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The Shipmaster and the Law

Background

From the thirteenth century the development of English overseas trade made necessary a body of laws to regulate commerce which, reflecting the practices of the markets, would be acceptable to denizen and alien merchants and shipmasters. Common law was peculiar to England and had grown out of customary usage; merchant law, on the other hand, had developed from the Roman *corpus juris* and was accepted, with local variations, throughout the rest of Europe. Merchant law followed the concept that the sea was outwith national jurisdiction, or *nullius territorium*, and was described by a fifteenth-century English chancellor as 'secundum legem naturam qu'est appell par ascuns ley Marchant, que est ley universal per tout le monde' ('following natural law which is called by some Merchant Law which is the universal law for the whole world'). In addition to common and merchant law, for problems which arose aboard ship or between one ship and another, mariners were subject to maritime law, a code of international application derived from the sea laws of the classical Mediterranean states and related to merchant law. For felonies committed ashore or at sea, mariners, as any other person, were subject to criminal law.[1]

In late medieval England, these and other legal codes in use were the result of disparate decisions handed down by a bewildering diversity of courts, each reflecting the differing expectations and needs of a section of society. Pleas could be brought to the county courts or to the Common and King's benches, to the King's Council or to Chancery, all practising common law; or to the aldermanic courts and the courts of markets and fairs of the Staple and of the Cinque Ports, all practising variants of merchant law. There were also the local manor courts, the specialised courts of the admirals practising maritime law, the courts of the Church practising canon law, and the courts of the universities. Very few decisions running contrary to the precepts of common, merchant or maritime laws have been found, and it appears that the various courts consistently followed variants of one of the three major codes throughout England.

[1] Holdsworth, *History*, 5, p. 62; *Year Book 13 Edward IV*, Pasch., pl. 5.

Because English common law jurists were reluctant to accept the precepts of the Roman *corpus juris*, merchant and maritime laws flourished independently in their different courts. Doubts sometimes arose about the relevant choice of code, and when the principles of one body of law favoured one litigant, the choice of code could become part of the dispute. The competition for business between merchant, maritime and common law courts was an important contributory factor in the development of the legal codes which regulated English overseas trade and shipping in the fourteenth and fifteenth centuries.

The Court of Chancery

Medieval common law was a formulary system developed from writs which, since the time of Henry II, litigants had had to obtain from Chancery to initiate litigation in the royal courts. Each writ gave rise to a particular manner of proceeding, or to a defined form of action with its own rules and procedures, and no plea could be brought to court without a writ. This procedure restricted the business of common law courts to complaints which fell within an existing form of action, and by the fourteenth century the range of writs had become too narrow for the increasing variety of commercial disputes. Ever more convoluted formulae had to be devised to pursue such complaints within the form of an existing writ; actions of account, for example, were used to claim not only unpaid debts, but also penal bonds arising from broken service agreements. Because common law courts could decide that the writ as presented disclosed no claim recognised by the law, plaintiffs in commercial litigation often found that there was no remedy for them at common law. The increasing complexity of mercantile transactions required either a broadening of the scope of common law or a higher jurisdiction which could make decisions and award fair remedies beyond the scope of existing procedures.

In theory, the chancellor could influence the development of the law by introducing new forms of writ to encompass new situations, but by the middle of the fourteenth century the categories of writ were closed. Frustrated by the inadequacies of common law, an aggrieved plaintiff looking for remedy in a commercial dispute then had three options, all expensive and sometimes uncertain. He could petition the King's Council, with the risk that a writ might be issued and the petition returned to a common law court; he could present a bill to Parliament in the hope of legislation; or he could ask the chancellor for an ad hoc decision by decree *ad personam*, binding only the parties in that suit. Of these, the procedure which was the simplest, quickest, and most satisfactory, was to petition the chancellor on whom the responsibility to award equitable jurisdiction fell.[2]

[2] Avery, 'Equitable Jurisdiction', *passim*.

The chancellor's jurisdiction grew from that of the King's Council, of which he was the representative, and it was partly through the issue of writs and partly due to their limitations that the chancellor became associated with the administration of justice. The chancellor did not see himself as administering a new body of law but rather as trying to give relief in hard cases, not by precedent but according to his own sense of right and wrong – 'equity is according to the conscience of him that is chancellor, and as that it is longer or narrower so is equity'. The Court of Chancery, as the court both of first application and of appeal, remained separate from and superior to the other common law courts and was able to hear suits which were deemed to be too difficult for lower courts, or where one or both of the disputing parties were aliens. It was less inhibited by the precepts of common law, had the power to oblige witnesses to attend, and could deal with actions with an overseas element. When the chancellor accepted a plea, he ordered the defendant to appear before him by subpoena, the penalty to be forfeited for non-appearance. Examination was under oath and was not necessarily restricted to specific questions raised in the complaint; issues of both fact and of law could be decided by the chancellor. His decision, which he could back up with an order for contempt, might well have differed from that which would have been reached in common law, but because it was *ad personam*, it did not necessarily (but could) affect common law.[3]

Maritime cases presented special difficulties to common law courts because of their technical content, the transient life-style of the witnesses, and the rule that cases had to be tried by a jury drawn from the place where the complaint had been laid. By the beginning of the reign of Richard II, plaintiffs in maritime suits, caught in the cumbersome and restrictive procedural net, were frequently obliged to direct their petitions to the chancellor, entreating him personally for remedy. That procedure offered many inherent advantages to seamen engaged in overseas trading: speed, no jury requirement (and therefore no geographical limitations), no restriction to specific questions raised in the complaint, and the power to oblige even foreign witnesses to attend without a royal warrant. Those advantages had to be weighed, however, against the additional expense incurred in pleading in the Chancery Court.

