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THE UNROMANTIC HISTORY OF LEX MERCATORIA IN ENGLAND

Professor Warren Swain, University of Auckland

> In Syria once there dwelt a company
> Of wealthy merchants, serious, straight and wise,
> That had a far-flung trade in spicery
> And cloth-of-gold and satins of rich dyes,
> All serviceable stuff that could surprise
> With novelty; and business was a pleasure
> Dealing with them and bartering for their treasure.[1]

Whilst it is hardly unexpected to find Chaucer describing merchants in this fashion it comes as more of a surprise to find some lawyers thinking in much the same way. There cannot be many books about law with the word 'romance' in the title, but there is at least one. The main thesis of Wyndham Bewes's 1923 book, *The Romance of the Law Merchant*,[2] was that a universal law merchant existed in the Middle Ages. It was described in suitably quixotic terms:

> The merchants carried their law…in the same consignment as their goods, and both law and goods remained in the places where they traded and became part of the general stock of the country. With small variations, the law in all countries was homogenous, being, perhaps, least adopted in our own land.[3]

[1] Chaucer, *The Canterbury Tales* (Nevill Coghill tr, Penguin 1977) 143.
[2] (Sweet & Maxwell 1923).
[3] Ibid vi.

The idea that a homogenous law merchant once existed is a popular one used by the two founding fathers of the 'new lex mercatoria' movement, [4] Berthold Goldman and Clive Schmitthoff,[5] in order to argue in favour of a modern body of transnational mercantile law.[6] History is central to their thesis, with Goldman going on to describe lex mercatoria as 'a venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated'.[7] Charles Donohue has called this take on history 'tendentious'.[8] But it does have support from some serious legal historians. A few years before Bewes, William Mitchell made much the same point about a universal system of mercantile law. He wrote that, 'The international nature of the sources from which it drew its rules and the persons over whom it exercised jurisdiction, combined with the universality of its guiding principles, fairly entitles the Law Merchant to be called "the private international law of the Middle Ages".'[9] Mitchell was quoting the great English legal historian Sir Frederic Maitland.[10] Maitland expanded on the point in his great work with Frederick Pollock, *The History of English Law*. Having noted that mercantile law chiefly differed from the common law in matters of proof he noted that 'Also these rules are not conceived to be purely English Law; they are, we may say, a *ius gentium* known to merchants throughout Christendom, and could we now recover them we might find some which had their origins in the coasts of the Mediterranean'.[11] Maitland can lay claim to be the greatest of the English legal historians but he was not infallible.[12] His view of lex mercatoria has proved just as attractive to modern writers. Harold J Berman, has gone as far as suggesting, 'Western mercantile law acquired in the late eleventh, twelfth, and early thirteenth centuries the character of an integrated system of principles, concepts, rules, and procedures'.[13]

[4] For a summary of the key literature see: JH Dalhuisen, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria' (2006) 24 Berk J Int'l L 129, 129-30.
[5] For a discussion see, Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (OUP 2017) 31-46.
[6] For a detailed account of the way both writers used history see, Nikitas Hatzimihail, 'The Many Lives – and Faces - of Lex Mercatoria: History as Genealogy in International Business Law' (2008) 71 Law & Contemp Probs 169.
[7] Berthold Goldman, 'Lex Mercatoria' (1983) 3 Forum Internationale 3.
[8] Charles Donahue, 'For Medieval and Early Modern *Lex mercatoria*: An Attempt at the *probatio diabolica*' (2004) 5 Chi J Int'l L 21.
[9] W Mitchell, *An Essay on the Early History of the Law Merchant* (CUP 1904) 21.
[10] FW Maitland, *Select Pleas in Manorial and Other Seignoral Courts Vol 1* (Selden Society 1888) 133.
[11] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law* (2nd edn, CUP 1968) Vol 1 467.
[12] For a useful reappraisal see, John Hudson (ed), *The History of English Law Centenary Essays on Pollock and Maitland* (OUP 1996).
[13] Harold J Berman, *Law and Revolution The Formation of the Western Legal Tradition* (HUP 1983) 348.

There is undoubtedly some romantic appeal to the idea of an 'integrated system' of mercantile law. Unfortunately it does not fit very well with the facts as we know them. An examination of mercantile law and practice across Europe in the Middle Ages suggests that far from a universal system of law, the law that applied to merchants was local rather than transnational.[14] Long distance trade did occur.[15] At various times it was important, but the volume of these transactions should not be overstated.[16] Small-scale regional trade networks were also important.[17] There is something very counterintuitive about the idea of a universal mercantile law as Kaden notes: 'Should we assume that these local people willingly gave up their own law to be governed by a law merchant created by and for foreigners?'.[18] The reality in England, at least, was decidedly unromantic. It is a product of several factors not least of which is that before the nineteenth century there was no unitary court structure.[19] Potentially overlapping jurisdictions competed for business from litigants. The common law courts were the most important. A good deal of mercantile litigation was conducted elsewhere including in special mercantile courts and the Court of Admiralty. Procedural factors, cost, and the state of legal doctrine ensured that the common law courts were not necessarily attractive to those wanting to conduct run-of-the-mill mercantile litigation in the Middle Ages. At the same time one of the reasons that the common law has proved to be such an enduring system is that judges are prepared to adapt to changing economic and social circumstances, even if that meant borrowing from other courts and adopting mercantile practices. By the sixteenth century the common law courts had absorbed much of the mercantile litigation. That they did so was largely a product of the rise of the action of assumpsit which was itself shaped by mercantile practice.[20]

MERCANTILE LAW IN THE MIDDLE AGES

[14] Emily Kadens, 'The Medieval Law Merchant: The Tyranny of A Construct' (2015) 7 J Legal Analysis 251. Kadens provides a useful introduction to the wider literature.
[15] MM Postan, *Medieval Trade and Finance* (CUP 1973) 92-231.
[16] Trade across the period also varied across time. The Middle Ages conventionally covers the period of around 1000 to 1453. For a snapshot of the end of the period see, Eileen Power and MM Postan (eds), *Studies in English Trade in the Fifteenth Century* (Routledge 1933).
[17] For an illustration see, Christopher Dyer, 'The hidden trade of the Middle Ages: evidence from the West Midlands of England' (1992) 18 Jour Hist Geo 141.
[18] Kadens (n 14) 263.
[19] For an overview of the legal system see: JH Baker, *An Introduction to English Legal History* (Butterworths 2002) chs 2, 3, 6, 7, 8.
[20] JH Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38 CLJ 295, 308-311.

