THE 'LAW MERCHANT' AND THE FAIR COURT OF ST. IVES, 1270-1324

by

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ACKNOWLEDGEMENTS

I came to the study of the law merchant by a rather indirect path. In June of 2000, the House Committee on the Judiciary held an oversight hearing on "The Internet and Federal Courts."[1] Before the hearing, the staff of each party prepared a memorandum for their respective Committee members, and as an intern for the Democratic staff, I was assigned to write a section on the new choice-of-law questions that the Internet posed. If a New York resident defrauds a resident of California on a website hosted in Delaware, which state's law should be applied? When applied to wrongs committed in cyberspace, the principles that had been developed to resolve such conflicts of law seemed inconclusive or inappropriate. Many commentators argued that a new, universal substantive law was needed to govern the borderless Internet—a *lex cyberspace* modeled on the medieval *lex mercatoria*, which was said to follow medieval merchants along the trade routes and to protect them from the arbitrary rule of lords and bishops. My academic interest in the law merchant was born of my surprise at finding an allegedly medieval concept at the center of a fierce debate over Internet law. At its core, this thesis is an effort to enter that debate and to remove a flawed historical assessment of medieval law from the contemporary political battlefield.

My introduction to the law merchant was only one of many fortunate consequences of the two summers I worked at Judiciary. I am deeply grateful to the committee staff, especially Perry Apelbaum and Samara Ryder, for the opportunities they afforded me, as well as to the Institute of Politics, which provided financial support during both summers through its Public Sector Internship Stipend program.

Much work was required before an amusing coincidence discovered the previous summer could become a subject of historical research. This transformation was largely accomplished under the skillful guidance of Samantha Herrick, my tutor in the Honors Field Tutorial, who helped me to identify and evaluate the primary sources that are the main focus of my analysis. Ms. Herrick also obtained for me the assistance of Barbara Burg, a research librarian of the Harvard College Library, and introduced me to Prof. Charles Donahue of Harvard Law School, who suggested a number of insightful and effective approaches to the material.

Over the past year, I have also benefited from the invaluable assistance of my advisor, Prof. Thomas Bisson. Through my discussions with Prof. Bisson, I was able to refine my argument and to gain an understanding of the larger historical context of the exercise of law at St. Ives. I also appreciate Prof. Bisson's patience and his willingness to review draft after draft of the thesis, occasionally on very short notice.

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[1] *The Internet and Federal Courts: Issues and Obstacles: Hearings Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 106th Cong. (2000).

This thesis was many months in the making, and I am grateful to those who supported me during that often-frustrating time. Vasugi Ganeshananthan generously assisted me with proofreading in the waning hours of March 20, and my friends and roommates Steven Wu, Jesse Zalatan, and Adrian Worrell graciously allowed me to turn one corner of our common room into a 'thesis shrine' piled high with books.

A number of minor errors in the original version of the thesis have since been corrected, thanks in part to the close scrutiny of one of my thesis readers, Gregory Smith. I encourage readers who find additional errors in the text to contact me via e-mail at *stephen.sachs@post.harvard.edu*; an updated version of the thesis will be permanently available at *http://www.stevesachs.com/papers/*.

Finally, I would like to thank my family for their unceasing love and support.

Stephen E. Sachs
Cambridge, Mass.
June 1, 2002

ABBREVIATIONS

BC *Borough Customs*, ed. and trans. Mary Bateson, 2 vols., Selden Society 18, 21 (London: B. Quaritch, 1904, 1906).

CB *The Court Baron: Being Precedents For Use in Seignorial and Other Local Courts*, ed. and trans. Frederic William Maitland and William Paley Baildon, Selden Society 4 (London: B. Quaritch, 1891).

CChR *Calendar of the Charter Rolls Preserved in the Public Record Office, London*, 6 vols., (London: H. M. Stationery Off., 1903-27).

DC Coquillette, Daniel R., *The Civilian Writers of Doctors' Commons, London*, Comparative Studies in Continental and Anglo-American Legal History 3 [*Vergleichende Untersuchungen zur kontinentaleuropaischen und anglo-amerikanischen Rechtsgeschichte*] (Berlin: Duncker & Humblot, 1988).

KB *Select Cases in the Court of King's Bench Under Edward I*, ed. and trans. G. O. Sayles, 3 vols., Selden Society 55, 57, 58 (London: B. Quaritch, 1936-1938).

LM *Lex Mercatoria and Legal Pluralism*, ed. and trans. Mary Elizabeth Basile, *et al*. (Cambridge: Ames Foundation, 1998).
(Note: Because *Lex Mercatoria and Legal Pluralism* contains two sections which are separately paginated, references to the original text will be cited as *LM*, while references to the editors' commentary will be cited as *LMLP*.)

LMA *Lex Mercatoria and Arbitration*, ed. Thomas E. Carbonneau (Dobbs Ferry, N.Y.: Transnational Juris Publications, 1990).

PWW *Select Cases in Procedure Without Writ Under Henry III*, ed. and trans. H.G. Richardson and G.O. Sayles, Selden Society 60 (London: B. Quaritch, 1941).

SCLM *Select Cases Concerning the Law Merchant*, 3 vols., vol. 1 ed and trans. Charles Gross, vols. 2-3 ed and trans. Hubert Hall, Selden Society 23, 46, 49 (London: B. Quaritch, 1908-32).

SP *Select Pleas in Manorial and Other Seignorial Courts*, ed. and trans. Frederic William Maitland, Selden Society 2 (London: B. Quaritch, 1889; reprint, London: Professional Books Ltd., 1974).

SR *Statutes of the Realm*, 9 vols. (London: George Eyre and Andrew Strahan, 1810-1822; reprint, London: Dawsons of Pall Mall, 1963).

Chapter I:
Introduction

In 1293, William of Abingdon sued William Martin in the fair court of St. Ives. A small vill in the county of Huntingdonshire, St. Ives held an annual fair every Easter, and a special court was established within the fair to hear disputes. In this case, the plaintiff appeared in the name of the London cloth merchant John of Abingdon, whom the defendant owed £11. The defendant challenged the plaintiff's standing to represent John, and the case was put on hold.

When the parties returned to court two days later, William Martin presented what he claimed was a written confirmation from John that the debt had been paid in full. The plaintiff immediately protested that the document was false, and he asked for a jury to investigate the obvious forgery. At this point, however, Martin argued that the plaintiff could not contest the document's validity, "since it is not lawful for him or for any other person to deny or abate the deed of another." The court agreed, Martin went free, and the unhappy plaintiff was fined for making a false claim before the court.[1]

From the story of William Martin's bold legal fiction, we can learn much of the practice of justice at the fair of St. Ives. It is difficult to believe that the piece of paper Martin presented in court was in any way genuine. If he had had it in his possession at the time of the first hearing, he would undoubtedly have presented it then, rather than attempt a procedural objection to the plaintiff's standing. The chance that a genuine acquittance from the creditor would have arrived in the intervening two days is virtually

[1] *SCLM*, i, 65-67.

nil, especially given that John of Abingdon was not present at the St. Ives fair and lived sixty miles away. So why would Martin have taken the risk of presenting to the court what he knew to be a false document? The only reasonable explanation is that he recognized—and, more importantly, expected the court to recognize—a legal principle that would prevent the forgery from being discovered. The scheme hatched by William Martin demonstrates that the fair court of St. Ives had rules, and that those rules were well known to at least some of the traders and St. Ives residents who appeared before it seeking justice.

Unfortunately, the historical record does not give a clear account of what those rules may have been. The records and plea rolls the fair court left behind do not explicitly describe who constituted the court or what legal principles it applied. However, since the early seventeenth century, the prevailing view among historians has been that fair courts in England enforced a law known as "the law merchant." This law was created by the merchant community and expressed their customs, reflecting the unwritten usages of the community rather than the written command of a sovereign legislator. At the same time, it was not the product of any single merchant guild or even a single country, but was the creature of the international merchant community, establishing substantive principles and convenient procedures to govern commerce throughout the world. The result was a new legal order, free from the oppressive control of local laws and local lords. In the words of Levin Goldschmidt, a German lawyer and

historian of the mid-nineteenth century, "Out of his own needs and his own views the merchant of the Middle Ages created the Law Merchant."[2]

Goldschmidt's thesis of a universal law merchant—produced, interpreted and enforced by a legally independent merchant class—is still accepted by most studies of English commercial law. The thesis has also profoundly influenced the development of commercial law in the modern era.[3] Yet it is the purpose of this essay to demonstrate that the Goldschmidt thesis is deeply inaccurate, at least as applied to the fair court of St. Ives. Instead, the Goldschmidt thesis provides a prime example of the misuse of historical evidence in support of political ends.

St. Ives is particularly well-suited for such a case study. In the early thirteenth century, the rural village was the site of one of the largest fairs in England, providing an opportunity for merchants from as far away as Italy to trade their wares along its central Bridge Street.[4] Though it reached its zenith under the reign of King John, the fair continued to be highly profitable throughout the 1200s and was a significant center for the cloth trade.[5] If the law merchant were indeed a universal means of regulating commerce, one should expect it to be in force at St. Ives.[6]

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[2] Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Colo.: F.B. Rothman, 1983), 9.

[3] For a discussion of the impact of Goldschmidt's work on modern American law, see James Whitman, "Commercial Law and the American *Volk*," 97 Yale L.J. 156 (Nov. 1987).

[4] Ellen Wedemeyer Moore, *Fairs of Medieval England: An Introductory Study*, Pontifical Institute of Mediaeval Studies, Studies and Texts 72 (Toronto: Pontifical Institute, 1985), 1.

[5] Dorothy Usher, "The Mediaeval Fair of St. Ives," *Two Studies of Mediaeval Life* (Cambridge: J.S. Wilson & Son, 1953), 11.

[6] St. Ives was a river town, and not a port; this study will therefore only be concerned with trade conducted on land, passing over related issues in the history of maritime law. *(cont.)*

More importantly, the actions of the St. Ives court are uniquely well documented. Far more information is available on the St. Ives court—both in published works and in manuscripts—than on any other English fair of its day. Fourteen of the fair court's annual plea rolls, recording the administrative business of the court as well as the cases argued before it, are preserved in the Public Record Office and the British Museum. The surviving rolls are variously dated between 1270 and 1324 and provide the chronological focus for this study. Additionally, the Selden Society has published a significant number of the records in two volumes of facing-page translation—one volume edited by the great legal historian F.W. Maitland, the other by Harvard history professor Charles Gross.[7] Though the Gross and Maitland editions are selective, the extracts were chosen with the design of presenting as much information as possible about the commercial law practiced at St. Ives.[8]

Interpretations similar to Goldschmidt's have been proposed for admiralty law as well, inspired by such documents as the Rhodian Sea Laws, the Laws of Oleron and Wisby, and the *Consulato del Mar*. *Cf. The Rhodian Sea-Law*, ed. and trans. Walter Ashburner (Oxford: Clarendon, 1909; reprint, Darmstadt: Scientia Verlag Aalen, 1976); *Monumenta Juridica: The Black Book of the Admiralty*, ed. Travers Twiss, 4 vols., *Rerum Britannicarum medii aevi scriptores* 55 (London: Longman, 1871-76); *Consulate of the Sea and Related Documents*, trans. Stanley S. Jados (University, Ala: University of Alabama Press, 1975). However, the sea laws pose substantially different problems to historians, and modern maritime and commercial law developed in large measure independently from one another. As a result, the two fields have often been considered separately.

[7] *SP*; *SCLM*, i. Maitland was only aware of one roll, containing records from the years 1275 and 1291; in the introduction to his edited selection, he noted that "it would be an eminently good deed to print the whole roll" (*SP* 130).

[8] Maitland was amazed by the rolls' "detailed information about the commercial law and commercial morals of the thirteenth century" (*SP* 130), and therefore emphasized the records of litigation over those describing the court's administrative tasks. Gross similarly sought to identify those records offering the most information "concerning the law merchant or the procedure of the fair courts" (*SCLM*, i, *xv*).

Gross had described the St. Ives series as "unrivalled," and his description has remained accurate to the present day. In *Fairs of Medieval England* (1985), Ellen Wedemeyer Moore remarks that early documents from English fairs are "scattered" and present a coherent picture "only when taken as a whole."[9] Although the heyday of English fairs was in the twelfth and early thirteenth centuries, most records from local fairs are only available for the period after the Black Death. The only series of documents that Moore regards as at all comparable to the St. Ives rolls are the account rolls of the St. Giles fair, which begin in 1287 and continue into the late fourteenth century; however, these are records of account and contain primarily fiscal information, which will not help us in examining the justice practiced in the fair court.[10] The thesis of a universal law merchant must be tested on the evidence available, and no other source contains as complete a collection of material on English fairs before the plague as the St. Ives rolls. The fair court records must therefore be trusted to depict accurately the experience of commercial law in English fairs of this period. Furthermore, although a great deal of original work has been done on English commercial law in the last twenty years, there has been no systematic examination of the St. Ives documents with an eye towards proving or disproving Goldschmidt's thesis.[11]

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[9] Moore, 2-3.
[10] Ibid., 3.
[11] The significant works include J. H. Baker's study of local customs and common-law courts in "The Law Merchant and the Common Law," *The Legal Profession and the Common Law* (London: Hambledon Press, 1986), 341-368; James Steven Rogers' investigation of bills of exchange in *The Early History of the Law of Bills and Notes*, Cambridge Studies in English Legal History (Cambridge: University Press, 1995); and the examination by Mary Elisabeth Basile *et al.* of a thirteenth-century commercial treatise in *LMLP*. Ellen Wedemeyer Moore examined the St. Ives rolls extensively in *(cont.)*

What the fair court rolls reveal is that the merchants of St. Ives did not create their own legal order out of their own needs and views. Rather, the administration of the fair was in large part subject to the king of England and to the abbey of Ramsey, a powerful and wealthy monastic foundation that held both the St. Ives fair and the manor of Slepe in which the vill was located.[12] The king and abbot had significant authority in the establishment of legal principles, the resolution of disputes, and the enforcement of the fair court's judgments. The merchants participated in each of these areas of authority, especially in rendering judgments; however, the same could be said of the unfree suitors of a contemporary manorial court, and there is little evidence indicating that merchants possessed any unique rights to independence or self-government. In fact, the most fruitful means of understanding the role of the fair court may not be as a special court for merchants, but rather as a seigneurial court whose business is primarily commercial in nature.[13]

Fairs of Medieval England, but her discussion is centered on the economic and social conditions of the St. Ives fair rather than the law practiced in the fair court.

[12] St. Ives came into the possession of the abbey of Ramsey in Anglo-Saxon times; the town was located on the Ouse, and its importance as a center of trade was helped by the road to Ramsey that ran through it, as well as the well-traveled bridge across the Ouse that gave the name to its central "Bridge Street." See Lillian J. Redstone, "St. Ives," *The Victoria History of the County of Huntingdon*, ed. William Page, Granville Proby and S. Inskip Ladds, 3 vols. (London: St. Catherine Press, 1926-36; reprint, London: Dawsons of Pall Mall, 1974), ii, 215. Henry III bought immense quantities of textiles there, and its revenues diminished into the reign of Edward I and Edward II (Ibid., ii, 216). It is estimated that in 1300, approximately 800 individuals lived in the vill as unfree tenants of the abbot (Moore, 231).

The abbey of Ramsey has itself been the focus of a great deal of study, and there exists a large amount of excellent documentary evidence on its holdings. See, *e.g.*, J.A. Raftis, *The Estates of Ramsey Abbey*, Pontifical Institute of Mediaeval Studies, Studies and Texts 3 (Toronto: Pontifical Institute, 1957).

[13] *Cf.* Rogers, 25.

Moreover, the evidence of the fair court rolls, in combination with that of royal court records and the charters and custumals of English towns, indicates that the "law merchant" occasionally cited at St. Ives was not a universal law for the merchant class. Goldschmidt would have agreed—indeed, insisted—that the law merchant was a customary law; it derived its force from mercantile customs, and not from any official promulgation or enactment. Yet these customs were not necessarily constitutive of a coherent legal order, nor were they necessarily shared across any great distance. Within St. Ives, the use of the phrase "law merchant" did not invoke a body of substantive principles so much as a mixture of local custom and contemporary notions of fair dealing. Claims that these principles were universal founder on the clear differences among the various customs of English fairs and towns. Indeed, the fair court rolls give no impression whatsoever that the suitors considered themselves to be participants in a tradition of commercial law that extended beyond the borders of St. Ives.

Given this evidence, why has a flawed interpretation of medieval commercial law succeeded so brilliantly? The thesis that the Middle Ages happened upon a universal means of regulating commerce is of more than mere historical interest; it has repeatedly been used to support various political programs, from the jurisdictional claims of the civil lawyers in seventeenth-century England to the demands for self-government of the merchant *Volk* in Goldschmidt's day. In the era of globalization, the Goldschmidt thesis has taken on new life, as scholars attempt to craft a new means of regulating international commerce (or even regulating the Internet) based on the model of the medieval law merchant.

Such models, however, are clearly divorced from the historical reality. There may indeed have been broad principles of mercantile law that were widely shared in medieval Europe; merchants would presumably prefer justice that was swift and fair, that took notice of mercantile customs, and that did not place contradictory demands on merchants trading across jurisdictional lines. But there is no suggestion in the fair court rolls of a legal order that spanned the continent; there might have been laws and customs of merchants, but no law merchant. What similarities existed in the regulation of commerce may be better explained as a result of the convergent evolution of local customs, rather than as a conscious expansion of a single body of law across Europe. The memory of medieval commerce has been distorted considerably in the seven centuries since William Martin made his gamble; the evidence of the fair court of St. Ives fails to support the view that the merchants of the Middle Ages "were subject to no legal order but their own."[14]

[14] *LMLP*, 188.

Chapter II:
Who Rules the Fair? Authority Over a "Merchant Court"

The fair court of St. Ives was of the sort widely referred to as "merchant courts" or "courts of piepowder," courts primarily devoted to the needs of merchants and to resolving the disputes that arose among them. Yet many recent historians have argued that such courts did not merely service merchants, but were also created and operated by them. According to Leon Trakman, these courts recognized the capacity of merchants "to regulate their own affairs,"[1] and Harold Berman writes that the merchant community "organized international fairs and markets" and "formed mercantile courts" to administer them.[2] In a forthcoming essay, Bruce Benson presents a vision of merchants who "wanted to expand international trade" but found "highly localized legal systems [standing] in their way"; to avoid these legal systems, they created their own, based on a law merchant that was "*voluntarily produced, voluntarily adjudicated, and voluntarily enforced*."[3]

Yet to what extent was the fair court a court of the merchants, a court that belonged to the merchant community and that consistently enforced their will? The fair court of St. Ives was established to hear plaints arising out of the fair, many of which would naturally be commercial in nature. But the mercantile orientation of much of its

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[1] Trakman, 9.
[2] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 240.
[3] Bruce L. Benson, "Law Without the State: The Merchant Courts of Medieval Europe," *The Voluntary City: New Directions for Urban America*, ed. David T. Beito (Oakland, Calif.: Independent Institute, forthcoming), 3. Available online at *http://garnet.acns.fsu.edu/~bbenson/volcity.doc*, last viewed Feb. 20, 2002. Emphasis in original.

business does not imply that the fair court was an institution under mercantile control. The vision of the law merchant as an entirely private legal system—with legal principles developed, interpreted, and enforced by merchants—would be frustrated if external authorities were found to wield substantial influence over mercantile courts.

To answer this question, this chapter will consider the sources of authority in the fair court's executive, judicial and legislative functions. The division of authority along these lines is in part anachronistic, as the court itself did not acknowledge these divisions. However, this tripartite arrangement does provide a valuable framework for distinguishing among the various types of power exercised at St. Ives.

Analyzing the evidence through these three categories shows that the merchants did not exercise anything approaching a monopoly of power over the fair court's day-to-day operations. Both in theory and practice, the fair court of St. Ives was a creature of the king of England and of its lord, the abbot of Ramsey. While the merchants may have exercised some influence in the court's decision-making, the evidence from St. Ives does not indicate the presence of a radically independent and self-governing merchant community. The power that the merchant community did directly exercise within the fair court was not unique to St. Ives or to merchant courts generally, but rather common to other local courts across England. Indeed, the fair court of St. Ives is most comprehensible in the terms of its contemporaries, as a seigneurial court subject to the power of the abbot. The evidence indicates that the fair court was part of a pre-existing political framework rather than a new merchant-led legal order.

A. Executive Authority

Who enforced the decisions at St. Ives? Who ensured that damages were paid and that fines were collected? On whose authority were the judgments pronounced? In the context of thirteenth-century legal theory, there could have been little dispute about such questions; these functions were very clearly the abbot's to command. The court was part of the patrimony of the abbot of Ramsey, and the court's officers—the steward, the bailiffs, and the clerks—were appointed by the abbot or by his representatives. The fines and amercements paid in the fair court went to the abbot's treasury, and the watchmen and constables as well as the jurors of presentment were unfree men who owed services to the abbot as their lord.[4] The abbot's men were responsible for collecting payments to the court,[5] for distraining absent defendants by seizing their goods,[6] and for conducting unlucky defendants to jail.[7] In 1287, a man named Totte Simon tried to collect a tax on wool; because he "executed this office without warrant and without the leave of the bailiffs of the fair," he was summoned to the fair court and his goods were seized.[8] The parties before the court explicitly recognized the abbot's executive control over the fair. A plaintiff in 1293 sued a servant of Amice Hendeman who had attempted to arrest his

[4] See generally Moore, 160-173, 192.
[5] See *Knaresborough v. Leyland* (1270), where the bailiff William of Graveley is charged with collecting the amercement (*SCLM*, i, 1).
[6] See *Waite v. Curtrey* (1287), where the defendant allegedly "broke the seal of William Unwin of Sawtry, a bailiff of the fair, which had been placed on his booth because he would not be justiced to answer Adam Waite plaintiff" (*SCLM*, i, 30).
[7] For instance, in 1287, Ralph of Armston and his fellow bailiffs were ordered to "cause the bodies of all the said harlots and the bodies of all other harlots, wherever they may be found within the bounds and lists of the fair, to be arrested and brought to the court and held in safe custody until etc." (*SCLM*, i, 16).
[8] *SCLM*, i, 16.

goods, saying that "the said Amice has no authority to arrest the goods of [the plaintiff] or of any other merchant which are hosted in the frontages during the fair, [nor has anyone] save only the lord abbot and his bailiffs."[9]

The right to hold an annual fair at St. Ives, however, was not the abbot's to assume. It was a royal right, granted to the abbey in 1110 by King Henry I. In the same grant, Henry extended to the abbey the customary rights to take tolls in the fair and to hold a court to govern it ("with . . . sac and soc, toll and team, and infangentheof"), as well as placing his royal peace on the fair and its merchants.[10] A dispute over the extent of this grant in the mid-thirteenth century illustrates well the official view of the St. Ives fair and its court. In 1252, the abbot of Ramsey sued several royal bailiffs for extending the term of the royal peace for three weeks after the end of the fair. In other words, the king had added his own three-week-long fair at St. Ives, leading many merchants to delay their arrival until after the abbot's fair had ended. The abbot and monks claimed that these actions were "contrary to their charter and contrary to the will of the king who had that charter made for their benefit"; the fair had been given "as an appurtenance to Ramsey abbey in free and perpetual alms," so that the abbots had possession of it "*as of*

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[9] *Bury v. Quy* (1293), *SCLM*, i, 66. The plaintiff eventually loses the case, but on factual rather than legal grounds.

