

SELECT CASES
CONCERNING THE LAW MERCHANT

A.D. 1251-1779

VOL. III
SUPPLEMENTARY
CENTRAL COURTS

EDITED
FOR THE SELDEN SOCIETY
BY
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Select Cases concerning the Law Merchant

VOL. III.

PREFACE.

WITH the publication of a Third Volume, this edition of 'Select Cases concerning the Law Merchant,' planned by the late Charles Gross nearly thirty years ago, is at last completed. In his Preface to the Second Volume the present editor has referred to the circumstances in which he undertook to carry out Professor Gross's plan, which seemed to contemplate a collection of Law Merchant cases from the Plea Rolls of the Central Courts at Westminster, to follow the Select Cases from pleas before Local Courts which were printed in the First Volume, edited by Gross himself and published in 1907.

The addition of a Third Volume was suggested by the present editor, and was recommended to the Council by the Literary Director, the intention being to supplement the selections made from the records of the Central and Local Courts by collections of records illustrating, respectively, the origin and course of procedure under the Statutes of Merchants and Ordinance of the Staple, and the Commissions, Assizes, and Inquisitions for hearing and determining special matters connected with the welfare of merchants by protection of their merchandise in English or foreign ports, and the regulation of the merchandising in markets and fairs.

From these sources more than 150 cases or documents have been printed or summarized in Volume III, making (with 100 printed in Volume II and 50 in Volume I¹) some 300 cases or documents relating directly or indirectly to the subject of the Law Merchant.

The present editor's share in the discovery, co-ordination and description of these documents must represent the chief part of his contribution to the history of the Law Merchant in the last two volumes of this edition, and it goes without saying that such references as he has ventured to make to the legal history or theory of the period are without prejudice to the value and use of the documents themselves.

Some further acknowledgement of assistance in connexion with the production of a section of the present volume has been made in the

¹ The sources included in this volume represent more extensive series of documents such as the St. Ives' Fair Rolls and the Court Rolls of Staple towns.

Introduction, and it remains for the editor to express once more his gratitude to the Record Officers and their library staff, and to the Archivists of the British Museum and Guildhall for courteous and friendly help. Finally, gratitude is equally due to the Literary Director and to the Secretary of the Selden Society, to whose patience, scholarly interest, and wise counsel, backed by the skilful efforts and resourceful methods of the printers, the completion of this belated work is due.

Reference has been made elsewhere in the present volume to the importance of the forthcoming volume of the City of London Plea Rolls for the study of the Law Merchant procedure. The present editor has also been unable to avail himself of the valuable and original researches of Dr. M. M. Postan on 'Private Financial Instruments in Medieval England' in *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* (xxiii. I.); but in this, as in the case of the City of London Plea Rolls, the subject was outside the scope of this work.

H. H.

November 1931.

INTRODUCTION.

Method of Selection.

REFERENCE was made in the previous volume¹ to the plan of the succeeding and final volume of this edition, which was to contain some supplementary cases concerning two aspects of the Law Merchant hitherto somewhat neglected, owing to the difficulty of making an adequate study of the sources. Select cases illustrating various forms of pleading on Statutes Merchant and Statutes Staple have been printed in the first part of the present volume,² while further cases have been selected as specimens of the conventional procedure for a 'recognizance in the nature of a Statute Staple' from 1532 to 1775, when this device was superseded by another system of licensed usury, the Annuity, reverting to the 'merry bond' of earlier times.³ Other cases have been selected from the 'Special Assize Rolls' (without incroaching on the fertile and well governed province of Professor Bertha Putnam) or from some other Plea Rolls, and they have been printed in the second part of this volume.⁴

These supplementary cases have been considerably augmented by some miscellaneous texts and notes contained in Appendices⁵ to the respective parts just mentioned, with a view to elucidating various passages in the texts of both parts; while further documents and notes will be found in an Appendix to the Introduction.⁶ This arrangement resembles that adopted in the previous volume, and it has at least the advantage of letting the documents speak for themselves. Indeed this may seem all the more desirable in presenting texts derived from collections which are practically unexplored and also very imperfect.