In *Lex Mercatoria*,[21] written in the late thirteenth century the author begins with a general account of mercantile law:

> Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive. So it should be observed that such markets take place in only five [types of] place, specifically in cities, fairs, seaports, market-towns, and boroughs, and this by reason of the market. From this it should further be seen just as markets are held in five [types] of place, so mercantile law or law of the market always follows.[22]

He goes on to explain that the mercantile courts dealt with the sale and purchase of clothes and food and 'almost every type of movable good'.[23] Real property was excluded but a large range of personal actions are listed.[24] The author of *Lex Mercatoria* suggests that mercantile law applied to any sale or exchange of merchandise involving a merchant.[25] If true it would mean the distinct rules of mercantile law applied to a huge number of transactions. Even if the jurisdiction of the Fairs Courts was as broad as described in *Lex Mercatoria* it was does not reflect the position in the other courts such as Borough Courts. These courts imposed entry conditions on litigants.[26]

Fairs played an important role in the medieval economy at a local level as well as attracting itinerate merchants. The Fairs Courts, or 'courts of piedpowder' as they were known, in reference to the dusty feet of the itinerant merchants who traded there, were therefore significant, even if the larger merchants may have preferred to settle disputes within their guilds, through settlements or by informal pressure.[27] A wide variety of litigation from the trivial to the relatively significant can be found in the court rolls of the fair of the Abbot of Ramsey at St Ives. [28] The court was not confined to matters arising within the boundary of the actual fair but also included the recovery of rents from houses in the town and debts contracted outside the fair. The dispute between Hamon of

[21] The standard modern version which is used here is: Mary Basile, Jane Bestor, Daniel Coquillette, Charles Donahue (eds), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Aftermath* (Ames Foundation 1998). References to the original text are taken from the chapter headings.
[22] Ibid. Ch 1.
[23] Basile et al, (n 21) Ch 1.
[24] Basile et al, (n 21) Ch 6.
[25] Basile et al, (n 21) Ch 2.
[26] Basile et al, (n 21) 45-48.
[27] Ellen Moore, 'Medieval English Fairs: Evidence from Winchester and St Ives' in JA Raftis (ed), *Pathways to Medieval Peasants* (Pontifical Institute of Medieval Studies 1981) 283, 290-91.
[28] Charles Gross, *Select Cases Concerning the Law Merchant AD 1270-1638* (Selden Society 1908) xxxv.

Barton and William Bishop is probably not untypical.[29] Barton sold Bishop two barrels of salt haddock. Bishop having paid Barton a God's penny,[30] refused to pay the balance of the price. He argued that the fish was 'corrupt and fetid' and refused to accept it. Barton claimed 20s by way of damages. The parties reached a concord and Bishop paid 12d. The judges in cases like this were not lawyers. They were local officials such as mayors in market towns and those who worked in the market like stewards and the merchants themselves.

There are explicit references to mercantile usage or even mercantile law in the proceedings of the Fair Court at St Ives. In 1291 Nicholas Legge complained that Nicholas of Mildenhall 'unjustly prevents him from having, according to the usage of merchants, a part of a certain ox' to his damage.[31] The term 'merchant law' was used.[32] At this time the boundary between law and custom was more fluid than it became. It makes sense to think of mercantile custom as source of law in the same way that other types of custom were used to determine cases in a number of the other inferior courts.[33] Such jurisprudential questions on the nature of law and custom are rather less important than the three practical differences between mercantile law and common law identified by *Lex Mercatoria*: the speed of decision making, differences in legal process and the limits placed on wager of law as a means of proof.[34]

Mercantile law was a system of formal contracting which meant that contracts completed in a certain way became binding. Sale was a key transaction. In the common law before the fourteenth century sale was a form of real contracting within the action of debt.[35] Earnest (God's penny) was paid at the time of the agreement. It was a visible manifestation of that agreement and sacrificed if the sale did not go ahead. However, the contract of sale only became binding on delivery of the goods or payment of the price, at which point an action of debt could be brought by buyer or seller. Earnest did not render the agreement binding. Writing in the mid-twelfth century the author of *Bracton* describes the payment of earnest:

[29] Ibid 50-51.
[30] The purpose of God's Penny is described below.
[31] Gross, (n 28) 46-47.
[32] Gross, (n 28) *Bedford v Reading* (1312) 91.
[33] David Ibbetson, 'Custom in Medieval Law' in Amanda Perreau-Saussine and James Bernard Murphy (eds), *The Nature of Customary Law* (CUP 2007) 151-175.
[34] Basile et al, (n 21) Ch 1: 2.
[35] D Ibbetson 'From Property to Contract: The Transformation of Sale in the Middle Ages' (1992) 13 JLH 1.

> When something by way of earnest has been paid before delivery and the buyer regrets his purchase and wishes to withdraw from the contract, let him forfeit what he gave; if it is the seller, let him give the buyer double what he received by way of earnest.[36]

Earnest had quite a different significance in mercantile courts. In the Fair and Borough Courts the payment of earnest, which might be a token sum, rendered an agreement binding without delivery of the goods or payment of the price.[37]

Mercantile law also recognised the enforceability of agreements on a tally stick. The tally stick consisted of a piece of wood on which obligations were recorded by notches.[38] The author of the thirteenth century work *Fleta*, notes that proof is 'in accordance with mercantile law' and that 'and merchants are permitted to prove, by witnesses and by a jury, tallies that are repudiated'.[39] *Lex Mercatoria* also observes that merchants frequently buy and sell on credit without tallies.[40] The existence of a tally gave plaintiffs a major advantage. *De Legibus Mercatorum*[41] describes using two or three witnesses to prove the tally. A similar process is described by the Ordinances of London.[42] Where the plaintiff proved the existence and validity of the tally then the defendant was unable to wage their law against it. Wager of law involved a defendant bringing oath helpers who were prepared to deny the transaction. This method of proof in which it might have been fairly easy to deny a claim when money was genuinely owed would cause some unhappiness in common law cases when no deed was used.[43] By the sixteenth century its continued existence was one of the factors which resulted in plaintiffs favouring the action of assumpsit, which used a jury, as an alternative to debt on a contract.[44]

The attraction of the mercantile courts for merchants did not lie in some supposed body of mercantile law doctrine that crossed geographical boundaries. It was the procedural rules of the court that attracted litigants.

