An Essay on the Early History of the Law Merchant

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CHAPTER I.

GENERAL CHARACTERISTICS.

THE Law Merchant has been aptly called "the private international law of the Middle Ages." It was regarded as a kind of jus gentium known to all the merchants throughout Christendom and the later writers who treated the subject laid stress upon its international character[1]. "The Law Merchant," wrote Sir John Davies in the 17th century, "as it is part of the law of nature and nations is one and the same in all the countries in the world; there is not one law in England, another in France, another in Germany, but the same rules of reason and the like proceedings are observed in every nation." This statement is too sweeping. Strictly construed it was not correct for the law as it existed in the 17th

[1] Malynes, *Lex Mercatoria*, 3. "The said customary law of merchants hath a peculiar prerogative above all other customs, for that the same is observed in all places."

Davies, *The Question concerning Impositions*, 10. "That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge."

century, and it was still less correct for the Law Merchant in the earlier stages of its evolution. There was during the early middle ages no strictly uniform system of mercantile law administered throughout the whole of Western Europe either in town or seaport or fair. The Great Fairs of Champagne had their own style, usage and customs which were at times altered in important points by royal ordinance. The Merchants of Antwerp refused[1] to submit to the law of London, and in the numerous "lettres de foires" that have recently been discovered at Ypres[2] the alien creditor has always to promise not to recover his debt by any other law than the law of Ypres. In Italy the special codes of commerce that almost every great city possessed, show greater or smaller discrepancies in almost every section, and as a natural result, in several cities[3], the commercial

[1] *Monumenta Gildhallae*, vol. II. part i. 63. "Et cil de Anwers ne passeront le pount de Loundres, si il ne voillent estre desmenez par la ley de Loundres."

[2] Des Marez, *La Lettre de foire à Ypres*, p. 97 and document 27. "Et li avant di Jehans de Flaringhes, borgois de St Quentin, a encovent et promis par foit ke il ceste dette ne requerra a nule loi fors a la loi de la ville d'Ypre."

[3] Statutes of Como, *Monumenta Historiae Patriae*, vol. XVI. col. 28, cap. XXXI. A.D. 1281. "Quod ipsi consules possint cognoscere de omnibus quaestionibus negociatorum forensium et de negociacionibus...quamcunque quantitatem ascendant et hoc tam in cognoscendo quam in diffiniendo et execucioni mandando‖ eisdem mercatoribus talem faciant et facere possint racionem et non aliter, qualiter fieret mercatoribus Cumanis‖in terra illius mercatoris tunc querentis sub eisdem consulibus."

A.D. 1352. Spalati St. Nova, cap. XXVII. p. 246 (in *Monumenta Historico-Juridica Slavorum Meridionalium*). "Ordinatum est quod amodo illud jus et justicia quod et que fiet civibus...

judges were ordered to give aliens no better law than their own citizens would have in the alien state.

Sometimes the variations in the Law were of far-reaching importance, and perhaps no better example can be given than the rules regulating the effect of Earnest money. Here, if anywhere, a definite and universal rule might be expected, for otherwise no merchant could be sure of his bargain. In the 13th century, however, the effect of the Earnest had not been finally settled. As a general rule it may be said that the payment of a God's penny was effectual to bind a mercantile bargain, and Fleta expressly declares that such was the law amongst merchants. Edward I., for instance, gave the Earnest a binding force, as a favour to the foreign merchants. "Every contract," ran a clause in the Carta Mercatoria, "between the said merchants and any persons whencesoever they may come, touching any kind of merchandise, shall be firm and stable, so that neither of the said merchants shall be able to retract or resile from the said contract when once the God's penny shall have been given and received[1]." At Avignon[1] the same rule prevailed; but there were exceptions. The Preston custumal[2] allowed the

Spalati in quacunque curia et foro cujuscunque civitatis...illud simile jus et justicia per similem modum et formam fiat in curia et foro civitatis illis hominibus."

1429. St. Merc. Brixiae, cap. 43. "Etiam possunt [consules mercatorum] forensibus tale jus reddere quale et quem ad modum in eorum terris redditur nostratibus."

[1] Maitland, *Select Pleas in Manorial Courts*, 133.

