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THE ANCIENT MAXIM CAVEAT EMPTOR

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A doctrine is like a family that is coming up in the world; it fits itself out with an ancient lineage.

OLD SIMIAN PROVERB.

I

THE text, which once lent authority to an essay in the law, has gone the way of studied sermon and formal faith. But its passing brings no deprivation of the ancient liberties. For in its stead the scribbler in need may select a decision from the emerging volumes of the reports, suit it to the occasion, and endow it with the appropriate meaning. Now and then a provident court hands down a judgment which properly combines suggestion and provocation. A recent example of such judicial benevolence is "the good oil case"¹ which seems heaven sent as the point of departure for the theme of the buyer, his ware, and the law.

The legislature of Connecticut, in an effort to protect the purses of its improvident citizens, passed an act fixing minimum standards for motor oils offered for sale. The statute provided that vendible oils must meet the tests for quality and composition set down in Technical Paper 323 B, issued by the United States Bureau of Mines. The legislation was challenged by a number of oil companies who prayed the federal court of the district of Connecticut for equitable relief. After an extended hearing, a special bench of three judges found the standards to be unreasonable, declared the measure to be a taking of property without due process of law, and pronounced the statute null and void.

The decision of the court provokes doubt rather than dissent. As the fortunes of law broke, the dominant issue came to be the reasonableness of the prescribed tests. In an able and comprehensive brief, the attorneys for the companies recited chapter

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¹ Atlantic Refining Co. v. Trumbull, 43 Fed. (2d) 154 (D. Conn. 1930).

and verse from experts, and presented the results of technical experiments to show how fallible were the Bureau of Mines standards as an index to the practical worth of oils. The representatives of the state countered as best they could with an argument whose burden was largely "powers," "the nature of regulation," and "legislative discretion." If the testimony introduced by the companies had been subjected to critical examination by the state, or if an argument for the technical reasonableness of the disputed tests had been introduced, the result might have been different. As it was the dialectic of legalism was of no avail against the recitation of technical fact.

But, if the question of regulation of the quality of the ware was not formally faced, it was by no means ignored. The object of legislation was neither bread, of olden time the staff of life, of late a declining article in the dietary; nor drink, once a lawful necessity, now a legal superfluity. Instead the issue was argued in terms of a product which as our culture goes is an essential commodity of everyday use. The court seemed concerned lest opportunity for sale be denied to "useful oils which have a wide market and satisfy the public,"² and seemed disposed to frown upon attempts to prevent "buyers and sellers from dealing" when "the buyer gets exactly what he wants."³ The appearance of such reasons, held in ready reserve, is significant; it indicates that even in high judicial places the notion survives that the buyer had best be allowed to take his own chances.⁴

This judicial incident, apparently closed,⁵ throws into striking relief the contrast between legal rule and market fact. The large corporation sells motor oils at filling stations which dot the country side; it uses the resources of an intricate technology in their refinement; it employs instruments of precision to establish the minimum standard of quality which vendibility makes necessary; it is able to enumerate the properties of the product in the exact language of chemical elements and composition. The consumer has only the amateur's acquaintance with oils; his knowledge of properties and processes is crowded within compact trade-names like Mobiloil, Texaco, and Socony; his caution lies within his bit of untested experience which he may mistake for experimentation. The goodness of the product de-

² *Ibid.* 158. The opinion was written by Judge Thomas of the district court. Circuit Judge Augustus N. Hand and District Judge Burrows also sat.

³ *Ibid.* 158.

⁴ Note (1930) 40 YALE L. J. 116, 117, n. 3. This comment presents a thorough discussion of the many issues raised in the case.

⁵ In spite of the importance of the constitutional issue, there is no record of an appeal by the State of Connecticut to the United States Supreme Court.

depends upon what the traffic, aided by the test of eye and finger and crude remembrance, will bear. He has the protection of the competition of other corporations for his custom so far as his unproved standard enables him to recognize the superior product. He has his abstract right to a private suit, if the oil he gets proves not to be the oil for which he bargained.⁶ Only if his personality is corporate, or he associates himself with like buyers, is he able to oppose science with science, match technique with technique, and share in the terms of the bargain. But in this respect motor-oil is a typical good of modern commerce. In the purchase of soaps, drugs, canned fruits, bric-a-brac, vacuum cleaners, dictionaries, radios, motor cars, and many another article, the buyer's inability⁷ to judge the quality of the ware⁸ is in striking contrast to the general legal presumption of his competence.

A contrast so striking invites a study of the legal presumption of the buyer's ability to look out for himself. This lingers in an era in which organized salesmanship has out-moded the individual seller. The refusal of public authority, through legislature and judiciary, to accord effective protection to the purchaser, has been crystallized into the compact expression *caveat emptor*. Although the words are supposed to constitute a principle of the law of sales, the rules which govern the vending of goods are far too detailed and specific to be set down so succinctly. They change in meaning with the course of events, and different judges may read words narrowly or broadly to secure variable results. Moreover *caveat emptor* has been a matter of judicial opinion, a value if you will, a principle if you must, which directs even the rules of laws to its own ends.⁹ Its power

⁶ The buyer has, of course, his abstract rights to legal remedies. He may, if it occurs to him and he dares, demand of the agent of the company who waits upon him, an express warranty in detail of the qualities of the oil; and, if he drives away with oil in his engine, call upon the courts for aid in making it good. He may, even without a document, prove an implied warranty, and get his money back, or part of it. He may perchance collect for consequential damage on the plea of negligence or fraud.

⁷ The head of a large department store once remarked to me: "God created the masses of mankind to be exploited. I exploit them; I do His will."

⁸ A test for state intervention has been proposed by a great exponent of individualism, John Stuart Mill. It is, where "the customer" is not "a competent judge of the commodity." *PRINCIPLES OF POLITICAL ECONOMY* (1848), Bk. V, Ch. XI, § 8.

⁹ A passage by Mr. Chief Justice Shaw deserves quotation in the margin: "It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive propositions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice,

of compulsion resides in the individualistic common-sense to which it belongs, and the expression of this common-sense has been limited to no legal domain. It is to be found in public law and in private, in a failure to keep improper goods off the market and in the imperfect remedies available to the buyer, in the inadequacy alike of preventive legislation and of remedial action. The study, accordingly, must take into account the prevailing ideas in the minds of judges as well as their holdings and must survey the whole realm within which the buyer is accorded or denied legal protection.

The focus of an inquiry which is beset with hazards is "the ancient maxim of *caveat emptor*." In the pages which follow an attempt has been made to set down, at least in fragmentary form,¹⁰ some account of a good old doctrine,¹¹ of the rules of law it has come to comprehend, and of the public policy it has been made to serve.

II

Caveat emptor is not to be found among the reputable ideas of the Middle Ages. As custom of trade or rule of law it is not to be met with upon the highways of mediaeval culture. To priest and lord, to yeoman and villain, and even to burgler and lawyer, it would have fallen strangely upon the ear. They did not talk that language.

The dominant note of the period was authority. The social organization was a hierarchy of controls; the individual, if such there was, owed allegiance to priest and bishop of Holy Church, to lord and baron of Feudal Order, to gild and town of a rising Third Estate. The foundations of obedience, which underlay all human activity, were established by churchmen. The world was a great penitential wherein man was fitted for the Kingdom of Heaven; the human being, conceived in iniquity and born in sin,

and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it." *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray 263, 267, (Mass. 1854).

¹⁰ The records for the early centuries are quite uneven; for the thirteenth, fourteenth, and fifteenth centuries, quite voluminous; for the sixteenth and seventeenth, not as ample as one would wish. For the last century and a half one can do no more than single out the more important documents, and sample the rest. The inquirer must put a skeptical trust in the assumption that the missing evidence is of a kind with that which is to be had. Thus to generalize is to assume or to omit. But the aim of the study is to inquire, not to decide. It is enough if the result is a hypothesis which invites overthrow, amendment,—or acceptance.

¹¹ *Caveat emptor*, as applied to rights in land, is beyond the frontier of this inquiry. There, attended by all the safeguards which have been contrived to protect the purchaser against loss, it is a very different doctrine from the *caveat emptor* of commercial law.

was a depraved person; he must be kept free from the world, the flesh, and the devil;¹² his plans, his actions, and even his thoughts were to be supervised by his betters,—to the great end of the salvation of his immortal soul. The spirit of the age, at least in ideal,¹³ imposed a religious purpose upon all human conduct.

The value of otherworldliness found expression in the mediaeval attitude towards wealth and trade. The teaching of the gospel had been simple and direct; the Christian was not to be fashioned according to this world; he was to sell what he had and give to the poor; he was, above all things, to avoid the pursuit of filthy lucre. In the early Middle Ages trade was condemned; it was worldly, not heavenly; it was sinfully carried on for gain;¹⁴ the merchant could not be pleasing to God.¹⁵ In time, as exchange began to win a place in a self-sufficient economy and good things were to be had that could not be made at home,¹⁶ the church came to be more indulgent. Aquinas, the great authority upon Christian conduct, always ready with his dialectic, drove an easy distinction between a wrongful trade which was carried on for profit and a rightful trade which served public necessity.¹⁷ The exact line between the two was not al-

¹² The ideology of the Middle Ages still lingers. It finds formal expression in ceremonials for admission to Christian churches which demand a renunciation of covetous desire and the vain pomp and glory of the world. The hymnology is still replete with expressions referring to the worshipper as a worm and to the world as a wilderness.

¹³ The ends of authoritative control are well set forth in TAYLOR, *THE MEDIAEVAL MIND* (4th ed. 1927). See especially the chapters on "The Monastic Ideal."

¹⁴ The theory that each article has its own just price gave an excellent dialectical basis for the condemnation of trade. It was easy to argue that the merchant could gain only by buying an article for less, or by selling it for more, than it was worth. The argument, after the manner of its kind, became quite vexatious to churchmen in a later age, who were disposed to look more favorably upon buying and selling. It goes without saying that their ingenuity was equal to the new argumentative occasion. 1 ASHLEY, *AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY* (1910) 126-132.

¹⁵ INGRAM, *A HISTORY OF POLITICAL ECONOMY* (2d ed. 1907) 27.