In particular, the records relating to the procedure of taking, certifying and executing statutory or official recognizances remained inadequately arranged and described in municipal and state archives alike down to recent times, with the result that some misconceptions or misstatements of their nature and use may be found in the classification and description of these documents. The imperfect

¹ *Law Merchant*, vol. ii, pp. x, xi.

³ Below, pp. 124-132.

⁵ Pp. 92-135 and pp. 170-184.

² P. 1 sq.

⁴ P. 136 sq.

⁶ P. liii sq.

attempt that has been made in the following pages to overcome some of the difficulties resulting from the usual neglect or indifference of earlier archivists (in the case of judicial records which were no longer useful for official reference) was assisted by two former students¹ who many years ago successively explored the earlier history and procedure of the Statute Merchant and Statute Staple registries. These pioneers abandoned the enterprise in favour of more accessible subjects of research, but the editor is indebted to them for much of the material that has been digested in the Appendix to this Introduction, and he hopes that further details collected through their industry may be deposited in academic custody for the information of other students.

It must not, however, be supposed that, apart from its archival exposition, the institutional and legal history of the subject has been neglected or mishandled by competent writers. Earlier lexicographers and antiquaries were, of course, familiar with the actual procedure of the statutory registries which from time to time figure prominently in the Law Reports and Year Books. Here and there, indeed, we may be tempted to wonder whether the King's justices or the jurors who had been made to come before them were always well informed respecting certain facts that could only be ascertained by an intelligent method of inquiry 'according to the law merchant.' This attitude, however, is not altogether surprising since the courts of common law had found it necessary to secure exemption from the provisions of the statutes of merchants which, in regard of the niceties of diplomatic intercourse and the avowed celerity of the official procedure enjoined thereby, positively reeked of the law merchant. In any case the reservation was scarcely necessary, and any seeming ignorance or hostility of bench or bar may probably be imputed to the professional caution that could impress eager students more favourably than an impatient King who frankly marvelled at such 'quibbling'—and passed on.

Possibly the professional as well as the constitutional situation was eased by the rapid decline of the Statute Merchant procedure in the face of the resolute competition of the Statute Staple seventy years later, for the Staplers were a close and recognized fraternity of merchants, graziers, yeomen, and country gentlemen at large, with a definite and summary jurisdiction that simplified matters for the courts above. In the next century we find Sir John Paston replying to his kinsman at the sign of the 'George,' S. Paul's Wharf, that in his opinion it is rash to let one's self be bound in 500 marks for a marriage portion; and in any case it will be hard to raise so much in the family, whose money is

¹ Mr. Harold Holloway, M.A., of the London School of Economics, and Mr. J. F. Nichols, M.A., Ph.D., of King's College.

in the hands of the Staplers, who are always 'slack payers'; yet he has drawn a bond as desired.¹

This view is supported by the interesting manifesto attributed to a Stapler of an earlier generation in Palgrave's mediæval romance.²

'... Since the passing of the Statute of the Staple, we merchants can do our business with much less money. The introduction of the Bills of the Staple hath given new life to all our trade. By such a Bill, which bestows upon the creditor the right, should the debtor fail in payment, to seize all his lands, his goods, his chattels, we merchants with prudence and good management, deal with our stock ten times over. Is not a penny four times paid as good as a groat? Let me have the Staple Bill, and with one hundred nobles in my cash chest, I can do business to the same amount as if I had a thousand. It is a treasure which defies the thief, for to him the parchment is as useless as an old song. It only grieves me,' continued Master Canning, 'that the Crown inevitably loses thereby, for when a letter of credence issueth, by which the King condescends to ask us merchants for a small loan of money in proportion to our means, and we are called upon to declare our substance, it would be against sound principle were we to bring into the valuation a Staple Bill, a *chose in action*, which is not taxable by the law.'