[10] The charter of Henry I granted the abbot a fair "to be held from Tuesday in Easter week until the octave, well and truly, with sac and soc, toll and team, and infangentheof, and with all customs such as any fair in all England has. And I wish and command that all coming there, staying there, or going away from there, may enjoy my firm peace" ("Charter to Abbot of Ramsey (1110)," *A Source Book for Medieval Economic History*, ed. Roy Cave and Herbert Coulson (Milwaukee: Bruce Publishing Co., 1936; reprint, New York: Biblo & Tannen, 1965), 119-120, available online at *http://www.fordham.edu/halsall/source/1110ramsey.html*, last viewed March 15, 2002). The term "sac and soc" included the grant of jurisdiction (along with the profits of justice) and the power to compel attendance at the court. *Cf. Black's Law Dictionary*, Bryan A. Garner, ed.-in-chief (St. Paul, Minn.: West Group, 1999), 1337.

their own soil, with which they could do as they pleased."[11] The plaintiffs repeatedly invoked the argument that the St. Ives fair was held on "their own soil," and they protested that the king's bailiffs had collected tolls and rent even from "the abbot's houses, stalls, and booths and from the boats and ships which were moored to the abbot's own soil." The abbot also represented the fair court of St. Ives as a private hundred, saying that "Hurstingstone hundred belongs to the abbot, and he has and always ought to have the attachments which arise from plaints within the fair and outside it, and [the right] to hear those plaints at his pleasure where he may wish. . . ."[12]

The royal bailiffs replied by asserting the king's power over the fair: once the term of the abbot's fair ended, the fair "came into the king's hand," and "the abbot can in fact claim no rights in either fair or market after the time of this fair is past."[13] Furthermore, the booths and stalls from which they took rent "stand [on] the king's highway and no one can or ought to meddle with it except the king"—and in any case, whatever the bailiffs did, they did "for the king's benefit."[14] However, the bailiffs did not contest the abbot's lordship over the fair during the period of the king's one-week grant. The resolution of the case is not preserved; the record of this case ends with the commissioning of a jury, consisting of twelve knights and twelve merchants, to investigate the customary rights of the abbot over the St. Ives fair. Three years later, if it were still continuing, the case was rendered moot, as Henry III sold to the abbot all the

[11] Curia Regis Roll, no. 146 (1252), *PWW*, 26. Emphasis added.
[12] *PWW*, 27.
[13] *PWW*, 27, 29.
[14] *PWW*, 28, 29.

revenues and jurisdiction of the fair however long it might last—establishing abbatial control over the fair for the entire period of the extant court rolls.[15]

In what is perhaps the most important test of control, the fair court was willing and able to assert the abbot's power when it was challenged. In 1291, Hamon of Bury St. Edmunds claimed the right to exercise the office of alnager (measurer of cloth) without appointment from the abbot. He based his claim on a letter patent from Sir Roger de Lisle, clerk of the Great Wardrobe, ordering that he be admitted to measure wool, linen and canvas. Hamon was arrested on a Saturday for measuring canvas without appointment to the office; on Monday, the court cited the "charter of the lord king touching the fair" and declared that "no bailiff or officer of the lord king should in any way interfere with the said fair or its appurtenances," since that might prevent the abbot and convent of Ramsey from "having for ever the administration of all things pertaining to that fair both inside and outside the vill"—an unabashed statement of abbatial power. He was finally admitted to his office—after all, he had served as the abbot's alnager several times in the past—but was forced to give up the letter and renounce his claim to authority based on the command of a royal official.[16]

Why did the abbot guard his authority so jealously? The answer is money. Though Moore notes that the revenues from the fair court were relatively small—only £8

[15] Charter, 42 Henry III (May 7, 1258), *CChR*, ii, 10. Many years later, Edward I transferred the annual rent the abbot paid for the fair to his Queen Eleanor by charter (3 Edw. I, Oct. 22, 1275, *CChR*, ii, 193), and in 1293, Edward granted the abbot a weekly market on Mondays in addition to the fair (21 Edw. I, May 14, 1293, *CChR*, ii, 427).
[16] *SCLM*, i, 42.

9s. in 1287, compared to £126 from stall and shop rentals the year before—the fines and amercements still represented a valuable source of income.[17]

The manner in which these payments were recorded provides additional evidence of the abbot's financial interest. The notes in the margins of the St. Ives court rolls contain information that the scribe or a later reader found significant and chose to emphasize; as a result, the contents of the marginalia should give us some insight into the court's purpose in maintaining records. Of the first year of records that Gross translates, for example, two-thirds of all marginalia record the amount of money paid in fines or otherwise rendered to the abbot.[18] Other notes include such information as "*Prec' est* [it is ordered]," generally to mark a distraint, or "*Memorandum*" simply to draw attention to a proceeding. The fact that so many of the marginalia record payments—and that almost all payments to the court are recorded in the margins—indicates that the court rolls were used not only by the court to keep track of its proceedings, but also by the abbot's officials to calculate how much their lord was owed. This may have been viewed as a more central purpose of the rolls than their use as authorities in future cases, which seems from the records to have been rather infrequent.[19] If so, the St. Ives fair would have been in keeping with the best administrative practices of its day. An anonymous treatise on husbandry, written *circa* 1300 and believed to reflect the procedures on the Ramsey abbey estates, mentions court rolls only in the context of assessing the profits of justice:

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[17] Moore, 200-1.
[18] See *SCLM*, i, 1-10.
[19] Out of the hundreds of proceedings recorded in the Gross and Maitland collections, only five refer to the record of a previous case on the rolls. *Glemsford v. Longmark* (1295), *SCLM*, i, 72; *Titchwell v. Burdon* (1300), *SCLM*, i, 81; *Lolworth v. Soaper* (1300), *SCLM*, i, 82; *Gavelock v. Trot* (1300), *SCLM*, i, 82; *Cause v. Ward* (1302), *SCLM*, i, 88.

"The steward ought to hand in his court rolls soon after Michaelmas so that one can charge with these rolls reeves and bailiffs who ought to render account for the perquisites of courts for the whole year."[20]

As the holder of a royal grant and as the lord of St. Ives, the abbot of Ramsey thus enjoyed an immense amount of control over the conduct of the fair.[21] No similar claim to executive authority could plausibly be made on behalf of the merchant community. Benson writes of "the threat of ostracism by the merchant community at large" as a means of enforcing the decisions of the court, and certainly merchants would have thought twice before extending credit to a man who had just been convicted of theft.[22] But the fair court rolls contain no evidence that such ostracism was ever institutionalized; indeed, given that some defendants appear repeatedly in the rolls, one should infer that they had lived to trade again. If the merchants indeed regulated their own affairs, they depended on the abbot to make those regulations enforceable.[23]

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[20] "Husbandry," *Walter of Henley and Other Treatises on Estate Management and Accounting*, ed. and trans. Dorothea Oschinsky (Oxford: Clarendon, 1971), 437. Oschinsky argues that the original version of this treatise was included in the remembrancer produced for John of Sawtrey, who was abbot of Ramsey from 1286 to 1316 ("Introduction to the *Husbandry*," *Walter of Henley*, 200-1).

[21] A lord who held a royal charter could exercise significant authority over a fair even if it were not held on his "own soil." Often the king would grant a fair to an outside lord to be held in an independent town; in such cases, the lord's authority would supersede that of the burgesses. During the fair of St. Giles at Winchester, the power of the civic authorities was entirely transferred to the officers of the bishop, who held the keys of the city gates so long as the fair lasted. Similar powers were claimed by the lords of fairs in Hereford, York, Westminster, and many other towns (*SCLM*, i, *xxii*).

[22] Benson, "Law Without the State," 5.

[23] The sole possible exception to this rule would be the practice of individuals raising the "hue" following an assault, which presumably alerted the fairgoers to the danger. However, 'raising the hue' does not appear from the records to mean activating an institutionalized practice of communal self-defense so much as 'causing a commotion.' See, *e.g.*, *Hautaine v. Burdon* (1295), *SCLM*, i, 72.

B. Judicial Authority

1. Negative Evidence

Who judged the cases in the fair court? A number of contemporary sources indicate that the merchant community at a fair like St. Ives could claim independent judicial authority. According to the thirteenth-century treatise *Lex Mercatoria*, in market courts "every judgment ought to be rendered by merchants of the same court and not by the mayor or by the seneschal of the market."[24] Indeed, there is a good deal of evidence that this was the case in St. Ives. In the case of *Fulham v. Francis* (1311), upon encountering a particularly knotty legal problem (namely, whether servants may swear an oath to establish ownership of goods by their master), the court called upon the merchants to render the decision. The court rolls record that "thereupon all the merchants of the said fair, both natives and foreigners, to whom judgments belong according to the law merchant [*secundum legem mercatoriam*], having been called for this purpose and consulted, say that [the servants] may properly be admitted in this and similar cases according to the law merchant."[25]

In fact, merchants were apparently relied upon to render the decisions of the fair court quite frequently, not only in cases of exceptional difficulty. We know that there were merchants present at the court on a regular basis. In *Swavesey v. Pope* (1288), the question arose whether Hugh Pope, the defendant, had received a new trial date before he

[24] *LM*, 20.
[25] *SCLM*, i, 89.

left a previous court hearing. According to the rolls, Pope "craves that the record of the merchants and of the whole court be allowed him. The merchants and all others of the court testify and say that the said Alexander withdrew from the court before a day was given to him; wherefore they say that Hugh made default at that court."[26] The merchants had a significant role even in cases concerning royal law: when Simon Blake of Bury was arrested for violating the royal assize in selling canvas, the court assembled all the merchants of the fair to try his case.[27]

The merchants' decision-making role is emphasized by the parties themselves in *Graffham v. Pope* (1291), in which Alan of Berkhamstead intervened to claim as his own a horse that had been attached for a debt. He said that he had bought the horse from Thomas of Ramsden, "and that this is so he craves may be inquired [by an inquest], unless he may be admitted to [make] his law [*i.e.*, prove his case by oath] by the award of the merchants." The inquest later reveals that Alan had bought the horse through collusion with the defendant, but the fact that Alan had sought relief "by the award of the merchants" indicates that the merchants attendant at court were seen as the decision-makers.[28] Later in the same session, a dispute arose in *Fleming v. Tanner* (1291) over whether the appropriate means to prove a breach of contract were an inquest or a wager of law, a formal oath of innocence sworn by the defendant and a specified number of compurgators. On this question "the parties put themselves on the judgment of the merchants, and it is awarded by the merchants that the truth of the matter be inquired [by

[26] *SCLM*, i, 35.
[27] *Court v. Blake* (1275), *SP*, 154.
[28] *SCLM*, i, 50-51.

an inquest]."[29] These are only a few of the many cases at St. Ives in which a party appealed to "the merchants" for a favorable decision.

These cases would seem to establish that the merchant courts did give decision-making power to the merchant community. The ability of the merchants to render decisions in this way would certainly be unusual in the court of King's Bench or Common Pleas, and some historians have pointed to this fact to demonstrate that the role of merchants in mercantile courts was one of voluntary self-governance.[30] However, although the merchants may have exercised significantly more authority in the fair court than in the central royal courts, the central courts are not necessarily the appropriate basis for comparison. After all, the fair court of St. Ives was operated by the abbot, not by the king. Furthermore, St. Ives was not a free town, but a vill whose residents were largely of villein status and who owed tenurial obligations.[31] The abbot therefore had direct, personal jurisdiction over the many residents of St. Ives who appear in the court rolls, and they came before the fair court as before the court of their lord. In fact, they joined the merchants in rendering decisions—these are the "others of the court" mentioned in *Swavesey v. Pope*.[32] If the process followed in fair courts were compared to that of manorial and other seigneurial courts, one would find that it is actually quite standard—and that participatory procedure is not an innovation of the merchants.

An examination of the records of nearby manorial courts shows a structure very similar to that of St. Ives. In 1295, in the court of the manor of King's Ripton (which,

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[29] *SCLM*, i, 52.
[30] See, *e.g.*, William Searle Holdsworth, *A History of English Law* [1903], 17 vols., 7th ed. (London: Methuen, 1956; reprint, London: Methuen, 1982), i, 536.
[31] Moore, 231.
[32] *SCLM*, i, 35.

like St. Ives, was part of the patrimony of the abbot of Ramsey), a legal question is "inquired by the township," which says that the plaintiff "has produced sufficient suit."[33] Clearly, this procedure seems to involve the same population that is judged by the court in the process of making judgments. In 1249, in the court of the manors of the abbey of Bec, Richard Blund asks for a jury "of the whole court" to determine whether he has the greater right in a specific piece of land; after investigation, "the whole court say upon their oath that the said Richard has greater right in the said land than anyone else."[34] The "whole court" seems very clearly to be an assembly of suitors rather than a single judge, especially given that they pronounce their judgments by oath. Cases are delayed in the abbot's honour of Broughton in 1295 because "the present court is thinly attended by suitors," and in King's Ripton in 1293, "the whole court" requested a delay in giving judgment until the next court session—an event that is only comprehensible if the "whole court" includes the suitors and not the steward alone.[35]

These examples support the assessment of F.W. Maitland that although the steward may have presided over a court, often he "was not the judge; the suitors were the judges." Maitland cites a case of 1226 from Bracton's Note Book in which the sheriff of Lincolnshire was forced to adjourn the court "because he had quarreled with the

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[33] *SP*, 118. "Suit" here refers to the *secta*, the witnesses and others who accompanied the plaintiff and would swear to the truth of his accusations. In contrast, "suitors" refers to those individuals attendant at court who participate in rendering the decisions.
[34] *SP*, 29.
[35] *SP*, 67, 111. One can also find examples further afield. In a 1326 case in Hatfield Chase, Yorkshire, it was "attested by the community of the court" that deathbed transfers of land were not accepted, and in 1344 an inquest in Great Waltham, Essex, was "taken by the entire vill" to determine a point of law (*Select Cases in Manorial Courts, 1250-1550*, ed. L.R. Poos and Lloyd Bonfield, Selden Society 114 (London: Selden Society, 1998), nos. 12, 118).

freeholders whose business it was '*facere judicia.*'" To make judgments—even in a royal county court—was the responsibility of the suitors, although the steward or sheriff "is the presiding magistrate, . . . controls the whole procedure, issues all the mandates, [and] pronounces the sentence."[36] As in the fair of St. Ives, there were no fine distinctions in personal jurisdiction in most local courts, "no distinctions in procedure between cases which concern freeholders and cases which concern customary tenants"; villeins could even be suitors and "do justice upon their lord," even as they owed him services "of a very 'villanous' kind."[37] In the end, the injunction of *Lex Mercatoria* that judgments are to be rendered by the suitors of the court and not the seneschal does not seem very far removed from the principle cited by Maitland that "*Curia domini debet facere judicium et non dominus.*"[38]

Such a system of justice may seem quite alien to those familiar with modern courts, where an appointed judge decides questions of law and a jury tries questions of fact. In determining who had the greater right to a piece of land, the jury of Bec was of course making judgments of both fact and law, determining the proper custom to apply as well as how the parties stood with regard to that custom. Indeed, Maitland seems to hint that the exception to the rule and the true innovation of the period was the more formal procedure of central courts, and not that of the fairs.[39]

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[36] *SP*, *lxv*.
[37] *SP*, *lxix-lxxi*.
[38] *SP*, *lxviii-lxix*.
[39] "Elsewhere the position of the '*curia*' is less clear because it seems to discharge many functions: now it judges, now it presents, now it serves as a jury of trial. Imitation of the royal courts seems to be transfiguring it. . . ." (*SP*, *lxviii-lxix*).

2. Positive Evidence

The evidence presented thus far has been negative, arguing against the thesis that the judicial power of the fair court was specially reserved for the merchants. Yet one can also find positive evidence of the influence of the abbot over the court's business. First, the merchants had little opportunity to escape the abbot's jurisdiction. In 1287, Robert of St. Leonards and Ralph Pole sued Richard Elsdon; instead of going to court, they asked for a day in which to negotiate a settlement, and "submit themselves in all things to the arbitrament of Bartholomew of Acre."[40] Yet this verdict was accepted only after the defendant paid 12d. for the amercements of both parties.[41] This is the only case in all the records collected by Gross and Maitland to contain a clear mention of private arbitration. There are many cases where parties sought to settle their cases out of court, but there is no indication in any of them that the parties ever submitted themselves to the decision of an arbitrator, nor was the fair court ever called upon to enforce an arbitral award. Additionally, in each case where the parties seek leave to make concord on their own, they must do so "saving what should be saved"—with the leave of the steward (and, by implication, of the lord), free to agree on their own only so long as they protect the lord's rights, "especially his right to demand a fine."[42] In other words, this tribunal is not

[40] *SCLM*, i, 18.
[41] *SCLM*, i, 21. The arbitrator's decision is that the *plaintiffs* should give the *defendants* 4s. No reason is given for the reversal, although it is possible that there were counterclaims which do not appear in the record.
[42] *Serjeant v. Foville* (1270), *SCLM*, i, 2-3. A manual for holding seigneurial courts written *circa* 1307 offers a similar message, saying that "none can make compromise without the leave of the lord or his steward when a plaint has been made and gage and *(cont.)*

merely a voluntary mechanism for resolving private disputes among individuals, but a coercive public forum that can and does demand payment even from parties who decide not to litigate.

Second, the abbot's officers exercised significant discretionary powers in the fair court, similar to those they might possess in manor courts. For instance, through the office of the steward, the abbot had the authority to pardon offenses and remit fines. Pardoning is used twenty-five times in the cases described by Gross and Maitland, and some of these pardons may have indeed been intended to correct a perceived miscarriage of justice.[43] Unsuccessful plaintiffs were normally fined for their "false claim," and eight pardons were used to excuse plaintiffs in such cases—perhaps because the steward chose not to add a fine on top of the suffering alleged in their plea. In the case of *Tempsford v. Chaplain* (1291), the plaintiff's allegations against an intervening party had been supported by the results of an inquest, which was later thrown out because it had been undertaken by the steward *ex officio*; although the intervening party successfully waged his law, the steward chose to pardon the plaintiff for his false claim.[44] Four more cases involved procedural errors; Colletta Donel lost her case against Robert Woodfull when it

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pledge given, except with a saving for all the lord's rights" ("The Manner of Holding Courts—John de Longueville," *CB*, 79).

[43] This number does not include a number of cases where a party had his fine pardoned on account of poverty and then pledged his body—a euphemism for being sent to prison for inability to pay. It does, however, include *Ribaud v. Russell* (1287), where the defendants were found to be poor, pledged their bodies, and then were liberated on their faith (*SCLM*, i, 15).

[44] *SCLM*, i, 44.

was revealed that her real name was Hawise, but the warden of the fair—an official of the abbot who had no prescribed role in the fair court—chose to remit her fine.[45]

Pardons could also be granted for less noble purposes. Although poverty was a common ground for pardons, accounting for another eight of the twenty-five cases, these judgments were not always objective. In 1293, a merchant selling dishware 'at the backs' (*i.e.*, away from the main street of the fair) was pardoned for his poverty and immediately thereafter paid 12d. to the lord abbot to sell there lawfully. The payment shows first that he was hardly impoverished, and second that the pardon may have been part of a deal to increase the abbot's revenue.[46] Those involved with the abbot's administration frequently received pardons: the court pardoned the bailiffs of the fair in a case involving improper distraints, and when the abbot was found to have lent houses to prostitutes through an attorney, the attorney's fine was quickly forgiven.[47] The court also pardoned defendants "at the instance of" various intervenors "and other friends," whose intervention was no doubt influential.[48] The ability to grant pardons at the steward's discretion made the favor of the abbot a valuable commodity, and it reinforces the vision that the fair court was not fundamentally different from its sister court of the manor.[49]

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[45] *SCLM*, i, 57.
[46] *SCLM*, i, 56.
[47] *Boys v. West* (1293), *SCLM*, i, 60; *SCLM*, i, 74.
[48] *SCLM*, i, 41.
[49] This is not to say that all pardons, or even most, are examples of favoritism. Based on a survey of the pardons granted by the fair court of St. Ives in the year 1287, Moore concludes that the abbots and his officials were "relatively equitable and impartial" in granting pardons, with "at least as much concern for the humble and impecunious as for the wealthy fairgoers" (201-202). However, even if pardons were, on the whole, granted fairly, the fact remains that officers of the abbot held the arbitrary and unchecked power to grant them—and that pardons granted in the fair court to further the abbot's interests or *(cont.)*

Third, the records of appellate royal courts provide convincing evidence that the fair court was well-integrated into the contemporary legal framework. In 1315, Simon Dederic of Guisnes appealed a decision of the fair court of St. Ives to the court of King's Bench. Specifically, he brought suit against the abbot of Ramsey and against one of the abbot's bailiffs for executing what Guisnes considered an improper judgment—the abbot was being held personally responsible for the actions of the St. Ives court.[50] A similar practice can be found in the court of the Exchequer in 1321, where the abbot of Westminster was sued for the actions of his bailiff pursuant to an order given by the fair court of Westminster. The merchant plaintiffs argued that in arresting their goods, the bailiff acted as "minister of him, the abbot, of the . . . fair aforesaid to do those things that concerned that liberty and the jurisdiction thereof in the place and name of [the abbot], which things the abbot ought to have done if personally, etc." On that basis, the act of the bailiff "ought to be regarded as the act of the abbot himself, when as bailiff . . . exercising the jurisdiction of the abbot[,] he arrested the said goods. . . ."[51] Finally, we see that the merchant courts did not have a monopoly over pleas arising out of the fairs. In 1276, Richard Lombe brought suit in the court of King's Bench for an assault that had taken place in the fair of St. Ives, when five men "beat and wounded him and cut off his

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"at the instance of . . . other friends" were never contested by the merchants (*SCLM*, i, 41).

[50] Coram Rege Roll 221, m. 93d (1315), *SCLM*, ii, 86-88.

[51] PRO, Exchequer Plea Roll 43 (1321), *SCLM*, ii, 93.

left ear and so ill-treated him that his life was despaired of."[52] Similar cases can easily be found in the St. Ives court rolls, but Lombe chose to sue in the royal courts instead.[53]

The combined message of these central court records is that the fair courts did not possess any source of judicial authority independent from existing patterns of lordship. In the context of the time, the fair court operated exactly as a manor court would have, with the suitors drawn from the population to be judged. The lord held his fair court by royal grant, and when its decisions were in error, the courts of the lord king were competent to hear the appeal and apply the proper remedy.[54] Furthermore, though he established courts to hear mercantile pleas, the king did not sacrifice his original jurisdiction over fairs and markets. Perhaps nothing else should be expected from the records of royal courts, but the evidence does not betray even a trace of the idea that cases arising in "merchant courts" are properly resolved only through a decision of the merchant community.[55]

Fourth, there is a striking absence of any clear line between the business of the fair court and the business of other courts belonging to the abbot of Ramsey. When "a certain carter" in 1287 accidentally knocked three tiles off a house belonging to the

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[52] Coram Rege Roll no. 26 (Michaelmas 1276), m. 40, in *KB*, i, 30.

[53] See, *e.g.*, *Shearman v. Longville* (1287), *SCLM*, i, 29. No reason is provided as to why Lombe entered the royal courts; it is possible that the defendants left the fair shortly after the assault, or that Lombe expected better results from the more powerful tribunal. Also, his suit was brought shortly after Michaelmas, when the St. Ives fair court had been out of session for at least four months and would not convene again until the coming Easter.

[54] See also *Saxby v. Bedford* (1255), PRO Curia Regis Roll 155, m. 1d, *SCLM*, ii, 5. Consider these appeals in light of Benson's statement: "To steer clear of unnecessary litigation, delays, and other disruptions of commerce, appeals were forbidden" ("Law Without the State," 7).

[55] *Cf.* Benson's discussion of appeal in "Law Without the State," 7-8, where he argues that the king's appellate jurisdiction only came into being after the 1353 Statute of the Staple.

abbot, he was fined 3d. in the fair court. Yet there is no explanation why the case is heard in the fair court rather than that of the manor, which presumably would have been more appropriate.[56] Additionally, at least one record survives in which a case is removed from the fair court to that of the weekly market in St. Ives, which was granted to the abbot in 1293.[57] In 1316, Ralph of Houghton sued John Christian in a plea of debt, and after the defendant was distrained by "a tapet, a barrel, two hogsheads, and a tankard" and still failed to appear, the plaintiff requested that the case be transferred "to the court of the market together with the said distresses."[58] No explanation is given for the transfer, but as the case was heard on May 29, very close to the end of the fair court's session, the plaintiff may have chosen to keep his case alive in a weekly court instead of waiting until the next fair.

The same phenomenon can be found in other manorial courts. The abbot of Ramsey held his honor court, where his free tenants would be justiced, in the manor of Broughton. This manor lay within Hurstingstone hundred, a private hundred which the abbot held of the king, and we can see examples of cases transferred without explanation from one court to another. In 1256, Richard King sued one of the abbot's bailiffs for trespass in the honor court; the parties were given a day "at the hundred."[59] On August 31, 1235, a servant named Laurence accused John le Megre in St. Ives of stealing a sheep. Laurence offered to prove that the sheep was his master's at the honor court the

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[56] *SCLM*, i, 31.
[57] *Cartul. monast. de Rames*, ii, 298, cited in *SCLM*, i, 121.
[58] *SCLM*, i, 101.
[59] Warren Ortman Ault, "Introduction," *Court Rolls of the Abbey of Ramsey and of the Honor of Clare*, ed. Ault, Yale Historical Publications, Manuscripts and Edited Texts 9 (New Haven: 1928), *xvii*.

next day. There was no need for the case to be heard there—Warren Ault, in recounting the dispute, notes that "the matter is scarcely in its field"—but the manor court was then no longer in session, and Laurence might have had to wait for justice until the following spring.[60] The case was eventually disposed by assigning it to yet a third forum, the hundred court, where it was heard the next Monday.[61] The ability to move from one court to another implies that the abbot's justice was to a certain extent fungible. Regardless of the tribunal's name or function, it was ultimately the court, not of the merchants, but of the abbot of Ramsey.

Fifth and finally, there is evidence from what any good merchant would consider an incontestable source: the fairgoers' pocketbooks. When John Beeston of Nottingham sued Gilbert Chesterton of Stamford in 1275 for the lordly sum of £10 principal and £10 in damages, he promised one-third of any money he would receive to the lord abbot "that he may have aid."[62] A significant number of litigants repeated this gesture; four merchants accused of selling cloth with a false measure gave the abbot 40s. "for his grace and favour."[63] The merchants who traded at St. Ives made their living from trade; they would not been so willing to make payments if they did not believe that the abbot could give them something in return. There would be no reason for the parties to pay such substantial sums to the abbot in a court organized and operated by merchants alone. Even in cases that did not concern the abbot directly, the parties at the fair court knew where their justice was coming from.