¹⁶ The growing belief that there was goodness, or at least no badness, in the nature of trade is well set forth in the quaint words of a mediaeval preacher; "We cannot do without . . . such as are busied with trade . . . They bring from one kingdom to another what is good cheap there, and what is good cheap beyond the sea they bring to this town." BERTHOLD VON REGINSBURG, a sermon on *Tricks of Trade*, translated in COULTON, *A MEDIAEVAL GARNER* (1910), 348-354.

¹⁷ AQUINAS, *SUMMA THEOLOGICA, ETHICUS, II, II*, question LXXVII art. 4. Rickaby translation, (2nd ed., 1896) v. 2 p. 96. It is of note that the great theologian was skilled in the use of the minor premise. When called upon to choose between the principles of the Church Fathers and the useful institutions of his own day, he accepts both. An ingenious and engaging

ways clear to even the most churchly eye; the zone of priestly forbearance was gradually enlarged, and a pursuit which served so worthy an end came in time to be an end worthy in itself. But, to the lords spiritual and even to their temporal successors, trade remained an instrument of social purpose; the dealings of traders had to conform to standards of Christian conduct.

The church manuals, even as late as the seventeenth century, laid down standards of mercantile conduct for Christians. Aquinas, theologian or lawyer as you will, discusses with his usual common sense and his usual display of neat distinctions, the delicate problems which traffic in wares brings. In his didactic fashion he asks, "Is a sale rendered unlawful by a defect in the thing sold?" He answers that a defect in kind, in quantity, or in quality, if known to the vendor and unrevealed, is sin and fraud, and the sale is void. If the defect be unknown it is no sin. Yet the seller must make good to the buyer his loss, and likewise the buyer must recompense the seller if he discovers that he has received more than he paid for.¹⁸ He next inquires, "Is the seller bound to mention any flaw in the thing sold?" By an argument that moves straight to its appointed result, he concludes that the seller is bound to reveal secret flaws that may occasion loss through a decrease in the value of the article or danger through the ware becoming harmful in use. But if the flaw is manifest, he is not bound to reveal it "by any duty of justice,"¹⁹ though to do so would exhibit "the more exuberant virtue."²⁰ His judgment accords with an ancient adage that "a buyer's eye is his merchant where the defect is obvious."²¹ As to refinements of speech, and formalities of understanding, he makes no reference;²² to him, evidently, "between a simple word

use of the technique of distinction rarely fails the emergency. The debt which is his due for finding a way around early mediaeval standards, far too strongly entrenched to be attacked directly has had inadequate acknowledgment. Here, in the attitude of the church towards trade, as elsewhere in the domain of law and order, the major premise was the last thing to go.

¹⁸ *Ibid.* 93-94.

¹⁹ *Ibid.* 94-97. His quaint reason is that "because on account of it perhaps the buyer would wish more to be taken off from the price than ought to be taken off." His typical illustration is from horse trading. As is his practice, he states objections and argues them away.

²⁰ *Ibid.* 96.

²¹ The adage was, of course, meant to be taken literally. The eye is to judge where the eye can judge, that is where the defect is obvious. In time the eye became symbolic of all man's faculties, its jurisdiction was enlarged, and the restraint of the last five words was conveniently removed. The instance is typical of the ability of ancient language to express the thought of a new period.

²² See the discussion of warranty in the civil law in Section VI of this article.

and an oath God draws no distinction."²³ This statement, according alike with the civil law and Christian morals, was taught as the doctrine of the true church even to a time when it was no longer certain what church was true.

The institution of ecclesiastical discipline converted precept into practice. In an age of faith, salvation was, like bread and protection, a necessity; the priesthood had power to grant or to withhold the sacrament of the Eucharist; the possessors of the keys to heaven might force men to conform to their admission requirements. The church could convict men of sin, prescribe measures of atonement, impose humiliating penances, and even deny to the refractory the society of the faithful. The official listing of avarice as one of the seven deadly sins²⁴ brought into ecclesiastical jurisdiction the whole domain of trade.²⁵ It is not possible to discover and set down the detailed holdings which emerged from an application of the general principles in the manuals to the actual cases. The conduct of Christians in the business of trafficking rarely came before the higher tribunals. The parties to the confessional, where personal conduct was examined, were the sinner, his conscience, his priest, and his God. The reports, engraved only upon tablets of memory, went to the grave;²⁶ and there could be no appeal to a court of record from a confessor and judge who was powerless to commit error.

Nevertheless casual fragments bear evidence to the range of ecclesiastical discipline. The sermons are hardly a satisfactory substitute for the unavailable records of courts of conscience; but they do exhibit the sinful ways of gain which priests regarded as within their office to suppress. Usury was a symbol of

²³ Quoted in 2 POLLOCK AND MAITLAND, *HISTORY OF THE ENGLISH LAW*, (2nd ed. 1903) 195.

²⁴ A contemporary account of "The Seven Deadly Sins" is to be found in 3 *SELECT ENGLISH WORKS OF JOHN WYCLIF* (edited by Thomas Arnold, 1871) 119-167.

²⁵ The jurisdiction of the church was of course limited to members of the faith. But since in pre-Reformation England the church was established, its membership comprehended almost the entire population. The Jews, who were "under the protection of the King," that is royal chattles useful to His Majesty, were without its spiritual dominion. SELDEN SOCIETY, *SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS* (edited by J. M. Rigg, 1902).

²⁶ How much of secrecy, how much of publicity, there was in practice, can not be easily determined. Many of the penances could not be performed without the matter being noised about. The custom of "love-days," upon which personal quarrels were patched up through mediation, and of processions of penitents through the streets, indicates that the church was not indifferent to the employment of the opinion of the community as an agency of control. Instances are given in SELDEN SOCIETY, *THE COURT BARON* (edited by F. W. Maitland and W. P. Baildon, 1891) 20, 47, 57, 74. In later times many Protestant sects have encouraged the public confession of sins.

covetousness at its lowest; money alone changed hands, the lender might take advantage of the borrower's necessities, he was selling "time" which belonged only to God.²⁷ The quality of the ware, and the fulness of its measure, held an exalted place in homiletic literature. A thirteenth century parson, in words of classic directness, denounced the prevailing tricks of trade.²⁸ His catalogue begins with workers in clothing who steal half the cloth, use guile in mixing hair with wool, and stretch a good cloth to make it into worthless stuff. He notes, in passing, the iron-workers who hasten too soon from their work that the house may fall down in a year or two; the traders who take the names of the saints in vain for wares scarce worth five shillings; the sellers of meat, the innkeepers, and the cooks, who keep their sodden flesh too long, bake rotten corn to bread, and betray folk with corrupt wine; and the boors who bring to town loads of woods that is all full of crooked billets beneath and lay hay on the wagon so cunningly that no man can profit thereby. He closes with the doctors, the shoemakers, the bakers, and the hucksters, and their respective temptations to quaint and profitable deceits. In like vein three centuries later Bunyan²⁹ and Baxter,³⁰ who could not persuade themselves that exchange was the reason for man's sojourn on earth, were asserting the sovereignty of God over the rising tide of trade.

Ideals are, of course, never realized; and the discipline of the church met its failures. The records of the time attest a multitude of sins of minor greed and petty chicanery to be corrected or at least forgiven. The church clung to its stern moral principles, and yet managed to accommodate its doctrine to the prevailing secular activities. Even before the reformation, its power to subordinate money-making to spiritual ends was in decline. In an illuminating letter, written in the early fifteenth century, the Archbishop of Canterbury laments that temporal punishment is held more in dread than clerical, and that which touches the body or the purse more than that which kills the soul, confesses

²⁷ WILSON, A DISCOURSE ON USURY (1572) (edited with An Introduction, by R. H. Tawney, 1925). The church's prohibition still has a reputable, if formal place, in the law of the land.

²⁸ BERTHOLD VON REGENSBURG, sermon on *Tricks of Trade*, *supra* note 16. The author was a Continental, not an English, parson. It is presented here, because of its graphic language, and because a single quotation can be made to do duty for many excerpts. A text from WYCLIFF, *supra* note 24, at 333, reads, "All the goodnes that is in thes gildes eche man outh for to do bi comyn fraternyte of Cristendom by Godde's comaundement." This is, as a major premise, quite adequate to the demands of ecclesiastical discipline.

²⁹ THE LIFE AND DEATH OF MR. BADMAN (1680).

³⁰ A CHRISTIAN DIRECTORY: OR A SUMM OF PRACTICAL THEOLOGIE AND CASES OF CONSCIENCE, (1678). Baxter's work, in form like many an august predecessor, is in the great tradition of Thomas Aquinas.

the failure of the confessional, and importunes his brothers, the barbers of London, to use the device of a pecuniary loss to restrain their members from their trade on Sunday.³¹ When with changing times the principal effect of the church's prohibition of the taking of usury was to decrease the number of persons who really cared for Christian burial, the stern command had to be relaxed. But, in spite of oversight, compromise, and administrative failure, the church never admitted that any practice of business was outside the province of Christian ethics. In ecclesiastical polity there was no place for the notion that the seller was not responsible for the goodness of his wares.

III

If we pass from the spiritual to the temporal realm, we discover usage and institution to be marked by the same paternal solicitude. The picture of an authoritarian control is everywhere in evidence; yet the lines of the agencies of supervision are far from clean-cut. The activities of a people passing out of feudalism do not lend themselves to our distinction between public and private. The system of justice stretches far beyond the king's tribunals to include local and special courts of diverse duties and sorts.³² The law, not yet disentangled from local usage and private right, varying from place to place and class to class, is far from common. In the work of official bodies administrative and judicial functions are curiously blended, and examples of the separation of powers are hardly to be had. The whole system of oversight is in an irregular flux; changes appear before they are recognized; the new is present long before the old has ceased to be. There is, accordingly, no right way in which the secular scheme of supervision can be set down, and a presentation in sequence of the local, the gild-municipal, and the national regulation of the market is perhaps as good as any. If it does some violence to the distinction between institutions, it at least keeps to the fore the question of responsibility for goods offered for sale.

³¹ THE MEMORIALS OF LONDON IN THE THIRTEENTH, FOURTEENTH AND FIFTEENTH CENTURIES (edited by Henry Riley, 1868) 593-4. The letter is dated 1413.