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[36] Henry de Bracton, *On the Laws and Customs of England* (H George Woodbine and Samuel Thorne tr, HUP 1968) vol 2, 182, f 61 b.
[37] David Ibbetson, 'Sale of Goods in the Fourteenth Century' (1991) 107 LQR 480, 483-88.
[38] MT Clanchy, From Memory to Written Record England 1066-1307 (2nd edn, Blackwell 1993) 123-24.
[39] HG Richards and GO Sayles, *Fleta Vol II* (Selden Society 1955) 211-12.
[40] Bastile et al, (n 21) Ch 6.
[41] Bastile et al, (n 21) Appendix 41-42.
[42] This process is discussed in the London Ordinances of the 1280s or 1290s: see Bastile et al, (n 21) 112.
[43] There were some other situations as well as the presence of a deed which precluded wager as a mode of proof see AWB Simpson, *A History of the Common Law of Contract* (OUP 1996) 140-44.
[44] Which ultimately led to *Slade's Case* (1602) 4 Co Rep 91 (a), Yelv 20, Moo KB 433, for the context, see D Ibbetson 'Sixteenth Century Contract Law: Slade's Case in Context' (1984) 4 OJLS 295.

Such evidence as does exist points to mercantile courts applying local law rather than some universal law that crosses geographical boundaries.[45] Insofar as there was a transnational body of law it was to be found, not in the mercantile courts, but in the High Court of Admiralty which was hearing civil cases by the end of the fourteenth century.[46] Jurisdiction was limited by statute to matters arising on the 'high seas'.[47] Over the centuries it was kept within these narrow bounds by the common lawyers using writs of prohibition and interpreting what amounted to 'on the seas' narrowly.[48]

The Court of Admiralty applied a combination of civil law and maritime custom. Along with the Ecclesiastical Court it was the most important of the civilian courts, but it was not just civilian law derived from Roman principles that was applied there. As evidenced by the fourteenth century, Black Book of the Admiralty, a variety of laws applied here.[49] The Laws of Oleron were an important component. Despite originating in the customs of Oleron, a small island off the west coast of France, these laws came to have much wider application across northern Europe.[50] They were included in the *Little Red Book of Bristol*, along with *Lex Mercatoria* and other material.[51] The importance of Bristol as a seaport may explain why the Laws of Oleron even came to be pleaded in the Tolsey Court at Bristol in 1349.[52] The value of transnational law in the context of ships is obvious. Yet even here its universality is questionable. A detailed recent study has shown that the idea of a cross Europe maritime law is a myth.[53] No written compilation of maritime law available to all the courts purporting to apply it has been found. In fact the rules differed from place to place. Even where a body of rules like the Laws of Oleron clearly did exist they might be applied differently. The civilian aspect of maritime law was not of course confined by geographical boundaries and in England it could be contrasted with the common law. But in so far as these courts drew on civilian practice it was not necessary uniform. English admiralty law for

[45] Kadens, (n 14) 268.
[46] M J Pritchard and D E C Yale (eds.), *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society 1993) xxx.
[47] (1389) 13 Ric II c 5; (1391) 15 Ric II c 3; (1400) 2 Hen IV c 11.
[48] *Constable's Case* (1601) 5 Co Rep 106. Some common law judges were more hostile than others. Chief Justices Coke and Hobart were particularly strong critics, D E C Yale, 'A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians' in Dafydd Jenkins (ed.), *Legal History Studies 1972* (University of Wale Press 1975) 87, 98-100.
[49] Sir Travers Twiss (ed), *Black Book of Admiralty* 4 vols (Longman 1873).
[50] Timothy J Runyan, 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England' (1975) AJLH 95, 99.
[51] Francis Bickley, *The Little Red Book of Bristol*, vol 1 (Sotheran 1900) 88.
[52] H Hall (ed), *Select Cases Concerning the Law Merchant AD 1239-1633* (Selden Society 1929) xcv-xcvi. The Tolsey Court was designed for low value civil litigation.
[53] Edda Frankot, *'Of Ships and Shipmen': Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh University Press, 2012).

example, operated a distinctive process of arresting ships and goods. This action *in rem* has parallels in the Roman *actio in rem* but one detailed study has suggested that even here the relationship between the two may 'be more apparent than real, and more apparent in the eighteenth and nineteenth centuries than it was in earlier centuries'.[54] In the Middle Ages the idea of a uniform lex mercatoria is just not supported by the evidence. It has nevertheless become a part of the rhetoric of legal writers for centuries.

'IUS GENTIUM' AND COMMON LAW

The Roman jurist, Gaius, in his *Institutes*, written around 160 AD drew a distinction between, '*ius civile* (civil law) as being the special law of civitas (State)' and 'law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind'.[55] A distinction was made between the law that applied to citizens only (*ius civile*) and that that applied to both citizens and non-citizens (*ius gentium*). The term had a more philosophical meaning too. Cicero would equate *ius gentium* with the law of nature as common to all.[56] Gaius makes the same point. Ulpian, as reproduced in Justinian's *Digest*, made an important modification. He was more explicit in distinguishing between natural law which is 'common to all animals' and *ius gentium*, 'which all people use'.[57] By the seventeenth century these Roman categories would become important in the hands of writers seeking to find a place for lex mercatoria within English law.

In the Middle Ages little attention was seemingly paid to the classification of mercantile law. In *Lex Mercatoria* the common law was merely described as the mother of mercantile law,[58] to which the author added that, 'mercantile law is always to be upheld unless both parties openly and expressly agree on the common law' in the same passage.[59] The actual relationship was more complicated. The idea that the common law only governed the transaction if both parties agreed does not quite capture the true relationship between the two. Mercantile custom was deeply entwined with the common law from early on. The royal courts might even hear cases pleaded according to mercantile law.[60] Concrete examples demonstrate, that at the very least, there was a fluid

[54] Pritchard and Yale, (n 46) xxxix.
[55] Gaius, *The Institutes of Gaius* (Francis De Zulueta tr, Clarendon Press 1946) Inst 1.1.
[56] Cicero, *De Officiis* (Walter Miller tr, Heinemann 1928) 3.17.69.
[57] Justinian, *The Digest of Justinian* (Alan Watson tr, University of Pennsylvania Press1998) D 1.1.1.3.
[58] Basile et al, (n 21) ch 9.
[59] Basile et al, (n 21) ch 9.
[60] On this important point see Basile et al (n 21) 31-32.