Common law

One important result of equity decisions made in the Court of Chancery was the acceptance by common law of the precept of 'trust', concomitant with 'use'. Trust was frequently used de facto amongst medieval merchants, and probably

[3] Martin, *Modern Equity*, p. 7, citing Frederick Pollock, ed., *Table Talk of John Selden* (1927), p. 43; e.g. PRO, *Ancient Petitions*, SC8/81.

between shipowners and their shipmasters, when passing the custody of goods (or a ship) over to another for trading 'to the use of' or 'to their best avail'; in other words putting the goods into trust. The *de jure* acceptance of trust at common law avoided the necessity of a formal partnership between the parties involved, but the absence of written evidence of such agreements has the effect of making this *commenda* type of partnership appear to be less common in England than on the continent (there was no English word for this type of agreement). In fact, *commenda*-like arrangements between partners for service were not uncommon and were *commenda* partnerships in all but name. The use of trust also deferred the recognition at common law of the obligations of service contract, at considerable cost to the courts in lost business. The concepts of trust, contract and partnership in relation to the ownership of ships are explored further in chapter 3.[4]

The recognition of commerce by common law

Title to goods, their quality, and the enforcement of payment terms were three of the pillars of commerce; another was the problem of recognition of the obligations of service contract. Medieval common law's view of ownership of movables, or 'title', was grounded on possession, and its view of responsibility for the soundness of the product was justified, in effect, by the negative. As the courts of markets and fairs practising merchant law declined in number in the mid-fourteenth century, commercial complaints had to be pursued at common law. Thus, litigation arising from, as examples, bona fide purchases of stolen property, loans, debts, breaches of contract, faulty goods and failure to meet the terms of a financial obligation, went to courts practising common law, but only through the less than adequate procedure of Chancery writs. As common law courts took over the jurisdiction of the fair courts however, they began to absorb some of the precepts of the law merchant, recognising at the same time the legal privileges which had been extended to merchants. An important example of this absorption was the eventual acceptance of legally binding contracts. Eventually, common law courts gave full recognition to the law merchant, not by way of a judicial notice of a proposition of law, but by accepting evidence of mercantile custom as a question of fact. Merchant law continued to be practised by the Staple courts and so controlled the legal aspects of English foreign trade for at least a further century, but because of the osmosis from merchant to common law, it became well established that

4 Postan, *Medieval Trade*, *passim*; and Maitland, 'Trust and Corporation', III, p. 333 and *passim*. A *commenda* contract was an agreement between a sedentary investor, the *commendator*, and a travelling associate, the *tractator*. The *commendator* risked only the capital advanced and was exposed to no other losses. The contract ended when the *tractator* returned and profits were distributed. It was a convenient tool used to circumvent restrictive usury laws and reduce capital risk.

merchants could withdraw their suits from the former and submit them to the latter.[5]

Criminal, common, merchant and maritime law, each to a varying degree, recognised evidence, backed by compurgation, as acceptable proof. In this procedure, the plaintiff or defendant and six to eleven witnesses swore to the truth of a statement in a formal ritual; if it was carried out correctly and precisely, then the evidence was accepted as true, the fear of spiritual punishment for perjury being so profound. Compurgation could not be used to prove a negative and so the process, also known as 'to wage one's law', was frequently limited to the plaintiff. In common law, compurgation was used by the defendant in trials of debt and detinue raised on informal contracts, but the complex and intimidating procedure could easily fail by a simple mistake. A defendant in a complaint heard at the fair court of St Ives in 1287 attempted to wage his law, but one of his compurgators named the defendant Robert instead of Henry and so the defendant lost the suit. Compurgation was used at maritime law in 1382 in *Hamely* v. *Alveston*, a plea heard in Padstow and discussed in the next chapter. Compurgation lingered in civil actions until seen to be farcical and abandoned in the reign of William IV.

The common law attitude to 'service contract' and to 'title' through the fourteenth and fifteenth centuries, is important in an examination of medieval partnerships, trading agreements, credits and loans, charter-parties and other obligations. It is first necessary, however, to differentiate between formal and informal, or *parol*, agreements. The latter had intrinsic and important deficiencies: although actions arising from informal agreements for debts *sur contract* could be brought to common law courts, breaches of agreement to do something, such as to make a delivery of goods, were not actionable. Other deficiencies in the law's view of informal contracts, including rules which could not be questioned, were that debts of this type died with the debtor and so freed the executor from liability, and that there could be no recognition of informal guarantees. These and other defects led to the development of equitable remedies by the Court of Chancery and since equity effectively supplemented common law in commercial matters, the defects may have been the catalyst required for common law jurists to begin to take more interest in such affairs.[6]

Informal contracts were therefore of restricted use for general business purposes until the introduction for private citizens of actions for wrongs or torts early in the second half of the fourteenth century. Such actions for 'trespass', as they were known, were initiated by a 'writ on the case' which was flexible and could be drafted for the special circumstances of the case. Trial was by a jury which

5 *The Little Red Book of Bristol*, ed. F.B. Bickley, 2 vols (Bristol and London, 1900), I, p. 68: 'De feoffatis infra bundes etc.', and pp. 57–8: 'Incipit lex mercatoria, que, quando, ubi, inter quos et de quibus sit.' See also Goode, *Commercial Law*, p. 32.