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[60] Ibid., *xviii*.
[61] Ibid.
[62] *SP*, 144. Despite his generous offer, Beeston later lost his case (155).
[63] *SP*, 155.

C. Legislative Authority

On what legal principles did the court of St. Ives rely? Unfortunately for our inquiry, the fair court was a forum of expedience, not one preoccupied with the labored examination of statute and precedent. When a certain Luke sued Gilbert Tarter for failure to pay 7s. rent, the fair court concerned itself only with determining the facts, and would likely have thought it absurd to ask which specific principle the alleged actions had violated.[64]

Even if such principles were debated, such debates would rarely be preserved in the records. A treatise entitled "The Manner of Holding Courts," written *circa* 1342 for the abbey of St. Albans, discussed the dilemma of a defendant in a court like St. Ives who acknowledged a debt but who wished to show his innocence under the law—for instance, because the debt had been paid.[65] In such a case, the defendant should make a general denial of the allegations and then make his proof "by his law" (by his oath) or "by the country" (by a jury inquest).[66] In either case, the defendant's specific arguments would not be introduced into the record, which would reveal only successful or unsuccessful oaths or verdicts of "guilty" or "not guilty"—making it impossible to determine the facts of the case and concealing the substantive law that was applied to them. As in the contemporary common-law courts, the inscrutable methods of proof prevented a clear

[64] *Luke v. Tarter* (1300), *SCLM*, i, 75-76.
[65] The date and identification are found in Frederic William Maitland and William Paley Baildon, "Precedents for Court Keeping," *CB*, 15.
[66] "The Manner of Holding Courts—S. Albans Formulary," *CB*, 91-92.

distinction between law and fact.[67] Indeed, the proceedings of the fair court are even more difficult to decipher, as the rolls habitually confuse actions of contract, debt, and trespass with a freedom that would be shocking to a doctrinaire common lawyer.[68]

Yet the fair court had established rules of substance and of procedure, even if it rarely presented them in an explicit manner. To understand them, we must leave behind the modern assumption that courts decide cases only on the basis of positive, written, enacted law; as Fritz Kern has noted, the fair court's contemporaries would have likely considered true law to be "unwritten and unenacted."[69] The substantive principles on which the fair court operated seem in large measure to have been general principles of equity. Promises ought to be kept; debts ought to be paid; trespasses ought to be punished. These may be addressed by custom, but they are also matters of simple justice, which it was the duty of the fair court to provide.

For some, these principles constituted an alternative legal system, a "voluntarily produced" law merchant.[70] Indeed, there are cases in the St. Ives records in which decisions are reached "*secundum legem mercatoriam*," which Gross translates as "according to the law merchant." The translation is not uncontroversial, but a full

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[67] *Cf*. J. H. Baker, *An Introduction to English Legal History*, 3rd. ed. (London: Butterworths, 1990), 95-96.

[68] The fair court was anything but rigorous in its classification of cases; Maitland cites an example in which an action for money due on contract "is conceived as an action to obtain money 'detained and deforced by violence against the lord's peace.' It looks like an action of tort; it also looks like an action to obtain coins which already are the plaintiff's" (*SP* 134).

[69] Fritz Kern, *Kingship and Law in the Middle Ages* [*Gottesgnadentum und Widerstandsrecht im früheren Mittelalter*] [1914], ed. and trans. S. B. Chrimes, Studies in Mediaeval History 4 (Oxford: B. Blackwell, 1939; reprint, Westport, Conn.: Greenwood Press, 1985), 156.

[70] Benson, "Law Without the State," 3.

examination of the meaning of this phrase must be postponed until the next chapter. For the moment, assuming the translation to be accurate, it is enough to make two observations. First, the merchants at St. Ives were subject to many legal regimes *other* than "the law merchant," including the ordinances of the abbot, the statutes of the king, and the customs and principles of equity that constrained and modified these two authorities. Second, the law merchant as practiced at St. Ives was not an exclusive law for a well-defined merchant class. Taken together, these observations gravely weaken the argument that the merchant community exercised the primary legislative authority within the fair—that the merchants were sole authors of the laws by which they were privileged to be governed.

1. Alternative Sources of Legal Principles

When it was invoked at St. Ives, the law merchant was cited as a specific motivating principle for the court's deliberations in an individual case. However, it was not the only principle cited in this fashion—the regulations of the abbot, the statutes of the king, the dictates of custom, and the principles of equity are all used at various times to justify decisions of the court. Indeed, the records of the fair court give very little indication of where one type of authority ended and another began. To adopt T.F.T. Plucknett's phrase, the fair court was wound within an "elastic web" of legal authority, in which the will of the lord and of the lord king would have significant influence, although

not necessarily complete adherence.[71] As a result, we cannot read "according to the law merchant" into the court's deliberations in cases where it does not appear; we must take the documents as they are, and consider the law merchant as one among many alternative sources of legal principles.

a. Abbatial Authority

To investigate the substantive legal principles that the fair court applied, we must look first to the manorial institutions that the court most closely resembled. As was argued in the previous chapter, the fair court can in many ways be understood as a manor court of the abbot of Ramsey; in Lloyd Bonfield's formulation, it "established and enforced village by-laws, elected local officials, enquired into disturbances of public order, . . . and [monitored] payment of fines and the performance services owed to the lord," all in addition to resolving disputes among parties subject to its jurisdiction.[72] Tenurial obligations related to the fair, such as the requirement that the vill of Houghton supply watchmen,[73] were addressed in the fair court along with unrelated issues such as fire safety regulations[74] and complaints about a neighbor's garbage piles.[75]

In its capacity as an administrative institution of the abbot, it is only natural that the fair court would make decisions based upon the authority of the abbot's will. An

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[71] T. F. T. Plucknett, *Legislation of Edward I*, Ford Lectures 1947 (Oxford: Clarendon, 1949), 13.
[72] Lloyd Bonfield, "The Nature of Customary Law in the Manor Courts of Medieval England," *Comparative Studies in Society and History* 31 (1989), 517-518.
[73] *SCLM*, i, 73.
[74] *SCLM*, i, 75.
[75] *SCLM*, i, 84.

entry from 1315 fines a clerk six times for successively failing to "present the articles of the fair, as is the custom [*prout moris est*]."[76] Exactly what these articles contained, we do not know; however, we can assume that they served to regulate conduct within the fair. In 1287, Richard of Banbury was accused of selling russet cloth "at the backs," meaning away from the main street of the fair—an act that was considered "contrary to the ordinances [of the fair]."[77] Similarly, letting houses to prostitutes was described in 1300 as "contrary to the ordinance of the fair [*contra statutum ferie*]."[78]

As it enforced the will of the abbot of Ramsey, the fair court enjoyed a substantial degree of flexibility in the principles it applied. The ten-year-old John, son of William, son of Agnes of Lynn was found stealing a purse near the bridge in St. Ives in 1291; however, the court reasoned that "because he is not old enough to sustain the judgment which is ordained and provided for such evil-doers," he was instead ordered to leave the vill.[79] Similarly, that same year, when Roger of Pontefract and his wife Beatrice were convicted of stealing shoes worth 2½d., it was judged that "because the said shoes are of little value, wherefore no one may lose life or limb," they were ordered to "leave the vill of St. Ives and never more hereafter return thereto."[80] The court's discretion could also be applied out of less humanitarian concerns. The successful resolution of a case would occasionally depend on the current diplomatic concerns of the abbot; judgment against

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[76] *SCLM*, i, 98.
[77] *SCLM*, i, 21. The phrase "contrary to an ordinance of the fair" is used in two other cases of selling at the backs, those of Reginald of Wetwang in 1293 and of William of Gidding in 1300 (*SCLM*, i, 58, 78).
[78] *SCLM*, i, 74.
[79] *SCLM*, i, 43. It is unclear from the court rolls what the standard penalty for theft would have been in St. Ives, although it appears from the below that "life or limb" may have been at stake.
[80] *SCLM*, i, 38.

the defendant in *Lolworth v. Soaper* (1300), who was "of the homage of the bishop of Ely," was suspended "owing to a love-day [*i.e.*, a time to make concord] between the bishop and the abbot, which has been granted and at which they are to treat concerning the various matters in dispute between them."[81]

Despite the flexibility that his authority allowed, the power of the abbot to work his will through the court was not unlimited. In many respects, the abbot's actions were tethered by the principle of custom, which gave claimants another source of legal authority.[82] In 1287, Robert Pole and six others sought permission to sell woolen cloths and canvas in the same stalls, a practice prohibited by the abbot's regulations. For the significant sum of 20s., their request was granted for one year only, and they were required to take an oath that "never in the future will they make such a sale there, or demand this as a custom, save by leave of the warden and the steward of the fair."[83] The fact that the abbot's officials would require a solemn oath to prevent a claim of custom shows the influence that such a custom might have wielded had it been allowed to form, as well as the power of custom to restrict the abbot's freedom of action.[84]

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[81] *SCLM*, i, 82. One could argue that it is not the judgment that is suspended, but rather the fine, since the court does award that the plaintiff shall "recover his debt together with his damages." However, at the end of the record, the plaintiff "puts Richard of Peche in his place," meaning that further proceedings in the case were envisioned. *Cf. Fleetbridge v. Coventry* (1275), *SP*, 155.

[82] Some evidence of the power of custom is provided by the fact that the fair court appealed to custom, not to the abbot's command, in fining the clerk who had failed to present the articles of the fair (*SCLM*, i, 98).

[83] *SCLM*, i, 24.

[84] To understand this notion of custom, however, we must separate it from the concept of "precedent," which contains not only the principle that similar reasoning must be applied to similar cases, but the requirement that rules be held either to be unchangeable or to be changed only in a certain legally recognized manner. Such a description would be entirely inappropriate for the customary law of the St. Ives court, especially given that the *(cont.)*

b. Royal Authority

This mix of authority and constraint was not unique to the abbot; the king's will found its expression in St. Ives in a similar way. The fair court often acted as if it were subject to the king's will. When faced with a direct royal command—such as the order in 1315 to seize the goods of all Flemish merchants present at the fair—the St. Ives court immediately sought to comply.[85] It also obeyed the terms of the king's charters, of course giving pride of place to those that outlined the privileges of the abbot,[86] but also accepting as valid royal grants that exempted individuals from the fair court's jurisdiction. For instance, in *Almaine v. Flanders* (1270), the fair court exempted foreign communities from judgment if they could present royal charters granting them immunity.[87] Those of the city of London had the right to be tried in their own courts, and the fair court

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abbot's representatives feared a new custom would emerge through a single one-year exemption. As Bonfield put it, confusing custom with precedent might also "startle historians of common law, because it would mean that manor courts had adopted the concept of precedent centuries before that of the royal courts" (522).

[85] *SCLM*, i, 94. The goods were to be seized in an effort to help repay a countess for her robbery at the hands of Flemish pirates. The bailiffs answered that no goods or chattels of Flemish merchants had been found in the fair since the writ was delivered, and "therefore up to the present time nothing has been done therein etc."

[86] In 1288, John Poke was convicted of leasing two houses when not all of the houses of the abbot had yet been leased. This was described as "contrary to the charter of the lord king" (*SCLM*, i, 34). Gross notes that Henry III had granted a charter ensuring that the abbot's houses would be the first to be leased (*Cartul. monast. de Rames.*, ii. 68, *SCLM*, i, 34).

[87] *SCLM*, i, 9-10.

respected this right when it was invoked.[88] The king reserved the rights to establish standards of weights and measures and to take prises of goods for the royal wardrobe, and the court rolls contain records of these procedures.[89] Furthermore, the king could still exercise some legislative control over the fairs of his realm, as when he granted privileges in St. Ives to the bishop of Ely or exempted foreign merchants from many taxes and tolls in the *Carta Mercatoria* of 1303.[90]

Indeed, the court of St. Ives was occasionally called upon to enforce royal rights that had nothing to do with its own jurisdiction. In 1293, Thomas of Grantham sued the abbot of Thorney for taking 6d. toll from him in the abbot's market of Yaxley, even though "he and all citizens of London are free and quit of such demands in all cities and boroughs throughout the realm of England."[91] The record leaves no indication of why the abbot of Thorney was subject in this case to the abbot of Ramsey's jurisdiction; however, it does show clearly that the fair court could and did execute judgments based on the royal will.[92]

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[88] See *Coventry v. Fleetbridge* (1275), *SP*, 155. This case was "reserved for the abbot's hearing," perhaps because it posed difficult diplomatic issues between the communities of London and Lynn.

[89] *SCLM*, i, 40-41, 76.

[90] *SCLM*, i, 32; *English Economic History: Select Documents*, ed. A.E. Bland *et al.* (London: G. Bell and Sons, 1914), 211-216. In 1287, the prior of Ely appeared in St. Ives to request the privileges he had been guaranteed in prior royal charters; these included the right to receive the amercements of his men and to have his officers carry a rod in the fair as a symbol of their power. No answer to the request is recorded (*SCLM*, i, 32).

[91] *Grantham v. Thorney* (1293), *SCLM*, i, 63-64.

[92] This case cannot be explained, as are a number of others arising from conduct that did not take place in St. Ives, by assuming that the plaintiff found the defendant in the fair and turned to the nearest court at hand. The abbot of Thorney and his co-defendant, his bailiff William Curteis, were both represented by attorneys, giving the impression that they had expected the litigation and had sent counsel to argue in their place. The case is *(cont.)*

The extant records from St. Ives coincide with the explosion of legislation under Edward I, and one might expect a famous age of royal statutes to bring a clearer delineation of textual authority in the fair. Occasionally, a royal statute does effectively change the practice of justice at the fair court. Before 1275, for instance, a creditor could attempt to collect not only from the individual debtor, but from the debtor's entire community. Indeed, much of the litigation examined by Gross in the fair court rolls of 1270 and by Maitland in the rolls of 1275 arose out of such disputes.[93] The Statute of Westminster I, however, exempted English communities from this practice, and this change is clearly reflected in the records—at no point after 1275 are the goods of an English community seized in an individual dispute.[94]

Yet changing local practice through royal statute was not always easy. The difficulty is illustrated in the matter of "forestalling," in which merchants intercepted supplies on the road to a fair or market in an attempt to manipulate prices. In 1291, William Ram was summoned to the fair court because "he is accustomed to meet men bringing provisions to the fair, which he buys, and he thus causes great dearth of such provisions in the vill to great damage of the merchants."[95] In this record, there is no mention of the word 'forestalling,' and no indication that any ordinance has been violated; it is merely an inconvenience to the fair. Around 1300, however, Edward I issued the *Judicium Pillorie*, condemning those "Forestallers" who "buy outside of the

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made still more mysterious by the fact that the defendants chose to settle for the sum of a full mark, many times the 6d. claimed as damages.

[93] *Cf. SCLM*, i, 1-10; *SP*, 145, 149.

[94] Statute of Westminster I, 3 Edw. I, c. 23 (1275), *SR*, i, 33. Foreign communities were still vulnerable to being sued as a group.

[95] *SCLM*, i, 48.

town, to the intent that they may sell the same in the town more dearly."[96] The next case of forestalling recounted by Gross seems to take note of this royal interest; in 1312, the local jurors accused William Kemp of Bury St. Edmunds of forestalling wool "contrary to the custom of the fair, to the great damage and prejudice of the lord king."[97] Though the mentions of the word and of the king seem to be an allusion to the statute, it also demonstrates the resilience of local custom; Kemp's main offense was to have acted "contrary to the custom of the fair," not to have violated a royal statute.[98] A royal charter of August 1302, granting the status of a free borough to the town of Berwick-on-Tweed, reiterated at great length the prohibition on forestalling as it enumerated the town's customs—indicating that the statute alone may not have been enough to change the customs at the local level.[99]

In many cases, the provisions of royal legislation could be altered in their implementation by the court of St. Ives. In the matter of currency, the St. Ives court took judicial notice of Edward I's currency reforms, stating in *May v. Stanground* (1300) that the debased "crockards and pollards" had been "prohibited by the lord king throughout all England" and requiring the defendant to pay a debt in legal tender.[100] However, soon

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[96] *SR*, i, 201-202.
[97] *SCLM*, i, 92-93.
[98] William Wythe of Houghton, who was found to be a "forestaller of small hams" in the record immediately following that of Kemp, was simply fined 2s. without comment by the court (*SCLM*, i, 93).
[99] 30 Edw. I, *CChR*, iii, 28. Specifically, the charter granted that "no merchant shall go to meet merchants coming by land or water with merchandise or victuals to the said borough, to purchase such goods or sell them again, until they have come to the borough and exposed their goods for sale, upon pain of forfeiting the thing bought and of imprisonment, whence he shall not escape without serious chastisement."
[100] *SCLM*, i, 80.

afterward the court accepted without hesitation the use of crockards and pollards to help pay damages in *Yarmouth v. Fick* (1300).[101]

A similar process of alteration is seen with regard to the Statute of Merchants. In 1287, the fair rolls record that the communities of merchants at the fair of St. Ives "were assembled to hear the command of the lord king in accordance with the new form of his statute touching merchants frequenting English fairs." The "new form of his statute" is believed to be the Statute of Merchants, issued at in Westminster in 1285, which supplanted the 1283 Statute of Acton Burnell.[102] As a result of this assembly, the merchants would have presumably been familiar with the procedure for debt collection that the statute established. However, after the statute is mentioned in this record, it virtually disappears from the rolls. In fact, the St. Ives records appear to contain only one case where the Statute of Merchants is invoked, namely *Hereford v. Lyons* (1293), where a debtor is imprisoned "in accordance with the statute of the lord king [*secundum statutum domini regis*]" until he can find security for the payment of his debts.[103] Even in this sole example, the fair court does not adhere strictly to the terms of the statute, as the debtor is given an opportunity to sell his goods and repay the debt before he is arrested—a practice allowed by Acton Burnell but prohibited by the Statute of

[101] *SCLM*, i, 91.
[102] *SCLM*, i, 19. *Cf.* Statute of Acton Burnell, 11 Edw. I (1283), *SR*, i, 53-54; Statute of Merchants, 13 Edw. I (1285), *SR*, i, 98-100.
[103] *SCLM*, i, 63-64.

Merchants, which required that the debtor be imprisoned immediately upon a showing of default and that he remain in prison until the debt were paid in full.[104]

Moreover, some royal statutes were simply ignored altogether. Clause 35 of the Statute of Westminster I (1275) forbade the officials of non-royal courts to seize goods in cases involving "contracts, covenants, and trespasses done out of their power and their jurisdiction . . . nor within their franchise where their power is. . . ."[105] This statute seems to be entirely ignored, even by those who would have an interest in citing it so as to avoid punishment. For instance, *Saddington v. Langbaurgh* (1287) arose entirely out of a dispute that took place in the town of Bedford, and the plaintiff in *Titchwell v. Burdon* (1293) had pursued the defendant for almost a year for a debt incurred in Boston before catching up with him in the St. Ives fair.[106] To be treated so unevenly, these statutes cannot have been understood as strict, positive law; instead, the fair court seemed to follow more closely the interpretation of Plucknett described earlier, that statutes "in essence were merely modifications of the elastic web of the customary common law."[107]

The elastic nature of the fair court's legal principles can also be seen by examining the institution of the peace, the promise of safe conduct extended by many medieval lords to those under their jurisdiction. For instance, Henry I's charter of 1110 granting the fair of St. Ives to the abbot of Ramsey stated that "all coming there, staying

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[104] *SCLM*, i, 63-64; Plucknett, *Legislation*, 140. *Cf. SR*, i, 53-54, 98-100. The parties in this case eventually settle, after the defendant promises to pay his debts by the end of the coming June.
[105] Statute of Westminster I, 3 Edw. I, c. 35 (1275), *SR*, i, 35. *Cf. LMLP*, 45, 107.
[106] *SCLM*, i, 22, 59.
[107] Plucknett, *Legislation*, 13.

there, or going away from there, may enjoy my firm peace."[108] Yet the peace of the abbot of Ramsey receives considerably more interest in the documents than that of the king—likely because it was the court of the abbot of Ramsey to which the plaintiffs appealed. Most of the cases of assault are said to occur *"contra pacem domini Abbatis,"* and the phrase appears repeatedly in cases of trespass, slander, and breaking and entering.[109] The formula even makes its appearance in a case of debt and contract, where the defendant was accused of having violated the peace by taking possession of a horse before he had sufficiently paid for it.[110]

Each of these references could have cited the king's peace instead; indeed, in *Chapman v. Boston* (1275), the plaintiff accused the defendant of assaulting and robbing him on the king's highway "against the peace of the lord abbot and his bailiffs."[111] However, the king's peace was almost never invoked by fairgoers, and the only reference to it in the St. Ives records seems to be in error. In 1270, Gottschalk of Almaine sued the communities of merchants from Flanders because the bailiffs of the countess of Flanders had taken from him fourteen sacks of wool "against the peace of the realm [of England]" while he was trading there. However, the seizure had taken place in Flanders by officers of the countess, and it would seem that those trading in Flanders are not protected by a peace offered by the king of England.[112] The fact that the jurisdictional lines are drawn so unclearly seems to indicate that the peace was not viewed at St. Ives as a distinct set of

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[108] Charter to Abbot of Ramsey (1110).
[109] *Ledman v. Barber* (1288), *SCLM*, i, 33; *Wells v. Horningsea* (1275), *SP*, 138; *London v. Woodfool* (1275), *SP*, 143; *Raven v. Cobbler* (1275), *SP*, 145.
[110] *Lawford v. Northampton* (1287), *SCLM*, i, 25.
[111] *SP*, 141.
[112] *SCLM*, i, 9.

substantive legal protections, but rather an equitable guarantee of protection from harm. After all, the "peace of the realm" violated by the countess of Flanders cannot be understood as a specific prohibition.[113]

c. Conclusions

As is clear from the above discussion, the authority of the king and that of the abbot were not entirely distinct in the fair court's records, and may not have been distinct in the minds of the fair court's suitors either. Several cases in the court rolls cite royal and abbatial authority almost interchangeably, and occasionally combine it with customary provisions. For instance, selling "at the backs" was usually referred to in the court rolls as an infraction against the abbot, or (as above) as contrary to an "ordinance of the fair." However, when the merchants of Louvain and Malines were found engaging in the practice in 1315, it was called "contrary to the custom of the realm etc."[114] Stephen of Reedness that same year was accused of selling at the backs "to the contempt of the lord king and to the great damage of the said abbot"; he was ordered to appear to answer "the lord king and the abbot of Ramsey," and an inquest was begun "on behalf of the king etc."[115] And in pleading against Nicholas Crowthorpe of Northhampton in 1288, the bailiff Philip Pollard cited as authorities the "ordinances of the fair," the "charter granted

[113] This conclusion is restricted to the practice at St. Ives only; in the central royal courts and elsewhere, the concept of the king's peace may have had a more formal definition.
[114] *SCLM*, i, 93.
[115] *SCLM*, i, 93.

by the lord king," the "peace of the lord abbot and his bailiffs" and the "law and custom of the [St. Ives] fair" all at once.[116]

The fair court therefore cannot be seen as participating in a single legal tradition. The abbot's dictates, the king's statutes, the residents' customs, the suitors' sense of justice—all these participated in an organic, 'living' law. The principles of the fair courts were not merely grounded in the will of the merchant community, even if traders rendered the decisions of law and fact; instead, the authority of the lord and of the lord king was keenly felt in the fair's day-to-day administration. The law merchant was not merely 'what merchant courts do,' but rather one among several rationales that could be invoked to support a legal decision. As a result, the St. Ives evidence does not support a portrayal of the law merchant as the only law by which the merchants were bound.

2. The Law Merchant and Non-Merchants

The law merchant may not have been the only legal authority at St. Ives, but it was *an* authority, and one of documented application. To whom, however, was it applied? It is tempting to understand the law merchant as the private law of merchants. Under this interpretation, merchants possessed the privilege of being judged by the law merchant in merchant courts, much in the same way that churchmen had the right to be judged by canon law in ecclesiastical courts. Harold Berman makes this analogy explicitly, arguing that the *lex mercatoria* was the mercantile equivalent of canon law.[117]

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[116] *SCLM*, i, 35.
[117] Berman, *Law and Revolution*, 346.

In this, he follows the position of William Mitchell, who argues—largely on the basis of Continental examples, although he does have some evidence from England—that the law merchant was a guild privilege, "in its origin a personal law, the law of a special class." Merchants, he states, had the ability to be judged by the law merchant as opposed to the common law by virtue of their profession; Mitchell calls this class-based choice of law a "characteristic feature" of the law merchant "throughout the Middle Ages," and argues that it persisted in England until the seventeenth century.[118]

However, this interpretation does not seem to fit the evidence from St. Ives. As Frederick Pollock and F. W. Maitland described it, the law merchant "seems to have been rather a special law for mercantile transactions than a special law for merchants."[119] At St. Ives, appeals to custom are by no means limited to a merchant class. Non-merchants could invoke the protection of the customs of the fair or even of the law merchant, and the records contain a theoretical argument that men of all social classes can be considered "merchants" for the purpose of the law merchant's protection. In other words, the records present the law merchant as a general body of customs applying to commerce rather than a set of privileges granted to a specific class.