[2] Custumal of Preston, Article 12. Bateson, *Eng. Hist. Review* (1900), p. 497. "Item si Burgensis aliquid forum vel

seller to break the contract by repaying double the Earnest, and the buyer by forfeiting five shillings. In Italy most of the commercial statutes[1] declare that if once an Earnest is accepted the contract is binding, but Varese[2] again offers an exception to the general rule, while in Sicily[3] it was the custom among merchants to consider the Earnest merely as a

aliquem mercem emerit et hernas dederit et ille qui vendiderit de foro suo penitebit duplicabit hernas ementis. Si autem emens forum suum palpabit vel habebit forum vel quinque solidos de vendente."

[1] Circa 1200. St. Antiqua Mercatorum Placentiae, cap. 65, p. 20. "Et si quis de nusii (=mercantiae) jurisdictione mercatum fecerit...et...denarium dei dederit vel dari fecerit, illud mercatum inter partes ratum haberi faciam."

1214, confirmed in 1265. St. Legis civitatis et insulae Curzulae (in *M.H.S.M.*), cap. xxxv. p. 15. "Si quis mercatur emendo aliquid ab aliquo dederit unum denarium parvum pro arris, mercator sit firmum et venditor teneatur dare et emptor recipere merces: ab uno denario supra si aliquis dederit arras, pro quo remanebit mercatum, ille teneatur solvere alteri parti arras in duplum." Cf. p. 36, cap. 38.

1302. Florence. St. Calimalae, Lb. iii. cap. i. "Quo denario dato mercatum stabile sit et firmum."

1312. Spalati vetus statutum, Lb. iii. cap. 96, p. 109 (in *M.H.S.M.*). "Si...arre date fuerint...dictum mercatum sit firmum et ratum...quia nihil tam contingit fidei humane congruum quam ea que juste per pactum inter aliquos intervenerunt observari."

14th century. St. Scardonae (in *M.H.S.M.*), cap. x. p. 122. "Si aliquas arras dederit, illud mercatum nec emptor nec venditor valeat relinquere."

[2] 1347. Lattes, *Diritto Commerciale*, p. 132, note 14. "Quando le merci fossero state spalmate o benedicte, chi mancava al contratto dovesse risarcire ogni danno, invece se si fosse soltanto data la caparra, chi l' aveva dato dovesse perderla, chi l' aveva ricevuta, restituire il doppio." Quoted from St. de Varisio.

[3] Brunneck, *Siciliens Mittelalterliche Stadtrechte*, p. 186, note 1.

penalty for breach of contract until a law of Frederick II. forbade the custom. There are signs of the same uncertainty in Germany. At Hildesheim[1], in the middle of the 13th century, the Earnest did not make the contract binding, while according to the custumal of 1300 it did.

Maritime Law again, which showed great uniformity in later times, was far from uniform during the Middle Ages. Numerous local laws and customs existed which were gradually supplanted in the North by the Laws of Oleron and Wisby, and in the South by the Laws of Barcelona. It was a slow process, however, for as late as the 17th century the code of Amalfi[2] was recognised in Southern Italy, while legislation in England, Holland and France soon began to create fresh divergences.

But it is perhaps in the fairs, where special courts existed for administering the Law Merchant, that strict uniformity might most naturally be expected; for here the international element was unusually strong. Foreigners are judged in the Fair Court of St Ives[3]; Spanish, Italian, French and

[1] 1249. Stadtrecht of Hildesheim, cap. 23. (In *Hildesheim Urkundenbuch*, vol. I. no. 209.) "Si quis aliquid emerit et aliquam summam super eo dederit quod dicitur 'oringe,' si idem vult retractet ipse amittet summam quam dederit; si vero venditor retractare voluerit, ipse summam quam accepit restituet et postea duplo restituet ipsam summam que dicitur 'oringe.'"

Circa 1300. Stadtrecht, cap. 152, no. 548, p. 294. "Koft me enne kop und gift me dar enne goddespenning up, de kop scal stede sin."

[2] v. Wagner, *Seerecht*, p. 37, note 7.

[3] v. cases in court of St Ives. Maitland, *Select Pleas*, pp. 152, 155.