It is true that this gasconade does not help us to solve some problems which emerge from the pleadings on statutory recognizances before the justices; nor could we obtain full satisfaction from a perusal of the printed texts referred to in the Lists of Statutes, Rolls of Parliament and Year Books printed below,³ or of more than a small portion of the List of general and special authorities which follows these.⁴ But the last-mentioned list does contain the titles of works which should enable the reader to follow the ordinary procedure in cases certified to the Chancery and transmitted thence to the King's court; also in cases where some special matter is counted or pleaded, such as *Elegit*, Contempt, Conspiracy, Deceit, Forgery, Escape, Minority, Clergy, Duress and other titles that appear in the record publications and academies cited above and in some modern text-books.⁵

All these topics and many others are duly noted in the 'Abridgement' and text-books referred to, and some of them will be mentioned presently in connexion with the relevant cases which are printed below. It must be remembered, however, that the Edwardian statutory recognizances did not supersede the existing system of enrolling obligations for the repayment of trade debts or loans. Such instruments

¹ Paston Letters (ed. Gairdner), vol. iii, p. 166.

² *Collected Works of Sir F. Palgrave*, vol. viii, p. 255. Conceivably such 'Bills' could be negotiated or discounted (cf. *Econ. Hist. Rev.* III. 2).

³ Pp. 185-191.

⁴ Pp. 192-207.

⁵ Among the text-books referred to, the editor is specially indebted to those which appear under the names of Sir W. H. Holdsworth, Professor Plucknett, Professor Jenks, Professor Hazeltine, Dr. McKechnie, J. Jacobs, and Mrs. O. S. Watkins.

are continuously enrolled in the Close Rolls of the Chancery as well as in the Plea Rolls and Miscellaneous Books of the Exchequer,¹ King's Bench and Common Pleas. In the Close Roll of 1328 (March), the Chancery being then at York, will be found an entry as to the enrolment of a grant of lands, extended at 167*l*. (under a recognizance made in the Chancery), to be held by the merchant creditor according to the form of the Statute of Merchants until the debt is levied.² The Year Books show the vogue of these privileged enrolments and the infinite variety and subtlety of the diplomata which are preserved there or as originals in the Chancery and Exchequer files.³ Again, there were official enrolments of bonds taken as securities for good behaviour on the part of tax-collectors and other officials as well as to ensure the due observance of commercial ordinances and regulations. The political uses and value of the statutory recognizance as a profitable and effectual means of coercion was readily deduced from the solidarity of the statutory mainprise, and interesting specimens will be found in the text of this volume from the thirteenth century onwards. The menace to a political offender of a debtor's prison was a recognized instrument of mediæval government, but at the same time it remained an exceptional expedient in view of the more effective precautions of statutory tribunals in the Tudor and early Stuart periods as well as of the activities of Justices of the Peace in these and earlier times, although the private use of such securities for marriage settlements, etc., had steadily increased. Finally, there are pleadings on writings obligatory of various kinds not officially enrolled, but entered casually in the registers of ecclesiastical or lay dignitaries or corporations.⁴ Probably they were not entered at all in many cases, while in other cases both the original bonds and the entry books have perished, for even the official records are by no means complete.⁵

Evolution of the Bond.

The skill and learning expended on the drafting of these commercial instruments has often been commended by modern lawyers. This aspect of the matter may also throw light on the legal training available for that purpose. A typical source of information is Canon Woodruff's delightful selection of letters from a Canterbury Chapter register containing applications for relief from the 'voracity of money-lenders' addressed to Prior Henry of Eastry by several Kentish students

¹ See below, p. xxiii, last paragraph.

² Calendar, p. 373.

³ For the classification of these documents, see Hall, *Formula Book*, vol. ii, p. 129 sq., and Madox, *Formulare Anglicanum*, passim.

⁴ For a good specimen see Pontissara's Register (Y. & C.S.), ii, p. 587.