The fair court records do not contain a single example of a challenge to a party's social standing to have a case heard by the court or to be judged according to the law

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[118] William Mitchell, *An Essay on the Early History of the Law Merchant: Being the Yorke Prize Essay For the Year 1903* (Cambridge: University Press, 1904), 81.

[119] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols., 2nd ed. (Cambridge: University Press, 1898; reprint, 1952), i, 467. They add that "in private law 'merchantship' . . . seems too indefinite and also seems to have few legal consequences to permit our calling it a status. . . . Until lately no one but 'a trader' could be made bankrupt; still we should hardly say that in 1860 'tradership' was a status" (Pollock and Maitland, i, 461).

merchant. After all, questions of a theoretical nature are rarely raised in this very practical forum. Yet the records do establish that the jurisdiction of the fair court of St. Ives, and even its application of the law merchant, was in no way restricted to merchants. Some of those who came before the fair court were indeed members of merchant guilds or mercantile communities; Gottschalk of Almaine, who by his name was almost certainly a German merchant, was also a "burgher of Lynn."[120] However, individuals of all classes and occupations appear in the court rolls of St. Ives: in addition to merchants, local and foreign, we see a parade of monks,[121] knights,[122] townsmen,[123] bakers,[124] carters,[125] servants,[126] and those even lower on the social scale.[127] St. Ives was in a rural area; before its incorporation in the late nineteenth century, it was not a city with independent legal status or a free town where merchants made the law. Some residents farmed, others provided services, and many did both; some residents were even quite well off. But they were almost all were unfree and had various obligations to their lord, notably the pannage of pigs, hay-making, tallage, and payments on the marriage of daughters and for grazing pigs in the forest.[128] These individuals of servile status, who would be classified as villeins by the common law of the time, were judged in the fair of

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[120] *SCLM*, i, 9.
[121] *Ape v. Kirkstead* (1275), *SP*, 147.
[122] *Hereford v. Lyons* (1293), *SCLM*, i, 62.
[123] *Cousin v. Huy* (1270), *SCLM*, i, 3.
[124] *Cricklade v. Wellingborough* (1293), *SCLM*, i, 57.
[125] *Court v. Carter* (1287), *SCLM*, i, 31.
[126] *Waite v. Hamon* (1287), *SCLM*, i, 13.
[127] " . . .Richard Brewhouse receives the merry-andrews in the midst of the fair to the disturbance and peril of the merchants; therefore he [is in mercy] 6d." (*SCLM*, i, 107).
[128] Moore, 237. Redstone similarly notes that the town did not receive its charter until 1874, and the inhabitants during this era paid a yearly rent, did customary works, owed obedience to the lord's bailiff, and needed licenses from the lord for the marriage of widows or daughters (ii, 216).

St. Ives under the same rules as great merchants; they could still call themselves "merchants" and even seek judgments according to the law merchant.

Consider Nicholas Legge, a butcher of St. Ives found in the rolls as an ale taster and juror. In his case against Nicholas of Mildenhall in 1291, Legge sought to intervene in a contract between Mildenhall and another butcher, as he was allowed to do by "the usage of merchants." Mildenhall admits that "the law merchant does indeed allow every merchant to participate in a bargain made with a butcher"; clearly, both parties include Legge in the category of "merchant," and the court raises no objection to the argument.[129] Yet Legge was a resident of the vill—he was elected constable among residents of Bridge Street in 1302—and there is no indication that he was of unusual status. In any event, he was certainly no member of a corporate merchant guild.[130]

One can even find in the fair rolls a rare theoretical discussion of the jurisdiction of the law merchant. In the 1312 case of *Fulham v. Francis*, two servants of the abbot of Burton-on-Trent appear in court to prove, "according to the law merchant," that a horse being seized to pay a debt actually belongs to their master. When forced to defend their right to testify, they cite a point of law and claim that it applies to "any merchant . . . whosoever he may be, whether earl or baron, bishop or abbot, or any such person of rank."[131] More importantly, the plaintiff never contests this expansive definition of "merchant"—he only claims that the servants should not be allowed to act as their abbot's attorneys.

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[129] *Legge v. Mildenhall* (1291), *SCLM*, i, 46.
[130] Moore, 162, 257.
[131] *SCLM*, i, 89-90.

This all-inclusive definition is accepted without objection by the court and seems to settle the question of whether the law merchant was a private law. If the classification of "merchant" has any meaning as an occupational description or as a name for a social class, it cannot include earls, barons, bishops, or abbots; these groups, especially the churchmen governed by ecclesiastical law, possessed a legal status profoundly distinct from that of merchants and townsmen. Indeed, the writer Gerard Malynes would later specifically exempt "Clergymen, noblemen, gentlemen, soldiers, [lawyers], publick officers and magistrates" from the ranks of the "merchants" whom the law merchant could protect.[132] The understanding at St. Ives seems to have been that a "merchant" is anyone who engages in trade, which would mean that the law merchant was really a commercial law of a general nature, not a personal one. If the law merchant were the indeed the legal privilege of a class, that class must have been so inclusive as to be historically and legally meaningless.

D. Conclusions

A later historian, comparing the procedure of the St. Ives courts to those of King's Bench or Common Pleas, would doubtless find significant differences between the two. In comparison to the royal courts, the merchants exercise more power over their own fate; as a community, they are allowed to share in making judgments, and the court is willing to take notice of their customs. But the central royal courts hardly represented the

[132] Gerard Malynes, *Consuetudo, vel Lex Mercatoria, Or, The Ancient Law-Merchant* (London: Adam Islip, 1622; reprint, Goldbach, Germany: Keip Verlag, 1997), 6.

only legal tradition in England. A manual on "How to Hold Pleas and Courts," written *circa* 1274 by John of Oxford, a monk in the priory of Luffield, reminded the reader that there was one manner of pleading in the court of King's Bench, another before the justices in eyre, another in county and hundred courts, and still another in the courts of knights, freeholders, or lay or religious lords.[133] These individual courts did not always enforce the common law of the land, but might possess their own customs; a good steward "should know the customs of that county, hundred, court or manor, and the franchises pertaining to the premises, *for laws and customs differ in divers places. . . .*"[134]

The type of justice practiced by manorial and seigneurial courts is likely more ancient than that of the courts of common law, and it may have been more familiar to the litigants at St. Ives. The practices described in "The Court Baron," a popular instruction manual for the stewards of seigneurial courts in the late thirteenth and early fourteenth centuries, very closely resemble those of the fair court.[135] In one sample case included in this text, a merchant defamed another and caused him to lose credit for a purchase; the defendant is allowed to wage his law six-handed at the next court.[136] Exactly the same procedure is followed in cases at St. Ives such as *Rushbrooke v. Woodfool* (1293) and *Woodfool v. Pors.*[137] In another sample, the defendant in a case of debt asks for a love-day in an attempt to settle the dispute. The steward grants the love-day, but does so "saving the right of the lord in all things"; an essentially identical procedure occurred in

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[133] "How to Hold Pleas and Courts," *CB*, 68. The identification of author and date is found in Maitland and Baildon, 12-13.
[134] "How to Hold Pleas and Courts," 68. Emphasis added.
[135] Maitland and Baildon, 6-7. At least seven copies of the manuscript survive.
[136] "The Court Baron," *CB*, 40.
[137] *SCLM*, i, 57, 71. In the latter, the defendant Robert Pors fails in his law because he "came three-handed when he ought to have come six-handed" (*SCLM*, i, 71).

Cousin v. Huy (1270).[138] The proceedings in the St. Ives rolls are also similar to those described in the two manuscripts of "The Manner of Holding Courts"—one composed *circa* 1307 for John de Longueville, a lawyer who represented the borough of Northampton in Parliament,[139] and another composed *circa* 1342 for the Abbey of St. Albans.[140] One must remember that these treatises were not written to address mercantile courts specifically; rather, they were intended to be generally applicable to proceedings in seigneurial courts throughout England.

When viewed in this context, the experience of merchants at the fair of St. Ives is hardly exceptional. The appropriate conclusion from the evidence of the fair of St. Ives is not that the merchants were given a unique license by existing authorities and allowed to determine their own affairs. Instead, the fair court followed existing models of seigneurial courts—a perfectly sensible conclusion given that it *was* a seigneurial court, a court that "has a lord."[141] One should not see the involvement of merchants in rendering decisions as legal independence, any more than one should interpret the participation of the unfree King's Ripton suitors as self-government. The mercantile courts of thirteenth-century England were not courts ruled by the merchants; instead, in James Steven Rogers' phrase, they seem much more like "local courts of general jurisdiction held at places where a great deal of trade took place."[142]

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[138] *SCLM*, i, 5.
[139] Maitland and Baildon, 14.
[140] Ibid., 15.
[141] *SP*, 130.
[142] Rogers, 25.

Chapter III:
One Law Merchant, or Several?

In 1473, a foreign merchant sought an exemption in the court of Star Chamber from certain English shipping regulations. Although English law required that he register the number of sailors and the name of the vessel in exchange for safe-conduct, the merchant protested that he should not be "bound by [English] Statutes, which Statutes are *introductive of new law*." As a foreigner who was unfamiliar with the peculiarities of English law, the merchant argued, he should be held to obey only those rules "*declarative of ancient right*, that is to say, Nature, etc.," and his case should be "determined according to the law of Nature, in the Chancery." Without deciding the merits of the case, the Chancellor agreed that the merchant should not be forced "to abide a trial by 12 men and other solemnities of the law of the land"; rather, his case should be heard in the Chancery according to "the law of Nature, which is called by some 'Law Merchant,' which is law universal throughout the world."[1]

For hundreds of years after 1473, influential writers on English commercial law echoed the language of this court record. In *Consuetudo, vel Lex Mercatoria* (1622), the merchant Gerard Malynes spoke of the law merchant as "a customary law, approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince"; for Malynes, the "customary law of merchants" held a "peculiar prerogative" above all other customs and laws in that it "is observed in all

[1] Year Book 13 Edw. IV, cited in *SCLM*, ii, *lxxxvi*. Emphasis in original.

places."[2] Similarly, in his *Question Concerning Impositions*, seventeenth-century lawyer John Davies stated that the "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 laws of all nations do take special knowledge."[3]

Indeed, the vision of the law merchant as a single entity common to all nations has persisted in the work of modern historians. In his classic history of English law, William Searle Holdsworth emphasizes the "cosmopolitan character of the Law Merchant," arguing that while "usages differed from place to place," it was generally recognized that the law of markets and fairs and the law administered by mercantile courts in the boroughs was "a special law merchant, differing from the ordinary law"—a "species of *jus gentium*," the law of nations, rather than "the law of a particular state."[4] William Mitchell noted the "strongly marked international character" of the law merchant, asserting that "the mainlines of [its] development were everywhere the same."[5]

Yet in trying to understand the nature of medieval commercial law, a modern reader is struck by the discrepancy between the soaring rhetoric employed by Malynes, Davies, Holdsworth, or Mitchell and the unassuming arguments found in the fair court rolls. Some 200 years before the Chancellor's decision, Gerard of Cologne was told in the St. Ives court that he was not sufficiently equipped to wage his law "according to law

[2] Malynes, "To the Reader" *vi-vii*, 4.
[3] John Davies, "The Question Concerning Impositions" [1656], *The Works in Verse and Prose of Sir John Davies*, ed. Alexander Grosart, 3 vols., Fuller Worthies' Library (Blackburn: C. Tiplady, 1869-1876), iii, 12.
[4] Holdsworth, v, 66; i, 528-529.
[5] Mitchell, 20.

merchant" and was sent back to find more compurgators; was this an invocation of a universal principle, a tenet of the Law of Nature?[6]

We cannot assume that the suitors at St. Ives were drawing on the same concepts as the writers of the early modern period or even the foreign merchants of the late fifteenth century. In fact, the best evidence from the original sources seems to be that they were not—that the law governing markets and fairs was not a "law universal throughout the world," nor did the suitors of St. Ives act on the presumption that it was. Within the St. Ives court, among mercantile and royal courts throughout England, and in the provisions of royal charters and statutes, one can find evidence for significant variations in the principles of mercantile law—variations that may justify abandoning the notion of a universal law merchant.

A. "The Law Merchant" Within St. Ives

What did the St. Ives court believe itself to be doing when it decided an issue *secundum legem mercatoriam*? As in the case of royal statutes and abbatial ordinance, the fair court did not seek exacting compliance with a specific code. Rather, it sought in each case to provide an equitable solution to an individual dispute. Indeed, the very use of the term "the law merchant" may be inappropriate, as the fair court rolls demonstrate substantial variation in the principles established *secundum legem mercatoriam* as well as in the terms employed to describe their source of authority.

[6] *Cologne ex rel. Currier v. Lynn* (1270), *SCLM*, i, 5.

Of the 332 cases examined by Gross and Maitland, eleven are decided (at least in part) "according to the law merchant."[7] These cases offer no easy characterization. They generally involve matters of procedure, such as how long a plaintiff must wait to receive the attached goods of a defendant in default,[8] but they also include important substantive questions such as when a sale is complete,[9] as well as seemingly arbitrary usages such as the right of outside butchers to participate in any sale of meat or fish.[10] Sometimes a special assembly of merchant communities invoked the law merchant's authority; at other times, the court included the phrase almost as an aside.[11]

The characterization is made more difficult by the fact that the law merchant seems to have been inconsistently applied. For example, when Gerard of Cologne tried to claim his casks of wine as mentioned above, he was instructed "according to law merchant" to return six-handed (*i.e.*, with five compurgators).[12] However, in *Tempsford v. Chaplain* (1291) and in *Fulham v. Francis* (1311), only two compurgators were considered necessary "according to the law merchant" to establish ownership of goods that had been attached.[13] Given the relative rarity with which the phrase appears in the

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[7] For comparison, the peace of the abbot or of the realm is mentioned at least eighteen times.
[8] *Fairhead v. Tankus* (1295), *SCLM*, i, 71.
[9] *Tempsford v. Chaplin* (1291), *SCLM*, i, 44. Here the merchants of the court decided that a sale was complete as soon as the earnest money—a token down payment also called a "God's penny"—had been paid.
[10] *Bishop vs. Godsbirth* (1315), *SCLM*, i, 97; *Legge v. Mildenhall* (1291), *SCLM*, i, 46.
[11] See, *e.g.*, *Fulham v. Francis* (1311), *SCLM*, i, 89; *Cologne ex rel. Currier v. Lynn* (1270), *SCLM*, i, 5.
[12] *Cologne ex rel. Currier v. Lynn* (1270), *SCLM*, i, 5.
[13] *SCLM*, i, 45, 89-90. Meanwhile, the anonymous treatise *De legibus mercatorum*, which Basile *et al.* believe was an educational text composed in London in the late thirteenth century, states unambiguously that five compurgators are necessary (*LM*, 42).

court rolls (these are, after all, three out of a total of eleven cases), the variation must be regarded as significant.[14]

One can find similar variability in the treatment of jury inquests ordered *ex officio* by the steward of the fair. In 1291, Walter Danes of Roxton sought to claim a horse that had been attached in *Tempsford v. Chaplain*. The rolls state that "because the claim of the said Walter is regarded with suspicion"—later noting that "he was a person of ill fame and had not chattels of such value, and [it was suspected] that he did this by fraud and collusion"—an inquest was ordered to determine the truth.[15] The jurors found that Walter's claim was fraudulent, but Walter replied that he had not put himself on the inquest, which was taken by the steward *ex officio*, and that he had the right to prove his claim by oath "according to the law merchant."[16] The case was put on hold for eleven days, until the "merchants of the various communities" could be assembled; the court then ruled that since the inquest was taken merely *ex officio*, and since his claim to have bought the horse was valid "according to the law merchant," Walter would be allowed to come "three-handed [*i.e.*, with two compurgators] with good and elected and credible men" to prove that the horse was his.[17]

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[14] Moreover, we cannot ignore the fact that Gerard of Cologne may well been a foreigner, unknown to the suitors of the court, while the intervenors in the other two cases were Englishmen. As Bonfield notes, in order to infer the existence of substantive principles from court records, we must assume that the courts extended the parties substantive due process as well as equal protection; *i.e.*, that "the decisions reflect a proper application of customary law regardless of the status of the parties involved and the equities of the dispute" (523). In the case of St. Ives, this assumption may not be justified.

[15] *SCLM*, i, 38, 44-45.

[16] *SCLM*, i, 38.

[17] *SCLM*, i, 44-45. He made his law successfully, and was allowed to leave with the horse.

This case would seem to establish, as a principle of the law merchant, that the steward of the fair was unable to carry out binding inquests *ex officio*. Yet the records contain another example of an *ex officio* inquest that very closely resembles that of *Tempford v. Chaplain*. In *Stanwick v. Wylye* (1295), a black horse had been seized as security in the case, and a monk of Lavendon appeared claiming that the horse belonged to the monastery. The court awarded that the monk "should prove that the horse was his," *i.e.*, by oath. However, without waiting for the wager of law to take place, the steward took an *ex officio* inquest "for greater security," and the jurors replied that the horse did indeed belong to the abbot. "Wherefore," the record continues, "it is awarded that the said monk recover the said horse"—the inquest alone was taken as proof, and there is no evidence that an oath was ever sworn.[18] There would have been little point in taking an inquest "for greater security" if a negative result would have been ignored; as a result, this case seems to indicate that a steward *could* order a binding inquest *ex officio*, and that the principle of the law merchant enunciated four years earlier was not of universal application.[19]

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[18] *SCLM*, i, 67-68.

[19] Two additional cases of *ex officio* inquest are found in the documents, both of which seem to give the steward significantly more authority to determine the facts in cases of trespass. In 1291, Alice Tanner had accused Maud Francis of stealing three bushels of malt. Alice then said she would not sue, and was punished for her non-suit along with her two pledges to prosecute. However, even though no cause of action remained, the steward "'ex officio,' as if at the suit of the lord king," asked Maud how she obtained the malt, and an inquest was taken. The jury reported that Maud received the malt from a stranger, not suspecting that it had been stolen (*SCLM*, i, 48). More important than the end result, however, is the fact that the steward was able to proceed without an actual case or controversy before the court. *Benefield v. Fittleton* (1300) seems to have followed a similar procedure, in that the steward took an *ex officio* inquest when the plaintiff did not arrive to press his claim of trespass (*SCLM*, i, 74). In most cases, however, the standard procedure when the plaintiff does not press his suit is to end the *(cont.)*

Additionally, there are cases in the St. Ives court rolls that seem to incorporate new principles as part of the law merchant. In 1311, two servants of the abbot of Burton-on-Trent intervened in the case of *Fulham v. Francis* to claim for their master a horse that had been attached for the debt.[20] The plaintiff argues that they should not be allowed to prove their case through oaths, citing a general principle that "when anyone should make proof of the ownership of any merchandise . . . it is necessary that he whose ownership is alleged should appear in his own person to make [proof]."[21] The servants reply that whenever a merchant delivers his goods to a servant to have them put on sale, it would be "hard and inconsonant with right if such servants . . . should not be admitted to make such proof in the name of their lord."[22] The emphasis is placed on issues of equity rather than substantive law—to deny the servants their opportunity to make proof would be "hard and inconsonant with right," not contrary to accepted legal principles. To resolve the case, the court convenes "all the merchants of the said fair, both natives and foreigners," who declare that the servants "may properly be admitted in this and similar cases according to the law merchant," language that indicates a rule to be used in the future rather than one of long standing in the past.[23] Indeed, when the servants succeed in making their oath, they are allowed to keep the horse "according to the law merchant

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litigation and let the defendant go free—see, *e.g.*, *Howell v. Mules* (1287), *SCLM*, i, 28-29; *Broughton v. Canwick* (1291), *SCLM*, i, 46; *Glemsford v. Longmark* (1295), *SCLM*, i, 75.

[20] *SCLM*, i, 89-90.

[21] *SCLM*, i, 90.

[22] *SCLM*, i, 90.

[23] *SCLM*, i, 90.

hitherto approved"—a phrase giving the strong impression that something new has been introduced.[24]

A similar impression is given by the plea of Christine of Darlington against Adam Burser of Bury St. Edmunds in 1302. Darlington claimed that "on Wednesday last in this present year" Burser accused her of theft and "assaulted her with vile words, calling her harlot, knave, and other enormities," causing her to lose credit for six quarters of wheat. Burser denied wrongdoing and asked for judgment against Christine "and against her count"; she had specified the day of the assault as being in "this present year," when she ought to have specified "the twenty-ninth or thirtieth year of the reign of King Edward, as is the custom in every court," and he asked for a verdict from the merchants.[25] Darlington responded that her plea was sufficiently precise "according to the law merchant," since anyone can figure out the year "when the heading of the [court roll] specifies the thirtieth year of the reign of King Edward."[26] However, she did not contest Burser's claim that including the year of King Edward "is the custom in every court," merchant courts presumably included; instead, she seems to have contended that doing so is unnecessary, and it therefore could not have been required by "the law merchant." Eventually, the case was settled out of court, and Burser paid a fine of 6d.—less than a thousandth of the £40 in damages Darlington had originally claimed.[27] Given that Darlington was willing to settle and that Burser was willing to ask the assembled

[24] *SCLM*, i, 90.
[25] *SCLM*, i, 85.
[26] *SCLM*, i, 86.
[27] Gross believes that this absurdly large figure is an error for 40s.; even so, the fine would then be one-fiftieth of the damages (*SCLM*, i, 86).

merchants for a verdict, it seems likely that Burser had the law on his side, and that "the law merchant" could be used as an expression for commonsense principles of equity.

Given that contradictory principles could be applied "according to the law merchant," is it still reasonable to use the phrase "the law merchant" to describe a coherent legal order? The translation of this phrase as indicating a single law is highly problematic. In the case of Gerard of Cologne, the court did not demand more compurgators *secundum legem mercatoriam*, but "*secundum legem mercatorum.*"[28] Gross translates this phrase as "according to law merchant," but the text provides no justification for dropping the article—a better translation would be "according to the law of merchants."[29] Indeed, some authors have called into question the translation of *secundum legem mercatoriam* as referencing "the" law merchant, which indicates the presence of a single entity. The phrase *secundum legem mercatoriam* might be rendered "according to law merchant," "according to merchant law," or the more comprehensible "according to mercantile law," a phrase which carries no connotations of legal uniqueness or universal applicability. This translation is urged by Basile *et al.*, who maintain that "the law merchant" has received a distorted interpretation in the secondary literature.[30] Indeed, Rogers goes so far as to argue that the "sense of mystery and jurisprudential complexity" that the phrase "Law Merchant" evokes is attributable to "nothing more than [its] odd grammatical construction."[31]

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[28] *SCLM*, i, 5.
[29] Thomas N. Bisson, personal communication, Cambridge, Mass., March 7, 2002.
[30] *LMLP*, 7.
[31] Rogers, 250. He then explains its oddity at some length: "In English, when a noun is made into an adjective, a suffix is usually added, and adjectives in English generally precede rather than follow nouns. Moreover, in the twentieth century, we no longer *(cont.)*

If a number of terms could be used to render *secundum legem mercatoriam* into modern English, even more are used at St. Ives to express equivalent ideas in Latin. In 1312, a question arose at St. Ives over whether a shipment of licorice should be forfeited to the king "according to merchant law and custom etc. [*secundum legem et consuetudinem mercatoriam etc.*]"; the formulation is very similar to that of *secundum legem mercatoriam*, and the two seem to be used interchangeably in this case.[32] Similarly, in *Legge v. Mildenhall* (1291), the plaintiff makes a claim "according to the usage of merchants [*secundum usum mercatoriam*]," and the defendant admits that the claim is correct "according to the law merchant [*secundum legem mercatoriam*]"—no distinction seems to be made between "law," "custom" and "usage."[33] The "custom of the fair"[34] as well as the "law and custom of the fair"[35] each describe principles applicable at St. Ives, and the phrases are used as if they were entirely synonymous. Their use implies that the practice of mercantile law in the fair of St. Ives was more flexible than the translation of "the law merchant," with its reifying definite article, would imply. The other phrases support an interpretation of *secundum legem mercatoriam* as appealing to a loose concept of custom and fairness rather than a specific, well-defined body of law.

The few extant records from merchant courts outside St. Ives support this interpretation of the term. For instance, the fair court of West Malling in *Dyer v.*

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employ such stylistic flourishes as capitalizing nouns, or rendering them into Latin" (Ibid.)

[32] *Bedford v. Reading* (1312), *SCLM*, i, 91.

[33] *SCLM*, i, 46-7. Gross translates "*secundum usum mercatoriam*" as "according to the usage of merchants," but a more accurate translation (and one that is more consistent with Gross's other choices) might be "according to merchant usage."