German merchants are among the contracting parties in the bonds of the Fair of Ypres[1], while to the great Fairs of Champagne merchants streamed from every part of Europe. But even in fairs there is evidence to show that the Law is not everywhere identical. When Edward I. declared in the Carta Mercatoria that all plaints of foreigners should be decided according to the Law Merchant, he added that if any dispute should arise as to their contracts with any persons, proof and inquiry should be made according to the usages and customs of the fairs and market towns where the contract had been made[2]. Evidently the usages and customs of fairs differed. Equally significant is the statute of Westminster of 1275. "It is ordained," ran one of its clauses, "that in any city, borough town, fair or market, a foreign person who is of this realm shall not be distrained for any debt for which he is not debtor or pledge." This changed the law as observed in English towns and fairs, and created a difference between the usage in England and in other countries. In Northern Italy a long series[3] of treaties—many of later date

[1] Des Marez, *La Lettre de foire à Ypres*. See documents, nos. 68, 73, 74, 77, 81, 84.

[2] *Monumenta Gildhallae*, II. i. p. 206. "Et si forsan super contractu hujusmodi contentio oriatur, fiat inde probatio vel inquisitio secundum usus et consuetudines feriarum et villarum mercatoriarum ubi dictum contractum fieri contigerit et iniri."

[3] See the many treaties printed in *I trattati commerciali della Repubblica Fiorentina* by Arias. The treaty of 1279 included all Venice, Genoa, and all the cities of Tuscany, Lombardy and Romagna. Fairs are not specially mentioned, but the terms of the treaty are so general as to include them. This treaty provided that "nullus dictarum civitatum possit vel debeat pro

than Edward's legislation—was slowly and fitfully securing for the Italians this same protection against distraint for the debts of a fellow-citizen. The law, however, for long remained unchanged and in the case of absence or repudiation of a treaty, the Italian had no protection.

In England it seems that at one time the procedure adopted in fairs and towns against absent defendants varied so much that a 14th century treatise on the "Lex Mercatoria[1]" declared that no one could know or ascertain the procedure of the Law Merchant on this point. Uniformity in this particular was, however, established in the end, and probably with the aid of the royal authority[2].

Still, in spite of minor differences, the international character of the Law Merchant as administered in the fair courts cannot be denied. "The customs of different places may have varied slightly, but the law in its broad lines was necessarily of that international character which has always been its chief characteristic." Nor is this true only of the law administered in fairs. The same general

alio detineri vel capi vel etiam inquietari in persona vel rebus, sed cui datum fuerit illi solum requiratur vel illi qui de jure teneretur." Arias, p. 402.

[1] Bickley, *The Little Red Book of Bristol*, p. 62. "Et ita diversimode in diversis partibus quod nullus omnino processum legis mercatorie in ea parte scire nec cognoscere poterit."

[2] Bickley, *The Little Red Book of Bristol*, p. 62. The new uniform regulations which are evidently intended to apply to the whole kingdom are introduced by "propter hoc ordinatum est." Uniformity was secured not by custom, but by regulation from above.

agreement upon the main rules and principles, with the same divergences upon less important points, characterize all the commercial codes and customs of Europe. The Law Merchant, in fact, was vague and indefinite; in many of its courts the law was regarded as a purely customary law to be declared, in case of doubt, by the merchants of the courts themselves, and even where its rules had been codified there were in reserve unwritten rules founded on custom which the commercial judges were ordered to observe[1]. But in spite of its vagueness the Law

[1] A.D. 1281. St. of Como in *Monumenta Historiae Patriae*, vol. XVI. column 15. "Eadem [placita] definiam...secundum statuta pertinentia ad officium mercatorum, et deficientibus ipsis statutis secundum alia statuta consulum Cumarum justiciae et civitatis Cumarum, deficientibus ipsis secundum usus et bonos mores civitatis ejusdem approbatos, et his deficientibus secundum leges et jura."

1305. Pisa. *Breve Curiae Mercatorum*, c. 9. (Bonaini, vol. III. p. 12.) "Et si qua reclamatio coram me...de minori quantitate solidorum XL denariorum fuerit facta ipsam diffiniam... secundum usum pisanae civitatis et consuetudinem mercatorum."

1305. *Eodem*, c. 6, p. 10. "Si constitutum inde non est in causa hujus, secundum bonum usum civitatis Pisanae et mercatantie."

1305. *Eodem*, c. 81, p. 59. "Et juro quod observabo et tenebo omnes et singulas bonas consuetudines et bonos usus quae et qui fieri consueverunt in suprascripta curia in terminando lites et causas."