boundary between common law and mercantile law. In two decisions in the Royal Courts, Bereford CJ refused to allow wager of law to be used against a tally.[61] One motivation may have been a wider sense of unease with wager as a mode of proof as much as a desire to embrace mercantile usage.[62] By 1315 Bereford CJ had changed his mind and was of the opinion that, 'A tally is a dumb thing and cannot speak'.[63] These events nevertheless show that mercantile law was not hermetically sealed or confined to specialist mercantile courts. There are good grounds to think that way that contracts of sale were enforced in mercantile courts may have been a factor which contributed towards the creation of a consensual model of contracting.[64] Leading writers would embrace mercantile law within the common law. Sir Edward Coke wrote that lex mercatoria 'is part of the laws of this realm'.[65] When he came to describe the common law, Sir Mathew Hale said that that it includes lex mercatoria 'as is applied under its proper Rules to the Business of Trade and Commerce'.[66]

There was another way of looking at mercantile law. On this view the law merchant was part of a body of universal law from outside the common law. An early example can be found in 1473 in the Star Chamber where the judge was the Civilian Dr Robert Stillington. He equated law merchant with the law of nature, 'which is universal throughout the world'.[67] Two common lawyers, James Whitelock and John Davies, adopted his remarks in the seventeenth century, not because they were particularly concerned with explaining the law merchant, but because it was relevant to a debate about the proper place of the Royal prerogative.[68] A third writer, Gerarld Malynes was quite a different proposition. He wrote from the perspective of the merchants.

Malynes in his *Consuetudo, vel lex mercatoria, or The ancient law-merchant* in 1622[69] equated the law merchant with the *ius gentium* or law of nations. He told his readers that if the law merchant was taken out of the law of nations then, 'the remainder of the said Law will consist but of few points'.[70] According to Malynes

[61] *Beneyt v Lodewyk* (1310) YB 3 Edw 2 pl 31; *Finchingfeld v Byrcho* (1311) YB 4 Edw 2 pl 10.
[62] Bastile et al, (n 21) 65.
[63] *Marston v Dalby* (1315) YB 8 Edw 2 pl 2.
[64] Ibbetson, (n 37) 488-89.
[65] Edward Coke, *The First Part of the Institutes of the Laws of England or a Commentary upon Littleton* (W Clark 1817) 182 (a).
[66] Charles M Gray (ed), Sir Matthew Hale, *The History of the Common Law of England* (The University of Chicago Press 1971) 18.
[67] *The Carrier's Case* (1473) in M Hemmant (ed), *Select Cases in Exchequer Chamber vol. 64* (Selden Society 1946) 30, 32.
[68] Basile et al (n 21) 132-39.
[69] (Adam Islip 1622).
[70] Ibid 3.

not only was law merchant universal, it was also of great antiquity.[71] In the preface he wrote that the law merchant was 'a customary law approved by the authoritie of all Kingdomes and Commonweales'.[72] The point he was making here was a simple rhetorical one. The law of merchant was both old and universal ergo it was too important to be ignored. Whether Malynes truly believed such demonstrably false statements hardly matters. His primary aim was to advance the claims of law merchant against a common law he found wanting. Assertions of this sort promoted his argument. It may also explain why he commented quite extensively on what he saw as the inadequacies of negotiable instruments.[73]

Malynes was one of a group of writers who recognised the fragility of economic growth and understood the importance of the law in continued English prosperity.[74] Some of these men look enviously across the Channel at developments in Holland. They were clear that one of the reasons that the Dutch were flourishing economically was their laws. William Petyt contrasted the state of the English law with that of the Dutch and 'their Register of Titles and Contracts, and their cheap and easie decision of Law-Suits'.[75] Sir Josiah Child grumbled that, 'The law that is in use among them for transference of bills for debt from one man to another: this is of extraordinary advantage to them in their commerce; by means whereof they can turn their stocks, twice or thrice in trade, for once that we can in England'.[76]

MERCHANTS AND LAWYERS

Those writers who praised mercantile law were of course also implicitly criticising the common law. There were explicit complaints as well. Writing in the mid-seventeenth century, John Marius complained that 'the right dealing merchant doth not care how little he hath to do in the Common Law'.[77] The reason that merchants felt aggrieved was not just by what they perceived as the inability of the common law to handle something as simple as negotiable instruments, it was more fundamental. Their complaints were about the way that the common law worked. Merchants were not alone in this view. By this time the common law was increasingly seen a

[71] Malynes, (n 69) 2.
[72] Malynes, (n 69) Preface.
[73] Malynes, (n 69) 59-65.
[74] For a range of examples, see JR McCulloch, *Early English Tracts on Commerce* (Economic History Society 1952).
[75] W Petyt, *Britannia Languens, or A Discourse of Trade* (Richard Baldwin 1680) 4.
[76] J Child, *Brief Observations Concerning Trade and Interest of Money* (Elizabeth Calvert 1668) 6.
[77] J Marius, *Advice Concerning Bills of Exchange* (2nd edn, William Hunt 1655) preface. These remarks do not appear in the first edition of 1651.

cumbersome and overly complex. These were the kind of complaints which found expression, a century later in the work of Richard Boote,[78] and would take until the mid-nineteenth century before these problems were seriously tackled. Some of the concerns of merchants were more specific. Josiah Child wrote that, 'After great expense of time and money, it is as well if we can make our own council (being common lawyers) understand one half of our case, we being amongst them as in a foreign country, our language strange to them, and theirs strange to us.'[79] That these complaints seem to come to a head is probably the product of a number of factors. It has been claimed that for most of the seventeenth century that 'the law fell far short of business needs'.[80] These inadequacies were exposed more than previously because of the emergence of a large body of mercantile literature. This was also a period of economic expansion, which was often fragile, and that no doubt also increased tensions.[81]

The idea that the common lawyers did not understand the needs of merchants and paid no heed to them is a good rhetorical device but it did not reflect reality. It was quite clear in the Middle Ages that common lawyers were aware of the practices of the mercantile courts. In fact a system which ignored the needs of merchants was unlikely to survive very long. There were a number of ways in which mercantile custom could be raised in common law litigation.[82] Mercantile practice could be brought before the court in evidence during the course of trial and through the use of juries of merchants.[83] Judges were quite prepared to consult with merchants outside of the court room when it came to developing the law. Holt CJ admitted that, 'he had all the eminent merchants in London with him in his chambers…and they held it to be very common, and usual and very good practice'.[84] Mercantile literature also began to be referred to in the course of litigation.[85] Tellingly, when faced with one particularly tricky question, Holt CJ, despite having consulted 'two of the most famous merchants in London',[86] still reached the opposite conclusion. Even where the witness was as authoritative as the mercantile writer Malynes, there was no guarantee that the mercantile practice would be adopted as part of the common law. As Holt CJ made clear, it was not the existence of the practice that he doubted but whether it should be applied. He