³² The discussion here is limited to the local courts. The thread of the discussion is likely to be lost if an account of the various courts,—communal, municipal, seignorial,—of leet, of baron, of custom,—is interpolated here. The condition of the records leaves the structure of the system, the functions of the several bodies, and the relations of the local courts to the King's courts and the courts Christian quite far from certainty. The inquiring reader is referred to SELDEN SOCIETY, SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, (edited by F. W. Maitland, 1889), and to the introductions in the other volumes of the publications of the Selden Society mentioned in notes 33-55 *infra*.

It was in the courts of custom, of manor and baron, of leet and talsey, that secular justice made its most immediate contact with the activities of the people. At the beginning life was lived very close to the soil, a standard hardly up to subsistence prevailed, the list of necessities which demanded protection was short, the wares which came to an intermittent market and fell under control were few. As the crafts increased in number and claimed more followers, the scrutiny of the community was progressively extended. The intent of the folkways, which were just passing into law, was to insure an open market,³³ a fair price, an honest measure, and a quality good after the fashion of the day. The foundations of the scheme of regulation were the assizes of bread and of beer.³⁴ A host of persons have won such immortality as the dusty annals of justice accord by having it set against their names that they were in mercy because of poor loaves or insufficient gallons.³⁵ It hardly stands to reason that bakers excelled brewers in their immunity to temptation; yet ameracements for breach of the assizes of bread are not numerous,³⁶ while it is often recorded that all the ale-wives have sold contrary to the assize. An entry has it that a manorial lord claimed his liberty to collect revenue from brewers who were not proof against dispensing bad beer or scant measures, not from the King, but by ancient right.³⁷ The cases were so numerous that the complaint was reduced to the formula, "they say

³³ The means used was the prohibition of regrating, engrossing, and forestalling. The legal condemnation of these practices has been so much discussed as to require little more than mention here. Interesting examples of attempts at suppression in the thirteenth and fourteenth century are to be found in *SELDEN SOCIETY, LEET JURISDICTION IN NORWICH* (edited by William Hudson, 1892).

³⁴ The assize of bread and of beer goes back to 1256, to the reign of King John. *SELECT PLEAS IN MANORIAL COURTS*, *supra* note 32.

³⁵ *LEET JURISDICTION IN NORWICH*, *supra* note 33, at 16, 70, 72; *SELECT PLEAS IN MANORIAL COURTS*, *supra* note 32, at 113, 139, 140. *THE COURT BARON*, *supra* note 26, at 50, 80, 88, 111.

³⁶ This is certainly true for the records of the leet court of Norwich and the manorial courts; the records of the court baron contain more references to breaches of the assize of bread than of beer.

³⁷ In assuming the right to enforce the assize of beer the lords were prompted by other considerations than law enforcement. "They made profit thereby, for the assize seems to have been broken with as much regularity as the most orthodox of political economists could possibly demand." *THE MANORIAL COURTS*, *supra* note 32, at xxxviii. The evidence seems to indicate that the ale-wives were regularly rounded up, regularly fined, and regularly allowed to continue as of yore, a practice which in modern times might be described as an imposition of a franchise tax, protection, or a racket. It is of note that "the lords claimed their jurisdiction over beer by common custom." In other words the right—or the privilege—of taking toll of the passing traffic is an ancient liberty. Such a custom, even if of unconscious growth, presents a most ingenious paradox.

concerning . . . as above."³⁸ The amercements were frequently assessed, only to be remitted. But, often enough, the baker went to the pillory, and the ale-wife publicly journeyed to the tumbrel with distaff and spindle.³⁹

But the system of regulation went far beyond ale and bread. There was a regular check-up of persons who had their own peculiar notions of gallons, pottles, and quarts, or who on occasion were disposed to buy by the greater and sell by the less.⁴⁰ A list of sample actions indicates the extent of public notice. It was complained that Sprouston men buy measely pigs and sell the sausages and puddings, unfit for human bodies in Norwich market;⁴¹ that John Trukke bought a drowned cow and sold it in little pieces;⁴² that all the cooks and pastry-makers warm up pastries and meat on the second and third day;⁴³ and that William Brok, butcher, sold meat of oxen and sheep, measely, bad, and putrid through age.⁴⁴ The practices condemned, as exhibiting a greater zeal for trade than concern for customers, included selling whelks with good and bad mixed in together,⁴⁵ mixing herrings, oysters, and other goods, and selling the same to strangers,⁴⁶ disposing of oil of one kind for another,⁴⁷ vending wood mixed with verdigris and potters clay mixed with lees of wine,⁴⁸ and possessing fuller's blocks which were used for making up old clothes, and so making fraud in their work.⁴⁹

An ancient institution, of rather obscure origin,⁵⁰ was skillfully turned to the regulation of trade. The court leet, or view of the frankpledge, was held twice a year; all men of the lower orders were required to present themselves in groups of ten or twelve, each under a tythingman, and were held responsible for each other's good behavior. The tourn became a kind of petty assize for the hundred, at which inquiry was regularly made, among many other things, into the conduct of tradesmen and such as bought and sold. The country was dotted with courts of honors, liberties, franchises, manors, and boroughs which together kept oversight over a very large part of the popu-

³⁸ THE COURT BARON, *supra* note 26, at 16, 103.

³⁹ *Ibid.* 100; THE MANORIAL COURTS, *supra* note 32, at xxxvii-xxxviii.

⁴⁰ LEET JURISDICTION IN NORWICH, *supra* note 33, at 13, 72.

⁴¹ *Ibid.* 8.

⁴² *Ibid.* 47, 10.

⁴³ *Ibid.* 13, 60, 71.

⁴⁴ *Ibid.* 80.

⁴⁵ *Ibid.* 10.

⁴⁶ *Ibid.* 48.

⁴⁷ *Ibid.* 47, 92.

⁴⁸ *Ibid.* 47.

⁴⁹ *Ibid.* 55, 5, 60, 64, 65.

⁵⁰ THE MANORIAL COURTS, *supra* note 32, at xxvii.

lation.⁵¹ Before the middle of the fourteenth century form books were in use⁵² for holding the view of frankpledge and all that pertained to the view. In their words the presenters were loyally to inquire among themselves whether there were among them⁵³ tailors who knew how to make leggins and caps and such like out of an old cloak, or goldsmiths who are wont by night to melt down cups or bells and to make thereout buckles, brooch-pins, and ear-rings, or smiths who were inclined to make out of a stolen plough-share tongs or trivets.⁵⁴ If the catalogue is not an extended one, it includes the types of goods which went regularly to market.

The view of the frankpledge performed its regulatory task for many centuries. It was in existence before the merchant guild had come to power, it was performing its task after the craft guilds were gone. As late as the time of Elizabeth the mercantile presentments run; the brickmaker makes bricks too small, the chandlers do not always give "good language and fayre spech" to customers who complain that the "stouffe ys not good as yt ought to be," the coopers send barrels out unmarked, the horse dealers provide "tierid jades unable to carye a man in his journey," a miller has "putt into a sacke of wheat a pottle of the sande of the sea," and porters who ought to fetch and carry allow cards and backgammon to divert them.⁵⁵ Its long life and general use indicates that the institution was nicely adapted to the task of finding out the gross and even the subtle deceits of trade.⁵⁶ Its function was preventive rather than remedial; there seems to have been no place for a suit by a customer who had been worsted in a bargain. The amercements doubtless were pocketed by sheriff, baron, lord, or whoever dispensed his justice. A typical penalty was that the lord and good folk have damage of 100s and shame to the amount of 40s.⁵⁷

If the form of action must be given a name, it may be called a communal tort. For it was a device contrived to protect the folk and the offense was against them.

IV

After all such institutions were local, suited to petty trade, and addressed to the conduct of persons of the meaner sort. The

⁵¹ HEARNshaw, *LEET JURISDICTION IN ENGLAND* (1908), especially pp. 17-18.

⁵² *THE COURT BARON*, *supra* note 26, at 3-18.

⁵³ *Ibid.* 15, 93-106. It was written, at least in the form it here assumes, in 1342 or thereabouts, though the MS from which it is taken is not of so late a date.

⁵⁴ *Ibid.* 94-95.

⁵⁵ HEARNshaw, *supra* note 51, at 209-212, and the citations given there.

⁵⁶ *Ibid.* 115-117.

⁵⁷ *THE COURT BARON*, *supra* note 26, at 23-24, 26.

scheme of control belonged rather to the close-knit neighborhood than to the more regular trafficking which came to be commerce.

The stirrings out of which business was to emerge began in the fairs. There lords and bishops were less conspicuous,⁵⁸ a great variety of staple and novel goods were for sale, deals might run into large figures, and buyers and seller met as strangers from different places. Here there was as much of impersonality as the age could exhibit; and yet, even here a system of regulation, designed to promote fair trading, was in evidence. Goods were to be sold only in shops which had frontage;⁵⁹ it was to the contempt of the Lord King and the great damage of the abbot,⁶⁰ for merchants to sell wares without making display thereof in the body of the fair. The weights and measures were presumed to meet established tests,⁶¹ and the alnagers whose office it was to measure cloth swore with mighty oaths that they would take nothing from one party or the other, whereby any harm might befall the buyer or the seller.⁶² Woolen cloths and canvas were not to be sold in the same place;⁶³ because it might confuse the purchaser or tempt the vendor to subtle deceit. At the fair of St. Ives, official supervision extended to hides, wool, and cloth, the principal articles of traffic,⁶⁴ and to other wares which on occasion found their way to market.⁶⁵ An attempt was made to suppress deceptions of all kinds and collective bargaining,⁶⁶ as savoring of monopoly, were forbidden. There was at hand a court to which litigants, who could not be justiced at common law,⁶⁷ might speedily resort;⁶⁸ it heard pleas arising by reason of merchandise of all sorts, and disposed of them by

⁵⁸ The feudal lord, temporal or spiritual, was not uninterested. His concern grew out of proprietorship, or rights in, the fair; but he was not there as the titular head of a community of souls. It was about the business venture that his problems centered. The Abbot of Ramsey, who by royal grant conducted the fair of St. Ives, discovered a threat to his privileges in his overlord, the Bishop of Ely. See SELDEN SOCIETY, 1 SELECT CASES ON THE LAW MERCHANT (edited by Charles Gross, 1908) 32.

⁵⁹ Merchants are hailed into court for sales at the back of houses. 1 THE LAW MERCHANT, *supra* note 58, at 2, 56, 58.

⁶⁰ *Ibid.* 93-94. In the case cited here, perhaps frequently, the accused is quit thereof.