6 Cheshire and Fifoot, *Contract*, pp. 2–6.

assessed the remedial damages. Amongst the trespasses brought for remedy were actions of *assumpsit* in which the plaintiff alleged that the defendant had failed, by negligence, to complete the obligations which he had undertaken in exchange for 'consideration', an entirely new concept of 'contract' distinct from 'use': 'Verily if this action be maintainable on this matter, for every broken covenant in the world a man shall have an action of trespass', as Justice Martin said in 1425. Because in such actions the plaintiff was not required to produce evidence under seal, the procedure was open to abuse until, finally, in the first half of the fifteenth century a compromise was devised whereby *assumpsit* was taken for misfeasance (doing something badly), but not for nonfeasance (not completing the undertaking). Nevertheless, the first tentative step towards the recognition of 'service contract' had been taken.[7]

Although common law was becoming more flexible, it could also be harsh. Because it was a standard premise that a document was firm proof and that an unsupported *parol* agreement could not stand against it, an informal agreement could be without remedy. Important agreements were therefore made in writing and authenticated by sealing; early written 'contracts' then became actionable at common law following one of two forms of action. First, an action of covenant, which had come into use in the thirteenth century as an action for the specific performance of agreements to do something, such as to deliver certain goods to a determined place, developed into an action for damages, assessed by a jury, for the wrong of breaking a covenant. In the early fourteenth century, this action came to be limited to agreements under seal and hence the term 'covenant', originally meaning simply an agreement, came to mean an 'agreement under seal'. The seal was, therefore, virtually essential in common law, a requirement set out by Fleta, whether it were simply a blob of wax impressed with a fingernail or something more elaborate.[8]

The action of covenant was little used, however, and important contracts were generally reduced instead to agreements whereby the parties entered into bonds to pay penal sums of money unless they carried out their side of the bargain. If a written and sealed obligation was fulfilled, the penal bond became void (a condition of 'defeasance'); if it was not fulfilled then the terms of the bond had to be honoured. Disputes as to whether the conditions, which contained the real agreement, had been fulfilled or not, were to be decided by a jury. Such penal bonds with conditional defeasance could be adapted to cover virtually any transaction and were widely used as early contractual instruments. In the vast preponderance of medieval common law cases concerning contract, the dispute was over the bonds, their illegality or impossibility and the rules which governed them; the

7 *Year Book* 3 Henry VI, fo. 36, pl. 33.

8 'Non solum sufficiet scriptura nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum praesentium', Holdsworth, *History*, 3, p. 417, quoting Fleta, ii, 60, 25.

law's approach to the disputed contract was, therefore, from a 'reverse angle'. Also, as in the treatment of informal agreements, the law of formal agreements could be harsh; a lost bond or one which had lost its seal was without remedy; for example a debtor who had paid but had failed to have his copy of the bond endorsed, remained liable. A debtor remained in the hands of his creditor, who could have him committed to prison for default until he had paid – and could prove it.[9]

It was as late as the third quarter of the fourteenth century before common law courts could be relied upon to give a hearing, fair in the view of merchants and shipmasters, to cases which involved service contracts and the other basic instruments of business. Until then, those engaged in commerce who wished to pursue a perceived wrong, had to find a suitable court elsewhere. They could try the court of the local fair or market (by then disappearing), or the mayoral court (where their pleas would be heard at merchant law), or one of the developing admiralty courts should their business be maritime (see the next chapter). If all else failed, there were the more expensive options of the Court of Chancery or of presenting a bill to Parliament.

Merchant law

For hundreds of years merchant law subsisted in England as a distinct source of law administered by its own mercantile courts, until it was ultimately absorbed into common law. Until the fourteenth century, the English-owned mercantile fleet was comparatively small and generally confined to coastal or cross-Channel work. The few denizen mariners with commercial grievances pursued them locally, using the market, fair or borough courts practising merchant law. Statutorily, the *Carta Mercatoria* of 1303 gave aliens the right to be tried in local courts without delay by a jury made up of equal numbers of their compatriots and of denizens, and many suits in which that privilege was used have been recorded. Some alien merchants and mariners had alternative, and usually preferable, recourse to their own courts granted by charters and treaties; members of the Hanseatic League, for example, were given the right in 1282 in the city of London, and in 1310 in Lynn, to be tried in commercial litigation before two burgesses of the city and two Hanseatic merchants.[10]

It was probably not uncommon for native and foreign mariners and merchants, when they had to turn to litigation in minor disputes, to appear with the local traders in the 'piepowder' courts of the markets and fairs. Those courts were informal in nature, the name deriving from the Norman-French *pieds pouldres* ('dusty feet'), and were required to produce a verdict before the end of the day, a

9 Cheshire and Fifoot, *Contract*, p. 3.
10 *Statutes*, 27 Edward III, st. 2, cc. 1–29. *CPMR*, 1, p. 359.

requirement similar to that in the port towns' courts where, 'for straunge maryn-erys passaunt and for them that abyden not but her tyde [pleas] shuldene ben pleted from tyde to tyde'. The courts, similar to those of northern Europe, were held before the mayor and bailiffs; some boroughs had such courts as part of the municipal judiciary even without a market or fair, specifically to try without delay suits in which transient merchants were involved. In Bristol, for example, a piepowder court was held during the annual 14-day fair and during the rest of the year the tolsey court administered justice. Pleas were begun without a writ and there were few formalities; all types of plea could be heard including trespass, debt and contract, but not those concerning land nor serious crimes which were reserved for royal justices. The law the courts administered was derived from the customs of English and continental merchants and in the fourteenth century was still relatively unevolved. It reflected enough of the continental *lex mercatoria* to be acceptable to both native and foreign litigants, stood apart from common law, was specifically for mercantile transactions rather than for merchants, and was in effect a body of rules of required evidence (proof of sale, for example) in a disputed agreement.