⁵ See below, pp. xvii, xl of this Introduction.

of civil and canon law at Orleans and Bologna.¹ Among these is the proposal for a loan of 3 marks to enable young Richard of Haute to pursue his studies and incidentally to save the forced sale of his cherished autograph copy of the Decretals. The writer promises faithfully to satisfy the lender whether he lives or whether he dies by a natural or a 'civil' death.² Further, he will bind himself by an oath and assign all his goods in hand or to come to him (renouncing the plea of minority). Finally, he will appoint a kinsman (named) to prepare a bond on any terms agreeable to his patron.

We gather that this business-like proposal was accepted by the kind-hearted prior, like others that have been preserved in this collection³; and it is interesting to find that Richard of Haute was appointed in due course to transact the legal business of the Prior and Chapter.⁴ We gather, too, that the preparation for a career of legal chicanery was hard and perilous, although the lessons of adversity may have been eventually profitable. As a work of art, however, the private bond perfected by the Italian lawyers could not compete on equal terms with the conventional bonds prepared by mere scribes or notaries in accordance with a statute or ordinance of Parliament. The advantage possessed by the 'statute' was in fact grasped by officials of the King's court and council as well as by business men and their attorneys, and it is interesting to notice that the device of a 'statute' or 'defeasance' was readily adopted as an instrument of government as well as a negotiable security in commerce.⁵ It is unfortunate that few traces have survived of the statutory or official establishments by which these instruments and contracts were prepared and recorded. Apparently anything resembling a notarial college was unfavourably regarded in mediæval England, though without some such proprietary status and establishment the archives of expired or extinct functionaries or departments had little chance of surviving the vicissitudes of mundane things.⁶

¹ *Arch. Cant.* XXXIX. The writers complain also of robberies by their Italian servitors.

² i.e. by process of law.

³ Instructive references to the activities of the Chapter's Law department may be found in the valuable but neglected account books preserved in Lambeth Library (Nos. 242, 243).

⁴ The Henry of Haute who succeeded in obtaining a grant of Elmstead fair at the expense of an earlier grantee may have inherited this legal skill. See below, pp. 153-157.

⁵ Above, p. xiv, and below, p. 120 sq.

⁶ The inquiries of the Royal Commission on Public Records (1910-1919) elicited some instructive information as to the disparity of insular and continental methods of registering private deeds, although in fact the results of the organized registration of such documents in the Channel Islands or Colonies, or in provincial and metropolitan archives, are dwarfed by fortuitous deposits in the archives of the Crown and its feudal tenantry in point both of quantity and quality.

It is at least certain that the archives of statutory authorities, central or local, have fared worse than those in the custody of courts of justice, town councils and houses of religion or charity, because these institutions have usually absorbed the records of subordinate or cognate departments. Thus the records of town courts have largely survived, while those of statute merchant registries have mostly perished, because they were at the disposal of keepers of the King's seals,¹ who frequently appointed deputies and presumably kept the records in their own houses.²

Evolution of Statutory Recognizances.

The history of the Statute Merchant and Statute Staple registries cannot be written here, but the editor felt that some attempt should be made to explain more fully the objects of their institution and to describe more clearly the nature and scope of their statutory undertakings. Some such explanations and descriptions are, indeed, available in 'law dictionaries' and other works of reference, but the writers are mostly concerned with the 'statutes' as *choses in action* before the King rather than with the capacity and functions of the registry. As the Chancery clerks and the Justices or Barons who heard or discussed the cases that are printed here were familiar with both these aspects, we may miss the full significance of their comments or decisions unless we realize the environment.

Students of Economic History may not always appreciate the technical distinction between debts that are incurred in respect of contracts or deeds of feoffment and those which are of record, such as judgment debts, recognizances taken in the King's Courts (with or without defeasance clauses), statutory recognizances connected with the Statute Merchant and Statute Staple proceedings, etc. The penalties expressed in obligations of this kind are evidently more easily enforced, and so they have been estreated and levied by process of record for many centuries at the instance of busy merchants or vigilant ministers of State. None the less, some difficulty may be found by modern students in identifying the several tribunals before which these recognizances for solvency or good behaviour have been recorded, and in discovering or co-ordinating the surviving archives. Abundant material for study exists among the inrolments and miscellaneous files or exhibits of the courts at Westminster, or of the Courts of Assize and Quarter Session held in county towns, besides the miscellaneous contents of the offices of the Secretaries of State, and of municipal administrations;³ but this

¹ Below, App. p. li sq.