[34] *Court v. Kemp* (1312), *SCLM*, i, 92.

[35] *Pollard v. Crowthorpe* (1288), *SCLM*, i, 35-6.

Stonehill (1334) ordered a defendant attached by twenty-nine pieces of wool "according to the law of the fair [*secundum legem ferie*]."[36] Similarly, in one very late reference in the Tolsey court of Bristol, in *Warre v. David* (1518), a plea was heard "according to the law merchant and the usage and custom of that town used and approved from time immemorial."[37]

The use of customary terms to describe an entity resembling the "law merchant" is not restricted to the records of merchant courts. Already in 1215, Magna Carta had recognized the "ancient and lawful customs" of merchants.[38] Several charters issued by Edward I confirming the customs of merchants and fairs referred to *lex mercatoria*.[39] Yet royal charters could also invent different terms for what seems to be the same source of justice. According to a 1280 charter, the wardens of the fairs of St. Edward of Westminster are to "show full justice . . . according to the custom of the fair of Winchester." A 1306 settlement between the city of Norwich and the prior of Holy Trinity specified that the townsmen would be under the jurisdiction of the fair court of

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[36] *SCLM*, i, 112.
[37] *SCLM*, i, 131.
[38] Chapter 41 of the 1215 text of Magna Carta states that "All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs" (Magna Carta, 1215, British Library, available online at *http://www.bl.uk/collections/treasures/magnatranslation.html*, last viewed March 15, 2002).
[39] A 1280 charter to the burgesses of Melecumbe discussed pleas of merchandise, which "by the law merchant are determined in boroughs and fairs" (8 Edw. I, May 27, 1280, *CChR*, ii, 223), and in 1303 Edward promised the merchants of the duchy of Aquitaine that "all bailiffs and ministers of the fairs of the cities, boroughs and merchant towns shall do speedy justice . . . according to the law merchant" (30 Edw. I, Aug. 13, 1303, *CChR*, iii, 30).

Norwich "when any matter belonging to the law of fairs [*jus feriarum*] requires."[40] Royal courts could do the same: a case in King's Bench endorsed a practice as being used "in law merchant [*in lege mercatoria*]" as well as justified "according to maritime law [*secundum legem marinam*]."[41] Another case in the county court of Southhampton describes a delivery of goods as having been conducted "according to the customs of merchants [*secundum consuetudinem mercatorum*]."[42]

The variability in the principles established "according to the law merchant" as well as the terms used to express the concept demonstrate the somewhat haphazard nature of the justice administered at St. Ives. The court sought above all to provide its community with "justice and equity,"[43] taking judicial notice of existing merchant customs (and occasionally creating new ones) to ensure an equitable result. According to the evidence that can be gathered from the rolls, the St. Ives court did not invoke the law merchant as a well-defined set of principles, but rather as a complex, vague, and ever-changing body of "merchant law and custom."[44]

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[40] 9 Edw. I, Nov. 24, 1280, *CChR*, ii, 239; 35 Edw. I, Dec. 4, 1306, *CChR*, iii, 74.
[41] Coram Rege Roll, No. 187 (Michelmas 1287), m. 46, in *KB*, i, 170. For comparison, if *secundum legem marinam* were translated in the same fashion as *secundum legem mercatoriam*, it would be rendered as the unusual phrase "according to the law maritime."
[42] *Dunstable v. Le Bal* (1278), in *SCLM*, ii, 29. Hall erroneously translates this phrase as "according to the custom of the country."
[43] *SP*, 153.
[44] *Reading v. Bedford* (1312), *SCLM*, i, 91.

B. Mercantile Law Beyond St. Ives

It is far beyond the scope of this study to compare systematically the commercial regulations of jurisdictions across Europe—or even across England—during this period. However, it is possible to find some direct evidence of such variations in the theory and practice of mercantile law within England; such evidence is available in contemporary treatises, royal court records, and borough custumals. Additionally, indirect evidence of variations can be found in the structure and activities of mercantile courts such as St. Ives, which acted independently of their sister courts and sometimes even at cross purposes with them. Although some similarities may have existed in the regulation of commerce, there is nothing in this evidence to indicate that a single law merchant prevailed across Europe and across the many centuries of the Middle Ages.

1. Direct Evidence for Variation

a. *Lex Mercatoria*

If there were a single, universal law merchant, what did it say? The enticingly entitled treatise *Lex Mercatoria*, believed to have been composed by a London lawyer in the late thirteenth century (perhaps the 1280s), purports to describe the contemporary state of commercial law in England.[45] Indeed, Ellen Wedemeyer Moore, whose treatise on the medieval English fairs otherwise shows a profound familiarity with the fair court

[45] *LMLP*, 110, 116.

rolls of St. Ives, uses *Lex Mercatoria* to fill in the gaps the fair rolls leave regarding St. Ives court procedure, concluding that "all of the principles [*Lex Mercatoria*] describes accord perfectly with the practice of merchant law as revealed in the St. Ives fair court records of 1270-1324."[46] Holdsworth goes even further in discussing *Lex Mercatoria* and the St. Ives records, saying that "it is clear from these authorities that these piepowder courts were of the same general type as the fair courts of the Continent."[47]

However, the treatise does not give the supporter of the universal law merchant as much ammunition as Holdsworth might hope. The second chapter of *Lex Mercatoria* describes the "law of the market," saying that it "differs from the common law of the kingdom in three general ways": it delivers a judgment more quickly, it holds the defendant's pledges responsible for all damages and court costs in the event of an adverse judgment, and it does not allow the defendant to wage his law.[48] In all other matters, including "prosecutions, defenses, essoins, defaults, delays, judgments, and executions of judgments," the treatise suggests that "the same procedures should be used in both laws."

This is an oversimplification, of course—if it were literally true, there would be no need for the subsequent nineteen chapters of the treatise. But the fact remains that *Lex Mercatoria* does not present the law merchant as an entirely independent legal system, with its origins in the laws of Nature and of nations; rather, it is highly dependent on the English common law, "which is the mother of mercantile law and which endowed her

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[46] Moore, 168.
[47] Holdsworth, v, 106. In an earlier volume, he claims that "it is clear from the records of the courts of [fairs such as St. Ives] that they were of the same type as the courts of similar fairs which existed all over Europe" (i, 536).
[48] *LM*, 2-3.

daughter with certain privileges in certain places."[49] If the parties would rather litigate at common law rather than mercantile law, "they certainly can, and they do so more often than not throughout the whole kingdom."[50] These plaintiffs chose to litigate at common law despite its elaborate procedures, which allowed defendants to delay judgment for months or years at a time. Such a description is hardly commensurate with the portrait of the law merchant as having sole jurisdiction over all commercial cases or as an escape from an oppressive, archaic common law.[51]

Examining *Lex Mercatoria* does reveal some general principles followed by the St. Ives court—for instance, the speedy process of justice. However, contrary to Moore's account, the differences between the procedures as described in the treatise and as implemented in the fair court are striking and fundamental. The first example of such difficulties regards the disposition of attached goods when their owner is absent. Merchant courts moved quickly; most pleas were addressed in a single day or perhaps over two days. According to *Lex Mercatoria*, those defendants who did not appear in three consecutive courts were to be declared in default, in which case the plaintiffs would be able to offer proof in their absence and subsequently seize those goods that had been attached to secure the defendants' appearance. The author of *Lex Mercatoria* notes this procedure and recognizes the difficulties that might attend it, especially for defendants

[49] *LM*, 18.
[50] *LM*, 2.
[51] Indeed, Holdsworth interprets the limited differences asserted in *Lex Mercatoria* as evidence of the creeping incorporation of the law merchant into the common law. The writer of the treatise "regards the Law Merchant as a mere off-shoot of the common law," and he "can only point to three specific differences" (i, 59). But if *Lex Mercatoria* accurately describes the system in use across Europe, as he states above, then in what differences from the common law does the law merchant consist?

who are far away from the fair grounds when the case is brought. After briefly considering whether such a procedure is just, the author then notes that "it is ordained" that if those attached are in distant parts, they are to receive a grace period of several days depending on the distance, so that they will be able to reach the court in time to defend their goods.[52]

Yet this discussion of attached goods weakens the view of the law merchant as a shared body of law. First, although the language used in the passage is similar to that used when the author refers to a royal statute or other formal ordinance, no such statute has been found.[53] The "ordained" procedure seems to represent wishful thinking on the part of the author rather than actual practice of the thirteenth and fourteenth centuries.[54] Second, the passage notes significant discrepancies in the procedures of various courts. In criticizing the current procedures for addressing attachment, it notes that the distraints were handled "in such different ways in different parts [of the kingdom] that no one at all was able to know or learn the process of mercantile law in this respect," a description that

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[52] See generally *LM*, 7-10; *LMLP*, 69-71. Note that the seizure of goods (and, in many cases, the bodies of those too poor to offer a security) contradicts Benson's assessment that the merchant courts lacked "the coercive authority of a state" (*The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), 33).

[53] *LM*, 9; *LMLP*, 69-71.

[54] This is not the only instance in which the author of *Lex Mercatoria* failed to distinguish between his preferences and existing practice. We have already encountered the treatise's declaration that "every judgment is to be rendered by merchants of the same court and not by the mayor or by the seneschal of the market" (*LM*, 20). Yet although the author identifies a specific writ in royal court as the proper corrective for a steward who has overstepped his bounds, there is no extant writ of the form he describes, nor is there any record of any trespass action brought against a steward or mayor on these grounds—leading Basile *et al.* to conclude that this 'ordinance' is a recommendation instead of an existing statute (*LMLP*, 74-6).

contrasts sharply with the view of the law merchant as substantially uniform.[55] Third, the rapid disposition the author describes as widespread does not seem to have been the practice at the court of St. Ives, which regularly delayed disposition of attached goods—sometimes only until the close of the fair, but often for a year or more. At the fair of 1299, Adam of Yarmouth sued John Fick of Hawley, who failed to appear; a white horse of Fick's was attached, but Adam did not receive the value of the horse until the close of the fair of 1300, after more than a year of repeated defaults.[56]

More damningly, the strictures of *Lex Mercatoria* also diverge from St. Ives practice regarding such fundamental procedures as the nature of proof, a subject central to the functioning of any court. The treatise states unambiguously that the law merchant differs from the common law in that "it does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant."[57] Indeed, as noted above, it lists this distinction as one of the three general differences between law merchant and the common law.[58] In medieval English courts, proof was an advantage rather than a burden; a

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[55] *LM*, 9. A similar admission with regard to the seventeenth and eighteenth centuries can be found in the first chapter of T.E. Scrutton's *Elements of Mercantile Law* (London, W. Clowes, 1891): "And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system of Mercantile Law in England" (quoted in Frances M. Burdick, "What is the Law Merchant?," 2 Columbia L. Rev. 470, 480 (Nov. 1902)).

[56] *SCLM*, i, 81. See also *Ulting v. Hardwick* (1315), in which the settlement was delayed by a year before the final execution was made, as well as *Court v. Gidding* (1316), in which one of the sureties for the goods attached in *Ulting v. Hardwick* is punished for failing to answer for their value (*SCLM*, i, 97, 101).

[57] *LM*, 3.

[58] *LM*, 3.

defendant who could wage his law—take a solemn oath, together with a specified number of oath-helpers, that the allegations against him are false—could establish his innocence at once.[59] The treatise later repeats this provision, noting that although common law might allow the defendant to wage his law when no tally, writing, or other record of the sale has been preserved, the law merchant says otherwise—"in no way ought [the defendant] be admitted to this." The author goes on to explain that merchants often sell their goods on credit without tallies or writings, and it would be "hard and very tedious and a kind of burden and continuous obstacle to them" if plaintiffs were forced to record in full detail even the most minor of transactions.[60]

Despite the strength of the author's convictions on this point, scores of cases from the St. Ives fair rolls show precisely the opposite procedure. In 1275, Ralph Raven sued Alan Cobbler of St. Ives for a debt of 8s. in silver in payment for tanned hides. Cobbler waged his law, and the next day he swore successfully and was released. The court then fined Raven 6d. for making a false claim.[61] This is only one among scores of cases that were settled by a defendant's wager of law, which appears to have been the accepted practice in St. Ives. In fact, the translated records appear to contain only one instance of a plaintiff's wager of law.[62] Clearly, the oaths of defendants in pleas of debt were given full weight in the St. Ives court.[63]

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[59] The fact that the word "law" is used as a synonym for "oath" shows the respect accorded to solemn oaths in this period; see *LMLP*, 63.
[60] *LM*, 11. A tally was a notched stick that was used as a record of debts.
[61] *SP*, 144-145.
[62] In the case of *Holywell v. Beverley* (1270), Michael of Holywell is recorded to have made his law sufficiently against Stephen of Beverley and his fellow Nigel, whom he had accused of detaining 5 marks and 5s. payment on eleven treys of barley (*SCLM*, i, 7). However, the earlier proceedings in the case are not preserved; depending on what *(cont.)*

A final argument against *Lex Mercatoria* providing the substance of a universal law merchant is that it does not address a number of questions that were resolved "according to the law merchant" at St. Ives. Whether the victim of an assault must specify the day of the year the assault occurred or whether a butcher can intervene in a sale of meat or fish by crying "Halves!" are never considered in this treatise;[64] indeed, they would seem quite out of place. Yet if the author considered himself to be presenting a complete description of a complete legal system, as the enumeration of the law merchant's differences from the common law would imply, these omissions seem to indicate that the author was either unaware of the customs practiced at St. Ives or did not consider those customs to be part of the law merchant.

Thus, *Lex Mercatoria* does not accurately describe the practice of commercial law at St. Ives. But if the text contained deliberate or accidental falsehoods as to the widely recognized content of the law merchant, one would expect those falsehoods to be caught, refuted or corrected by readers familiar with its terms.[65] Alternatively, the law merchant

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occurred before the records begin, it is possible that this case is consistent with the rest of the case law in denying plaintiffs the opportunity to wage their law.

[63] Consider all this in light of Holdsworth's statement regarding merchants that "wager of law was unknown among them" (i, 570), or Trakman's remark that "commercial adjudicators . . . avoided the delays that would otherwise arise from the administration of oaths" (2).

[64] *Darlington v. Burser* (1302), *SCLM*, i, 85-86; *Legge v. Mildenhall* (1291), *SCLM*, i, 46-47.

[65] Indeed, at least one portion of the text seems to have been was added by a later writer, the proposed exchange of letters between the merchant courts of London and Paris in the last chapter. The exchange is clearly fictional; some of the sample letters are dated both to the year A.D. and to the reign of Phillip the Fair, but the two dates do not correspond. A sample letter dated 1296 describes King Phillip as being "of glorious memory," but he did not die until 1314. Furthermore, the proposed letter from Paris refers to the city's "guildhall," an institution that was well known in London but which had no known equivalent in Paris at this time. Basile *et al.* speculate that the choice of Paris as the *(cont.)*

may have been sufficiently malleable and variable across distances that fundamentally different procedures could be used in St. Ives without a concerned and learned author sixty miles away in London becoming aware of it.[66] In that case, Malynes' claim that the law merchant was "observed in all places" seems entirely without foundation.[67]

b. Royal Courts

The best means of determining whether St. Ives participated in a shared tradition of the law merchant would, of course, be to compare its practices to those of other English fairs. As was noted in the Introduction, the St. Ives documents are themselves the most complete extant record of English fair courts for the period before the plague. However, we do occasionally see cases in the royal courts based on pleas arising out of fairs, and the royal court records can provide some small indication of how justice was

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correspondent city may have been intended to show solidarity between merchant communities even in a time of war between England and France (*LM*, 38-40; *LMLP*, 103-105). Holdsworth cites this chapter to demonstrate "the communications maintained between the courts of different fairs, whether in England or abroad" (v, 107).

[66] The author may not have been very aware of developments in his own city of London; in one mercantile court of the late thirteenth century, the merchant suitors did not render the decision, but rather the warden together with the alderman (H.G. Richardson, "Law Merchant in London in 1292," *English Historical Review* 37, no. 146 (April 1922), 245).

[67] Moreover, there is no guarantee that the law merchant described in *Lex Mercatoria* is anything like the commercial law with which Malynes is familiar. This position is upheld by Paul R. Teetor, who prepared the first English translation of the treatise *Lex Mercatoria*. Although Teetor's translation may have since been superseded by that of Basile *et al.*, and although he offers little commentary on the text, his analysis of its historical implications is quite accurate. While the ancestry of the "law merchant" of Justices Holt and Mansfield can be clearly read in seventeenth-century authors, *Lex Mercatoria* depicts "a rudimentary commercial law so different in many respects as to raise serious questions about the nature of its connection with the later 'law merchant' despite the identity of names" (Paul R. Teetor, "England's Earliest Treatise on the Law Merchant," *American Journal of Legal History* 6 (1962), 180).

administered in fairs other than St. Ives. Furthermore, these cases demonstrate that procedures in fair courts could differ significantly.

For example, a number of records concern the disposition of the attached goods of an absent defendant. According to the record of one royal court in 1255, the practice then current at the St. Ives fair was that if a defendant refused to appear, the plaintiff would receive any attached goods at the close of the fair in execution of the judgment.[68] In 1281, however, the fair court of Stamford held that distraints should be kept for a year and a day before turning them over to the plaintiff, "as the custom of merchants is [*prout moris est mercatorum*]."[69] The steward and bailiffs of the Boston fair claimed in 1301 that "there are divers customs in use among the merchants coming there and pleading according to the law of merchants [*secundum legem mercatoriam*]," one of which was that defendants who fail to appear will have their goods delivered to the plaintiff and held until the next fair, at which time they will be appraised and used to pay the debt.[70]

The royal records also contain more direct evidence of conflict over the terms of mercantile law. In 1315, Simon Dederic of Guisnes, a cloth merchant, sued the abbot of Ramsey and one of his bailiffs in the court of King's Bench, arguing that the goods under the care of his servant were wrongfully taken from him in the fair court of St. Ives.[71] The bailiff states that he kept the goods "under arrest until the close of the fair," but that the merchant didn't appear to claim them; the bailiff them "delivered those cloths, which

[68] *SCLM*, ii, 5.
[69] PRO Assize Roll 497, m. 65, in *SCLM*, ii, 31.
[70] Coram Rege Roll 162, m. 64d., in *SCLM*, ii, 66.
[71] Coram Rege Roll 221, m. 93d., in *SCLM*, ii, 86.

were appraised by the merchants, [to the plaintiff] . . . according to the law merchant."[72] Simon responds that the goods "ought to [have been] detained under arrest in the custody of the lord of that fair until the fair of the same place in the following year," claiming that "the law merchant is this in all and every fair throughout the whole realm, etc."[73] The bailiff then responds that "the law merchant is this," that unless the owner appears "during that fair to claim those goods and merchandises, etc.," the goods "so attached at the close of that fair ought to be immediately appraised by merchants sworn to this and execution made thereof, etc., without further delay. . . ." The royal court being unable to resolve this conflict on its own, a jury of forty-eight merchants was summoned to declare the custom (twelve each from London, Lincoln, Winchester, and Northampton).[74]

No final result is recorded in this case, so we do not know what verdict the jury returned. It is quite possible that there was a single custom on this subject, and that either the cloth merchant or the St. Ives bailiff attempted to conceal that custom in order to help his case. However, given the above examples in which fairs maintained different practices of distraint, it is perhaps more likely that both parties believed that they expressed the true custom. Moreover, Dederic never claims that the bailiffs acted contrary to the order of the court—meaning that the merchants of St. Ives who had been suitors for the fair court during the proceedings had agreed with the bailiff's interpretation of the law. The customs of St. Ives and of Guisnes in northern France could well have diverged on this point, and it is not clear that the jury of merchants that was summoned would have had any more of an authoritative view.

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[72] *SCLM*, ii, 87.
[73] *SCLM*, ii, 87.
[74] *SCLM*, ii, 88.

The possibility of such variance in procedure would not have been considered out of place in the royal courts; a request for information from the city of Bordeaux in 1276 was answered by an inquisition "made according to the manner of that country [*ad modum patrie illius factam*]," and the court accepted the results of the inquisition willingly.[75] It may not even have been cause for concern among contemporaries. It does, however, represent a cause for concern among historians who hold the medieval law merchant to be a single, invariant body of doctrine.

c. Cities and Towns

The law merchant, *Lex Mercatoria* stated in its first chapter, "is thought to come from the market," emerging from the practice of trade. Given that those markets are found in five different places—"cities, fairs, seaports, market-town, and boroughs"—we might do well to look at the practice of the law merchant in English cities, market-towns and boroughs. Holdsworth adds that whether or not a borough held a separate piepowder court, the fact that it was a center of trade "often caused the customary law administered in its court to be better suited to the needs of commerce than the common law"; the emphasis on equity "clearly made for the reception and recognition of reasonable mercantile customs, and enabled such courts, when necessary, to administer the law merchant."[76]

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[75] Coram Rege Roll 24, m. 17d., in *SCLM*, ii, 15.
[76] Holdsworth, i, 538.

Is Holdsworth correct in his assessment, and did cities and towns govern their commercial activity through the law merchant? It would be a monumental task to consider the records of cities, towns and boroughs across England in the same level of detail that has been applied to St. Ives. However, from an admittedly cursory examination of printed extracts from custumals and other documents stating the local laws on mercantile matters, two observations arise.

First, the records present the customs as part of a body of law specific to the town, with no external justification in a universal law merchant or general regulatory principles. The Bristol custumal (c. 1240) echoes the language of *Lex Mercatoria*, but not its reasoning—burgesses and strangers can plead among themselves "from day to day, without writ, according to the custom of the town."[77] Similarly, if a merchant in the town of Grimsby refuses to acknowledge a debt, according to the 1259 town charter he "shall enjoy the law and custom of the said town" in proving his case.[78] To the author of *Lex Mercatoria*, these matters would be properly covered by the law merchant; the towns, however, regard them simply as part of local custom. Occasionally the local records invoke the law merchant, as in the case of the 1291 Ipswich custumal, which guarantees to plaintiffs in certain circumstances a "good inquest according to merchant law [*solom ley marchaunde*] in the form below written. . . ."[79] However, when the law merchant does appear, it does so in the context of a local rule, and the custumal advances no claim that a court elsewhere in England is obliged to follow the same procedure in a similar case.

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[77] *BC*, ii, 184.
[78] *BC*, i, 126.
[79] *BC*, ii, 188.

Second, the differences among the local customs found in the records are significant. These cannot be dismissed as minor variations in procedure, peculiarities that should be expected in a legal environment where communication is slow and record-keeping expensive; to judge from the references at St. Ives, much of the law merchant consists of procedure. If one were to ignore the areas of law for which the variations were substantial, very little of a shared "law merchant" would remain.

