself to a man of honor and conscience." We are now a little better prepared for a true understanding of the Law Merchant. So far we have had various titles and we have found them to be perfectly empty of meaning - mere names and nothing there to name. How is it with the Law Merchant?

In the present writer's opinion the amelioration and improvement of English law is attributable (apart from legislation and acknowledged fictions) to Equity, Common Counts, Public Policy and Law Merchant. Equity was a renaissance-a return to the Law of Nature, or the Law of Nations, or the Common Law (reflect on that for a moment), or Common Sense as you may choose to call it. Mansfield's tricks with the Common Counts [Lord Mansfield was quite frank in what he did. Weaker men would have pretended some precedent. Mansfield avowed that "the gist of this kind of action is that the defendant upon the circumstances of the case is obliged by ties of natural justice and equity to refund the money." *Moses v. MacFerlan (1760), 2 Burr. 1005*. And weaker men ever since have been attributing Mansfield's decisions to the Common Law and the Law Merchant. Blackstone knew better and ascribes Mansfield's work to "Natural reason and the just construct of the law" (*Commentaries, Bk. III, c. 9*).] and the Law Merchant were in reality but new and ingenious and masterful methods by which human reason of years gone by (obsolescent indeed, but caked and riveted there) was made to yield to human reason of later time. The cakes were called the Common Law, but they had ceased to represent common sense. The new human reason might also (just as properly) have been called the Common Law, but they named it Law Merchant, and people ever since have been looking for the thing, not knowing that it was nothing. Find the Law of Nature, the Law of God, the Law of Nations, the Law of Reason, the Law Universal, the Common Law, Equity-find Common Sense, and I shall have much pleasure in accepting at your hands an introduction to the Law Merchant.

Am I wrong in thus identifying the Law Merchant with these other empty names-these aliases, given by ourselves for the further fooling of ourselves? Let me at least shield myself behind Professor Burdick who says that Gondolphin quotes with approval the statement of Sir John Davies, that the Law Merchant, as a branch of the Law of Nations, has ever been admitted," &c. [*2 Columbia Law Review, 477*.]

Who quotes from Sir John Davies:

"Which Law Merchant, as it is part of the Law of Nature and Nations universal, and one and the same in all countries of the world." [*Ibid., 477*.]

"The Law Merchant which is a branch of the Law of Nations." [*Ibid., 478*.] who quotes also from Dr, Zouch:

"It is manifest that the causes concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general laws of Nature and Nations." [*Ibid., 477-8*.] and who himself writes:

"As early as 1473 the Chancellor had declared that alien merchants could come before him for relief, and there have their suits determined by the Law of Nature in chancery. . . . which is called by some the Law Merchant, which is the Law Universal of the world." [*Ibid., 485*]. In 1473 it was said by Stillington, Edward the Fourth's Chancellor, in the great case of larceny by a carrier breaking bulk, that the cause of merchant strangers "shall be determined by the Law of Nature in the Chancery." Foreign merchants put themselves within the king's jurisdiction by coming into the realm, but the jurisdiction is exercisable "*secundum legem naturae que est appelle par ascuns ley marchant, que est ley universal par tout le monde*." [*V.B. 13 Ed. 4th 9, p1. 5*. Quoted from Sir F. Pollock, *2 Columbia Law Review, 28*.]

But for all prose purposes we might as well speak of the Law Universal of the Universe; for this ubiquity which people are accustomed to attribute to their own ideas is asserted for the same

evidential purposes as the avatar claims of all religion--founders, and with as much verity as (we shall say) all but one of these. "The Law of Nature is binding over all the globe in all countries," said Blackstone, [*Commentaries, Introduction. s. 2*.] without meaning anything in particular. "The Law of Nations is Common to all mankind," said Justinian, [*Institutes, Lib. 1, tit. 2, s. 2*.] meaning nothing at all. There is "a Common Law of all mankind," said Aristotle and Demosthenes and Justinian, meaning as much. There is a "Law of God," said Austin, a veritable legal touchstone meaning, if possible, still less. And now Professor Burdick quotes for us that there is a "Law Merchant which is the Law Universal of the world." Would that some swift lineotype could catch this thing, and reduce its irritating omnipresence (much too big to look at) to some one geographical spot, for sixty seconds, or even less.