[78] R Boote, *An Historical Treatise of an Action or Suit at Law* (A Sowle 1766).
[79] J Child, *A Discourse about Trade* (A Sowle 1690) 113-14.
[80] Richard Grassby, *The Business Community of Seventeenth-Century England* (CUP 2002) 215.
[81] Julian Hoppit, *A Land of Liberty? England 1689-1727* (OUP 2000) 313.
[82] For a detailed discussion, see W Swain, 'Lawyers, merchants and the law of contract in the long eighteenth century' in D Ibbetson and M Dyson (eds), *Law and Legal Process* (CUP 2013) 186-216.
[83] Mercantile juries became particularly important in the eighteenth century see (n 103).
[84] *Mutford v Walcot* (1700) 1 Ld Raym 574, 575.
[85] For a list of examples see Swain, (n 82) 203-204.
[86] *Buller v Crips* (1703) 6 Mod 29, 30.

held that, 'I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street) that acceptance of such a note is not actual payment'.[87] Knowledge of mercantile practice was clearly not the same thing as slavishly following it.

In the 1740s, Willes CJ explained that, 'Courts of Law have always in mercantile affairs endeavoured to adapt the rules of law in the course and method of trade in order to promote trade and commerce instead of doing it any hurt'.[88] The way in which negotiable instruments came to be enforced in the common law action of assumpsit is an object lesson in legal sensitivity to mercantile practice. The notion that the rise of mercantile instruments like bills of exchange and later promissory notes was ultimately a case of 'reception' of law from the Continent under the guise of mercantile custom has long been discredited.[89] As has been pointed out it is unrealistic to imagine the existence of a homogenous body of mercantile law. The role of mercantile custom in this context was slightly different. It was something than began to be alleged in actions on bills of exchange from the early seventeenth century and it was a device for expanding the scope of assumpsit. Blackstone took mercantile custom to be a form of special custom as opposed to general custom.[90] Like other special customs it had to be pleaded and proved. There was one difference. Most special customs were confined by geographical boundaries. The potential breath of this sort of custom as a pleading device is evident from *Mogadara v Holt* where mercantile custom was explicitly equated with *ius gentium*.[91] There are obvious parallels here with the arguments of someone like Malynes. Yet it is unlikely that such allegations had much concrete substance. The custom alleged in such cases usually pertained to two places. In *Buller v Crips*[92] it was observed that it was usual to allege a particular custom between London and Bristol. The law seems to have slipped into fiction. Ultimately when custom was alleged its existence was a matter for a jury who would often have been made up of merchants. Rather than seeing custom as a concrete body of mercantile law doctrine it seems to have been a device for developing bills of exchange within the action of assumpsit. Bills of exchange were part of the common law in that they were enforced by assumpsit but they were always seen as slightly separate. This was why consideration in such cases was presumed but not abandoned altogether. The process of developing assumpsit as a means to enforce negotiable instruments was not straightforward and the detail is complex.[93]

[87] *Ward v Evans* (1702) 2 Ld Raym 928, 930.
[88] *Stone v Rawlinson* (1745) Willes 559, 561.
[89] W Holdsworth, *A History of English Law* (Methuen 1937) vol viii, 151.
[90] W Blackstone, *Commentaries on the Laws of England*, 4 vols (Clarendon Press 1765) vol 1, 75.
[91] (1691) 1 Sow 317, 318.
[92] (1703) 6 Mod 29.
[93] For a detailed account see Swain, (n 82) 192-200.

Some of the difficulties in integrating negotiable instruments into the common law are demonstrated by the difficulties of adapting to promissory notes and which eventually required statutory intervention.

Although the relationship between lawyers and merchants was much commented on during the seventeenth century the specialist mercantile courts had actually declined in importance. The local mercantile courts had largely become an irrelevance by the late fifteenth century.[94] Beyond a few types of claim,[95] the Admiralty Court was in terminal decline by the English Revolution. It never really recovered its position despite the rapid expansion of the merchant navy.[96] The common law courts, which enjoyed a concurrent jurisdiction, in many instances of maritime contracts, absorbed much of this business, albeit with the occasional jurisdictional squabbles, especially in relation to sailors' wages.[97] A partial revival in the early nineteenth century[98] as a consequence of the flood in prize litigation during the Napoleonic Wars[99] failed to save the court. By the 1860s the Civilian lawyers who practised there had lost their monopoly[100] and not long afterwards it was completely absorbed into the rest of the court system as a division of the High Court in the 1870s.[101] The place of the mercantile courts changed over the centuries and so did the relationship between lawyers and merchants. By the eighteenth century it had entered a new phase.

LORD MANSFIELD AND THE MERCHANTS OF LONDON

[94] Baker, (n 20) 306-307.
[95] George Steckley, 'Collisions, Prohibitions and the Admiralty Court in Seventeenth Century London' (2003) 21 Law & Hist Rev 41.
[96] EE Rich and CH Wilson (eds), *The Cambridge Economic History of Europe* (CUP 1977) vol. 5, 530. Merchant ships had a total tonnage of 421,000 tons in 1751 compared with 115,000 tons in 1630. By 1760 there were 7,081 merchant ships with a tonnage of 486,740.
[97] Examples include: *Bayly v Grant* (1699) Holt 48; *Gawne v Grandee* (1706) Holt 49; *Ragg v King* (1729) 1 Barn KB 297; *Reed v Chapman* (1732) 2 Barn KB 160. For the role of the Admiralty Court in the case of sailors wages see, George Steckley, 'Litigious Mariners: Wage Cases in the Seventeenth Century Admiralty Court' (1999) 42 *Hist Jour* 315.
[98] F Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (CUP 1970) 26. For some figures see H Bourguignon, Sir William Scott, Lord Stowell (CUP 2004) 61.
[99] Prize was the act of taking the cargo of an enemy ship. By the sixteenth century some of the prize was required to be paid over to the Crown and the Admiralty, Bourguignon, ibid. 9. For the origins of the prize jurisdiction, see R G Marsden, 'Early Prize Jurisdiction and Prize Law in England' (1909) 24 EHR 675.
[100] Admiralty Court Act (1861) 24 & 25 Vict c 10.
[101] Judicature Act (1875) 38 & 39 Vict c 77.