⁶¹ *Ibid.* 23, 40, 41, 43.

⁶² *Ibid.* 37, 41, 58.

⁶³ *Ibid.* 14, 15, 24.

⁶⁴ *Ibid.* xxxiii.

⁶⁵ See the cases cited in Section VI of this article.

⁶⁶ 2 THE LAW MERCHANT, *supra* note 58, at xlix (1417).

⁶⁷ 1 THE LAW MERCHANT, *supra* note 58, xlix.

⁶⁸ The courts of "pie powder" were open to "travelers." A traveler was defined as one who dwelt so far from the town that he could not rise in the morning and come on foot to the common court by 9 A.M. SELDEN SOCIETY, 2 BOROUGH CUSTOMS (edited by Mary Bateson, 1906) 192.

the custom of merchants.⁶⁹ The proprietors were concerned to insure honesty in dealing and to keep up the good names of their fairs.

As trade lost its adventitious character, the fair was succeeded by the market town. The burough contrived to win, buy, or wangle privileges from the overlord, and in industrial matters became almost a self-governing community. It claimed over manufacture and sale the control which the manor had exercised over agriculture; upon the ancient foundations, in the spirit of the authoritarian ideal, it erected a detailed and elaborate system of regulation. The gilds, decked out in the trappings of religious orders and dedicated to the worship of God, Our Lady the Virgin, and all the Saints,⁷⁰ held themselves out to serve as roundly as any Rotary Club. The conduct of the several handicrafts were regulated by their own statutes, which became rather generally ordinances of the town. Their enforcement rested with the officers of the gild, under the oversight of officials of the city. The Mayor and Alderman constituted an authority which was alike an administrative body and a court. They heard complaints and outlawed anti-social practices; before them were brought for trial by jury persons who had violated the ordinances. The right to try causes in their own courts, and not have to look for justice to the king's benches, was highly prized; the fair name of the liberty of the city was not to be slandered.⁷¹ The system differed in its details as it was accommodated to the petty trade of Beverley, the more extensive merchandizing of maritime Bristol, or the great business of London; but in aim, in spirit, in institution it was everywhere much the same.⁷²

The market was the hub of industrial life, and an elaborate code was contrived for its control. In London every day save

⁶⁹ A discussion of cases involving the quality of the ware under the law merchant is to be found in Section VI of this article.

⁷⁰ From the Preamble to the Ordinance of the Gild of the Tailors in Exeter (1466) 2 TRANSLATIONS AND REPRINTS, FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY, (University of Pennsylvania, 1895) No. 1, p. 26.

⁷¹ A most illuminating case (1371) which touches upon the common law and its rivals, is recorded in MEMORIALS OF LONDON, *supra* note 31, at 352-3. A person is hailed before the authorities because he had violated an ordinance that no one shall presume to publish or spread false news or to invent the same. The charge was that he had circulated a report that no pleas from henceforth were "to be pleaded within the City before the Mayor and Alderman, but all were in future to plead at Westminster before the Justiciars of our Lord the King." For the lie by him maliciously invented, he was hustled off to the pillory, to have the whetstone hung from his neck.

⁷² The materials for this and succeeding paragraphs come largely from London. The system of regulation stands out in clear-cut relief, the documentary evidence is quite sufficient, and cities of lesser size even then were wont to model themselves on London town. It is significant that the details presented from the records of other cities fit neatly into the general picture.

the Holy Sabbath was market day; in London even permanent shops were a part of market overt. Here goods were publicly on display; the buyer wanted assurance from the stranger that his purchase would not be snatched away by its rightful owner. A sale, if properly executed, carried a warranty of title⁷³ not to be had if the deal were privately cooked up.⁷⁴ As industry flourished exchange was affected with a public interest and had to be carried on in the open.⁷⁵ Market places were appointed for meat, cheese, fish,⁷⁶ and other commodities coming into the town, and in many trades men of the franchise and foreigners had their separate stands. The sale of goods in privy places and in secret was prohibited.⁷⁷ The craftsmen were required to keep away from hotels and private houses, save when some great lord should send for them, and required to vend their wares only in their own shops.⁷⁸ There were to be no sales by candle light or after the bell had rung for sunset;⁷⁹ old was not to be mixed with new whether of oil or wine;⁸⁰ the pepperers were not to put things of one price or sort with things of another price or sort.⁸¹ The guests of taverners were commanded to visit the

⁷³ The theory probably was that if goods had been stolen the owner or his representative or neighbor would go to the market where they were likely to be offered for sale to reclaim them. In market overt the good could not be disposed of without publicity, and with publicity stolen property was not likely to escape detection. In days when theft did abound in the land, the market overt seems to have been a kind of mercantile purgatory; the emerging good went forth with a clean, or nearly clean, bill of health.

⁷⁴ But it is interesting to note that the term "market overt" was subject to construction. In London shops were stalls and hence belonged to market overt. But if a deal was consummated back of the shop, or in an inner room, or behind a screen, or even with the shade drawn or the window closed, it was not in market overt. Pease, *Market Overt in the City of London* (1915) 31 L. Q. Rev. 270. The word "wousin," popularized by Walter Wheeler Cook, was centuries off, but there was even at this early time no lack of skill in its use.

⁷⁵ MEMORIALS OF LONDON, *supra* note 31, at 75, 141-2, 339, 405-7, 532-3, 540-2 (1310-1398). This volume is a collection of documents for the thirteenth, fourteenth, and fifteenth centuries, taken from the official records. While other materials are included it is particularly rich in ordinances for the regulation of trade and in mercantile cases heard before the Mayor and Aldermen.

⁷⁶ *Ibid.* 435-6 (1379). But I discover one item to the contrary. Fishmongers were commanded, not to stand, but to hawk their commodity, "moving about in the said city from street to street, and from lane to lane, to retail the same." The object of the ordinance was to give to customers equal chances at the market. *Ibid.* 508-9 (1388).

⁷⁷ SELDEN SOCIETY, BEVERLEY TOWN DOCUMENTS (1900) 28, 105 (1372).

⁷⁸ *Ibid.* 354-5, 360-1 (1371).

⁷⁹ *Ibid.* 141-2, 339, 532-3 (1320-1392); 2 BROUGH CUSTOMS, *supra* note 6S, at lxxx.

⁸⁰ MEMORIALS OF LONDON, *supra* note 31, at 458 (1332).

⁸¹ *Ibid.* 120-1 (1316).

cellars to see that refreshing draughts came from the proper casks.⁸² The inspectors of wares and keepers of the market were to discharge their fiduciary offices with diligence and honesty so that the people of the commonalty might avoid disorderly and deceitful bargains.⁸³

The same strict system of regulation was applied to the materials and methods of manufacture. Bakers were not to be so daring as to make loaves which were false either as to the dough or to the weight;⁸⁴ barbers and chandlers, to put resin in images or wax-tapers;⁸⁵ weavers, to set their threads too far apart or turn out cloth worse in the middle than at the sides;⁸⁶ and skinnners to furbish up worn furs otherwise than with the collars and linings of the old garments attached.⁸⁷ The materials which went into wares were to meet rigid standards; no skinner was to mix lambskin with budge fur, but each kind was to be worked up in itself in due and faithful fashion;⁸⁸ no tanner was to use false leather, disloyally tanned or curried;⁸⁹ no potter, to construct utensils of bad metal, which put upon the fire and exposed to great heat would come to nothing and melt;⁹⁰ no casket-maker cunningly to contrive his boxes of false and rotten wood covered over with linen cloth;⁹¹ no founder to employ metal contrary to what it should be or a solder which might cause wares to fail and break and come assunder;⁹² no tapicer to use other stuff than good wool of England and Spain, or to depart in his work from the lawful assize of ancient times;⁹³ no blacksmith to ply his trade in a secluded spot that he might avoid doing work which was avowable and proper;⁹⁴ no cooper to construct casks for ale and beer out of second-hand wood lest the savour of the liquor be spoiled;⁹⁵ and no pewterer to contrive any vessel except that it be made of good, lawful and sufficient metell after the rewle and assay of London.⁹⁶ The low standard of living caused second-hand goods to be much in demand; so it was ordained that among cobblers, cordwainers, and petterers those who were busied with new should not intermeddle with

⁸² *Ibid.* 81-3, 181, 213-4, 318-19, 415 (1311-1378).

⁸³ *Ibid.* 556-7 (1403); BEVERLEY TOWN DOCUMENTS, *supra* note 77, at 73.

⁸⁴ MEMORIALS OF LONDON, *supra* note 31, at 180-1 (1331).

⁸⁵ BEVERLEY TOWN DOCUMENTS, *supra* note 77, at 57 (1467).

⁸⁶ 2 THE LITTLE RED BOOK OF BRISTOL (1906) 2-6 (1346).

⁸⁷ MEMORIALS OF LONDON, *supra* note 31, at 153-4 (1327).

⁸⁸ BEVERLEY TOWN DOCUMENTS, *supra* note 77, at 40-1.

⁸⁹ 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 103.

⁹⁰ MEMORIALS OF LONDON, *supra* note 31, at 118-19 (1316).

⁹¹ *Ibid.* 563-4 (1406).

⁹² *Ibid.* 512-5 (1389).

⁹³ *Ibid.* 178-9 (1321).

⁹⁴ *Ibid.* 361-2 (1372).

⁹⁵ *Ibid.* 541-2 (1396).

⁹⁶ 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 184.

old.⁹⁷ A clause tucked in here and there aimed to protect the repute of the town by requiring the inspection of all goods intended for export to foreign parts. Such stray items, lifted almost at random from the records, attests the zeal with which entrance to market was guarded against unworthy goods.