Consider the subject of earnest money, frequently invoked by historians explaining the difference between the law merchant and the common law. In St. Ives, the payment of a "God's penny" or other earnest money signaled the conclusion of a sale; in *Tempsford v. Chaplain* (1291), the assembled merchants declared that a buyer had "according to the law merchant . . . sufficiently concluded the purchase of the said horse by giving a God's penny" to the seller.[80] A similar policy is found in the 1249 *Statuta gilde* of Berwick, in which anyone who had already paid the God's penny or other earnest money "shall pay the merchant from whom he bought the said goods according to the bargain made, without breach of contract or breach of the earnest."[81] However, other jurisdictions did not treat the sale as final once earnest money had been paid—or, at the very least, made the sale conditional on the seller's acceptance of the earnest. The twelfth-century Preston custumal stated that a seller may cancel the bargain before delivery by repaying double the buyer's earnest; in the case that the buyer has already handled the goods, "he must either have them or 5s. from the seller."[82] In 1303, *Carta Mercatoria* attempted to standardize the law on this point, stating explicitly that "neither

[80] *SCLM*, i, 44.
[81] *BC*, i, 217.
[82] *BC*, i, 217.

of the merchants can withdraw or retire from that contract after God's penny shall have been given and received between the principal contracting persons."[83] Yet exceptions still remained; in Waterford, an early fourteenth-century custumal allowed buyers to "repent" of having given the "God's silver" for a payment of 10s.[84]

One could also compare the local customs on wager of law. The differences between the St. Ives practice and that of *Lex Mercatoria* have already been noted, as have instances where the St. Ives court contradicted its own rulings on the subject. Yet a very brief examination of town and borough documents reveals a myriad of customs on the manner of proof. Some towns followed the practice set out in *Lex Mercatoria*, whereby the responsibility of proof falls entirely on the plaintiff. In the Irish town of Kilkenny, a fourteenth-century custumal stated that "every plaintiff ought to prove his action by the suit of two lawful men brought with him," and the defendant is given no opportunity to offer proof in his defense.[85] Similarly, a 1291 Ipswich custumal noted that for some minor transactions "it is not usual for merchants to make writing or tally for the speedy payment," and in such cases the buyer "shall not be allowed in pleading to defend by his law," so long as the sale or delivery "can be proved or averred by good inquest according to merchant law [*solom ley marchaunde*]."[86] However, a number of other towns allowed the defendant to wage his law three-handed (with two oath-helpers) in cases of debt, even if the plaintiff brought a suit of witnesses.[87] A 1348 custumal in Northampton allowed

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[83] *English Economic History*, 213.
[84] *BC*, i, 218.
[85] *BC*, ii, 187.
[86] *BC*, ii, 188.
[87] See, *e.g.*, the 1301 Manchester custumal (BC, i, 180-181) and the twelfth-century Preston custumal (*BC*, i, 178). "Suit" here again refers to the *secta*.

defendants in small cases with less than 12d. at issue to wage their law without a single compurgator, and twelfth-century London did the same for foreigners who could not find six countrymen to swear with (although the defendant was required to repeat his oath at the six nearest churches).[88]

In even a short survey of local practices, one finds a series of unique customs, each stranger than the next. If a citizen of Waterford buys from a foreign merchant and cannot make the payment before the merchant is ready to return overseas, then the citizen "shall have only three ebbs and three floods as delay," after which the bailiffs pay the merchant and recover from the debtor.[89] In the early-fourteenth-century Norwich custumal, whether a plaintiff can "exclude his adversary from his law" depends on whether the trespass was committed within the bounds of the market; if not, there must be an inquest by a jury selected from "that neighborhood where the deed was done."[90] Finally, in Torksey, attendance at the piepowder court in 1345 was optional for those with lands or tenements in the borough; no such person, even a merchant, could be sued or fined there "unless he chooses of his own free will."[91]

None of these practices are found at St. Ives or in *Lex Mercatoria*, and none of them seem consistent with the idea that mercantile activity in medieval England was governed by universal rather than local principles. In the end, Holdsworth himself is

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[88] *BC*, i, 181, 177. One truly bizarre procedure for wager of law can be found in disputes among burgesses of Ipswich. The 1291 custumal describes a process whereby the defendant brings ten compurgators into court, divided into two parties of five men each; one party is then chosen randomly by the throw of a knife, and one member of that party is rejected, "and the remaining four shall make the oath with him who is to wage the law" (*BC*, i, 179-180).
[89] *BC*, ii, 185.
[90] *BC*, ii, 189.
[91] *BC*, ii, 192.

forced to conclude that the borough courts do not fit his model of the law merchant. Although commercial needs may have influenced their procedures, he notes that "commercial law does not . . . hold a large place in the borough custumals," and one must look to the courts of the fairs, rather than those of the boroughs, to "trace the development of commercial law" in medieval England.[92]

Given that the evidence from fairs is largely restricted to St. Ives, these discrepancies call into question the notion of the law merchant as a single entity. A more compelling understanding might be that the merchants who asked that their cases be judged *secundum legem mercatoriam* were not necessarily all asking for the same thing. Perhaps these merchants wanted only to be judged with fairness and by their own customs, and used general terminology even if those customs might have differed from city to city. As we will see below, the law of merchants does not have to be the law of *all* merchants.

2. Indirect Evidence for Variation

It is difficult to make any conclusions about national or international similarities based primarily on court records from only one limited area (the fair of St. Ives) and period of time (1270-1324). As was noted earlier, very few questions of substantive law were argued in a way that is accessible to us from the records—too few to support any systematic investigation of whether foreign or local merchants had a more accurate

[92] Holdsworth, v, 105-106.

understanding of the law applied at St. Ives.[93] Yet one can examine the supposed universality of the law merchant in reverse; rather than ask whether other courts resembled St. Ives, one can inquire to what extent St. Ives sought to follow other courts.

[93] Of the 332 cases which Gross and Maitland examined, 32 involved some kind of default—an error of procedure or substantive law on the part of one party that resulted in the loss of a case. However, of these cases, many involved technical errors or "miskennings," mistakes in pleading. For instance, in *Langbaurgh v. Bytham* (1287), one of the compurgators accidentally named the plaintiff when he should have named the defendant (*SCLM*, i, 20); in *Legge v. Mildenhall* (1291), the defendant failed to repeat the plaintiff's count exactly in the course of his denial (*SCLM*, i, 46). These errors would have resulted in defaults in other English courts as well, and so do not point to any deficiency in the defendants' knowledge of mercantile law. In other cases, such as *Risborough v. Russell* (1275), the defendant was unable to find a sufficient number of compurgators (*SP*, 150). This may indicate that he did not know how many to bring, but it may also indicate that the defendant was widely known to have been guilty, and that few people at the fair were willing to endanger their souls by swearing to his innocence.

In all, only four examples can be clearly identified in which a case was lost due to an error of law. (Given that the intent of the Gross and Maitland selections was to investigate the law applied at St. Ives, it is unlikely that many more examples remain in the unpublished documents.) William of Abingdon lost his case for the reasons explained in the Introduction (*Abingdon v. Martin* (1293), *SCLM*, i, 66). John Woodfool had sued Peter of Tooting in 1287 on the assumption that the latter would be bound by the agreements made in his name by the servant of a third party, but the court refused to apply the law of agency and rejected his plea on the grounds that the servant "survives in flesh and bone, and the said John can bring an action against him if he desires" (*SCLM*, i, 23). A similar question appeared in *Fulham v. Francis* (1312), in which the plaintiff unsuccessfully contested an agent's ability to make a claim of ownership on his master's behalf (*SCLM*, i, 89). Finally, Sarah Poke claimed that she could not be held liable for damages caused by her live-in handmaid, but the court denied her claim and the inquest jury found in the plaintiff's favor (*Redknave v. Poke* (1316), *SCLM*, i, 101). (In one additional case, *Fleming v. Tanner* (1291), the plaintiff made an error of law which did not cause him to lose the case. William Fleming sought to wage his law after the defendant disputed the terms of the contract between them; he was not allowed to do so, and a jury inquest was held. However, the inquest eventually decided in the plaintiff's favor (*SCLM*, i, 51).)

Unfortunately, this selection is far too small for any rigorous analysis of whether foreign or local merchants were more likely to make errors of this kind. Presumably there were many more examples of such errors; however, if substantive legal arguments were considered by the jurors, they were not recorded on the rolls, and the information is therefore lost to us.

The fairs of medieval England could never be seen as entirely independent from one another; they were each part of a standard cycle of fairs, and the regular return of foreign merchants was crucial to their success and income. However, despite these interconnections, the fairs were quite distinct from one another as legal entities. The merchant courts functioned on an almost entirely independent basis; each court considered itself competent to decide cases arising from anywhere in the world, and showed no hesitation in doing so.

The court of St. Ives frequently heard cases that had first arisen in faraway places, involving disputes to which St. Ives had no connection other than being the temporary home of both plaintiff and defendant. Because merchants traveled regularly from fair to fair, contracts would often be written in one place to be performed in another. The dispute between William of Abingdon and William Martin mentioned in the Introduction was based on a debt incurred in London, with the payment to take place in the next fair of Stamford. Neither the negotiation of the contract nor the place of its performance was in any way related to St. Ives, yet the fair court could serve as the forum for the dispute.[94] The fact that such contracts were 'transmunicipal' was unnecessary for St. Ives to claim jurisdiction; in 1292, a wine merchant sued a deadbeat buyer in the St. Ives court, although the contract was created in the town of Boston and was intended to have been performed there.[95]

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[94] *Abingdon v. Martin* (1293), *SCLM*, i, 65. Other cases can be found involving the towns of Boston and Westminster (*Hereford v. Lyons* (1293), *SCLM*, i, 62), Boston and Northampton (*Curteis v. St. Romain* (1287), *SCLM*, i, 26), and Stourbridge and Haddenham (*Treasurer v. Haddenham* (1317), *SCLM*, i, 103), among others.

[95] *Titchwell v. Burdon* (1293), *SCLM*, i, 59. Similarly 'internal' cases can be found arising out of actions in Stamford (*Risborough v. Russell* (1275), *SP*, 150), Bedford (*Saddington*

(cont.)

In an age of slow communications and expensive transportation, the incentives for defendants to slip out of town rather than face a lawsuit must have been rather strong. The general principle applied by the St. Ives court appears to be that the plaintiff could sue wherever the defendant was found; faced with a defendant who was without assets (and thus judgment-proof), the plaintiff in *Gavelock v. Trot* (1300) got a tally "whereby he can prosecute against the said Richard for the recovery of his said debt, wherever it seems to him most expedient."[96] This wide-ranging jurisdiction was not limited to cases of contract and debt; in 1315, Edmund of Winchester sued Alexander of Nailsworth in the St. Ives court for a simple assault that took place in the town of Northampton the previous year.[97] These cases seem to support the description advanced by Rogers, that the fair courts were "local courts of general jurisdiction" and not specialized institutions limited to commercial pleas arising out of the fair.[98]

Yet if the mercantile courts were partners in the administration of a universal law merchant, one might expect some sort of organized division of labor among them. This is especially true given that cases in the St. Ives court might be simultaneously litigated elsewhere: the plaintiff in *Tooting v. Woodfool* (1302) brought a lawsuit after an insult

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v. Langbaurgh (1287), *SCLM*, i, 22), Bury St. Edmunds (*Ribaud v. Russell* (1287), *SCLM*, i, 15), and many other English cities.

[96] *SCLM*, i, 82-83.

[97] *Winchester v. Nailsworth* (1315), *SCLM*, i, 96.

[98] Rogers, 25. As was noted in Chapter II, this general jurisdiction was exercised contrary to royal statute; the first Statute of Westminster in 1275 had prohibited the officers of anyone but the king from attaching individuals' goods for "contracts, covenants, and trespasses done out of their power and their jurisdiction . . . nor within their franchise where their power is. . . ." (Statute of Westminster I, 3 Edw. I, c. 35 (1275), *SR*, i, 35). Gross also notes that "the trial of actions concerning contracts or other matters that did not arise in the fair" was widely seen as among the fair courts' "abuses of jurisdiction," and future statutes (17 Edw. IV, c. 2; 1 Richard III, c. 6) were issued to remedy it (*SCLM*, i, *xviii*).

made in the vill of St. Ives, but Gross notes that he also began litigation for the same cause that day in the royal court of Huntingdon, and the Monday before he had done so at Boston.[99] What principles mediated the contacts between St. Ives and its sister courts, and how were conflicts between them resolved?

Some minor degree of collaboration between courts is observed in the St. Ives rolls. For instance, in *Beeston v. Chesterton* (1275), the case turned in part on the content of a letter patent from the bailiffs of Graffham, describing past proceedings in the Graffham court.[100] However, such examples are exceedingly rare, and generally represent other aspects of court process rather than true collaboration. In *Waite v. Hamon* (1287), the plaintiff sued to collect on a judgment of the Boston fair court, but the case was presented as a simple matter of debt rather than the execution of a foreign judgment.[101]

However, though the St. Ives court was willing to pass judgment on cases that arose out of foreign cities and fairs, it did not appear to recognize the courts of those areas as participating in a special and shared international jurisdiction. Decisions reached in the courts of other cities or communities could be challenged and even reversed in the fair court. Some of these reversals seem to be unintentional.[102] However, many more examples show a clear intent on the part of the St. Ives court to reject the authority of another forum. In *Hamerton v. Cambridge* (1270), the plaintiff claimed that the court of

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[99] *SCLM*, i, 84.
[100] *SP*, 15.
[101] *SCLM*, i, 13.
[102] According to a 1255 case from the Coram Rege rolls, a burgess of Beverley won a judgment in the Archbishop of York's court in Beverley for £7. However, the defendant later found the original plaintiff in St. Ives, falsely claimed that the £7 had been stolen, and promptly won the money back (*SCLM*, ii, 5-6).

Cambridge failed to "do right to him" and brought suit in the court of St. Ives to correct the error.[103] In 1275, Brun de S. Michel of Bordeaux brought suit in St. Ives only after failing to collect his debts in the courts of Boston and Norwich.[104] William of Fleetbridge and his wife Amice successfully sued the entire community of Leicester in 1275 by claiming that the court of Leicester had "made default of justice" when they tried to collect a debt.[105] The court of St. Ives even claimed power to oversee how another abbot ran his market, as when Thomas of Grantham sued to protest an uncustomary toll that was taken from him in the market of Yaxley.[106]

The resolution of cases in other courts was clearly not regarded as final—or even as persuasive. Correspondingly, the suitors of St. Ives could not have reasonably expected their decisions to be recognized in other communities in England, let alone across Europe, as binding precedent. In light of their independence from one another, the vision of the merchant courts as participating in a single, shared legal tradition—and the vision of the law merchant as a single "law universal"—seems very difficult to maintain.

C. The Counter-Argument: Royal Recognition

The above discussion has documented substantial variation in the governance of trade within and among medieval English courts, and has suggested that there was no widely applied body of law that can be given the name of "law merchant." Yet the

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[103] *SCLM*, i, 3.
[104] *S. Michel v. Troner* (1275), *SP*, 152.
[105] *Fleetbridge v. Leicester* (1275), *SP*, 14.
[106] *Grantham v. Thorney* (1293), *SCLM*, i, 63.

phrase appears in the documents, and it must have had some meaning to the lawyers and clerks who wrote them. This section will therefore examine two documents, the *Carta Mercatoria* and the Statute of the Staple, which are traditionally interpreted as strong evidence that their contemporaries recognized a distinct law merchant that transcended local boundaries.[107] These documents clearly describe the law merchant as the proper means of deciding certain mercantile cases. However, one can invoke the concept of the law merchant without any necessarily recognizing any particular provisions as being part of that law. Indeed, the best evidence from the charter and the statute, as well as from the courts that they govern, indicates that the practice of mercantile law differed from court to court—and, more importantly, that contemporaries tolerated and expected this variation.

For the *Carta Mercatoria*, issued by Edward I in 1303, the case is easy to make. Among the many other privileges granted in the charter to foreign merchants, the king ordered "all bailiffs and ministers of fairs, cities, boroughs and market-towns" to do "speedy justice to the merchants . . . who complain before them from day to day without delay according to the law merchant touching all and singular plaints which can be determined by the same law."[108] Yet the charter states two clauses earlier that if disputes should arise over contracts sealed with a God's penny—in other words, disputes over sales, the most common source of business for a merchant court—then "proof or

[107] See, *e.g.*, John H. Munro, "The International Law Merchant and the Evolution of Negotiable Credit in Late-Medieval England and the Low Countries," *Banchi pubblici, banchi privati e monti di pietà nell'Europa preindustriale*, ed. Dino Puncuh, *Atti della Società Ligure di Storia Patria*, n.s., 31, no. 1 (Genoa: Società Ligure di Storia Patria, 1991), 53. See also Benson, "Law Without the State," 6.
[108] *English Economic History*, 213.

inquisition shall be made thereof according to the uses and customs of the fairs and towns where the said contract shall happen to be made and entered upon."[109] Far from establishing a single law merchant throughout the realm, the charter sees its action as guaranteeing to merchants the various uses and mercantile customs of the towns and fairs that hear their disputes.

The Statute of the Staple, issued by Edward III in 1353, poses a more complex issue.[110] This statute established certain staple towns (including York, Canterbury, and Westminster) with joint monopolies over the trade of wool, leather and lead. Although this statute falls outside the period of the St. Ives rolls, it is frequently cited as evidence of a law merchant that was recognized as separate from the common law or local custom. Clause 8 of the statute gives exclusive jurisdiction over the staple to the officials who oversee it, and explicitly provides that the merchants coming to the staple "shall be ruled by the Law-Merchant [*la lei marchant*], of all Things touching the Staple, and not by the common Law of the Land, nor by Usage of Cities, Boroughs, or other Towns. . . ."[111] Thus, on its face the statute invokes the concept of a law appropriate to mercantile affairs that is distinct from the common law and from the usages of any specific town.

However, there are five reasons to doubt this interpretation. First, when viewed in context, the protection granted in clause 8 appears to be primarily jurisdictional in nature. The quoted sentence continues, ". . . and [they] shall not implead nor be impleaded before the Justices of the said Places [*i.e.*, of 'Cities, Boroughs, or other Towns'] in Plea of Debt, Covenant and Trespass, touching the Staple, but shall implead all Persons of whom

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[109] Ibid.
[110] 27 Edw. III, stat. 2, *SR*, i, 332-342. Also described as the "Ordinance of the Staple."
[111] *SR*, i, 336.

they will complain . . . only before the Mayor and Justices of the Staple. . . ."[112] The phrase "Cities, Boroughs, or other Towns"—identifying the source of the usages from which merchants were protected—is exceedingly general, and was probably not meant to indicate the small number of enumerated staple towns. The clause had already granted that "the Mayors and Constables of the Staple shall have Jurisdiction and Cognisance [*sic*.] within the Towns where the Staples shall be," making it superfluous to mention that the merchants could not be sued before the justices of the towns in which the staples were located.[113]

In other words, the primary purpose of the grants in this clause was not to protect merchants from variations in the application of law among the staple towns in which they traded. Rather, it was to guarantee that plaintiffs would not be forced to litigate in other cities and under other laws. There was no danger that town courts would apply to foreign merchants "the common law of the Land"—*i.e*., the law applied in the central royal courts as well as in the courts of county and hundred. The danger was that the merchants might face litigation elsewhere, or might be confronted by defendants who claimed, as did William of Fleetbridge at St. Ives, that they could only be sued in London or in another jurisdiction.[114] Indeed, clause 8 explicitly identifies the purpose of its own provisions: they are instituted "so always that of all Manner of Contracts and Covenants . . . the Party Plaintiff shall [choose] whether he will sue his Action or Quarrel before the

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[112] *SR*, i, 336.
[113] *SR*, i, 336.
[114] *Fleetbridge v. Coventry* (1275), *SP*, 155. This protection is consistent with the provision in clause 5 that the process of justice in the staple towns will not be interrupted by a general eyre, in which royal justices hear all the cases arising within a county and local systems of justice are suspended (*SR*, i, 335).

Justices of the Staple by the Law of the Staple [*la lei de lestaple*], or in other Place [*i.e.*, in royal courts] at the common Law. . . ."[115]

Second, the statute's repeated references to the "Law of the Staple" blur the distinction between a mercantile law meant to apply to all trade and the specific laws applied by the various staple courts. The phrase "Law of the Staple" appears far more frequently in the statute than the phrase "Law-Merchant," and in certain instances, the statute uses the terms *lei marchant* and *lei de lestaple* interchangeably. Clause 20 mandates that when foreign merchants suffer "Outrages" outside the bounds of the staple, the justices of that place "shall do speedy justice to them after the Law-Merchant from Day to Day, and from Hour to Hour, without sparing any Man or to drive [the foreign merchants] to sue at the common Law. . . ."[116] Almost identical language is used to describe the procedure for dealing with one who levies unlawful taxes on foreign merchants; clause 2 states that "speedy and ready Process shall be against him from Day to Day, and from Hour to Hour, according to the Law of the Staple, and not at the Common Law. . . ."[117] Similarly, clause 21 specifies that the mayors of the staples are to have "Knowledge of the Law-Merchant, to govern the Staple";[118] yet at the same time, they are to punish violators "after the Law of the Staple."[119] Clause 23 of the statute requires that merchants agree to the mayor and constables' exercise of jurisdiction "according to the Law and Usage of the Staple [*la lei & usage de lestaple*]" and that the merchants also preserve the Staple "and the Laws and Usages [*les leis & usages dycelle*]

[115] *SR*, i, 336.
[116] *SR*, i, 340.
[117] *SR*, i, 334.
[118] *SR*, i, 340.
[119] *SR*, i, 341.

of the same, without fraud or deceit. . . ."[120] The conceptual plurality of these laws and usages does not sit easily with the concept of a single, invariant law of trade.

Third, the application of the *lei marchant* and the *lei de lestaple* in practice provides strong reason to believe that the law of the staple courts was more local than universal. Although very few records of staple court proceedings survive, we find in the records of two cases that were copied from the original rolls and sent to the Chancery that the concept of the *lei de lestaple* allowed for variations from place to place.[121] The plaintiff in *Pope v. Davy* (1428) sued for debt in the staple court of Exeter "*secundum legem mercatoriam et stapule predicte*." The phrase, which Gross renders as "according to the law merchant and the law of the said staple," indicates not two distinct laws but a single entity.[122] In this case, the court repeatedly recognizes a law that has as much to do with a particular staple as it does with mercantile practice. Even more flexibility was shown in *Eliot v. Dyne* (1401); here the staple court of Westminster found that a plaintiff in a case of debt could wage his law singlehandedly, as long as his account-book recorded the debt and the defendant had no written evidence that it had been paid. This judgment—which would never have been accepted at St. Ives a hundred years earlier—was rendered by the court "*solom leur usages et custumes par leye marchant*," which Gross renders as "according to their usages and customs and according to the law merchant."[123] However, another translation might be "according to their usages and customs *by* mercantile law"—"*leye marchant*" provided for the application of the suitors'

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[120] *SR*, i, 341.
[121] As Gross notes, so few staple court records are extant that some historians have been led to think that no such records were kept. See *SCLM*, i, *xxvii*.
[122] *SCLM*, i, 116.
[123] *SCLM*, i, 113-114.

usages and customs, not of any substantive principle of law. After he was found guilty, the defendant was committed to prison "according to the usage of the said staple [*solom lusage du dicte estaple*]."[124]

Fourth, the terms *lei marchant* and *lei de lestaple* seem to be used in the statute as catch-all phrases for the customs of the court—useful concepts, but not necessarily demonstrative of the existence of an independent law. In clause 19, merchants are held not to be liable for the deeds of their servants, unless the servants act at their master's command, in the capacity of their office, or "in other Manner, that the Master be holden to answer for the Deed of his Servant by the Law-Merchant, as elsewhere is used."[125] The clause goes on to say that because merchants cannot stay long in any one place, "speedy Right" should always be done "from Day to Day, and from Hour to Hour, according to the Laws used in such Staples before this Time holden elsewhere. . . ."[126] The merchant plaintiffs were to have access to speedy procedure, and thus could not be required to sue in royal courts and at the common law; beyond that, however, the statute gives little indication of what the *lei marchant* or the *lei de lestaple* might contain. One is reminded of the grant of the fair to the abbey of Ramsey "with all customs such as any fair in all England has"—a clause which indicated the presence of customs without indicating any individual customs in particular.[127] In the same way, the discussions of *lei marchant* and *lei de lestaple* may have been a means of referring to principles of mercantile law, but the use of the terms does not imply that the drafters of the statute or

[124] *SCLM*, i, 114.
[125] *SR*, i, 340.
[126] *SR*, i, 340.
[127] Charter to Abbot of Ramsey (1110).

even the merchants for whom it was enacted had any specific principles in mind.

Fifth, if it were a distinct legal order, the law merchant the statute describes would fail an essential test of fairness. Both the statute and the charter grant privileges to merchants only in their capacity as *plaintiffs*, giving them the option to sue in merchant courts as well as in the royal courts at common law. The defendants are given no such choice; though defendants would have generally preferred the common law, with its far more elaborate procedures and many opportunities for delay, it is not hard to imagine reasons why they might seek the protection of a merchant court.[128] The grants of the *Carta Mercatoria* and the Statute of the Staple provide no procedure whereby common-law claims could be removed to merchant courts. If the customs of merchants are to govern trade, then the customs that favor defendants must be just as binding as the customs that favor plaintiffs—but because of the plaintiff's opportunities for forum-shopping, only the latter are given effect.

The *Carta Mercatoria* and the Statute of the Staple therefore do not provide sufficient reason to describe the law merchant as a body of commercial law, *i.e.*, a set of substantive principles that governed trade. Nor can it easily be viewed as a procedural privilege, allowing merchants to be ruled only by equity and their own customs—which may have been as various as the courts in which they were declared. We have already seen the influence of crown and abbot at the fair court of St. Ives; the *Carta Mercatoria* and the Statute of the Staple explicitly preserved the king's appellate jurisdiction over

[128] For instance, eleven compurgators may be required for wager of law in a royal court, while only two or five might be required at St. Ives (Baker, *Introduction to English Legal History*, 87; *Tempsford v. Chaplain* (1291), *SCLM*, i, 45; *Cologne ex rel. Currier v. Lynn* (1270), *SCLM*, i, 5).

merchant courts, either in the court of King's Bench or in the Council and Chancery.[129] In no sense, then, can one say that the charter and the statute subjected the commerce of medieval England to a uniform, cosmopolitan law merchant.

D. Conclusions

It may very well have been that in determining mercantile cases, local authorities—at St. Ives and elsewhere—paid strong attention to the customs of merchants, as they did to the customs of all those who came before them. It may have been that similarities existed in merchant customs and ways of doing business across wide areas of England or of Europe, similarities supported and reinforced by trade among various regions. It may have also been that these some of these customs, in a legal environment, went by the common name of *lex mercatoria*.