Reading some accounts it would be easy to conclude that judges before Lord Mansfield paid little attention to the needs of merchants.[102] The earlier discussion shows this view to be false. During his tenure as Chief Justice it was less the existence of mercantile influence that changed but its extent. Lord Mansfield was perhaps even more prepared than some other judges to listen to the views of merchants and to receive mercantile opinion in evidence. Special juries made up of merchants became more and more significant as a channel for the mercantile point of view.[103] A case like *Lewis v Rucker*[104] illustrates the potential value of mercantile jurors. Lord Mansfield explained, 'They understood the question very well, and knew more of the subject than anybody else present; and formed their judgement from their own notions and experience'.[105]

The role of Lord Mansfield should not be exaggerated. Much of the work of bringing negotiable instruments into the common law was complete by the early eighteenth century. Lord Mansfield's role in this area was less about creating a body of law and more about tidying up some existing anomalies. For example, the rules relating to so called inland and foreign bills of exchange were unified.[106] The law relating to promissory notes and bills of exchange was also 'put on the same footing'.[107] As a result of these changes there was little to distinguish between bills of exchange, promissory notes and banknotes other than the way in which they were drawn up.[108] Most of the law relating to negotiable instruments was settled by the 1760s.[109]

[102] This view is at least as old as Lord Campbell's, *The Lives of the Chief Justices of England*, 3 vols (John Murray 1849) vol 2, 402-403. More recently, Morton Horwitz, *The Transformation of American Law 1780-1860* (HUP 1977) 167.
[103] James Oldham, *The Mansfield Manuscripts and the Growth of English Law* (University of North Carolina Press 1992) vol 1, 82-99; James Oldham, 'The Origins of the Special Jury' (1983) 50 U Chi L Rev 137, 173-75. Lord Mansfield was not the only judge to favour the use of special juries, see James Oldham, *The Varied Life of the Self-Informing Jury* (Selden Society 2005) 24-31. The term 'special jury' and 'mercantile jury' were not synonymous. Special juries need not be comprised of merchants.
[104] (1761) 1 Burr 1167.
[105] Ibid. 1168.
[106] *Heyling v Adamson* (1758) 2 Burr 669.
[107] Ibid. 677.
[108] John Bayley, *A Short Treatise on the Laws of Bills of Exchange, Cash Bills and Promissory Notes* (E Brooke 1789) iii.
[109] The problem of stolen bills and discounting whereby bills were exchanged for cash was a perennial problem which gave the courts trouble into the nineteenth century: *Lawson v Weston* (1801) 4 Esp 56; *Gill v Cubitt* (1824) 3 B & C 466; *Snow v Peacock* (1826) 3 Bing 406; *Crook v Jadis* (1834) 5 B & Ad 909.

Insurance contracts began to be widely litigated in the eighteenth century.[110] John Wesket remarked that insurance 'is of all the transactions among mankind the most abundant source of disputes and perplexities'.[111] A vibrant maritime insurance market existed in London[112] and other major ports.[113] Fire and marine insurance were well established by 1750;[114] life insurance was increasingly popular.[115] In earlier centuries insurance contracts had fallen within several jurisdictions.[116] By the end of the seventeenth century they were usually litigated in the common law action of assumpsit.[117] Yet at the same time as Park explained, 'there have been but few positive regulations upon insurance, the principles, on which they were founded, could never have been widely diffused, nor very generally known'.[118] Insurance was largely developed through case law rather than statute.[119]

William Blackstone described recent developments in marine insurance as a 'very complete title in a code of commercial jurisprudence. [120] Thomas Parker maintained that Lord Mansfield had rendered the law so 'plain and clear'.[121] John Wesket was less sanguine:

[110] J Park, *A System of the Law of Marine Insurances* (1st edn, T Wheildon 1786), Preface. The preface is reproduced in the second edition of 1790. References are to the second edition: J Park, *A System of the Law of Marine Insurances* (2nd edn, T Wheildon 1790).
[111] J Wesket, *A Complete Digest of the Theory, Laws, and Practice of Insurance* (Frys, Couchman and Collier 1781) i.
[112] Associated with Lloyd's Coffeehouse though at this stage this was no more than an informal gathering of underwriters, see F Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (Macmillan 1876) chs 5-7.
[113] G Jackson, *Hull in the Eighteenth Century: a Study in Economic and Social History* (OUP, 1972) 148-56.
[114] For some snapshots of the sometimes erratic growth in the insurance industry, see B Supple, *The Royal Exchange Insurance* (CUP, 1970) 61-2. With a large increase in imports, exports and re-exports between 1700-1800 the conditions for marine insurance were particularly favourable: BR Mitchell, *Abstract of British Historical Statistics* (CUP 1962) 279-81.
[115] PGM Dickson, *The Sun Insurance Office* (OUP, 1960) 101; G Clark, *Betting on Lives: The Culture of Life Insurance in England, 1695-1775* (Manchester University Press 1999) ch 3.
[116] D Ibbetson, 'Law and Custom: Insurance in Sixteenth Century England' (2008) 29 JLH 291.
[117] Ibid., 306-7.
[118] Park (n 110) xliv. For similar remarks, see J Millar, *Elements of the Law of Insurance* (J Bell 1787) v-vi. Park and Millar had a point but were still guilty of exaggerating the absence of earlier authorities; see WS Holdsworth, 'The Early History of the Contract of Insurance' (1917) 17 Colum L Rev 85.
[119] Though not entirely. There was a steady trickle of legislation on insurance. Much of this was designed to tackle the problem of gaming using insurance, for example (1746) 19 Geo 2 c 37.
[120] W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1766) vol 2, 461.
[121] T Parker, ***The laws of Shipping and Insurance, with a Digest of Adjudged Cases; Containing the Acts of Parliament Relative to Shipping, Insurance and Navigation*** **(**W Strahan and M Woodfall 1775) v.