² Below, App. p. 103.

³ i.e. the Statute Merchant or Staple, Piepoudre and Quarter Sessions records. The process in these cases is well described in the Calendar of the City of London Plea Rolls.

material requires to be assembled and shaped before it can be profitably used. Moreover in certain cases ancient official archives have disappeared or have been only partly accounted for, as in the case of the records of fairs and staples generally,¹ while in other cases they have strayed from the original archive with the result that the functions of certain ancient tribunals have been obscured. A notable instance occurs in the case of the recognizances taken as a prescriptive right or privilege of the court of the Steward and Marshal of the Royal Household, which carried on a flourishing business in fees and other perquisites of recognition even before and after the Edwardian statutory procedure as well as during its observance.² At the present time, however, we do not know for certain whence these records came or whither they went, and we are in the same dilemma with regard to other prescriptive jurisdictions. A further difficulty is that one series of the statutory recognizances is now among the Lord Chamberlain's records, while others may have perished with most of the other judicial records of the Court of the Verge.³ Even so, the records of the Marshalsey court and prison are quite fragmentary, while the preservation of the records of the Royal Household could not be expected of an official custody which was the subject of a strong remonstrance by the Royal Commission of 1912-1919.⁴ Another group of related archives, which are also alluded to in this and the previous volume, was doubtless housed in the Guildhall of London⁵ as well as in the Tower,⁶ and there should have been records of interest at St. Martin's le Grand, as well as in the Sheriff's Court and in the Fleet and Newgate prisons.⁷ Finally, there are water-bailiff's courts akin to maritime courts and interested in the law merchant. The case printed below from the Dartmouth court reminds us that it was at Dartmouth, and as early as 1326, that

¹ The records of local fair-courts held under the official supervision of the City of London are represented only by the wreckage described in *Law Merchant*, vol. ii. A model for their further reconstruction has been recently supplied in Mr. Herbert Wood's edition of a Court book of the Archbishop of Dublin's fair.

² See the references to this court in the Indices of this and the preceding volume.

³ See Preface to the official list.

⁴ Second Report (1914), pp. 4, 89 : Appx. pp. 7, 104.

⁵ It has been stated by the late Dr. R. R. Sharpe, in his *Calendar of the Guildhall Letter Books* (A.P. 79) and in his *Introduction to the same volume* (p. iv), that the city fathers set the Statute of 1283 at defiance by resolving that recognizances under the Statute might be taken by the Chamberlain in his own house instead of before the Mayor and King's clerk at the Guildhall. The editor does not seem to have been aware that recognizances of debts had been taken before the Chamberlain and continued to be so taken, and that these had nothing to do with the statutory recognizances taken before the mayor and clerk from 1283 onwards.

⁶ In London, Bristol, and other cities, the franchises were taken into the King's hand and administered by a keeper who was also a chatelain.

⁷ The difficulties of a defendant debtor, who was commonly kept in chains, were obvious (see below, p. xxvi).

the King's Admiral held an inquest of mariners according to the law merchant in connexion with the spoil of a foreign merchant vessel.¹ We know that similar courts with a mercantile procedure must have existed in the fourteenth and fifteenth centuries both in England and Ireland, though in a later period the water bailiff had become a municipal port master, while the local Admiralty and 'Chancery' courts were held by civilian lawyers.

The 'Judaism' as a precedent for the Edwardian Statutes.

We are not concerned here with the general facts and theories connected with the economic and social conditions of the English Jews or with their implications, but in view of the important part played by the Jewish Exchequer² in connexion with the evolution of the Edwardian statutory registries of mercantile debts, some reference must be made to the Jewish ark and starr as the precursors of the Edwardian registry and bond.