But solicitude for the consumer did not stop at a direct regulation of quality; it found expression in a control almost as comprehensive as the range of industrial activity. Merchants were forbidden to set up red or black cloths or shields whereby the eyes of the buyers were deceived in the choice of a good cloth.⁹⁸ Night work was forbidden to spurriers, founders, armorers, and other workers in metal, because it gave opportunity to introduce false iron for tin and to gild false copper.⁹⁹ Measure and weight were of common concern; a rigid prohibition was laid against the ungenerous gallon, and a pound had to contain all of fifteen honest ounces. The feudal device of the seal was made to serve mercantile justice; the baker had to put his mark upon his bread,¹⁰⁰ the chandler upon his tapers and images,¹⁰¹ the weaver upon his cloths,¹⁰² the bladesmith, the blacksmith, and the goldsmith upon their respective products.¹⁰³ Thus, if there were any defect in the work,¹⁰⁴ the author of the default was easily to be discovered. The makers of measuring vessels were forbidden to send them forth without seals, and were made equally responsible with their users for deficiencies.¹⁰⁵ As a term of the bargain price was no affair of the contracting parties; its amount was determined by authority and graduated to quality; the seller departed from the lawful standard at his peril. This pecuniary oversight extended from bread to prayers;¹⁰⁶ it comprehended

⁹⁷ MEMORIALS OF LONDON, *supra* note 31, at 228-30, 539-40, 571-4 (1365-1409).

⁹⁸ 1 BLAND, BROWN, AND TAWNEY, ENGLISH ECONOMIC HISTORY (1920) 155.

⁹⁹ MEMORIALS OF LONDON, *supra* note 31, at 226-228, 512-15 (1345-1389).

¹⁰⁰ *Ibid.* 323-4 (1365); 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 228.

¹⁰¹ MEMORIALS OF LONDON, *supra* note 31, at 358-360 (1371).

¹⁰² 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 2-6.

¹⁰³ BEVERLEY TOWN DOCUMENTS, *supra* note 77, at 40; MEMORIALS OF LONDON, *supra* note 31, at 338-9, 361-2, 567-70 (1372-1408).

¹⁰⁴ An interesting item records the loss of a seal with the impression of a tun thereon; the loser would no longer be bound by the seal aforesaid, and any obligation made through its instrumentality would be null and void. MEMORIALS OF LONDON, *supra* note 31, at 45 (1301).

¹⁰⁵ *Ibid.* 234-5 (1347).

¹⁰⁶ A parson was forbidden to exact more than one farthing for a mass; if a half-penny were extended in payment and the proper change was not forthcoming, the worshipper was to have his prayer for nothing. The parson was, however, permitted to make less generous charges for baptism and marriage. *Ibid.* 463 (1382).

all the material and spiritual necessities of man. It is, however, of note that if a buyer discovered any of his purchase to be good above, or worse below, the sum paid, he ought to amend it by the view of honest men appointed for the purpose.¹⁰⁷ The object of the law was to insure to every good offered for sale a fair price, full measure, and good workmanship.

Quality was held in such regard that it served as a cloak for customs which served quite other ends. If strangers and men who were not of the franchise were not welcomed by the barbers as of their fraternity, it was for the love of God and a work of charity to keep the unskilled out;¹⁰⁸ if plumbers looked with disfavor upon alien craftsmen,¹⁰⁹ it was for the usual reason that through evil persons knowing nothing of the mystery the town was badly served.¹¹⁰ If the number of apprentices was to be kept down, surely there was a limit to the number of helpers a master could oversee without slighting his work.¹¹¹ If one master was not to entice away another master's servant, it was because the unskilled underling might profess greater knowledge of the art than he actually possessed.¹¹² If serving men were forbidden to organize, it was to keep the control of the conditions of manufacture out of the hands of those less skilled in the science.¹¹³ If no work of hurers and cappers was to be fulfilled in mills, but only by the hands of men, the prohibition of machinery was to insure a high-class product.¹¹⁴ The usages which were claimed as of olden time might stop little short of a monopoly; yet the protection of the consumer was a value so unquestioned that it was a first aid whenever rationalization was necessary.

In all probability practice did not accord with the letter; but the regulation had its support in a scheme of law enforcement. Each trade had its overseers,¹¹⁵ substantial and honest and credi-

¹⁰⁷ 2 BURROUGH CUSTOMS, *supra* note 68, at 182. This statute of Berwick dates from 1249. A like provision in the Grimsby Charter (1259) is that handclasp contracts shall hold unless the merchandise for which hands were clasped are of worse quality than was agreed, and of this a reasonable estimate shall be made by men worthy of credit.

¹⁰⁸ MEMORIALS OF LONDON, *supra* note 31, at 393-4 (1376).

¹⁰⁹ *Ibid.* 321-3 (1365).

¹¹⁰ 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 93; 1 BROWN, BLAND, AND TAWNEY, *supra* note 98, at 143.

¹¹¹ MEMORIALS OF LONDON, *supra* note 31, at 513, 547, 564, 570 (1398-1409).

¹¹² *Ibid.* 322, 362, 514, 564, 570, 626 (1365-1416).

¹¹³ *Ibid.* 542-4 (1396); 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 42 (1364).

¹¹⁴ MEMORIALS OF LONDON, *supra* note 31, at 558-9 (1404).

¹¹⁵ An exception seems to have been the fullers, at least for a brief period of time. A petition in 1369 states that the quality of the work suffers because of the excessive demands of inspection. So the supervisors are relieved of their duties, and the buyer shall take the cloth at his own risk. *Ibid.* 340-41 (1369).

ble persons, whose office it was to inspect shops and wares.¹¹⁶ The scrutineers searched truly and well, as by oath they were bound to do, for deceits and defects; they presented the offending craftsmen and their handiwork before the Mayor and Alderman. Against the periodic inspection gildsmen were not to be rebellious or contumacious. The other officers of the town had like duties, particularly in the markets, and private complaints were also entertained. In the court of the liberty, charges were made, the offenders put themselves upon the country, juries were summoned, the accused were asked how they were to quit themselves, and sentences were imposed upon the guilty.

Almost enough causes are of record in London to make up a modest casebook. There is a constant procession of bakers who have broken the assize and are given rides on hurdles through the city.¹¹⁷ The miscreant who put a bushel of good oats at the mouth of the sack when the rest was of worse quality,¹¹⁸ and the wretch who sold forty-seven hides which were raw and false went to the pillory.¹¹⁹ The circulation of such deceptive wares as false bowstrings,¹²⁰ barrels wanting in their true measure by two gallons,¹²¹ cups bound with circlets of silver gilt,¹²² caps oiled with grease that was rank and putrid,¹²³ hats made out of stuff they should not contain,¹²⁴ worthless rings and fermails craftily disguised,¹²⁵ small bags filled with other merchandize than good powdered ginger,¹²⁶ and false counters of gold¹²⁷ was punished by pillory or stocks, and confiscation. A surgeon was found to lack the ultimate degree of skill in the treatment of disease,¹²⁸ and a faith healer, whose charm for fever and ailments was a leaf of parchment wrapped up in cloth of gold, was mounted on a horse and led through the city with trumpets and pipes, with a whetstone about his neck, and urinals hung about him fore and aft.¹²⁹ A number of bakers were haled into court for contriving holes in their counters, artfully concealed by ingenious trap-

¹¹⁶ BEVERLEY TOWN DOCUMENTS, *supra* note 75, at 45, 87, 101, 116, 127, 130; MEMORIALS OF LONDON, *supra* note 31, at 358-360, 438-42, 512-15, 540-542, 556-7 (1371-1403).

¹¹⁷ *Ibid.* 90, 119, 423 (1311-1373):

¹¹⁸ *Ibid.* 352-3 (1366).

¹¹⁹ *Ibid.* 420-1 (1378).

¹²⁰ *Ibid.* 486 (1385).

¹²¹ *Ibid.* 596-7 (1413).

¹²² *Ibid.* 363 (1372).

¹²³ *Ibid.* 529-30 (1391).

¹²⁴ *Ibid.* 91 (1311).

¹²⁵ *Ibid.* 337-8 (1367).

¹²⁶ *Ibid.* 536-7 (1394).

¹²⁷ *Ibid.* 418-19 (1378).

¹²⁸ *Ibid.* 273-4. (1354).

¹²⁹ *Ibid.* 464-6 (1382). It should be added that the court discovered that he could not read and was of an atheistical turn of mind.

doors, through which their customers' dough was stolen before their very eyes.¹³⁰ The makers knew their wares; their customers, who were inexpert, did not. The law was invoked lest there be deceit of many people having no knowledge of the same.¹³¹

It is idle to try to reduce this mass of litigation to modern legal terms. In spite of the monotonous words of complaints, the procedure was quite informal; the offenses, such as petty larceny, conscious deceit, and plain negligence are not clearly separated. If words must be used, the cases are criminal rather than civil; they belong to public administration rather than to private action. There must have been a great deal of patching up of bad bargains; the casual references to brawls following a bargain, the studied efforts to preserve peace between buyer and seller, the responsibility attaching to traders' marks, and the elaborate provisions for tracing deceitful wares to their origin all attest as much; an ordinance of the pelters that a buyer might have a good fur for a worthless one is in point.¹³² But, in the absence of rolls of private pleas, the scope and detail of the remedial system cannot be set down. The reports contain many instances of complaints by disappointed buyers determined to have the law on offenders, but they are of a semi-public character. There is a record of an action in trespass before the Mayor's court for the sale of a garland for more than it was worth; although it was successful, a public penalty was assessed; the seller had the punishment of the pillory and had to forswear the city for a year and a day.¹³³

The records attest the dominance of the idea of solidarity. The welfare of the collect is always given first position; the statutes forbade a going out to meet provisions on the way to the city; the good burgesses were to have equal chances to purchase in open market.¹³⁴ The custom of sharing in bargains according to their several estates still prevailed.¹³⁵ The devices in which greatest reliance was put were publicity and prevention. The deceitful maker and the dishonest vendor were paraded through the streets with their fraudulent wares, exposed in the stocks¹³⁶ with their false products burned beneath their feet, and

¹³⁰ *Ibid.* 162-5 (1327).

¹³¹ *Ibid.* 399-400 (1376).

¹³² *Ibid.* 328-330 (1365).

¹³³ *Ibid.* 133-4 (1320).

¹³⁴ THE LIBER ALBUS, quoted in 1 BESANT, *MEDIAEVAL LONDON* (1906), 190-1; THE MEMORIALS OF LONDON, *supra* note 31, at 255 (1350), 387, 406, 432, 436, 437 (1350-1379).

¹³⁵ 2 BOROUGH CUSTOMS, *supra* note 68, at lxxviii-lxxiii. In 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 24, 73, may be found examples of the custom relating to fish.