Although the law merchant was of such importance to merchants and appears to have had a considerable effect on the law practised in local courts, direct reference to it by name is strangely absent from borough custumals. The only sure surviving evidence of the influence of merchant law on the workings of local courts comes from before the fourteenth century. Examples include the pleas of persons passing through London in 1221 who were unable to wait for the Hustings, the pleas over debts to be heard without writs in Bristol in c.1240, and the necessity of immediacy in hearing pleas of strangers (from hour to hour, after dinner as well) and mariners (from tide to tide) in Ipswich in 1291.[11]

Because of the natural association between port towns, merchants and ships, the laws merchant and maritime had aims and problems in common. In addition to their remote common ancestor, to a certain extent they grew up together although their appearance in England was probably neither synchronous nor sudden; both codes arrived in an elementary form and developed individually with use and experience. That they marched together may be seen in the frequent instructions to justices to proceed in piracy claims 'following the law and customs of Oleron and similarly the law merchant'. Both were seen as species of *jus gentium* available across frontiers and both were victims of the jealousy of common law courts.[12]

The rationale of merchant law was that, unlike common law, decisions should

[11] *The Acts of the Parliament of Scotland*, I, part 2, p. 725 (*t*. King David, 1124–53): 'De placito inter piepoudrous.' Gross and Hall, *Law Merchant*, I, p. xiv, citing Bracton, fo. 34. Twiss, *Black Book*, I, pp. 16–20; Bateson, *Borough Customs*, pp. 183–5, as in a case before the mayor and bailiffs of Bristol in 12 Edward III.

[12] 'secundum legem et consuetudinem de Oleron et similiter legem mercatoriam'; Twiss, *Black Book*, I, pp. lxi–lxii.

be in the interests of commerce. 'In what way the law merchant differs from common law' is explained in a treatise in the *Little Red Book of Bristol*. In common law, proof of purchase in good faith merely relieved the innocent third party from the possibility of punishment for theft, and the goods had to be returned to the true owner without restoration of the purchase money. In the law merchant, with the interests of commerce in mind, the true owner had to refund the purchase price to the bona fide purchaser on the return of the stolen goods, in effect a repurchase by the owner of his own property. Also in merchant law, whoever pledged for anyone to answer for trespass, covenant, debt or detinue of chattels, pledged for the whole of the damages and expenses, which was not the view at common law. Further, in common law the precept *caveat emptor* ('buyer beware') prevailed and there was no obligation on the vendor to reveal defects in his goods (unless they were victuals); in merchant law the responsibility for the quality of the goods remained with the vendor.[13]

Yet another important difference between the codes of law was in the master/servant relationship, which in the context of shipowner/shipmaster or shipmaster/crew is particularly relevant. In merchant law the principle was that 'no merchant … shall lose or forfeit his goods or merchandise for any trespass or forfeiture incurred by his servant, unless his act is by the command and consent of his master'. The philosophy behind that was clearly that if a master was to be held responsible for the acts of his servant, especially if they had been perpetrated against his instructions, there would be a considerable brake on trade and the appointment of agents would be a hazardous affair. A master was held responsible however, when his apprentice or servant, publicy known to be trading for him, bought on credit for his master's use. Similarly, if a merchant creditor could prove that the apprentice or servant who bought certain goods was with his master at the time and conveyed the goods to him, the master was responsible for the debt. An example may be seen in a plea brought before the mayoral court in London in 1389. John Forteneye, an apprentice of John Mokkyng of London, bought from John Costace of Gascony 10 casks of Gascon wine in Sandwich for £57 18s. 4d. (from the price, the casks appear to have been tuns). The casks were landed, gauged and filled in London but Forteneye refused delivery and would not pay for them on the grounds of some unreported irregularity; the jury were divided in their opinion but four vintners decided in favour of Costace, and Forteneye was gaoled. The latter then brought a bill against his master, Mokkyng, alleging that Mokkyng had approved the purchase of the wine but had refused to accept it when it reached London, and that the profit from the bargain was not for himself but for Mokkyng. The court decided in Forteneye's favour, released him from gaol

[13] 'Quomodo lex mercatoria differt a lege commune': Bickley, *Red Book*, 1, p. 58. Bateson, *Borough Customs*, 2, pp. lxxvi–lxxix. A further complication was the rules of 'market overt'.

and ordered Mokkyng to pay Costace after deducting 51s. 8d. for gauging and other expenses.[14]