1250. St. Bologna of 1250, Lb. iv. cap. 19 a. "Quod jus fori et mercati reddatur secundum consuetudinem fori sive mercati."

1237. Commercial Treaty between Florence and Sien (Arias, *op. cit.* 373). "Teneantur arbitri...omnes lites...diffinire...secundum jura et bonum usum mercantiae utriusque terrae."

1400. St. Merc. Mantuae, c. 2. "Omnes lamentationes et querimonias mihi factas a meis negociatoribus diffiniam secundum

Merchant existed. In every commercial country in Europe there were rules and legal doctrines for merchants and mercantile transactions that were regarded alike by merchants and by jurists as distinct from the common law of the land.

These rules and doctrines, which were distinct, it must be repeated, from the common law, were the Law Merchant. Each country, it may almost be said each town, had its own variety of Law Merchant, yet all were but varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same. It is the growth and development of these common rules and underlying principles that constitute the history of the Law Merchant. No doubt, in each country the Law Merchant to a certain

rationem et bonam consuetudinem negociacionis et secundum statutum mercadandiae."

1161. Prologue to *Constitutum usus* of Pisa (Bonaini, vol. II. and Pertile, I. p. 395, note 35). "Pisana itaque civitas propter conversationem diversarum gentium per diversas mundi partes, suas consuetudines non scriptas habere meruit, super quas annuatim judices posuit, quos previsores appellavit, ut ex equitate pro salute justitiae, et honore et salvamento civitatis, tam civibus quam advenis et peregrinis et omnibus universaliter in consuetudinibus praeviderent....Unde Pisani...consuetudines suas quas propter conversationem quam cum diversis gentibus habuerunt, et huc usque in memoriam retinuerunt, in scriptis statuerunt redigendas, pro cognitione omnium ea scire volentium."

It is to be noted that of the five "previsores" only one was to be a jurisperitus, and that a copy of the "constitutum usus" was always to be in the "curia maris" for any one belonging to the Sea Gild (aliquis de ordine maris) to consult. See Schaube, *Das Consulat des Meeres in Pisa*, pp. 127 and 129.

extent traced out its own curve of progress. The English Law Merchant has its history, no less than the Italian. But neither alone is the history of the Law Merchant. This essay has for its object to trace the development of the common essential elements that are found in the early Law Merchant of every country. The scope of the subject is not narrow and I can only attempt briefly to touch upon what seem the most important points.

The Law Merchant, then, was a body of rules and principles relating to merchants and mercantile transactions, distinct from the ordinary law of the land. Possessed of a certain uniformity in its essential features, it yet differed on minor points from place to place. The question at once arises, in what did this uniformity of character consist? To this question only a close investigation can give a complete answer, but the essential features of the Law Merchant and the broad general principles that permanently influenced its development, are clearly marked and can be stated at the outset.

In the first place, the Law Merchant was in the main customary law. "The grandeur and significance of the medieval merchant," says Goldschmidt, "is that he creates his own laws out of his own needs and his own views." Early in the 11th century, the German merchants were already asserting the force of their own customs against the common law. "Merchants assert," said Notker[1],

[1] Keutgen, *Urkunden*, no. 74, p. 44. "Also choufliute stritent, tas der chouf sule wesen state, der ze jarmercate getan wurdet, er si reht alde unreht, wanda iz iro gewoneheite ist."

"that sales made in fairs, whether made with proper legal forms or not, should be binding, since it is their custom." A few years later the merchants of Tiel[1] are described as deciding cases not according to the law, but as they wished. In Italy the commercial judges based their decisions upon custom and upon mercantile statutes[2] framed for the most part by the Merchant Gild, though confirmed by the State. The Bristol Treatise[3] on the Lex Mercatoria shows clearly that in England the force of custom was recognised. Everywhere, in commercial transactions, custom held sway, and even where the State legislated it had often merely to confirm or slightly modify the rules that had long before been established by custom.

The earliest English statute on Insurance, of the year 1601, declares that it "hathe been tyme out of mynde an usage among merchants," while similarly

[1] Keutgen, A.D. 1018, *Urkunden*, no. 75. "Judicia non secundum legem sed secundum voluntatem decernentes." Cf. Freiburg Stadtrecht of 1120 (Keutgen, no. 133, c. 5, p. 118). "Disceptatio...pro consuetudinario et legitimo jure omnium mercatorum, praecipue autem Coloniensium examinabitur judicio."