¹³⁶ An ordinance provides that pillory and tumbrel be kept of due strength in order that judgments might be carried out without danger to limb. 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 219.

denied the community of their trades and of the liberty; the maker and his ware were alike advertised to the town. The stream of goods which came to market was to be kept pure by stoppage at the source. In the prevailing legal theory it was not so much the buyer who was injured as the commune. The indictments habitually contain the word deceit and write the offense down as against the repute and honor of the craft which is not to be scandalized, the fair name of the worshipfull Towne, Godys Commaundement and holy Chyrche, all Goode Rewell and Conciencie, and especially against the good people. The cause of action always goes to trial in the name of the Commonalty.¹³⁷

V

It was out of such stuff of idea, custom, and statute that the national control of trade emerged. It was, like all things English, of slow and halting growth. Its coming, against the stubborn resistance of local usage, is early in evidence. The loser in a cause affecting merchandizing did not usually do so, but he might appeal to Westminster. A pretending officer of the Marshalsea, all complete with staff capped at both ends with horns, makes his appearance in the fourteenth century London market.¹³⁸ The Mayor and Aldermen pronounce solemn judgments upon offenders who have impersonated royal officials, marked casks of ale for the king's use, and departed in peace for a consideration.¹³⁹ The towns were constantly apprehensive over the prospect of His Majesty's encroachment upon their liberties. The worldly concern of the Tudors and the devine pretensions of the Stuarts made a reality of royal supervision.

The emerging system was compounded out of many overlapping institutions. The statute of apprentices, passed early in the reign of Elizabeth¹⁴⁰ was designed to set men to their trades and to insure to artisans the necessities of life.¹⁴¹ The Privy Council took action to keep the avarice of the sellers of provisions within bounds and to prevent the pinching of people of the poorer sort.¹⁴² A Proclamation assigned the punishment and reform of abuses among such crafts as the Millers, Butchers,

¹³⁷ 2 THE LITTLE RED BOOK OF BRISTOL, *supra* note 86, at 121, 181; BEVERLEY TOWN DOCUMENTS, *supra* note 75, at 39; THE MEMORIALS OF LONDON, *supra* note 134.

¹³⁸ THE MEMORIALS OF LONDON, *supra* note 31, at 531 (1393).

¹³⁹ *Ibid.*, 489, 536, 645 (1386-1417).

¹⁴⁰ 5 ELIZABETH c. 4 (1562).

¹⁴¹ For a penetrating analysis of the legislation, and its incidence upon industrial life see FURNISS, THE POSITION OF THE LABORER IN A SYSTEM OF NATIONALISM (1920).

¹⁴² 2 CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE (3d ed. 1903) 92-94.

Vinteners, Cooks, Bakers, Fishmongers, Chandlers, Grocers, Mercers, Weavers, Brokers, Tanners, Smiths, Glovers, Malsters and Woodmongers to the Clerkes of Our Market.¹⁴³ As fabrics came in which did not conform to the standards for broad-cloth of the realm, their supervision was entrusted to the recently created Alnager of the New Drapery.¹⁴⁴ In like manner, by royal office or patent, paternal oversight was extended to the trades of tin, lead, iron, silk, and coal.¹⁴⁵ The decadent guilds were replaced by liveried companies, chartered by the King, and were charged with His Majesty's office over vendible wares.¹⁴⁶ These provisions, which supplemented and to some extent encroached upon the regulations of the towns, filled in gaps in local law and smoothed out the grosser differences between place and place. However profitable monopoly and office might be to the trusted, the professed end was to extinguish fraudes, to curb lucre and gaine, to preserve the peace between buyer and seller, and to avoid the discredit of the Marchandizes of the Commonwealth of this Our Kingdome.¹⁴⁷

The Court of the Marshalsea, more notorious than well-understood, typifies a none too clean-cut control. As English usage goes a feudal office may be furbished up for a mercantile task.¹⁴⁸ The original duty of the Marshal and Steward of the King's Household was probably to procure the royal supplies which had to come up to royal specifications. To that end the office took on an inquisitorial character and became the nucleus of a court, whose authority was extended to the market from which His Majesty's purchases might come. A convenient fiction, neatly contrived by some ingenious lawyer, detached "The Court of the Verge of the Household of the Lord King at Southwark in the county of Surrey" from the real and substantial household of the same Lord King in residence at Whitehall.¹⁴⁹ A jurisdiction so general and inviting, once freed from commissariat duties, was pretentiously extended to all markets and fairs; for "where-soever the King might be in England," in his active or constructive presence, "there would his court and equipage be also."¹⁵⁰ The Marshalsea¹⁵¹ had some control, how much cannot be said for certain, over the clerks of the market. It bobs in and out of the records, supplementing and disputing other authorities.

¹⁴³ *Ibid.* 94-5.

¹⁴⁴ *Ibid.* 296-7.

¹⁴⁵ *Ibid.* 299-300.

¹⁴⁶ *Ibid.* 303-306.

¹⁴⁷ Quoted in *Ibid.* 299, note 3.

¹⁴⁸ SELDEN SOCIETY, 2 SELECT CASES ON THE LAW MERCHANT (edited by Hubert Hall, 1930) cix-cxvi.

¹⁴⁹ *Ibid.* cxi.

¹⁵⁰ *Ibid.* cix.

¹⁵¹ This is a corruption of Marshalsey.

The royal system, buttressed by charter, proclamation, and statute, extended to all markets. The searchers for the various trades performed under higher auspices an ancient duty;¹⁵² cloths had to be measured, sealed, and stamped with the marks of the trader and the official¹⁵³ before they could be sold.¹⁵⁴ The clerks of the market lodged their complaints and made inquiries by the oaths of twelve men good and true. A typical market court of the late sixteenth century finds against various persons because they bake brede under the syze, do brewe ther ale not wholesome for man's body, have no taster according to ther charge, sell bottles of hey not conteynyng wayghte, do sell thir ffyssh not well wateryd, do not sell a quart of the best ale for a halfpenny, and do tewe calvesskynnes.¹⁵⁵ These monotonous lines exhibit a jurisdiction and a spirit of justice like that which prevailed three centuries earlier.

The aims of social policy are never realized.¹⁵⁶ Even though there is no report from a great fact-finding commission, the short-comings of regulation are not hard to discover.¹⁵⁷ The desire of good and worthy men to escape the office of supervisor, the manifest deceits and petty tricks of trade revealed in the record, the realistic detail with which prayers for the correction of abuses are set down, all tell of practice which lags behind profession. In the woolen industry, which was regarded as the chief pillar of the prosperity of the nation, the alnagers neglected the excuson of their office, infynite abuses and deceits were permytted, and seals were allowed to be affixed before the cloth was officially measured.¹⁵⁸ In the seventeenth century there was general complaint of great Abuses, Frauds, and Deceits, in fact of "such a multiplicity of Abuses and Offenses practised against the known Laws as the Cure seems almost desperate."¹⁵⁹ The clerk was accused of carrying standards differing perceptibly from those of the Exchequer—if not to the honor, at least to the wealth

¹⁵² The provisions for inspection fell little short of a national inquisition. For a graphic account of inspection and search at an earlier time see SALZMANN, *ENGLISH INDUSTRIES IN THE MIDDLE AGES* (1913) 220-237.

¹⁵³ 2 CUNNINGHAM, *supra* note 142, at 296-7.

¹⁵⁴ A contemporary complaint of the neglect of their duties by the alnagers is to be found in TAWNEY AND POWER, *TUDOR ECONOMIC DOCUMENTS* (1924) 190-1.

¹⁵⁵ *Ibid.* 127. The roll is from the court of the clerk of the market at Norwich in 1564. See also presentments in the leet court of Southampton at about the same time in Section III of this article.

¹⁵⁶ The failure of the middle ages to attain its ideal has fittingly been called "the spotted actuality." 1 TAYLOR, *MEDIAEVAL MIND*, *supra* note 13.

¹⁵⁷ 2 CUNNINGHAM, *supra* note 142, at 201-5, 307-12 gives a detailed account of the failures in the regulatory system.

¹⁵⁸ 1 TAWNEY AND POWER, *supra* note 154, at 190 (1576).

¹⁵⁹ *The Humble Petition of William Smith*, quoted in 2 Cunningham, *supra* note 142, at 204-5.

of the realm.¹⁶⁰ There was evidence of an absence of the due and civil order which should be among moderate men in trading,¹⁶¹ and merchants did not without reservation obey the precept to avoid sin rather than loss.

But, whatever shortcomings practice might reveal, the ideal stood fast.¹⁶² The salvation of the soul had been replaced by the might of the kingdom; but business was still the instrument of man's necessities.¹⁶³ The sense of the age, concerned to secure the common profit, had no reputable place for a notion of *caveat emptor*.

VI

An adage was never fitted more neatly to the part than *caveat emptor*; it is, among many excellent examples, the ideal legal maxim. It is brief, concise, of meaning all compact. Its terms are too broad to be pent up within the narrow confines of rules of law; they are an easy focus for judicial thought, a principle to be invoked when the going is difficult, a guide to be followed amid the baffling uncertainties of litigation. The phrase seems to epitomise centuries of experience; it is written in the language of Rome, the great law-giver; it comes with the repute of the classics and with the prestige of authority.

No history has traced the expression back to its origin; a lexicographer's search could tell but part of the story. Its significance lies, not so much in the changing meaning of the words as in the developing market policy of which it is a graphic symbol. No Roman author whose works survive seems to have scrib-

¹⁶⁰ 2 THE LAW MERCHANT, *supra* note 148, at xlix-1.

¹⁶¹ Baxter, quoted in TAWNEY, RELIGION AND THE RISE OF MODERN CAPITALISM (1926) 220-221.

¹⁶² It is a bootless task to appraise the scheme of authoritative control. Its merits and defects cannot be considered as against an alternative scheme; the institutions of an age are limited by its ideology, and the prevailing ideology of the period had scant place for any scheme save that of a control from above. The present-day criticism for the most part is beside the point; it is put in terms of the failure which came from not leaving matters of price and quality to be determined by the operation of the laws of supply and demand in the market. It is based upon a comparison of the shortcomings of regulation and the ideal results which flow from the perfect operation of the competitive system. The studies of competition as it actually operates indicate quite an antithesis between promise and performance. See, *e.g.*, STOCKING, THE OIL INDUSTRY AND THE COMPETITIVE SYSTEM (1925); SOULE, THE USEFUL ART OF ECONOMICS (1929); and HAMILTON AND WRIGHT, THE CASE OF BITUMINOUS COAL (1925). In appraisals ideal should be contrasted with ideal, and reality with reality. Such a venture into judgment is beyond the limits of this study. The real question is whether the English people were better off under such a scheme of protection as they could devise than they would have been without it.