The question of a shipowner's responsibility for the actions of his ship's master, or a shipmaster's responsibility for those of his crew, is extremely important. Although merchant and maritime law generally saw questions in a similar light, in the area of a shipmaster's responsibility there may have been a point of difference. The decision in the 1351 case of *Pilk* v. *Vener(e)* heard in the Bristol 'tolsey' court is puzzling. The hearing was in a local court which would normally have worked in merchant law, but both parties to the dispute agreed to the case being heard at maritime law and the 'law of the country'. The dispute was whether a shipmaster could be held responsible for theft from the cargo by members of his crew; the theft itself was not in dispute. The plaintiff claimed that the shipmaster was always responsible for the conduct of his crew; the defendant pleaded that only if the shipmaster had given a surety for the goods could he be held responsible. The court decided in favour of the plaintiff making it clear that a shipmaster is responsible for any criminal act perpetrated by his crew even if they were not acting under his instruction. Since the case was heard at maritime law and the 'law of the country', the court appears to have accepted the position of the latter.[15]

The case went to appeal, the result of which is unfortunately not known; it may be that the lower court decision was reversed and that the position at maritime and merchant law was seen to be identical. There are two pointers suggestive of disagreement by the superior court with the lower court's decision. First, the king instructed the mayor and bailiffs to certify the case, which had been heard *sine brevi nostro*, together with their decision, to the chancellor. That unusual order may have reflected jurisprudential disquiet at the decision or it may have been reaction to complaints from the defendant and possibly other shipmasters. Second, in the report on the case three textual corrections are apparent: in the introductory passage, the words 'secundum legem de Olerun deducta' are superscript and not on the text line, and in the body of the report, the words printed here in square brackets were inserted in the following phrases: 'secundum legem et consuetudinem [regni domini Regis Anglie ac leges] de Oleron' in one place and 'quod lex [Anglie et de] Oleron' in another. It appears that in the writing of the report there was some doubt about which code had been used at the hearing – or, *ex post facto*, common law was seen as best explaining the apparently anomalous decision of the lower court. *Pilk* v. *Vener(e)* remains an important case without a satisfactory conclusion or explanation.

Merchant law's view of the master/servant relationship was confirmed in 1442

[14] *Statutes*, 27 Edward III, st. 2 (Statute of the Staple), c. 19; Bickley, *Red Book*, I, p. 66: 'Quod mercatores respondeant etc.', and *CPMR*, 1381–1412, pp. xxx and 162–3, 4 July 1389.
[15] PRO C 47/59/2/48 mm. 1, 2 and 5–7.

in a petition to Parliament, in which a statute of Edward III and the law merchant were quoted as holding that

> no … possessor or owner of ships … lese nor be enpeached, constreyned nor put to answer … by any officer or minister of the Kyng for the deedes, trespasses or offences doon upon the water by any other person beying in shippes … than by hymself, but if it be hys commaundement, abettement or consent.

The 1353 Statute of the Staple extended the terms of the *Carta Mercatoria* of 1303, providing special courts in which merchant law was administered 'to give courage to merchants strangers to come with their wares and merchandise into the realm'. The English, Welsh and Irish Staple towns introduced Staple courts in which a chosen mayor and two constables administered justice swiftly, 'from day to day and from hour to hour', according to the law merchant, for all merchants coming to the Staple. The statute prescribed paramountcy for merchant law in mercantile disputes, expressly excluding common law where it conflicted with merchant law. Merchant plaintiffs, and presumably shipmasters, had the choice of suing in a Staple court at Staple law or elsewhere at common law for debt, covenant or trespass (although pleas of land or for felonies still had to be tried in common law courts). The king's justices and officers were to stay out of Staple affairs but there was to be a right of appeal to the chancellor or the King's Council. The composition of an inquest could be wholly alien, half alien and half denizen, or wholly denizen reflecting the origins of the parties in a dispute, and the mediators of a question were to be two of 'Almaigne', two of Lombardy and two of England.[16]

The new courts' procedure, the law to be applied and the control by the merchants themselves, reflected the procedures that prevailed all over the continent. Bargains made at the Staple were to be recorded by a Corrector and the mayor of the Staple was to take 'recognizances' and seal letters of obligations of debts (promissory notes), which gave the creditor statutory rights to a defaulting debtor's property, a development of the provisions of the earlier acts of 1283 and 1285. However, there was a further important innovation in the Statute of the Staple: 'And in cases that no creditor will have letters of the said seal, but will stand to the faith of the debtor, if after the term incurred he demand the debt, the debtor shall be delivered upon that faith.' In other words, after the Statute of the Staple, English merchant law was prepared to accept the concept of good faith, including unsealed letters recognising debt. This adaptability of merchant law was especially important in the development of acceptance of negotiable instruments. Long before it became acceptable in common law, merchant law recognised that the right to a sum of money embodied in a bill of exchange or promissory note

[16] *Rot. Parl.*, 1439–68, pp. 55–6, 20 Henry VI, no. IX: 'That masters of ships may not be punishable for the servant's faults.' *Statutes*, 27 Edward III, st. 2, cc. 1–28 (1353), Statute of the Staple.

could be conferred, even although the instrument was not under seal. When common law did eventually accept the binding force of executory instruments, it imposed restrictions which had not operated under merchant law. The Commons' reaction to the statute was immediate and inevitable; they complained 'that in many cases the Commons would be judged and ruled by the Laws and Usages of the Staple which are all unknown to the Commons'; which elicited the royal *Responsio* that the 'usages would be openly declared'.[17]