But none of this demonstrates that the merchants who sought to have their pleas adjudged *secundum legem mercatoriam* were all asking to be judged by the same law. Instead, the evidence cited above strongly implies that "*lex mercatoria*" was a general phrase for whatever law was *appropriate* to mercantile transactions, not necessarily a term for the specific body of principles actually applied to them—as in the staple court of Westminster, decisions were reached "according to their usages and customs by

[129] *Carta Mercatoria* stated that bailiffs and ministered who failed to do "speedy justice" to the merchants "shall be punished in respect of us as the guilt demands" (*English Economic History*, 213); clause 21 of the Statute of the Staple provided that "if any Merchant will complain of the Mayor of the Constables, that they have failed of Right . . . it shall be speedily redressed by the Chancellor and our Council without Delay" (*SR*, i, 341).

mercantile law."[130] As a result, one cannot conclude that the law merchant was experienced by the contemporaries of the St. Ives fair as a single legal system, a "law universal throughout the world." The fact that the many independent merchant courts were engaged in a similar enterprise, if true, would not imply that they were engaged in a *common* enterprise, or that they saw themselves as enforcing a single law throughout the realm. Bonfield's analysis of English manorial customs seems entirely applicable in the commercial context as well:

> There is little direct evidence to suggest that the conceptions of jurisprudence governing transactions in a court encompassed the regularity of application of rules either within a jurisdiction or throughout the kingdom required to support an argument that any decision reflected the collective cultural position. . . . Our preliminary sketch of cases suggests that the outcome of disputes touching fundamental issues of customary law seem to vary. I am not arguing here for contrary positions on individual issues of law but rather that law in its modern sense may be absent, regardless of how judgments are articulated.[131]

How, then, can historians such as Mitchell maintain that the law merchant was "possessed of a certain uniformity in its essential figures"?[132] For one thing, Mitchell's definition of the medieval law merchant—"the system of rules actually enforced in the commercial courts and actually observed by merchants in their dealings with one another"[133]—makes it logically impossible to deny that the law merchant was ever in effect.

Yet Mitchell's thesis is more than a mere exercise in tautology. He recognizes that "each country, it may almost be said each town, had its own variety of Law Merchant,"

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[130] *Eliot v. Dyne (*1401*)*, *SCLM*, i, 113-4.
[131] Bonfield, 530-1.
[132] Mitchell, 10.
[133] Ibid., 113.

but adds that they were all "varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same."[134] To support his argument, Mitchell offers four "broad general principles" of the law merchant that were "clearly marked," namely the following:[135]

• First, the law merchant was "in the main customary law. . . . 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 through custom."[136]

• Second, the jurisdiction of the law merchant was "summary. . . . Its justice was prompt, its procedure summary, and often the time within which disputes must be settled was narrowly limited."[137]

• Third, the law merchant "was characterized by the spirit of equity."[138] Throughout "England, France, and Italy," the development of the law merchant was characterized by "plain justice[,] good faith disregard of technicalities and regard for 'the sole truth of the matter.'"[139]

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[134] Ibid., 9. However, as biologists are well aware, the lines dividing species are sometimes quite arbitrary. Without an understanding of which features are "the most important," no matter how many the "minor points" on which the law merchant "differed . . . from place to place," one can always assert that it possessed "a certain uniformity in its essential features" (Ibid., 10).
[135] Ibid., 10.
[136] Mitchell., 10-11.
[137] Ibid., 12.
[138] Ibid., 16.
[139] Ibid., 20.

• Fourth, the "most striking feature" of the law merchant was once again "its strongly marked international character."[140]

It is worth noting that the fourth principle is entirely circular. The "uniformity in [the law merchant's] essential features" is what is to be proved, and one cannot use as proof the unsupported assertion that its "main lines of development were everywhere the same."[141] However, eliminating the obvious tautology of the fourth point, one is left with three *procedural* descriptions—the system provided merchants with a process of justice that was equitable and swift and that took judicial notice of their customs. Even if this phenomenon occurred simultaneously in all Christendom, it still would not provide a single substantive principle that could be considered as part of a "law merchant."

Mitchell's chapter on sale and contract reinforces this view. On nearly every substantive question of which he treats—whether the principle of market overt protects good-faith buyers of stolen goods,[142] whether unwritten contracts are binding,[143] whether written contracts must state the cause of the obligation,[144] whether debts contracted at a fair must be documented by a sealed bond,[145] whether the lands of a debtor could be seized to pay a debt,[146] whether merchants can be held liable for a fellow townsman's debts,[147] whether partnership must be registered with the civil authorities,[148] whether

[140] Ibid.
[141] Ibid.
[142] Mitchell, 93-102.
[143] Ibid., 102-105.
[144] Ibid., 105-107.
[145] Ibid., 110-111.
[146] Ibid., 119-120.
[147] Ibid., 122-124.
[148] Ibid., 130-132.

individual partners can enter into contracts binding on the firm,[149] etc.—substantial and perhaps complete disorder reigned among various European jurisdictions. This disagreement may explain why none of Mitchell's four points describe a substantive principle: there were exceedingly few such principles that were actually shared across all of commercial Western Europe, let alone the entire world. If the law merchant is only what is held in common, then it will certainly be universal, but it may also be substantively empty. Though he insists that the Law Merchant was "in its broadest sense the body of commercial rules observed throughout Western Christendom," Mitchell must concede that "each country developed to a certain extent upon its own lines," and he even admits a sense in which "an 'English Law Merchant' may be said to have existed"—which is exactly what the foreign merchant in 1473 denied before the Chancery.[150]

Indeed, even Holdsworth is compelled to this conclusion after his examination of the English sources. His evidence in support of the universal law merchant is mainly teleological in nature. The law merchant *must* have been "essentially cosmopolitan" in character, for it was only a law "from which national technicalities were as far as possible eliminated that would suffice for [merchants'] needs"—needs which made the reception of foreign doctrines of commercial law "absolutely necessary."[151] Others might think that

[149] Ibid., 132-136.
[150] Mitchell, 115. To be fair, one should note that Mitchell has a far better command of the primary sources than many other historians who have written on the law merchant. This may be the source of the logical tensions underlying his argument. Mitchell writes as if he were aware of the cracks in the dike, but is unwilling to reject the historiographical tradition and revise the prevailing interpretation.
[151] Holdsworth, i, 543; v, 109, 129.

historians should not assume such legislative functions;[152] before concluding that the law merchant "*necessarily* differed at many points from the ordinary law," one should perhaps start by determining what the differences *were*, and then for explanation look to the needs that they might have satisfied.[153]

Unfortunately, Holdsworth is unable to find among English merchants, with their "peculiar customs" and "peculiar privileges," evidence that is in accord with his teleology.[154] Holdsworth's assessment that one should look to the fair courts, rather than those of the boroughs, to "trace the development of commercial law" has already been noted.[155] However, in looking to the fair courts, he finds that unlike their colleagues on the Continent, the English courts "made no permanent contribution to the growth of special commercial courts."[156] One passage on the subject is worth reproducing at length:

> The impression which the published records of our fair courts leaves upon me is that they were courts which dealt for the most part with petty transactions, and that consequently, the law there administered had not much chance to develop. The forms of action, the procedure, and the rules of law possess the same primitive characteristics as marked the business in other local courts. Compurgation meets us at every turn. There is no clear line between tort and contract. . . . Neither in our fair nor our borough courts do we read much of the beginnings of those legal doctrines of our modern commercial law which were beginning to spread from Italy and southwestern Europe to the great fairs of France and the trading cities of the Netherlands.[157]

One might infer from this evidence that those commercial doctrines simply were not supposed to be there, that England possessed local mercantile customs but no

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[152] I am indebted for this phrase to Bertrand Russell, "On the Notion of Cause" [1912], *Mysticism and Logic* (London: Allen & Unwin, 1959), 132.
[153] Holdsworth, i, 543. Emphasis added.
[154] Ibid., v, 66.
[155] Holdsworth, v, 106.
[156] Ibid., v, 113.
[157] Ibid., v, 113-114.

cosmopolitan law merchant. Yet Holdsworth and his followers cannot accept this view, for two reasons. The first reason is that the universal law merchant is thought to arise naturally from the practice of commerce and exchange, in England as elsewhere.[158] If the principles of the law merchant were not approved by any sovereign legislator, there must be some other source for their normative quality—the usages of trade must, in Harold Berman's phrase, be "inherently binding."[159] The second and more problematic reason is that the evidence these authors cite to demonstrate that the law merchant is distinct from the ordinary law of the land is in large part derived from English sources.[160] *Carta Mercatoria* and the Statute of the Staple are part of the English legal tradition, not any continent-wide heritage. Even the terms used to state the thesis of a distinct law merchant suggest an English origin—especially the references to a "common law" that is not the *ius commune* of Continental merchant towns. If there is no universal law merchant in the court of an English fair, then where does it appear, and how is it known to be cosmopolitan rather than simply present in Continental sources?

The evidence from St. Ives and elsewhere seems to encourage a different approach. In Italian city-states as in English fairs, commercial regulations may have been simply part of the local law—influenced by commercial custom, perhaps, for reasons of

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[158] An example of this argument can be seen in Holdsworth's statements on the role of the notary. Even though the notary never held a significant position in English commerce, it is considered *natural* that he should have: "I cannot but think that if Englishmen had had much need to use the commercial instruments which these notaries drew, if these instruments had come with any frequency before the courts, we should have seen a similar class arising in England. That no such class arose in the Middle Ages points, I think, to the fact that the larger commerce was mainly in foreign hands, and that the litigation arising from it did not trouble the English courts" (v, 115).

[159] Berman, "The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy," *LMA*, 33.

[160] See, *e.g.*, Holdsworth, i, 543.

efficiency, but claiming no universal authority derived from the law of Nature. Indeed, it should be difficult to convince anyone that the practice of crying "Halves!" to intervene in sales of meat and fish could ever have been considered "law universal throughout the world." How this interpretation could have survived for so long, and why it has enjoyed such popularity among historians, is the story of the next chapter.

Chapter IV:
Merchant Law and Politics

As the previous two chapters have established, the regulation of commerce at St. Ives was not exclusively dependent on the will of the merchant community and a set of principles known as the law merchant. Furthermore, the law merchant did not act as a universal law to govern trade, replacing or superseding local laws that conflicted with its tenets. Why, then, is the medieval law merchant still remembered as possessing this authority, and why is this period considered to be one in which the merchants ruled their own affairs?

The answer appears to lie in the political realm. Since the early modern period, the history of commercial law in England has been used to justify a variety of different political programs; as a result, the interpretation of that history has been subject to a series of intense political influences. The historical tradition in this field began as part of a seventeenth-century battle between the English civilians and the common lawyers for jurisdiction in commercial cases. It was revived under the influence of a second set of political concerns, those of German Romantics who saw the law merchant as the fulfillment of their vision of communal and customary law. Their ideas were quickly adopted by Anglophone scholars, some of whom saw in the law merchant a vindication of the mercantile spirit of their age.

In the twentieth century, as the primary documents received closer scrutiny, historians' understanding of medieval commercial law underwent substantial revision. In the last generation, however, the universalist claims have returned yet again in the context of our own era of globalization. As international trade has become far more

pervasive and complex, some legal scholars have sought to find a uniform replacement for the crazy quilt of local regulations that a multinational corporation must face. Like the civil lawyers and the German Romantics, they have seen in the medieval law merchant what they wanted to see—in this case, a model of how to achieve legal uniformity outside the framework of national governments and existing authorities. The potential implications of such a *lex mercatoria* for modern policies have clouded historians' vision of commercial law as it was practiced in the Middle Ages.

The legal scholar Berthold Goldman has referred to the law merchant as a "venerable old lady who has twice disappeared from the face of the earth and twice been resuscitated."[1] Yet this resuscitation has taken place at the hands of changing political winds rather than legitimate historical discoveries. It is time that historians put this venerable lady to rest.[2]

A. The Civilians and the Merchant Courts

In the early sixteenth century, the institutions of the Roman civil law were steadily gaining power in England. The civilians had a monopoly on university legal education, where they attracted a growing crop of intellectuals to their cause. The civil law was used in the High Court of Admiralty as well as the ecclesiastical courts, which at

[1] Berthold Goldman, "Lex Mercatoria," *Forum Internationale* 3 (1986), 3.
[2] This essay cannot possibly provide a complete description of the historiography of the law merchant. As a result, the discussion below is limited to those authors who have exercised the greatest influence in the field, in part measured by the citations of their work by later scholars. For a more general survey of the field, see *LMLP*, 123-188.

the time heard cases on probate and marriage law. Furthermore, the civilians had significant institutional influence in the Chancery and in the Court of Requests.[3]

In the late sixteenth and early seventeenth centuries, however, the civilians found themselves fighting the common lawyers for jurisdiction in such cases, as the common-law writ of prohibition was used with increasing frequency to block Admiralty proceedings and to force commercial cases into the common-law courts.[4] Much of the battle between civilians and common lawyers was waged in the political realm; yet it also provoked fierce ideological disputes, in which the partisans of each side tried to demonstrate why theirs was the proper law to govern commerce. The English law merchant, which had never been discussed formally in any major treatise since *Lex Mercatoria*, suddenly became the focus of a great deal of legal attention.[5]

By this period, the regulation of commerce on the Continent had been strongly influenced by the civil law. The followers of the great fourteenth-century scholar Bartolo di Sassoferrato had long attempted to create a modern system of law based primarily on the *Corpus Juris Civilis*. The political and social chasm between Italian principalities and Justinian's Empire led to intractable theoretical conflicts and "considerable intellectual agony," in Daniel Coquillette's phrase; the tensions were resolved only through the acceptance of contemporary custom as law where it did not conflict with the Roman

[3] *DC*, 29-30.
[4] *DC*, 31.
[5] Plucknett notes that there is no systematic treatment of the law merchant in a formal textbook in England until after the end of the Middle Ages (*A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown and Company, 1956), 659).

tradition.[6] Thus, at the beginning of the seventeenth century, the civil tradition had far more flexibility and substantive commercial content than did the English common law.[7]

There was also the matter of convenience. International trade brought into English courts a number of foreign traders who were familiar with the civil law's terms but who knew nothing of the common-law tradition. In 1607 the civilian Sir Thomas Ridley relied on this point to argue for civilian jurisdiction over commercial cases, writing that "[b]usiness many times concerns not only our own countrymen, but also strangers, who . . . live in countries ordered by the Civil Law."[8]

The question of which courts should hear mercantile cases turned at least in part on whether the law merchant was distinct from the law of the land. A number of early civilian treatises had attempted to unify the civil and common law, and they portrayed the law merchant as merely one more aspect of this single legal framework. In the early sixteenth century, Christopher St. German separated the "law of reason" and the "law of man" into two camps, and in the latter he included both the "general customs" of the realm and the courts "Pypowdres."[9] However, if the law merchant were simply part of human law, then in England commercial cases would belong in the common-law courts, which were competent to interpret and apply the "general customs" of the realm. Only if

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[6] *DC*, 42-43.
[7] *DC*, 42-43, 94.
[8] Thomas Ridley, *A View of the Civile and Ecclesiastical Law* (London: Company of Stationers, 1607), 176-177, cited in *DC*, 120. In this and all quotations below, spelling has been modernized.
[9] Christopher St. German, *Dialogues Between a Doctor of Divinity and a Student of the Common Law* (1523), cited in *DC*, 52.

the law merchant were separate from the common law and part of a transnational mercantile tradition could it be retained in separate courts staffed by the civil lawyers.[10]

This position was argued ably in the early seventeenth century by Sir John Davies, attorney general for Ireland under James I. In his *Question Concerning Impositions*, Davies claimed that the king had power to impose taxes on foreign trade without an act of Parliament.[11] He justified this claim by arguing that international trade was governed not by the common law, but by the civil law, which—with its principle of *quod principi placuit*—granted far more authority to the sovereign. In an attempt to resolve an entirely separate political controversy, Davies contributed significantly to the debate on the status of the law merchant.

Davies began his argument of mercantile exceptionalism by noting that the community of merchants "hath always had a peculiar and proper law to rule and govern it," namely the Law Merchant, "whereof the laws of all nations do take special knowledge."[12] According to the civilian authors, cases concerning merchants are not to be decided by "the peculiar and ordinary laws of every country but by the general Law of Nature and Nations,"[13] of which the Law Merchant is "a branch."[14] As this Law of Nations "is nothing else but that which common reason hath established among all men," the Law Merchant is therefore "universal and one in the same in all countries in the

[10] *DC*, 35.
[11] Although the edition of this work cited above was not published until 1656, it was likely written while Davies occupied the office of attorney general, and his term of office ended in 1619.
[12] Davies, iii, 12.
[13] Ibid., iii, 18.
[14] Ibid., iii, 17.

world. . . . [T]here is not one Law in England, another in France, . . . but the same rules of reason and the like proceedings of the Law Merchant are observed in every nation."[15]

Once he had established that the laws of commerce were not local to England, Davies could then argue that the question of impositions was best addressed within an external legal tradition. The civil law had not been adopted in England as it had on the Continent, but it still prevailed within the Admiralty. The common law, Davies claimed, therefore governed "causes arising within the land only"; for cases "concerning merchants . . . crossing the seas," civil law was more appropriate, and indeed "our kings have ever used the Roman civil law for the deciding thereof."[16] The Law of Nations and the "imperial or Roman law" were used in cases concerning merchants, becoming "the law of the land in those cases"; why then "should not this question of impositions be examined and decided by the rules of those laws"?[17] The civil law accepted impositions, as did the Law of Nations as Davies understood it, and thus the king could claim more authority in this sphere than the common law of England would allow.

This expansive view of the Law Merchant was not limited to apologists for the Crown. Although several treatises on the law merchant were composed during this period,[18] one of the most influential was written, not by and for lawyers, but by the trader Gerard Malynes and for the use of the practicing merchant. Malynes' *Consuetudo, vel Lex Mercatoria* was by no means focused exclusively on legal questions; much of the

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[15] Davies, iii, 17.
[16] Ibid., iii, 20.
[17] Ibid., iii, 23.
[18] *Cf.* Prof. Welwod of St. Andrews, *Abridgement of All the Sea Lawes* (1613); John Marius, *Advice concerning Bils [sic] of Exchange* (1651). Although it appears much later, see also Beawes, *Lex Mercatoria Rediviva* (1758).

book is devoted to discussions of the various types of traded goods or foreign weights and measures. When he did turn to the legal foundations of the law merchant, Malynes explicitly drew on the civilian tradition, naming as sources Bartolus, Benvenuto Stracca and Rodericus Suarez, among others. However, his was not the civilian's approach; the books of those learned authors were "full of quillets and distinctions over-curious and precise."[19] Instead, Malynes was unrigorous yet unabashed in his description of the law merchant as superior to local laws.

What set the law merchant apart from local laws, Malynes argued, was the fact that it was a "customary law" and "not a law established by the sovereignty of any prince"—a *Lex Mercatoria* and not *Ius Mercatorum*.[20] "Every man knoweth," he wrote, of the "great diversity amongst all nations" in their "manners and prescriptions" for administering justice; yet the customs of traffic and commerce "may be said to be of like condition to all people, diffused and spread by right reason and instinct of nature consisting perpetually."[21] He repeatedly attempted to impress on the reader the persistence and universality of the law merchant, noting that it was approved by "the authority of all kingdoms and commonwealths";[22] since Biblical times, the law merchant "hath always been found . . . constant and permanent without abrogation, according to her most ancient customs, concurring with the law of nations in all countries."[23] As a result, "the customary law of merchants" fulfilled the definition of Cicero—"*vera lex est recta*

[19] Malynes, 5.
[20] Ibid., "To the Reader," *vi-vii*.
[21] Ibid., 3.
[22] Ibid., "To the Reader," *vi-vii*.
[23] Ibid., "Dedication," *ii*.

ratio, naturae congruens, diffusa in omnes, constans sempiterna"—and enjoyed "a peculiar prerogative above all other customs."[24]

Under the influence of the scholars of civil law, the law merchant had been assigned a place as part of the most powerful and universal law imaginable. Yet the depiction of the law merchant as part of the "general Law of Nature and Nations" was not necessarily in the civilians' best interest. Ridley had explicitly stated that the law merchant was *not* part of the *ius gentium*, the law of nations "which common reason hath established among men, and [which] is observed alike in all nations."[25] Instead, he described it as part of the *ius civile*, the law "which the old Romans used" and which is, "for the great wisdom and equity thereof . . . the common law of all well governed Nations, a very few only excepted."[26] Ridley knew full well that England was one of these exceptions, yet he identified the law merchant with a foreign legal tradition that was not officially recognized by the English common law. He did so because a law merchant "observed alike in all nations" would be part of the law of each of those nations, and thus could be enforced along with the other laws of the realm—*i.e.*, in the English common-law courts.[27]

Indeed, that is in large part what happened. The common lawyers effectively destroyed the Admiralty monopoly on commercial cases and created a new monopoly of their own. Littleton's *Tenures* had argued that "a custom used upon a certain reasonable

[24] Malynes, "To the Reader," *v-vi*; Ibid., 4.
[25] *DC*, 129.
[26] *DC*, 129.
[27] *DC*, 129.

cause *depriveth* [*i.e.*, substitutes for] the common law,"[28] and in 1622, the same year that Malynes wrote his *Consuetudo*, Chief Justice Hobert ruled that "the custom of merchants is part of the common law of this kingdom."[29] Under Chief Justices Holt and Mansfield, the common-law courts took ever greater control of mercantile cases, a process that has often been interpreted as "incorporating" the law merchant into the English common law. In the 1759 case of *Luke v. Lyde*, Lord Mansfield concluded that "the Maritime Law is not the Law of a particular Country, but the general Law of Nations," and at the same time assured it of a permanent place in the common-law courts.[30] Although the civilians had attempted to give the law merchant a foundation external to national laws, their attempt had backfired, and commercial cases were now entirely subject to the common law of England.

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[28] *DC*, 130.

[29] *Vanheath v. Turner* (1622), cited in Wyndham Anstis Bewes, *The Romance of the Law Merchant*, (London: Sweet & Maxwell, 1923; reprint, Littleton, Colo.: F.B. Rothman, 1986), 1.

[30] *Luke v. Lyde*, 2 Burr. 882, 887, cited in *DC*, 289. It was in this form that it entered American jurisprudence in the case of *Swift v. Tyson*, 41 U.S. 1 (1 Pet.) (1842). Justice Story, writing for the court, ruled that the true interpretation of commercial law was "to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence"; Story cited Mansfield to argue that the law of negotiable instruments was "not the law of a single country only, but of the commercial world" (41 U.S. 1, 19). This doctrine was overruled in *Erie v. Tompkins*, 304 U.S. 64 (1938), in which Justice Brandeis held that "There is no federal general common law" (78). Since *Erie*, federal courts sitting in diversity have been required to rely on the applicable state law.

B. The Romance of the Law Merchant

The triumph of the common lawyers in the seventeenth and eighteenth centuries brought about what Goldman considers the first disappearance of the English law merchant—the subjection of commercial cases to national courts and municipal law. Yet the concept of a transnational, customary law merchant was revived in the mid-nineteenth century for reasons that would have been anathema to the civil lawyers. While the civilians had sought to portray the law merchant as part of the universal Roman heritage, the law merchant's greatest champions of the nineteenth century saw it as an escape from foreign Roman influences.

The Romantic movement in nineteenth-century Europe placed strong emphasis on national and ethnic identity over the claims of universal or multinational empires. In the disunited Germany, the Romantics advanced the claim that proper law was not imposed from above, but rather grew out of the customs of the *Volk*.[31] A case not should be decided on the basis of Romanist principles, but on the "*Natur der Sache*"—the nature of the matter.[32] Already in the late eighteenth century, J.G. Busch had called on judges in commercial cases to "distance themselves from all juristic notions and simply use their common sense . . . to grasp and master the nature of the transaction [*die Natur des Geschaftes*]."[33] After the Revolution of 1848, serious efforts began to expel Roman jurisprudence from German systems of commercial law. These efforts culminated in the

[31] Whitman, 159.
[32] Ibid., 160.
[33] J.G. Busch, *Theoretisch-Praktische Darstellung der Handlung in deren mannigfaltigen Geschaften*, 2 vols. (Hamburg : B.G. Hoffmann, 1792), ii, 364, cited in Whitman, 160.

codification of commercial law in 1861, under the leadership of a young lawyer named Levin Goldschmidt.

Goldschmidt, who may have done more than anyone to revive scholarly interest in the medieval law merchant, felt a profound aversion to the claim of the civilians and Cicero to derive "true law" from "right reason." Instead, Goldschmit argued that "every fact-pattern of common life . . . carries within itself its appropriate, natural rules, its right law." This law "is not a creature of mere reason," nor is it "eternal nor changeless nor everywhere the same"; rather, it is "in-dwelling in the very circumstances of life." The task of the law-giver consists in "uncovering and implementing this immanent law."[34]

Goldschmidt decried the "orgy of statute-making" he saw around him; the immanent law was best revealed in the flexible "will of the *Volk*" rather than "the inflexible will of the legislator. . . . *Unconditional free play for custom is a cardinal point for the desired new phase of commercial law.*"[35] Because they relied on commercial custom, the medieval merchant courts were the true "judicial organs of merchant legal consciousness," giving expression to the will of the international merchant community.[36] Article I of Goldschmidt's code made the priority of custom explicit: "Insofar as this Code does not determine an issue, commercial custom is to be applied. In the absence of commercial custom, the general civil law is to be applied."[37]

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[34] Levin Goldschmidt, *Handbuch des Handelsrechts*, 3rd ed. (1875), 302, cited in Whitman, 158.
[35] Goldschmidt, Preface to "*Kritik des Entwurfs eines Handelsgesetzbuchs*," *Kritische Zeitschrift F.D. Gesammte Rechts Wissenschaft* 113 (1857), 4, cited in Whitman, 165. Emphasis in original.
[36] Goldschmidt, *Handbuch des Handelsrechts*, 2nd ed. (1864), 242-243, cited in Whitman, 165.
[37] Goldschmidt, *Handelsgesetzbuch*, art. 1 (1861), cited in Whitman, 172.