This Law Merchant "one and the same in all countries in the world." And Coke and his successors after one hundred and fifty years' work at it, had done little "towards building up any system of mercantile law in England." "The same in all countries"! And poor Mansfield in his day dining his specially qualified merchant jurymen and taking "great pains in explaining to them the principles of jurisprudence by which they were to be guided." "The same in all countries."! Listen to Lord Campbell's account of Mansfield's time:

"Hence when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine insurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports. ... If an action turning upon a mercantile question was brought into a court of law, the Judge submitted it to the jury, who determined it according to their notions of what was fair, and no general rule was laid down." [*Lives of the Chief Justices, III. 274*.] "The same in all countries."! [It may be well to set over against this statement the following extract from an address delivered to the American Bar Association last summer, by M.D. Chalmers, C. S. I., and printed in The Law Quarterly Review for January, 1903: "Lord Mansfield and Mr. Justice Story, in judgments which are too well known to need citation, have emphasized the essential unity of the law merchant throughout the world; and in more recent times, Lord Blackburn has again enunciated the rule. "There are, he says, in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not effect other countries; but the general rules of the law merchant are the same in all countries."] And Mansfield, endeavoring "to develop a body of legal rules," which he hoped would "commend themselves to all courts in all countries," so Professor Burdick tells us but they didn't.

If there is any one point of mercantile law more than another that would have been agreed about in Europe, it would have been the question of title (as against the true owner) to goods purchased at the fairs to which the merchants were accustomed to travel for trade purposes. But it is impossible to say that European law concurred with the English law of market overt upon the subject.

If there is any one point in the law of "negotiable securities" about which we might have expected unanimity, it would be as to title to them when passed by a thief or a finder. What the French law upon the subject was I have endeavored elsewhere to show. [*35 Am. Law Review, 722, ff.*] It had no resemblance whatever to that of England.

If there is any other point, in the law of bills about which agreement would be expected, it would be that which (with us) declares that a transferee after maturity takes subject to existing equities. But in France that never was the law. [*"L' endorsement entraine les momes*

consequences qu'il soit anterieur ou posterieur a l'echeance." Lyon-Caen and renault, s. 1094.] The Germans do not agree with either of us. [See *Law of 5 June, 1869, sec. 16*.]

And for *coup de grace* let me quote from the Lex Mercatoria, in which it is said that the customs as to bills:

"In their formation, times of running, and falling due, days of grace, & c., are almost as various as each European nation from one another." [p. 561.]

What else could they be? With lay judges: no records, no law books (or next to none); facts, customs and laws, all jumbled together; little communication; no consultation--customs as various as the nations? Yes, as various as the county towns, or as one prepondrous judge's notions from those of the other unskilled temporary adjudicators, with not even a Coke to help them.

Had I more space I would proceed to treat of several points still requiring explanation, but I must content myself with suggestion:

1. My notions seem to necessitate an inversion of generally assumed order; for have I not put courts first and the law that they are to administer as something subsequent? Yes, I have done so; and that is perfectly right. The other theory: that there was a common law, and equity, a law merchant first, and then courts established to apply them, is not only unhistoric, but, save in the very simplest social relations, quite impossible.

"It must be remembered that although we are naturally inclined to think of law as coming first, and courts being afterwards created to administer the law, it is really courts that come first, and that by their actions build up law, partly out of customs observed by the people, and partly out of their own notions of justice." [Bryce's *Studies in Hist. & Jur. , 79*]

2. Read Maine's *Ancient Law (31-33)* as to the "*in nubibus*" law, which courts are supposed in some mysterious way to precipitate out of the clouds into library receptacles. And reflect a little on the sentence:

'We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English Common Law, with some assistance from the Court of Chancery and from Parliament, are coextensive with the complicated interests of modern society." A most prudent pretender, that Common Law, I think.

3. And observe this paragraph extracted from a very good book. [Lightwood's *The Nature of Positive Law*.] "The proper idea of a rule of law is that it is an attempt to sum up current opinion upon a class of cases. The possibility of constructing rules, however, depends on two distinct faculties: the faculty of observation and the faculty of expression."

To which faculties the courts preposterous--I mean pepouderous--had not the slightest claim. Coke and his century and a half of successors may have had them, but, did not use them. Lord Mansfield, and not any pepoudrous predecessor "may be said to be the father of the commercial law," [Per Buller, J. In *Lickbarrow v. Mason (1787), 2 T. R. 63*.] the father par excellence; but of course the family has been much extended since his day. "Market law has long exercised and still exercises a dissolving and transforming influence....the wish to establish

as law *that which is commercially expedient is plainly visible in the recent decisions* of English courts of Justice." *Maine's Will. Com. 194*.]:

Legal rules must ever be adjusting themselves to the requirements of human relations.' [Lightwood's *The Nature of Positive Law, 360*.]

4. The Law Merchant, it is suggested, is still in existence. May we not yet have hope in the lineotype? Or, happy thought, that Marconi may some day, unsuspectingly, catch the thing? If emanations can reach him from anywhere, why not from everywhere? Why not from the home of Teufelsdroch Weissnichtwo? [Carlyle's "Don't know where.."] -- John S. Ewart