¹⁶³ In concluding his account of the regulation of trade and industry in Southampton in the sixteenth century Hearnshaw says, "The picture which

bled the two words down; yet the Latinity of the phrase is beyond doubt. *Emptor*, as the buyer, is genuine enough, and forms of *cavere*, as a verb of caution, are to be found as far back as Plautus.¹⁶⁴ The world of antiquity had its hazards, its writers were alive to dramatic situations, and as life broke or a story unfolded there was abundant opportunity to cry to actor or character to watch his step. In early days, when commerce and piracy had not been clearly distinguished, and an irregular trade was carried on with a potential enemy, the words may actually have been employed.¹⁶⁵ But if they were, they carried only a warning against a specific danger; and were probably followed, as usage has it, by a clause introduced by a *ne* setting forth the threatened danger. They did not embody custom or maxim, rule or philosophy.

Nor could the phrase easily have come into England by any reputable intellectual route. It is quite alien to the spirit of the civil law. In pastoral and agrarian times, it is true, the purchaser had scant protection; but sales were few and vendible wares just as scarce. The buyer was not consciously left to his own resources; it was rather that trade was a scant province as yet unsubdued to legal control;¹⁶⁶ as it increased in importance and in volume, it was made subject to the domain of law and order. Quite early the courts decreed that the seller must reveal latent defects in the slaves whom he offered in the market-place; the principle was extended, first to horses and cattle, and later to almost all vendible articles. In a society where the industrial system never outgrew a simple pattern and articles generally passed directly from their makers to their users, responsibility was thus imposed upon the party to the transaction who had the better chance to know the product. Where the marketing pro-

these mercantile entries as a whole impress upon the mind of the student is that of a semi-socialistic community in which every craftsman and every trader is to some extent a public official, working under license, enjoying monopoly, subject to supervision, regulated by authority in matters of quality, quantity, and price of goods, hours of labor, number of apprentices and journeymen, and almost every other particular of his occupation." LEET JURISDICTION IN ENGLAND, *supra* note 51, at 212.

¹⁶⁴ III THESAURUS LINGUAE LATINAE (1907) 630-644.

¹⁶⁵ A near parallel is to be found in the oft-quoted line: "*Timco Danaos et dona ferentes*"—VIRGIL, THE AENEID, Bk. II, 49. In primitive times trade began with an exchange of gifts. The commercial honesty of the Greeks was not above reproach and many of their neighbors would not have trusted the Danians even in a trade. Hence, the words "*dona ferentes*" may well have a technical significance.

¹⁶⁶ It is of note that the ideas of the later are read back into the usages of the earlier age. Thus a modern student states that the development of the Roman law of warranty began with *caveat emptor*. What he means is that, at a time when there was little trade and less appreciation of the need for protection, the buyer had at law no remedy for a defect in quality. MACINTOSH, THE ROMAN LAW OF SALES (1907) 278.

cess was complex enough to have a place for middlemen, liability still rested with the seller. The remedies for a defect in quality, allowing either an annulment of the contract or a reduction of the purchase price, constituted a buyer's code.¹⁶⁷ The regard of the law for the purchaser has led writers to try to crowd its complex meaning into the words *caveat venditor*.¹⁶⁸ The Justinian code is replete with references to *emptor*, and the verb *cavere* is by no means unknown to its titles.¹⁶⁹ But neither in sense nor in language is the formula *caveat emptor* approached.

Nor does the adage come into repute¹⁷⁰ by way of the law merchant. In England as early as the twelfth century traders had their own courts. The busy litigants had no time to await the trial of a jury¹⁷¹ or to abide the solemnities of the common law.¹⁷² They came with dusty feet and had presently to be away upon their business;¹⁷³ they demanded justice suited to the occasion; their pleas ought at the latest to be settled before the third tide.¹⁷⁴ The procedure, through which disputes were settled, had its conventions, but was quite simple and direct. A party complained; the other party denied tort and force all that should be denied; a good inquest was ordered made; the ordeal went forward with oath-helpers to the proper number. If the accused made his law sufficiently, he went quit and the accuser was in mercy by reason of his false claim; but if he failed, he

¹⁶⁷ BUCKLAND, A TEXT-BOOK OF ROMAN LAW (1921) 488-494.

¹⁶⁸ The expression *caveat venditor* does not belong to the Roman code; it is an invention of a modern scholarship, which has contrived an overneat distinction between the rules of the civil and the common law. The two doctrines are not antitheses. The buyer, who knows not the ware, must look out lest he purchase a worthless object and be found without a legal remedy; the seller, who is in a position to know, must be on his guard, for he will be called upon to make good deficiencies or defects in the ware. The use of the term *caveat venditor* is a conspicuous example of a moulding of ancient thought into a contemporary pattern.

¹⁶⁹ The forms of "*cavere*" are frequently used in the sense "to make sure" or "to give security." This leads a meticulous scholar to observe that "*sibi cavere* would carry something of the implication intended by the common law maxim." RADIN, THE LAWFUL PURSUIT OF GAIN (1931) 137, n. 10.

¹⁷⁰ The discussion in section II of this article indicates that it could not have made its English appearance by way of the canon law or ecclesiastical discipline.

¹⁷¹ 2 THE LAW MERCHANT, *supra* note 148, at Xi.

¹⁷² See section VII of this article.

¹⁷³ 1 THE LAW MERCHANT, *supra* note 58, at xxv. As late as 1724 Defoe wrote of Stonebridge Fair; "Here is a court of justice always open Here they (the magistrates of Cambridge) determine matters in a summary way, as is practiced in those we call pye-powder courts in other places, or as a court of conscience." 1 TOUR THROUGH GREAT BRITAIN (1748) 98.

¹⁷⁴ THE CUSTOMS OF NEWCASTLE-UPON-TYNE, STUBBS, SELECT CHARTERS (1913) 107-8.

was in default.¹⁷⁵ The issue was resolved, not by the law of the land, but according to the usages and customs of merchants.¹⁷⁶ This vague body of rules is declared to be "the law of Nature, called by some 'the Law Merchant,' which is law universal throughout the world."¹⁷⁷ The principles, so far as they stand out in relief, seem to come from over-seas and to be a distant off-shoot of the civil law. The standards imposed upon the seller are quite exacting.¹⁷⁸ The law states no more than what matters of controversy are to be made subject to inquiry; the result depends upon the goodness and the might of the swearing, aided by such direction as an experienced court could give to the ceremonial. Accordingly the subjects of the suits, rather than the judgments in the cases, is the matter of importance. In the words of the times, "a law is perilous."¹⁷⁹

The records are only records, and a scanty part is never the desired whole. Yet St. Ives was a large and not unusual fair, the items which come from its rolls are near-cases, and the sharp practices of which its court took account bear evidence to mercantile usage in the thirteenth and fourteenth centuries. A number of inquiries were made into the quality and performance of personal services; a smith undertook promptly to shoe a horse and dilly-dallied so that its owner lost its sale from the third to the ninth hour to his damage a half-mark;¹⁸⁰ a carpenter, who undertook to build a house, had to pay its owner to his damage 2 s. for putting alderwood and willow therein contrary to his covenant;¹⁸¹ and a certain John the son of John of Eltislely craved and was awarded judgment for 9d against a certain Roger Barber, who undertook to cure him of baldness, put his head in plaster, and afterwards withdrew from the vill.¹⁸² A number of entries record instances of ordinary business sharpness; Thomas the Canvasser, through his servant, sold canvas by a false ell in his booth;¹⁸³ Reginald Pickard confessed by his own mouth that he had sold as of the purest gold a ring of brass which

¹⁷⁵ For typical cases see 1 THE LAW MERCHANT, *supra* note 58, at 45, 65, 81.

¹⁷⁶ *Ibid.* 114; 2 THE LAW MERCHANT *supra* note 148, at cv.

¹⁷⁷ A judicial definition of the law merchant in 1473. It is to be found in Y. B. Pasc. 13 Edw. IV, f. 9, Pl. 5 (1473) (ed. Brook and Fitzherbert, 1680), quoted in 2 THE LAW MERCHANT, *supra* note 148, at lxxxv-lxxxvi.

¹⁷⁸ It is as yet not safe to hazard a conclusion on the relationship of the law merchant to the civil law. If an hypothesis which seems plausible is true, it limits the field of search for "the good old principle of *caveat emptor*."

¹⁷⁹ 1 THE LAW MERCHANT, *supra* note 58, at 21.

¹⁸⁰ *Ibid.* 22.

¹⁸¹ *Ibid.* 103-104.

¹⁸² *Ibid.* 36-37.

¹⁸³ THE MANORIAL COURTS, *supra* note 32, at 149. The record is of the fair of St. Ives for the year 1275.

he and a one-eyed man had found in the church of a Sunday, and had to repay the price and pledge his body for his trespass;¹⁸⁴ the servant of a certain Amelbergar had sold wine by a worthless pottle false and unsealed and had mixed in a cask Rhenish with white wine to defraud the merchants;¹⁸⁵ and William Scot and Agnes his wife complained that two cheeses pledged to be good and fit to eat were putrid, and the seller was at his law and made it insufficiently.¹⁸⁶

Among a mere tantalizing handful of cases four of primary importance are to be found. . . . Hamon of Barton complained of William Bishop that he unjustly detained and did not pay him for two barrels of salt haddock; the said William answered that the condition of the sale was that the fish should be suitable and not corrupt; that he found it to be corrupt and fetid; and that he refused to accept it, and wholly rejected it and remised it into the hands of the said Hamon. The case was apparently settled out of court; for afterwards they made concord, and William puts himself in mercy 12d.¹⁸⁷ John of Reading sold to Robert of Bedford two bales of licorice and warranted it to him as good and pure; the buyer complained that it was not so good and pure as the sample, and an inquest was made, whether the said licorice ought to be forfeited to the lord king or not according to merchant law and custom. Although the penalty to be assessed for such a breach of covenant is thus definitely set down, it is not of record how the case ended.¹⁸⁸ John of Honing showed to Roger of Stanton three kemps of good herring, and assured him that all the residue was similar; Roger gave him a God's penny in confirmation of the bargain;¹⁸⁹ afterwards the buyer discovered that the lot was mixed with sticklebacks and putrid herring; Roger was awarded 40d. damage and John was in mercy for 6d.¹⁹⁰ Lawrence Dyer bought of John of Grantham, an apothecary, and Bartholomew his servant, a bale of plum alum; he claimed that when the bale was emptied some days later clay and earth mixed with the alum were found contrary to the form of the covenant; John and Bartholomew

¹⁸⁴ *Ibid.* 139.