> What, in any country, could be more preposterous and intolerably grievous; or more reproachful to a great commercial Nation, in particular; than the Administration of private Justice, in the Affairs of MERCHANTS should be solely in the Hands of Inconclusiveness![122]

Lord Mansfield himself, speaking in 1761 complained that:

> The daily negotiations and property of merchants ought not to depend upon subtleties and niceties, but on rules, easily learned and easily retained, because they are the dictates of common sense drawn from the truth of the case.[123]

Two decades on there was still much to do: 'All questions on mercantile transactions, but more particularly upon policies of insurance, are extremely important and ought to be settled'.[124] As with negotiable instruments in the formative period mercantile custom played a vital role. On one level the process was less visible. There was no allegation of mercantile custom in cases of insurance. There was no need. The appropriateness of an action on a contract of insurance at common law was never in doubt. It was in the details of the operation of insurance that mercantile practice mattered. The dedication to Lord Mansfield in James Park's work read 'your extensive knowledge, joined to an unwearied application to every part of commercial jurisprudence … has endeared your Lordship's name to the Merchants of London'.[125] Commercial practice heavily influenced the direction of legal doctrine in this area.[126] Special juries were vital.[127] Those involved in the insurance and shipping industries were called as expert witnesses.[128] Underwriters[129] and others with knowledge of particular types of insurance[130] were consulted informally. John Wesket may even have had Lord Mansfield in mind when

[122] Wesket (n 111) xvi.
[123] *Hamilton v Mendes* (1761) 2 Burr 1198, 1214.
[124] *Nutt v Hague* (1786) 1 TR 323, 330. See also *Milles v Fletcher* (1779) 1 Doug 231, 232; *Simond v Boydell* (1779) 1 Doug 268, 270-71.
[125] Park, (n 110) iii.
[126] On the importance of mercantile practice, see *Gardiner v Croasdale* (1760) 2 Burr 904, 907.
[127] *Lewis v Rucker* (1761) 2 Burr 1167, 1168.
[128] DM Dwyer, 'Expert Evidence in the English Civil Courts 1550-1800' (2007) 28 JLH 93, 100 provides examples of expert witnesses mentioned in the printed reports at this time across a range of litigation. The evidence of expert witnesses could have a vital bearing on the outcome. For example in *Harrington v. Halked* (1778) Oldham (n 103) vol 1, 549-50, Park, (n 110) 302-3, sea captains were called to comment on a ship's course on a question of deviation.
[129] *Glover v Black* (1763) 3 Burr 1394; *Camden v Cowley* (1763) 1 W Bla 417, Oldham, (n 103) vol 1, 500-1 n. 6; *Wilson v Smith* (1764) 3 Burr 1550, 1556.
[130] *Salvador v Hopkins* (1765) 3 Burr 1707, 1714.

he complained that a judge may be 'as often misled as assisted, by these extrajudicial and *ex parte* conversations'.[131]

Lord Mansfield would claim that the law on insurance 'is the same all over the world',[132] even if this wasn't strictly true it did reflected the way in which he was prepared to utilise a cosmopolitan range of sources. This was nothing new. English insurance practice was closely aligned with that on the continent from the sixteenth century.[133] This was one area where there was a degree of cross-border influences on legal developments in England. The fact that ships were not confined by jurisdictional boundaries combined with the international nature of marine insurance meant that it was particularly well suited to this sort of treatment.[134] In *Goss v Withers*,[135] having sought the advice of Sir George Lee[136] on Admiralty practice, Lord Mansfield cited Grotius,[137] Cornelius van Bynkershoek[138] - whom he had praised in the course of argument-[139] Johannes Voet[140] and the Roman Law on prize.[141] Civilian sources began to appear more freely in the arguments of counsel but it is much more difficult to be certain about the precise role played by these ideas. In 1802, Lawrence J would state that the law of insurance was largely derived from foreign writers,[142] but he made the claim in an attempt to discredit the old Common law position that it was impossible to insure a profit.[143] On some occasions Civilian sources may simply be used to add lustre to arguments that were essentially taken from mercantile practice. There may be more than a grain of truth in the remarks of the defence counsel in *Goss v Withers*, whose

[131] Wesket, (n 111) xviii.
[132] *Pelly v Royal Exchange Assurance Co.* (1760) 1 Burr 341, 347. Wesket, (n 111) ii, was a firm supporter of this type of approach.
[133] There is a wealth of evidence on this point which is explored in Guido Rossi, *Insurance in Elizabethan England* (CUP 2016).
[134] *Mayne v Walter* (1782) 3 Doug 79.
[135] (1758) 2 Burr 683.
[136] Lee was the brother of William Lee CJ and a noted authority on Ecclesiastical and Admiralty matters; see WP Courtney, rev M Kilburn, 'Lee, Sir George' *Oxford Dictionary of National Biography*.
[137] (1758) 2 Burr 683, 694. For other references to Grotius and Pufendorf, see *Jones v Randall* (1774) Lofft, 383, 386. Natural law ideas were absorbed into the Common law more generally, D Ibbetson, 'Natural Law and Common Law' (2001) 5 Edinburgh L Rev 4.
[138] Lord Mansfield spoke of his admiration for Bynkershoek during the course of argument. His *De Dominio Maris* was published in 1702.
[139] (1758) 2 Burr 683, 692.
[140] The relevant passage is found in P Gane (ed), J Voet, *The Selective Voet, Being the Commentary on the Pandects* (Butterworth 1957) Book 49, Title 15.
[141] (1758) 2 Burr 683, 693. On prize more generally, see Oldham, (n 103) vol 1, 656-71.
[142] *Barclay v Cousins* (1802) 2 East 544, 548.
[143] M Lobban, 'Commercial Law' in W Cornish et al, *The Oxford History of the Laws of England, Vol XII 1820-1914: Private Law* (OUP 2010) 686.

withering response to an opponent who had reeled off a list of Civilian writers was: 'as to Molloy and Malines – almost anything may be proved by citations from them'.[144]

In *Carter v Boehm*[145] Lord Mansfield explained the nature of the contract of insurance:

> Insurance is a contract based on speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.[146]

The provenance of the duty of disclosure was not discussed. In the earlier decision, *Da Costa v Scandret,*[147] relief was granted in Equity after an attempt to claim on an insurance policy where the insured had failed to disclose, at the time that the policy was entered into, that the ship was in great danger. This was justified on the basis of fraud, a broad notion in Equity at the time. Lord Mansfield would claim that 'policies of insurance are more governed by principles of equity, than anything else'.[148] Yates J in contrast would attribute the duty of disclosure to Natural law.[149] In fact there was no need to seek justification in either Equity or Natural law. A clear line of authority existed at Common law.[150]

The requirement of disclosure reflected Lord Mansfield's understanding of how the industry worked. Brokers were at the centre. Reputation and trust were important, along with a degree of self-regulation.[151] In *Da Costa v Alcock* Lord Mansfield gave details of an exception which proved the rule:

[144] (1758) 2 Burr 683, 690.
[145] (1766) 3 Burr 1905.
[146] (1766) 3 Burr 1905, 1909.
[147] (1723) 2 P Wms 170.
[148] *Stephenson v Snow* (1761) 1 Wm Bla 313. These remarks do not appear in Burrow's report of the case.
[149] *Hodgson v Richardson* (1764) 1 Wm Bla 463, 465.
[150] *Anon* (1693) Skin 327; *Seaman v Fonereau* (1742) 2 Stra 1183.
[151] These themes are explored in C Kingston, 'Marine Insurance in Britain and America 1720-1844: A Comparative Institutional Analysis' (2007) 67 Jour Econ Hist 379, 385-87.