Goldschmidt's commercial code was profoundly influential; many of its principles were enacted into law after Germany's unification in 1871, and the American legal scholar Karl Llewellyn brought them into the U.S. Uniform Commercial Code in the 1940s.[38] Yet Goldschmidt's assessment of the medieval law merchant also found a willing audience. His ideas were introduced into English and American historiography largely through the work of William Mitchell. We have already seen how Mitchell's *Essay on the Early History of the Law Merchant* (1903) portrayed the law merchant as a transnational law, separate from the control of existing authorities and founded on the custom of the merchant community. Mitchell quoted with approval Goldschmidt's pronouncement on "the grandeur and significance of the medieval merchant," creating "his own laws out of his own needs and his own views."[39] Perhaps because of his focus on the English law merchant, Mitchell also managed to incorporate the universalist claims of the English civilians that Goldschmidt would have abhorred—repeating Davies' claim that the law merchant is part of "the law of nature and nations," derivable from the "rules of reason" and "the same in all countries of the world."[40] Although he did note that Davies' description may be "too sweeping," Mitchell retained the fundamental claim that the law merchant "was a body of rules and principles . . . distinct from the

[38] See Whitman, 157-8. Goldschmidt also supervised the dissertation of the young Max Weber in 1889. Weber's dissertation, which has not yet been translated into English, was written on medieval commercial law; it was later published in *Zur Geschichte der Handelsgesellschaften im Mittelalter, Nach sudeuropaischen Quellen* [On the History of Commercial Partnerships in the Middle Ages, Based on Southern European Documents] (Stuttgart: F. Enke, 1889). For a description of the work, see Lutz Kaelber, "Max Weber's Dissertation," available online at *http://www.uvm.edu/~lkaelber/research/weber.html*, last viewed March 15, 2002.)
[39] Mitchell, 10.
[40] Ibid., 1.

ordinary law of the land" and "possessed of a certain uniformity in its essential features."[41]

Mitchell's work was cited widely among Anglophone historians. The influence of Goldschmidt and Mitchell—as well as the documentary work of F.W. Maitland—led Charles Gross in *The Court of Piepowder* to note the increased "attention [that] has been devoted to the history of the law merchant."[42] In that work, Gross relied on those two authors extensively and adopted Mitchell's thesis, arguing that "the procedure of the court of piepowder resembles the procedure of the international law merchant as it was administered in all European tribunals."[43] As a result of the preliminary study, Gross urged that "the local archives should be exploited for more data concerning this interesting branch of the judicature," and two years later he himself published the first Selden Society volume of *Select Cases Concerning the Law Merchant.*[44] Similarly, William Searle Holdsworth's magisterial seventeen-volume history cited Mitchell, Malynes and Davies as the basis of many of its grand claims as to the extent of the medieval law merchant.[45]

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[41] Mitchell, 10.
[42] Charles Gross, "The Court of Piepowder," *The Quarterly Journal of Economics* 20 (Feb. 1906), 231. The earlier English authors had influenced Maitland as well; he considered the law merchant as "a *ius gentium* known to merchants throughout Christendom." At the same time, however, Maitland insisted that the law merchant primarily consisted of "rules of evidence" and was "not so much the law for a class of men as the law for a class of transactions" (Pollock and Maitland, i, 467).
[43] Gross, 245.
[44] Ibid., 247. In fact, Gross read Mitchell's work and met with the historian during the course of his work on *SCLM*; more details on the history of the volume's publication can be found in *LMLP*, 168*ff*.
[45] Holdsworth, i, 538, 570.

The work of Mitchell and Holdsworth was well received in an era in which business claimed increasing prestige. Wyndham Bewes' *Romance of the Law Merchant* (1923) ranged easily from the days of the Phoenicians to the seventeenth century chronicling the deeds of merchants. The foreword, written by Lord Justice Richard Atkin of the Court of Appeal, described the tales of "perils by sea, endurance, sacrifice, courage" to be found in the annals of commerce.[46] Bewes' description of the medieval law merchant was just as breathless: "There was no substantial difference in the customary law in the various trading nations. . . . It appears all at once, like Minerva sprung fully armed from the brain of Jove."[47] Although Mitchell and Holdsworth were far more careful in their work, their influence on Bewes is clear from his citations. Goldschmidt's romanticism continued to find new expression among those who sought to romanticize the law merchant.

C. Reinterpretation and Renewal

Together, the works of Goldschmidt, Mitchell, and Holdsworth cast a very long shadow. Into the mid-1950s, one finds editions of T.F.T. Plucknett's *Concise History of the Common Law* repeatedly citing Holdsworth and arguing for "a movement from local law towards a cosmopolitan law" promoted by the "international character of commerce."[48] Even in 1991, John H. Munro described Malynes' work as "the best and

[46] Bewes, *iii*.
[47] Ibid., 8.
[48] Plucknett, *Concise History of the Common Law*, 659.

most famous compilation" on the law merchant, "by a merchant with wide commercial and legal experience in both the Low Countries and England."[49]

However, from the beginning of the twentieth century onward, one finds a new, skeptical school of authors who question the extensive claims made on the law merchant's behalf. In November 1902, Frances M. Burdick published a prominent article on the law merchant in the Columbia Law Journal. Among other authors, he cited Bracton, Coke, Blackstone, Malynes, and Davies—either directly or through intermediate writers—and argued that "It is apparent . . . from the foregoing authorities, that for several centuries there was a true body of law in England which was known as the law merchant."[50] The next March, he was answered by John S. Ewart, one of the first historians to challenge the received interpretation. Ewart described the law merchant as "nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law."[51] Although the Roman *ius gentium* might have been described as universal, the Roman lawyers had never exhaustively compared its principles to those of all other nations; instead, the difference between local and universal law in Rome was only "the difference between the Roman law as it was, and the Roman law which more enlightenment declared it ought to be."[52] To Ewart, the attempt to attribute universality to the law merchant was similarly absurd; one might as well speak of "the Law Universal of the Universe,"[53] and the attempt to decide cases according to a

[49] Munro, 53.
[50] Burdick, 478.
[51] John S. Ewart, "What is the Law Merchant?," 3 Columbia L. Rev. 135 (March 1903), 138.
[52] Ibid., 145.
[53] Ibid., 150.

universal law was "nothing but a particularly happy method by which the law [could be] brought into harmony with current notions of justice."[54]

A number of historians since Ewart have come to the same conclusions. In the 1930s, L. Stuart Sutherland chided her contemporaries for ignoring the primary documents, calling it "useless" to rely on seventeenth-century writers in describing thirteenth-century courts.[55] Sutherland even lent a sympathetic ear to the "heretics" who claimed that "the merchant customs in the Middle Ages were too indefinite to be called by the name of Law Merchant at all."[56] J.H. Baker concluded in 1986 that the local variations in commercial customs "seem as numerous as the coincidences"; the merchant courts in England, he wrote, were not considered to apply "a distinct body of substantive law," but to provide "an expeditious procedure especially adapted for the needs of men who could not tarry for the common law."[57] Rather than adopting a body of law "peculiar to merchants," the merchant courts "followed the ordinary medieval principles of English law relating to customs."[58] After examining the records of royal courts, James Steven Rogers, in his investigation of the history of bills and notes, found that merchants had hardly avoided the central courts in England—their cases had merely been recorded in

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[54] Ewart, 156. This description seems to coincide with that of Lord John Campbell, who wrote that before Lord Mansfield fixed the customs of contemporary merchants into the common law, "no one knew" how mercantile cases were to be determined; a jury in a mercantile case would decide "according to their notions of what was fair, and no general rule was laid down" (*Lives of the Chief Justices* (1873), iii, 274, cited in Ibid., 151).

[55] L. Stuart Sutherland, "The Law Merchant in England in the Seventeenth and Eighteenth Centuries," *Transactions of the Royal Historical Society*, 4th ser., 17 (1934), 151-2.

[56] Ibid., 152-3.

[57] Baker, *Legal Profession and the Common Law*, 345-347.

[58] Ibid., 366.

ways that disguised their commercial nature.[59] And the examination of *Lex Mercatoria* by Mary Elizabeth Basile, Jane Fair Bestor, Daniel R. Coquillette, and Charles Donahue discovered "little transnational substantive content" in the mercantile law of thirteenth-century England.[60]

One would like to conclude that Baker, Rogers, and Basile *et al.* represent the current trend of opinion on the law merchant, and that the received interpretation has since died an honorable death. Unfortunately, the previous historiographical tradition has established a 'critical mass' of authorities that has led some later scholars to assume that the question is settled. Furthermore, since World War II, the world has witnessed a significant increase in the pace, volume, and complexity of international trade. This development has brought with it a desire for legal predictability and for uniformity across the globe, as multinational actors seek to reconcile the often conflicting demands of local laws, both through harmonizing institutions such as the International Institute for the Unification of Private Law (UNIDROIT) and through treaties such as the New York Arbitration Convention.[61] As a result, political changes have again made fashionable the idea of a universal law merchant.

This political impetus can be seen clearly in the work of Leon Trakman. Drawing on the writings of Malynes, Goldschmidt, and Bewes, Trakman claimed in 1983 that the

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[59] Rogers, 18. Baker also discussed this possibility: even though the common-law courts would not have necessarily recognized a bill of exchange as conclusive evidence in a plea of debt, the plaintiff could still sue on the underlying obligation; although the bill might be shown to the jury, it would not be mentioned in their decision, nor would it enter into the record if the defendant waged his law (*Legal Profession and the Common Law*, 350).
[60] *LMLP*, 179.
[61] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 21 U.S.T. 2517, available online at *http://www.uncitral.org/english/texts/arbitration/NY-conv.htm*, last viewed March 15, 2002.

medieval law merchant "reflected the ultimate move away from local law towards a universal system of law, based upon mercantile interests." In regulating medieval trade, "local influences subserved to the demands of the cosmopolitan trader."[62] Though he recognized that "the most fundamental concepts of the Law Merchant were . . . not always applied with consistency within different merchant courts,"[63] Trakman—like Holdsworth—retained the concept of universality because of what he perceived as the permanent needs of traders: the only law that could "effectively enhance the activities of merchants" would be a law that "recognized the capacity of merchants to regulate their own affairs through their customs."[64]

A similar vision can be found in the works of Harold Berman, who argued that with the revival of legal studies in the West in the eleventh and twelfth centuries, the law merchant "first came to be viewed as an integrated, developing system, a *body* of law."[65] Influences from Malynes, Blackstone, Goldschmidt, Bewes, Mitchell, and Trakman led him to conclude that "the universal character of the law merchant, both in its formative period and thereafter, has been stressed by all who have written about it."[66] Berman saw echoes of this universality in today's patterns of global trade; the "high degree of uniformity" observed in modern contract practices is not due only to "common commercial needs," but also to the fact that merchants constitute a "transnational

[62] Trakman, 8, 2.
[63] Ibid., 20.
[64] Ibid., 9.
[65] Berman, *Law and Revolution*, 333. Emphasis in original.
[66] Ibid., *Law and Revolution*, 342.

community which has had a more or less continuous history . . . for some nine centuries."[67]

The interpretations of Trakman and Berman were adopted wholesale by Bruce Benson, who described the development of the law merchant as a customary law and noted its evolution "into a universal legal system."[68] In *The Enterprise of Law* (1990), he used the medieval law merchant to argue that government should relinquish the task of law enforcement to private-sector institutions. To Benson, the development of the law merchant "effectively shatters the myth that government must define and enforce 'the rules of the game.'" Because the law merchant "developed outside the constraints of political boundaries" and because it "escaped the influence of political rulers," it provides "the best example of what a system of customary law can achieve."[69] Benson relied on what he believes to be the "actual historical experience" of the law merchant to disprove the political thesis that "an effective legal system and coercive state power must inevitably go hand-in-hand."[70]

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[67] Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, A *International Commercial Transactions* to International Business Transactions, pt. 3, folio 3, 2nd ed. (Philadelphia: American Law Institute, 1983), 1-2. One wonders how, short of a complete cessation of trade, the history of the merchant community could become discontinuous.
[68] Benson, *The Enterprise of Law*, 32.
[69] Ibid., 30.
[70] Benson, "Law Without the State," 2.

D. Conclusions

The persistent survival of the private, cosmopolitan law merchant, despite the best efforts of historians to eliminate it, would be bad enough. Even worse, however, it is this flawed interpretation that has been most influential to those outside the field, and new economic and legal research is being conducted based on an erroneous conception of the medieval mercantile experience. In 1990, Paul Milgrom, Douglass North, and Barry Weingast conducted an economic analysis of merchant courts, attempting to show that their role as disseminators of information on the credit-worthiness of indebted merchants helped make possible the revival of European trade. Based on the interpretations of Berman and Trakman, the authors described a medieval world "without the benefit of state enforcement of contracts or an established body of commercial law."[71] The merchants in that world "evolved their own private code of laws (the *Law Merchant*)" and resolved their disputes in courts that exercised limited coercive power over foreign traders.[72] Their analysis was then generalized by Edward Schwartz in 1993, who relied on Benson's account for his assumption that "the law merchant has no power to coerce any party into paying a judgment."[73]

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[71] Paul R. Milgrom, Douglass C. North and Barry R. Weingast, "The Role of Institutions in the Revival of Trade," *Economics and Politics* 2, no. 1 (March 1990), 2.

[72] Ibid., 2. Although the authors are correct that a *court* could not enforce a judgment abroad, the *parties* could (and did) seek justice in multiple courts in the cycle of fairs.

[73] Edward P. Schwartz, *Essays in the Positive Political Theory of Judicial Institutions*, Ph.D. diss., Stanford University, 1993 (Ann Arbor, Mich.: UMI Dissertation Services, Order #9317815, 1993), 82. Unfortunately, Schwartz falls into a particularly serious error in treating the "law merchant" as a *person*, a specific merchant whose task it was to arbitrate disputes. For example, the goal of finding knowledgeable judges "was achieved by choosing law merchants from among the population of traders at a fair" (103).

Such a characterization has no basis in fact. However, it effectively demonstrates how the historiography of the law merchant in England has turned into a child's game of "Telephone," with one generation interpreting the works of previous authors and then the next interpreting the interpretations. Unfortunately, the scholars who have sought to revise our understanding of the law merchant based on the original sources and the primary documents have been unable to catch the public eye. The thesis of a universal, substantive law merchant is politically suggestive; the thesis of a truly medieval law merchant, bereft of immediate political implications, far less so. One can only hope that scholarship rather than politics will soon take the upper hand.

Epilogue:
Lex Mercatoria and *Lex Cyberspace*

This essay is concerned only with the character of commercial law in medieval England; a debate on the proper means of regulating contemporary commerce goes far beyond its scope. But it is important to note that the current political debates are founded on a certain interpretation of the medieval law merchant, an interpretation that may be profoundly flawed. As Trakman writes, "History *does* provide lessons for the future. The Medieval Law Merchant does reveal the ability of merchants to regulate their business affairs within the broad framework of a suppletive legal order."[1] Justice will not prevail "when judges are unduly preoccupied with applying local public policies and indigenous legal rules to transregional business"; the law merchant of the Middle Ages "is a light whose vision cannot be ignored if we are to promote productive trade across national boundaries in modern times."[2]

Indeed, Berman carries this idea even further, arguing that the customs of the international trading community form "an autonomous body of law, *binding on national courts*."[3] In fact, this law can even be enforced on contracting parties who were unaware of the customs when the contract was written and signed.[4] To those who would object

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[1] Trakman, 17.
[2] Ibid., 4, 21.
[3] Berman, *International Commercial Transactions*, 49. Emphasis added.
[4] Berman cites with approval Article 9 of the Vienna International Sales Convention (CISG), which states that a trade usage can be applied even in a case where none of the parties knew of its existence, so long as it is widely observed and the parties should have been aware of it. Berman writes that this article "stretches the notion of implicit contractual agreement to its utmost limit," and that "the link between a usage and the intention of the parties" here "becomes rather ethereal." But such an international *(cont.)*

that customs only gain normative force through the municipal laws of a sovereign state, Berman replies that history proves the contrary: "the law of the international mercantile community"—the law merchant—"antedates the emergence of a system of nation-states by some centuries. . . . [T]he 'old' law merchant . . . never died but continued to develop, even in the heyday of nationalism, as part of the *jus gentium*."[5] The fact that "for many centuries international custom has been a principal source of the law" means that this custom "should be recognized as legally binding by national courts as well as by commercial arbitrators, independent of its incorporation into national legal systems."[6]

These claims, though presented as inferences from the historical example of the medieval law merchant, are clearly political in nature. For example, Article 1496 of the French Code of Civil Procedure allows a private arbitrator, under certain circumstances, to decide disputes "according to the rules of law he deems appropriate."[7] The decision of a private arbitrator to ignore municipal laws—laws enacted by an elected legislature—is a decision with significant implications for the distribution of power in commercial disputes. Indeed, Berman speaks in praise of arbitrators who decide cases "according to

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convention does not confer any binding force on the usage; instead, it "acknowledges the *inherently* binding force of usages" and thereby "acknowledges commercial custom" (Berman, "The 'New' Law Merchant and the 'Old,' 33). (Emphasis added.) This interpretation seems to abandon the traditional aim of contract law, which is to give effect to the agreement of the parties as they understood it. Baker objects strenuously to such a view, claiming that it would allow the merchant community "to devise new forms of transaction which defy existing law, and [entitle them] to have force breathed into them without the sanction of legislation" (Baker, *Legal Profession and the Common Law*, 344-345).

[5] Berman, *International Commercial Transactions*, 49-50.

[6] Ibid., 50.

[7] Berman, "'New' Law Merchant and the 'Old,'" 34.

international commercial custom" or "according to the law of international trade"—one hears in his words the faint echo of *secundum legem mercatoriam.*[8]

In the past twenty years, the medieval experience has become the foundation for a new political movement, aimed at replacing the local regulation of foreign trade with a transnational, customary law. To supporters of such a view, international commerce has a "*sui generis* character that warrants a special separate regime of governance. . . . Domestic requirements simply are too ensconced in national habits and culture to serve as the governing predicate for non-national relationships."[9] While replacing customs with fixed laws "may be dictated by democratic principles when state action threatens individual rights," this is not the framework "that should apply to commercial disputes."[10] Partisans of this "new" *lex mercatoria* look forward to a day when arbitrators will be free to decide cases according to the custom of merchants, relaxing a national regulation when it is "not fit for international trade."[11] Berthold Goldman, to whom colleagues attribute "a prominent role in defining [the law merchant's] sources and character,"[12] has celebrated instances where "a principle or a rule, not taken from a national law or even

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[8] Berman, *International Commercial Transactions*, 55.
[9] Thomas E. Carbonneau, "Remaking of Arbitration," *LMA*, 14.
[10] Ibid., 16.
[11] Andreas Lowenfeld, "Lex Mercatoria: An Arbitrator's View," *LMA*, 51. Such a vision has not been without its critics; F.A. Mann describes the resulting process as "nothing but palm-tree justice" ("Introduction II," *LMA*, *xx*), and William W. Park wonders whether arbitrators could use such a flexible *lex mercatoria* "as a fig leaf to hide an unauthorized substitution of their private normative preferences in place of the parties' shared expectations under the properly applicable law" ("Control Mechanisms in the Development of a Modern Lex Mercatoria," *LMA*, 109)). Keith Highet argues for the use of the term "*principia mercatoria*" rather than *lex*—signifying general principles, but not a body of autonomous law—and asks whether common sense could be similarly termed "a rule of law" because it also should be employed in resolving disputes (Keith Highet, "The Enigma of the Lex Mercatoria," 63 Tul. L. Rev. 613, 628 (Feb. 1989)).
[12] Carbonneau, "Preface," *LMA*, *xi*.

from international law . . . has been applied by arbitral tribunals or even by state courts."[13]

As scholarship on the law merchant spins further and further away from its documentary base, it has begun to breathe even the rarified air of cyberspace. Lawyers facing new questions of jurisdiction and conflict of laws on the Internet have turned to the romantic vision of the law merchant as a model for creating a new legal order without the involvement of sovereign states. I. Trotter Hardy describes the law merchant as a forerunner of a "Law Cyberspace," which will repeat the success of its predecessor in efficiently resolving disputes through cosmopolitan principles.[14] Following Hardy, David R. Johnson and David Post describe a medieval world in which merchants could not resolve their disputes in feudal courts, "nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control."[15] Instead, those who "cared most about and best understood their new creation" formed and championed the new law—and those who care most about and best understand their new creation, the Internet, should play a similar role.[16]

Again, though they find their inspiration and examples in history, such proposals are making claims about the proper distribution of power in contemporary society. For online activities that only "minimally affect the vital interests of sovereigns," Johnson

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[13] Goldman, "Introduction I," *LMA*, *xvi*.
[14] I. Trotter Hardy, "The Proper Legal Regime for 'Cyberspace,'" 55 U. Pitt. L. Rev. 993 (Summer 1994).
[15] David R. Johnson and David Post, "Law and Borders: The Rise of Law in Cyberspace," 48 Stanford L. Rev. 1367, 1389 (May 1996). The abbot of Ramsey would surely have disagreed.
[16] Ibid.

and Post argue, the self-regulation of system administrators is "better suited to dealing with the Net's legal issues."[17] Joel Reidenberg suggests that a "Lex Informatica" empower "technologists" instead of public actors, setting policy on topics such as data privacy through software rather than legislatures.[18] And Matthew Burnstein calls for a "lex cyberalty" to model admiralty law, with the medieval law merchant serving as a "conceptual framework for a new body of cyber-law" that would not be "subject to any state's exclusive jurisdiction."[19] To judge from their citations, these Internet scholars obtain their understanding of the law merchant directly from the works of Berman, Trakman, Bewes, and Mitchell.

It is not for this essay to decide whether such a transnational, customary body of law would be desirable for governing today's commerce, or even tomorrow's Internet. What seems more certain is that there is little evidence such a law was in effect at the medieval fair court of St. Ives. The St. Ives records—again, the best records available for fair courts of the period—do not indicate that the court granted merchants an unusual degree of legal independence, especially when compared to other manorial and seigneurial courts of the period. The idea of custom was found throughout the legal system of the medieval world, not only in English merchant courts. Furthermore, while the St. Ives court may have occasionally given effect to the customs of merchants, they were often commercial customs of a local nature, rather than the universally shared customs of an international merchant class.

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[17] Johnson and Post, 1390-1391.
[18] Joel R. Reidenberg, "*Lex Informatica*: The Formulation of Information Technology Rules Through Information Technology," 76 Texas L. Rev. 553, 566 (Feb. 1998).
[19] Matthew R. Burnstein, "Conflicts on the Net: Choice of Law in Transnational Cyberspace," 29 Vand. J. Transnat'l L. 75, 103, 108 (1996).

Perhaps the best description of what medieval merchants meant when they invoked principles *secundum legem mercatoriam* was unwittingly offered by Goldman, when he defined *lex mercatoria* as "the law proper to international economic relations."[20] When used to argue for the application of custom in modern commercial disputes, this definition is, as Highet notes, "essentially circular."[21] However, when considered in the context of medieval demands that courts do 'right' and 'justice' to the parties before them, an understanding of *lex mercatoria* as 'the law appropriate to govern trade' makes perfect sense. It best explains the strange mixture of equity and custom applied at the fair court of St. Ives, as well as the manner in which merchants could seek the protection of a general "law" without necessarily asking for uniform rules of substance and procedure. The suitors of the St. Ives court could all agree that cases ought to be decided by the principles of *lex mercatoria*, even if the content of those principles were a matter of dispute. Though modern-day authors may envision a single, cosmopolitan source of law to govern international commerce, the same cannot necessarily be said of the medieval traders whose examples they invoke.

William Martin was right in his gamble: the fair court did indeed have rules. Yet those rules must be understood in contemporary terms, and not as medieval prototypes of the laws that we would seek today.

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[20] Goldman, "The Applicable Law: General Principles of Law—the Lex Mercatoria," *Contemporary Problems in International Arbitration*, ed. Julian D. M. Lew (1986), 113, quoted in Highet, "The Enigma of the Lex Mercatoria," *LMA*, 102.
[21] Highet, "The Enigma of the Lex Mercatoria," *LMA*, 102.

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