[2] v. quotations, pp. 8, 9.

[3] In *Little Red Book of Bristol*, vol. I. c. 4, p. 60. "Sed apponitur adhuc le affidavit propter antiquam consuetudinem."

c. 21, p. 83. "Ut ipsi...fieri facerent quod de jure et secundum legem et consuetudinem mercatoriam fuerit faciendum."

For maritime law cf. *Black Book of Admiralty*, p. 3. The Admiral is to appoint as deputies "Some of the most loyal, wise and discreete persons in the law maratime and ancient customs of the sea."

Black Book of Admiralty, vol. I. p. 168. Additions to *Inquisition of Queensborough*, cap. 71. "Est de faire sommaire et plain proces selon loy marine et ancienne coustume de la mer." Cf. p. 409.

on the Continent the early statutes dealing with insurance only legislated upon minor points, leaving the main points to be decided by custom[1]. "In all great matters relating to commerce the legislators have copied, not dictated."

This customary nature of the Law Merchant was by far the most decisive factor in its development: it made the law eminently a practical law adapted to the requirements of commerce; and as trade expanded and new forms of commercial activity arose —negotiable paper, insurance, etc.—custom everywhere fashioned and framed the broad general principles of the new law. Custom is alike the ruling principle and the originating force of the Law Merchant.

The summary nature of its jurisdiction is a second feature that always characterised the Lex Mercatoria. Its justice was prompt, its procedure summary, and often the time within which disputes must be finally settled was narrowly limited[2]. To

[1] Goldschmidt, *Handbuch des Handelsrecht*, pp. 374—5, 378—9.

[2] 12th cent. Rouen. *Établissements*, c. 26. "Si quis requiserit curiam suam de debitis, conceditur ei, et faciat rectum clamius in *duabus octonis*."

The customs of Rouen were received in many French cities. See Gory's edition.

1302. Florence. St. Calimalae, Lb. ii. c. 2. "Et teneantur consules finire et terminare hujusmodi quaestiones...intra *XL.* dies."

12th cent. Pisa. *Constitutum usus*, c. 11. "Et post quam liquet, infra *octo* dies eam diffiniat."

1305. Pisa. *Breve Maris*, c. 19. "Omnes causas infra *tertium* diem ex quo mihi liquebit...diffiniam, nisi justa causa remanserit."

prevent lengthy processes it is not rare to find appeals forbidden[1]. Speedy justice, in fact, was necessary for merchants, and while the Canon Law[2] and the usage of the Papal Chancery may have furthered the development of this summary procedure in the Law Merchant, there can be no doubt that it was mainly due to the necessity experienced by the merchants themselves[3] of a speedy settlement of their disputes. This characteristic feature of the Law Merchant seems especially to have struck the 14th century author of the Bristol Treatise. "The Lex Mercati," he remarks, "differs from the common

1400. St. Merc. Mantuae, c. 2. "Omnes lamentationes et querimonias...occasione mercadandiae diffiniam et determinabo infra *unum mensem.*"

1286. St. of Como. Cases "inter mercatores occasione mercationum" to be decided "infra xv dies utiles," between other persons "infra duos menses."

[1] 1286. *Breve Pisani communis*, Lb. i. c. 61 (Bonaini, i. p. 155). "Omnes sententiae quae feruntur a consulibus ordinis maris de naulo et marinatico et de avere guasto, a libris centum infra valeant...a quibus sententiis non possit appellari."

See numerous references in Lattes, *Diritto Commerciale*, p. 279, note 59.

[2] 1306. The Decretal "Clementina Saepe" of Clement VI. dealt with the summary procedure, and there is a striking analogy in substance and form between the language of the Italian Statutes and the Decretal. See Lattes, *Studii di diritto statuario*, p. 51.

[3] Goldschmidt quotes (p. 174) from St. Merc. of Verona (p. 114).

1406. "More mercationis expedite et breviter procedatur, quia bene scitis quod mercatorum conditio longitudines non requirat." Cf. Bonaini, III. 207 note.

1384. "Si mercatorum negotia ad litigatorum tergiversationes et judicales observantias reducantur, peribit de societate mortalium mercatura."