> In insuring merchant ships, all possible information ought to be given to the insurers; but the case of privateers was an exception from this rule. The insured are not to give them any information of their destination or where they are to cruise.[152]

The application of disclosure involved allocating risk between the underwriter and the insured. When an underwriter knew or ought to have known material facts about which the insured remained silent then, as in *Carter v Boehm*, the risk fell on him.[153] Where both parties contracted in ignorance of some material fact the risk also fell on the underwriter.[154] Trade usage was important in determining where the risk should fall: 'Every underwriter is presumed to be acquainted with the practice of the trade that he insures … if he does not know it, he ought to inform himself'.[155] Sometimes the burden was on the insured to disclose the information.[156] At other times the underwriters were under a duty to find out the information for themselves.[157] In clarifying the grounds for avoiding an insurance contract, *Carter v Boehm* also showed 'how, and why, there had to be limits to an insurer's entitlement to avoid liability'.[158] Where the burden fell on the insured to disclose a material fact[159] and he fraudulently[160] or even innocently[161] concealed[162] that information, the contract was void.[163]

Lord Mansfield evidently had a good grasp of commercial realities. This was not an aberration. It brings us closer to the true nature of lex mercatoria in England.

LEX MERCATORIA AS COMMERCIAL PRACTICE

[152] From the London Chronicle 28 July 1781, reproduced in Oldham, (n 103) vol 1, 565. Privateering was the practice whereby the Government hired private ships to attack enemy vessels: DJ Starkey, *British Privateering Enterprise in the Eighteenth Century* (University of Exeter Press 1990).
[153] (1766) 3 Burr 1905, 1910. See also *Planché v Fletcher* (1779) 1 Doug 251.
[154] *Mayne v Walter* (1782) 3 Doug 79.
[155] *Noble v Kennoway* (1780) 2 Doug 510, 513.
[156] *Hodgson v Richardson* (1764) 1 Wm Bla 463, 465.
[157] *Noble v Kennoway* (1780) 2 Doug 510, 513.
[158] S Watterson, 'Carter v. Boehm' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract*, (Hart 2008) 59, 81, which contains a wealth of interesting detail about the background to the case.
[159] *Hodgson v Richardson* (1764) 1 Wm Bla 463, 465.
[160] *Tyler v Horne* (1783) Park, (n 110) 218, Oldham (n 103) vol 1, 589; *Pawson v Watson* (1778) 2 Cowp 785, 788.
[161] *MacDowell v Fraser* (1779) 1 Doug 260; *Shirley v Wilkinson* (1781) Oldham, (n 103) vol 1, 569, 1 Doug 306 (note).
[162]It need not involve an active concealment. A concealment that arose through a mistake also avoided the contract: *Carter v Boehm* (1766) 3 Burr 1905, 1910. This was so even where the mistake was by a broker rather than the insured: *Green v Bowden* (1759) Oldham, (n 103), vol 1, 484.
[163] *Hodgson v Richardson* (1764) 1 Wm Bla 463; *Fernandes v Da Costa* (1764) Park, (n 110), 177-78, Oldham, (n 103) vol 1, 502; *Fillis v Brutton* (1782) Park, (n 110) 182, Oldham, (n 103) vol 1, 571.

The modern advocates of a new lex mercatoria would have us believe that they are part of an older tradition in which mercantile customs unconfined by geographical boundaries were applied by courts. The reasons for the persistence of the myth can only be a matter of speculation.[164] The reality is rather less exciting. There was no general transnational body of commercial law before the twentieth century. Some doctrines including those derived from civil law crossed national boundaries but this was not a large-scale movement nor was it a systematic process. By the seventeenth century some mercantile writers were promoting a system of mercantile law. That they did so was less a reflection of the then current state of affairs and more a product of their dissatisfaction with the common law.

Although the relationship between the common law and mercantile practice may not have been perfect there is no reason to suppose that judges did not take the needs of merchants seriously. Compromises were always involved just as there were when it came to legislating for merchants.[165] Yet a degree of closeness was particularly visible during periods of economic change and expansion of the seventeenth and eighteenth centuries. By the eighteenth century much of the mercantile litigation went through the Court of Guildhall in London. This was the main trial court for London. Judges and the mercantile jurors who sat there were able to build up a level of expertise in commercial matters. Following the restructuring of the civil court there was an attempt to revive the idea of a specialist mercantile court. In the end a commercial list was created within the Queen's Bench Division of the High Court.[166] All of these developments had one thing in common. They show a legal profession that if not always receptive to the needs of merchants was not hostile to them either. This attitude was not just reflected in judges' words but in their actions as well. Insofar as there was a body of law which was designed for and applied by merchants it was more limited in scope. This was the law applied in the Fair and Borough Courts and it had a number of procedural advantages when set against the common law. No doubt that the law in England did not develop in complete isolation. But this is a very long way short of the claim that there was some vast and power body of trans-national law. All of this makes for a more mundane and decidedly less romantic conclusion than the idea that there was once a vibrant body of law called lex mercatoria.

[164] For some speculation see, Ralf Michaels, 'Legal Medievalism in *Lex Mercatoria* Scholarship' (2012) Tex L Rev See Also 259.
[165] On the medieval legislation see, Paul Brand, 'Merchants and the Legislative Process in Thirteenth Century England The Making of the Statutes if Acton Burnel (1283) and Merchants (1285)' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law Essays in Honour of Hugh Beale* (Hart 2014) 3-14.
[166] Patrick Polden, 'The King's/Queen's Bench Division' in William Cornish et al, *The Oxford History of the Laws of England Volume XI 1820-1914: English Legal System* (OUP 2010) 828-29.

A rather safer conclusion is that rather than a body of law imposed from without, mercantile practice largely shaped the English common law from within.