Maritime law

Northern European medieval maritime law was based largely on the *Lex d'Oleron* [hereafter *Oleron*], reputedly formulated by Richard Coeur de Lion some time after his return from the Holy Land in 1194. The history of *Oleron*, its origins in the classical Mediterranean sea laws *Lex Rhodia* and *Consolate del Mare*, and its development into the several versions used around the coasts of western and northern Europe, have been explored by, among others, Twiss in the 1870s, Studer in 1913 and Krieger in 1970, following the pioneering work from the seventeenth century onwards of Selden, Cleirac, Verwer and Pardessus. The consensus of scholarly opinion posits two versions of *Oleron* descendant from a twelfth-century southern French compilation derived from the ancient Mediterranean maritime laws. From one version the Flemish and German codes, and from the other the Castilian and Anglo-Norman codes, descended. The Anglo-Norman version of *Oleron* is the most relevant to English medieval shipping. Studer believed that it was drawn up about 1200 and was probably in operation from then, perhaps only locally. From references to the *loy doleron*, the *statuta de Olerona* and the *lex maritima* in local and admiralty courts, it is clear that by at least early in the fourteenth century *Oleron* had been generally accepted in England. For example, in 1339 the mayor and bailiffs of Bristol certified to the lord chancellor that the hearing of *Pilk* v. *Vener(e)* (discussed above) conformed to the 'lex et consuetudo de Oleron'. The articles of *Oleron* are presented as court decisions; in the Anglo-Norman manuscripts they start with the formulaic 'Ceo est la copie de la chartre Doliroun de jugemenz de la mer' ('This is the copy of maritime judgments in the charter of Oleron'), and each article ends with 'Et ceo est le jugement en ceo cas' ('And this is the judgment in this case').[18]

[17] *Statutes*, 11 or 13 Edward I, Statute of Acton Burnell; 13 Edward I, st. 3, Statute of Merchants, c.1; and 27 Edward III, st. 2, Statute of the Staple, cc. 9 and 22; 'q'en plusurs cases les Communes serront juggez & reulez par les Leys & Usages de l'Estaple, queles sont de tout desconuz a les Communes': *Rot. Parl.*, 2, 28 Edward III, p. 261, no. 47.

[18] Twiss, *Black Book*, *passim*; *The Oak Book of Southampton, c.AD 1300*, ed. Paul Studer, SRS, 2 vols and suppl. (Southampton, 1910–13), II, *passim*; *Ursprung und Wurzeln des Rôles D'Oléron*, ed. Karl-Friedrich Krieger, Quellen und Darstellungen zur Hansischen Geschichte, Neue

1 The first page of the *Lex d'Oleron* from the *Liber Horn*. The first line reads 'Ceo est la copie de la chartre Doliroun des iugemenz'. Folio 355v of MS *Liber Horn*, reproduced with the kind permission of the City of London Metropolitan Archives.

The two earliest known copies of *Oleron* in England are in the Guildhall, London. Studer agrees with Twiss in suggesting that the copy bound into the *Liber Memorandum* [LM] is the earlier because the marginal and superscript additions and corrections to the copy in the *Liber Horn* [LH] appear to be later. Krieger awarded seniority to LH because of certain earlier grammatical characteristics (for example, the plural of *il*) and because he believed that LM was a copy of LH, written before the corrections were made. Twiss and Krieger agreed, however, that both the manuscripts had been copied around 1315, their inclusion in the *Libri* indicated that the *Lex* was recognised in London at least as early as the first quarter of the fourteenth century, that they are of sound provenance and that they are copies, directly or indirectly, of an Anglo-Norman original.

The number of articles in the surviving copies of *Oleron* varies considerably: 24 in LH and LM, 24 or 26 in other Anglo-Norman manuscripts, 27 in the version in the *Oak Book of Southampton*, 35 in the fifteenth-century MSS Selden, Vespasian and Whitehall and 47 in the Breton version. The last three articles in the *Oak Book* do not occur elsewhere and concern pilots, the beginning of a Letter Patent from Edward I and a re-statement of the 1275 statute on wreck.[19]

The extra articles in the other manuscripts were added to reflect local practices or changes in maritime procedure; for example, the additional 11 in the 35-article manuscripts were added for the use of admiralty after the period here considered. They cover the definition of wreck and the rights, obligations and duties of the finders and the care of survivors. Interestingly, article 32 in the expanded versions amends an existing provision for jettison and general average (the earlier article 8) and is based on an ordinance of Edward I of 1285. Of the additional 11 articles Twiss writes:

> It was ordained and established for a custom of the sea that their authority rested upon something more than mere usage, but there is nothing which indicates directly the occasion of their being adopted as part of the system of maritime law to be administered in the maritime courts of England.

Folge/ Bande XV (Cologne and Vienna, 1970), *passim*; and, as quoted by Twiss and Krieger, John Selden, *Mare Clausum seu de Dominio Maris* (London, 1635); Cleirac, *Us et Coustumes de la Mer* (Bordeaux, 1661); A. Verwer, *Nederlants Seerechten* (Amsterdam, 1730); and *Collection des lois maritimes antérieures au XVIII siècle*, ed. J.M. Pardessus, 6 vols (Paris, 1828–45).