The idea of the registration of debts may have been derived from the ceremonial rites connected with the due performance of mercantile contracts, from which an elaborate system of registration was gradually evolved by the expert clerks of the King's Chancery and Exchequer, aided by native and foreign lawyers and merchants. These able ministers, intent on giving satisfaction to the King in the most important matter of the assessment of the King's Jews and their respective debtors (who hereby became the 'King's debtors'), contrived special tribunals, sessions, formulas and records which were gathered round the arks of new covenants in certain towns and were co-ordinated also with a central Exchequer of the Jews. Here on the chequered board devised by wise men of the East, the financial movements of the respective pawns were disclosed by Christian knights³ and Jewish bishops⁴ in a game that was always won by the King with his castle⁵ and his queen.⁶ The prerogative of the Crown having been secured, the co-operation of the Jewry was obtained partly through its helpless position and partly through the natural docility and religious discipline of the race. The English Kings wisely recognized the authority of the Jewish rabbis and allowed the Jewish usurer to bind himself and his kindred by picturesque deeds in the Mosaic script, witnessed and carried

¹ *Law Merchant*, vol. ii, pp. 99 and 155, 156.

² The valuable Calendar of the Plea Rolls of this Exchequer, edited by Mr. Hilary Jenkinson, who is also engaged upon the Exchequer Plea Rolls, will throw much new light on both these series of Exchequer Records.

³ Cf. Case 1 (p. 1).

⁴ Cf. Jacobs, *Angevin Jews*, p. 372.

⁵ For the supervision of the local Jewries by the keepers of the King's castles, see the works of Jacobs, Rigg and Jenkinson cited below (pp. 206-207).

⁶ For the Queen-gold from the Judaism, see Case 5 and the *Dialogus*, p. 157.

out by Jewish merchants and officials and safeguarded by a net-work of administrative and judicial precautions. These conciliatory measures were all the more creditable because it was a point of honour with the Jews to ignore Gentile laws and customs as far as possible, while the prejudices of Christian merchants and officials had to be smoothed or stifled. It was a masterly device to include Jew and Christian in the binding formalities of their respective religions and laws, and we may even be tempted to wonder whether these experiments were not assisted by the common interest and understanding that brought traders of all nations together in the customary procedure of the law merchant.

When the Judaism was organized under Richard I as a large source of revenue to the King's exchequer,¹ we find a system of registration permanently established which does not compare unfavourably with that of the statutory registries of nearly a hundred years later, unlike which it remained continuously under the supervision of Exchequer experts.

Certainly the advantages offered to the Jewry by the various ordinances of the Judaism were considerable. These comprised personal protection from fanatical violence, with privileges (as the King's debtors) in respect of freedom of trade, nominally without tolls; assistance from the King's court and officers to prove and collect their debts; an official certification of contracts and book debts, and the right to dispose of unredeemed pledges. All this, too, at a moderate charge on each transaction; but subject possibly to arbitrary fines or gifts, with the inevitable estate-duty at death wiping out the savings of a lifetime; though the Christian landowner or merchant did not fare much better himself, in that way, under the law and custom of the Realm, nor yet his latest successors.

More satisfactory still was the arrangement by which the Jewish creditor was allowed to prove the amount loaned to his debtor, who could in turn prove the amount of capital and interest repaid. At the same time the former was allowed to repay himself by receiving possession of half the debtor's lands, thus possibly anticipating the statutory provisions of the mercantile and judicial procedure of 1285.²

Besides these material advantages (with certain drawbacks) the King's Jews, as such, obtained a gratifying recognition of their own religious and civil self-government. Their bishops and judges and masters of the law were important personages and played their parts with credit. There is reason to believe that not a few of the influential

¹ Hoveden (Rolls), iii, p. 266; but cf. Gross, *Exchequer of the Jews* (1887), p. 219 sq.

² These relations are carefully stated by Sir William Holdsworth, *History*, vol. iii, p. 131.