19 The manuscripts mentioned here and below are: MS Bodley 462, Bodleian Library, Oxford [MS B]; MS Whitehall in Twiss, *Black Book* [MS W]; MSS *Liber Memorandum* and *Liber Horn*, Corporation of London Records Office, Guildhall, London [MSS LM and LH]; MS Rawlinson B356, Bodleian Libary, Oxford [MS R]; MS Selden B27, Bodleian Library, Oxford [MS S]; MS Cotton Vespasian B XXII, British Library, London [MS V]; MS *Liber Rubeus*, City of Bristol Archives, Bristol [MS LR] and MS 1386 Troyes, Bibliothèque de Troyes [MS T]; The texts of MSS LH, LM, LR and R are essentially the same and with B are fourteenth century; MS T gives the Norman version of the Laws, the *Coustume de Normandie*, and is also fourteenth century. MSS S, W and V, with 35 articles, are fifteenth century; *Statutes*, 3 Edward I, st. 1, c. 4.

The concluding words of the additional articles, however, indicate that they too were judgments handed down by a court or inquisition as were the original 24 articles, confirmation that the additional articles had been adopted in the maritime courts and that they reflected the needs of the expanding shipping industry.[20]

The material in the 24 articles of MSS LH and LM overlap to a certain extent, but may be divided into groups: the rules governing the shipmaster's conduct and responsibilities (1–12, 15, 16, 18–20 and 24); the crew's responsibilities (3, 6, 8, 11, 15 and 21); discipline (5, 6, 12 and 14); terms and conditions of employment (17–21); health and safety considerations (7, 8, 10, 16 and 17); general points of management and seamanship (4, 8, 9, 11, 13, 15, 16 and 22–4); and dealings with the freighting merchants (4, 8–11, 13, 15, 22 and 23). Noticeable deficiencies are any mention of felonies, which presumably were to be dealt with ashore, and any rules for the avoidance of collision at sea, although responsibility for accidents in havens is defined. MS LH, which is the clearer of the two Guildhall manuscripts, has been transcribed and translated, and is printed in Appendix 1 with a commentary; the first folio is shown in Figure 1.

As a code of law, *Oleron* became inadequate when confronted with the increasing complexity of fourteenth-century commercial shipping. To cope with that, the Inquisition of Queenborough was set up by Edward III in 1375 'to make certain the points written below in the manner they were used in ancient times'. The commission sat intermittently until 1403, crystallising certain aspects of maritime law by recording opinions on a number of practical questions posed to the jurors, who sat under oath. By its constitution, the commission brought considerable practical experience to its deliberations. The members, initially, were the Warden of the Cinque Ports, the Admiral of the North, and 19 mariners drawn from ports along the south and east coast of England. Although listed as one inquisition, the articles fall into three groups, each collected at a different time and covering rather different ground. In the first section, articles 1 and 2 concern finds and jettison, 3–15 and 17 set out wage and 'portage' (the crew's freight perquisite) rates, and 16 refers to pilots. In the second section, articles 18–70 list a miscellany of matters into which admirals should inquire or for which they have responsibility: prizes, piracy, aiding the enemy, felonies, deaths, mayhems, desertions, affrays, fishing, customs evasions, discipline, claims to wreck, forestalling and regrating, and misappropiation of ships' buoys and buoy-ropes. In the third section, articles 71–81, there is an extension of the duties and responsibilities of the admirals and, tellingly, their sources of income and rates of charges. In Appendix 2, I give a transcription and translation of the relevant articles from a fifteenth-century Anglo-Norman text preserved in MS Cotton Vespasian Bxxii (hereafter cited as *Queenborough*) and

[20] *CPR, 1281–92*, p. 168. Twiss, *Black Book*, I, p. 121 n.3.

reproduced in *The Black Book*, together with a commentary and a summary of the less relevant articles.[21]

A third contribution to an understanding of English medieval maritime law is a collection of court judgments and decisions made on the Isle of Oléron and preserved as *Les Bons Usages et les Bonnes Costumes et les Bons Jugemenz de la Commune d'Oleron* of which a unique copy has survived in MS Douce 227. It is written in a fourteenth-century hand in the Oléronais dialect, a variant of the *langue d'oïl* with affinities with Saintongeaise (the island was in the diocese of Saintes). Twiss transcribed and translated the manuscript in his *Black Book* because a number of the chapters were related to articles in *Oleron*. The manuscript was also transcribed, but not translated, in 1919 by Bémont who added notes on the provenance of the manuscript, the language used and the laws and procedures recorded in what he describes as the *Coutumier* (the title by which it is referred to hereafter). The dating of the manuscript is indicated by the end colophon: 'et fuit completus a. D. m°. cccxl. quarto, scilicet decima die mensis Februarii' ('completed on 10 February 1344'), but the provisions it contains are believed by Bémont and Twiss to be older.[22]

Although most chapters of the *Coutumier* are not relevant to the present review, some are especially useful. In chapter 88 the responsibilities of the shipmaster are more clearly defined than in *Oleron*; chapters 63, 64, 83, 86 and 87 define the mutual responsibilities in law of shipowners in partnership, information which occurs nowhere else; chapter 86 touches on the master/servant relationship which between merchant law and common law had become confused in England; chapter 94 concerns the shipmaster's contribution to general average and chapter 95 defines the responsibilty for hiring pilots. A translation of the relevant chapters of the *Coutumier* may be found in Appendix 3, with a commentary.

Given the obvious importance of the Island of Oléron as a source of maritime jurisprudence, its geographical and historical credentials from the twelfth to the fifteenth centuries is of interest. The island lies off Saintonge in the duchy of Aquitaine, the south end being about 15 nautical miles north of the mouth of the Gironde. Its position on an important trading route no doubt contributed to its prominence in matters concerning maritime law, and its magistrates and *prud'hommes* appear to have built up a reputation as reliable jurists. Its courts were, from the evidence in *Coutumier* chapter 87, available even to those from outside the island seeking equitable solutions to maritime legal problems.

With Eleanor of Aquitaine's marriage to Henry II, in 1154, the island came under English control. It remained so until 1214 when, because of the failed marriage arrangements planned for Henry III's daughter (aged three) to the younger son

[21] 'pour mettre en certain les points apres escript en manere comme ilz ont este usez dancien temps': Twiss, *Black Book*, I, pp. 132–7.
[22] Twiss, *Black Book*, II, pp. 254–401; *Coutumier*, *passim*.

of the count of la Marche, the ownership of Oléron, which was part of the dowry, was in dispute. Henry retrieved his infant daughter, but control of the island was argued until the Conference of Bourges in 1224 when Henry was able to negotiate an agreement with Louis VIII. In 1249 Henry gave the whole of Gascony to his son Edward 'to be held by the king and his heirs as they themselves had held it', a gift which was confirmed several times, latterly with the condition 'that [Oleron] would not be separated from the English crown'. Edward I's well-known ordinance defining the total loss of a ship as that from which no living creature has escaped, not even a cat or a dog, particularly mentions 'the coasts of Saintonge, the Isle of Oléron and of Gascony'. The people of the island remained *fidèles partisans* of England during the Franco-English wars at the end of the thirteenth century, for which the king ordered a payment to them of £1,000 *tournois*.

As he had received the island from his father before succeeding to the throne, so Edward I passed it, with the duchy of Aquitaine, to his son in 1306, to allow him to 'sustain his estate better and more honourably' – provided that he did nothing to alienate the island nor the duchy. Edward did not respect the interdiction and with other territories, gave Oléron to Piers Gaveston in 1308 until the latter's death in 1312, when it reverted to the crown. Following a period of unrest on the island it passed into French protection between 1324 and the 1360 treaty of Brétigny. Edward III then reclaimed possession and in 1362 incorporated Oléron in the principality of Aquitaine under his oldest son. By 1373 the island was again in French hands, a position finalised by the loss of Gascony in the middle of the next century.

The Island of Oléron was therefore under English control for 220 years, with two interruptions in *de facto* governorship from 1214 to 1224 and from 1324 to 1360, although *de jure* sovereignty was still claimed. The date of the MS Douce copy of the *Coutumier*, 1344, is during the second of these breaks in English control of the island; it is not possible to know if the copying of the judgments, which was by order of the mayor of London, was merely a routine municipal administrative matter or an attempt to preserve the island's legal inheritance during a period of political instability. Whatever the reason for making the copies, they make a valuable contribution to the understanding of early maritime law.[23]

A further document of interest, if only indirectly, in any examination of maritime law in medieval England, is the Catalan *Lo Libre de Consolat* (The Book of the Consulate). Two late fourteenth-century Catalan manuscript copies survive in Paris, one of which was printed and published in 1494. A 1791 Castilian edition of the same work, *Codigo de los costumbras maritimas*, has been transcribed and translated by Twiss and it is this translation which is used for reference here, with

[23] *CCR*, I, pp. 345, 386 and 389; *Foedera*, 1, part 1, p. 374, 11 July 1258; *Statutes*, 3 Edward I, st. 1, c. 4; *Gascon Rolls*, PRO C61, III, no. 4914. *Foedera*, 2, part 1, p. 48, 7 June 1308; *Coutumier*, pp. 44–5.

the abbreviated title of *Customs*. *Lo Libre de Consolat* comprises over 300 chapters of legal decisions and opinions by juries and judges on maritime situations. It was known in the thirteenth century, and almost certainly earlier, and was the code of maritime law widely accepted by Mediterranean coastal towns and cities. It is of only limited value to the present work as it does not have an English or Norman provenance, but it does share a common twelfth-century ancestor with the Anglo-Norman *Lex d'Oleron* and many of its chapters are similar in content to articles in that, and to chapters in the *Coutumier*. The similarities are most marked in the rules for the handling and stowage of cargo, jettison and general average; terms and conditions of employment of seamen; seamanship in anchorages; and the rules for partnerships in ship-ownership. There is also a considerable amount of commercial material in *Customs*, particularly referring to responsibility for damage to cargo, the relationship between merchants and shipowners, and dealing with a permutation of examples of frustrated contracts. Although there is a general similarity to what is known of English practices, there are several situations where significantly different legal views are held, some more and others less favourable to one or other of the parties.[24]

The next step

With the existence of a reasonably comprehensive code of maritime law and with the increasing complexity of litigation arising from maritime enterprises, it might be expected that specialised courts would be set up, dedicated to the quick and equitable settlement of disputes between mariners and merchants. The admiralty courts established in the mid-fourteenth century were intended for that purpose but, although for brief periods they worked effectively, within a century the pressure of political, commercial and personal interests contributed to their impotence in all but a narrow range of subjects. Their rise and fall are discussed in the next chapter.

[24] Twiss, *Black Book*, III, pp. lix and 35–657; the manuscript is Paris, Bibliothèque Nationale, MS Espagnol 124; *Customs* was published as *Codigo de los costumbras maritimas de Barcelona*, ed. Capmany (Madrid, 1791).