¹⁸⁵ 1 THE LAW MERCHANT, *supra* note 58, at 62.

¹⁸⁶ *Ibid.* 60-61.

¹⁸⁷ *Ibid.* 50.

¹⁸⁸ Whether the goods were to be burned, as often they were in the towns, or whether the king has a use for them, we are not told.

¹⁸⁹ The hand clasp and the God's penny are the formalities which seal the bargain. They are the mere vestiges of a ceremonial which was once as decorous as any known to the common law. 2 BOROUGH CUSTOMS, *supra* note 68, at lxxx. It is of note that even in the thirteenth century the court entertained cases growing out of covenant even though the terms had not been reduced to writing.

¹⁹⁰ 1 THE LAW MERCHANT, *supra* note 58, at 102-103.

answered that at the time the bale was delivered the alum was uniform with the sample, in so far as such mineral alum could or ought to be uniform; the inquest said that the alum was sufficiently uniform with the sample. So Lawrence took nothing by his plaint, but was in mercy 12d for his false claim, and had to leave as pledge a bale of alum.¹⁹¹ In the absence of evidence to the contrary, these cases may be taken to represent the law merchant. The buyer relies on the word of the seller, no special collocation of words is necessary to constitute warranty,¹⁹² an oral understanding is a binding contract, the merchandise must conform to sample, a confiscation of goods and damages to the wronged are alike penalties for unfair dealing.

A single one¹⁹³ out of fifty reported cases in the central courts turns directly upon the issue of the seller's responsibility for the quality of the ware; its lines throw so much light upon the law according to mercantile custom as to demand recitation in some detail. William of Dunstable had bought from Robert le Bal' of Winchester five score and three sacks of good merchantable wool, fifty-three sacks for eight marks, and fifty sacks for six marks. William caused eight sacks to be opened, four of the greater and four of the lesser price. William was well content, and Robert faithfully promised that the remaining wool sown up in the samples were like the wool opened.¹⁹⁴ William, attaching faith to the statements of Robert, took the wool away, and exposed it for sale in parts beyond the sea. There merchants who purchased it upon William's testimony, because he understood that it was true to sample, found fifty-three sacks to be vile and useless and wholly differing from his agreement, whereby William and his men stood in peril of death in the foreign parts. William made his complaint and assessed a loss in his goods and merchandises of a hundred pounds. The Lord King, evidently in his vicarious person, was unwilling to leave such great malice unpunished, if it should have been perpetrated. So he appointed two justices to inquire in the presence of lawful and discreet merchants and citizens of Winchester, by the oaths of good and lawful men, through whom the truth of the matter was best to be known. Robert came to the inquiry under protest, refused

¹⁹¹ *Ibid.* 105-6.

¹⁹² The word warranty as used in these cases is not an exclusive ceremonial term; it is used as the equivalent of representation, assurance, or pledge. In the cases discussed above the expressions in the original are *hoc ex condicione*, *warrantizavit*, *promisit*, and *sub tali plevina*. It seems evident that the exchange of words at the time of the sale was at best of secondary importance.

¹⁹³ 2 THE LAW MERCHANT, *supra* note 148, at 28-30. Pleas of Juries and Assizes at Romsey in the County of Southampton (1278).

¹⁹⁴ The words in the original text are "*et residuam lanam in sarpleris consutam similem lane aperte esse fideliter promisit.*"

to answer, and departed in contempt of the court. The jurors found the facts to be as set forth, said upon their oaths that the sale upon the assumption that the entire lot was alike and of the same clip as the sample was according to the law merchant, and awarded to William his price against Robert and in addition his losses as taxed by good and lawful citizens and merchants. This case, and the collection to which it belongs, attests a law merchant in which "credit, not distrust," is the basis of commercial dealings.¹⁹⁵

Accordingly, one must look elsewhere to discover the ancient adage. The apt maxim is not to be found within holy church¹⁹⁶ or the liberty of commune; it is unknown to the administrative courts of gild and town and fair; it is not to be fashioned out of such stuff as the civil law and the customs that were amongst merchants.¹⁹⁷ The quest leads from the highways to the byways of social life.¹⁹⁸ In early days the church had put its curse upon trade; it was evil, all evil, and the manner of its conduct did not matter.¹⁹⁹ One who trafficked was beyond its Christian fellowship. As it became respectable a petty and disorderly commerce grew up beyond the reach of the many arms of mediaeval control. Away from the marts of organized trade were to be found the wayfaring palmer with his relics and trinkets, the peripatetic peddler with gew-gaws and ornaments, strangers here today

¹⁹⁵ This is a characterization of the law merchant by one of its ablest students. SCRUTTON, *ELEMENTS OF MERCANTILE LAW* (1891) 23.

¹⁹⁶ The idea is to be found in the elementary formula for Christian marriage; the parties accept each other for better or for worse. In England from a time unknown until quite recently there has been a limited indulgence in the sale of wives. Even though the law has not accorded recognition, the bargains have usually stood. Whether the price was a mug of beer or a lusty sum in gold, it was understood that the buyer took his chance upon latent defects in the chattle. Kenny, *Wife-Selling in England* (1929) 45 L. Q. REV. 494.

¹⁹⁷ The author of the article CAVEAT EMPTOR in 3 *ENCYCLOPEDIA OF SOCIAL SCIENCES* 280 (1930) declares, "As maxim, custom, and rule *caveat emptor* is a product of the Middle Ages." At best the statement has authority, rather than evidence, to support it.

¹⁹⁸ A quotation from *Sandys, Instructions Touching the Bill for Free Trade*, in 2 CUNNINGHAM, *supra* note 142, at 287, is in point: "All free subjects" are entitled "to the free exercise of their industrie in those trades whereto they applie themselves and whereby they are to live. Merchandise being the chiefe and richest of all other, and of greater extent and importance than all the rest, it is against the naturall right and liberty of the Subjects of England to restrain it into the hands of some fewe." The specific complaint is, of course, against the grant of royal monopolies.

¹⁹⁹ If trade was sinful, there was no righteous way of engaging in it. A modern parallel is bootlegging. If the sale of alcoholic beverages is illegal, the law is not presumed to be mindful of the ways in which the business is conducted. A bill introduced in the legislature of a Southern state making it a misdemeanor for a vendor to sell short pints and quarts presents the issue graphically.

and there tomorrow, wayfaring men of no place and without the law.²⁰⁰ In such wares one had to trade at his peril; there was no authentic test for holy water and bones of the saints, for Venetian glass and spices of Araby. Nor could a standard have been used; before the latent became the obvious fault, the itinerant was far on his unknown way. There, too, was to be discovered the seller-by-trade, no good merchant of the realm, but a rogue anxious to be rid of stolen chattels, or horses from far away, or valuables from a ship which after all might not have been wrecked. There, too, was the horse-trader, the erratic properties of whose merchandise could not be reduced to a standard model; he was not expected to cry the uncertain defects of his steed or nag from the house-tops. Among such persons without rank or of mean estate a redress of wrongs was practically not to be had. It took time and the bitterness of experience to subdue the idea into compact language; but here it came to be understood that one's unconsidered bargain was his own tough luck.

How the trick of phrase was turned, and *caveat emptor* came into being we do not know. The wisdom seems to be the after-thought of the good man who has bargained, perhaps in a horse trade, once too often; the manner suggests the lawyer regretfully stating that the grievance seems to be without redress. It has happened often enough that tinkers and butchers and brewers have won the favor of kings and have then walked unabashed among the nobly born. Surely a *caveat emptor* may emerge from the folk-thought of the despised trades and stand without shame before judges as an ancient maxim of the common law.

VII .

At the end of the sixteenth century the common law was not yet the common law.²⁰¹ Its procedures still held the rigidity of the ordeal out of which it was contrived; it shared the domain of justice with courts of custom, the liberties of the towns, and special tribunals; it had hardly as yet brought within its jurisdiction the affairs of the common man.²⁰² Yet it has usually

²⁰⁰ AYDELOTTE, *ELIZABETHAN ROGUES AND VAGABONDS* (1913); CUTTS, *SCENES AND CHARACTERS OF THE MIDDLE AGES* (1885); JUSSERAND, *WAY-FARING LIFE IN THE MIDDLE AGES* (1884); JESSOP, *THE COMING OF THE FRIARS* (1889). The well-known incident of Mose and the spectacles, coming from a later period, is in point. GOLDSMITH, *THE VICAR OF WAKE-FIELD*.

²⁰¹ The term common law is used in a number of different senses. Here it is employed as a name for the law administered in the king's courts in contradistinction to the law of courts of custom, the law of the boroughs, and the law merchant.

²⁰² Goebel, *King's Law and Local Custom in Seventeenth Century New England* (1931) 31 COL. L. REV. 416.

been administered as if it were exclusive,²⁰³ and as if its current interpretation had always prevailed.²⁰⁴ It has, accordingly, rested its decrees upon reason, natural justice, and enlightened public policy,²⁰⁵ and has claimed for even its novelties the authority of established precedent.

The expression *caveat emptor*, in its upward climb, appears in print for the first time well along in the sixteenth century. The context is a legal discussion, and the reference, appropriately enough, is to horse trading. Fitzherbert wrote, "if he be tame and have ben rydden upon, then *caveat emptor*."²⁰⁶ In another passage the same writer cautions the buyer to make sure of the goodness of his bargain in horse-flesh while yet there is time,²⁰⁷ if the horse be sold without a warranty, it is "at the other's peril, for his eyes and his taste ought to be his judges" in that case. An ordinance of Lancaster, relating to the purchase of malt, ignored the distinction between obvious and latent defects and restated an old proverb, "let their eye be their chapman."²⁰⁸ At the beginning of the seventeenth century²⁰⁹ the expression appears to be quite well known.²¹⁰ Coke never hesitated to sum up a lucid discussion in a Latin line which seems to evade search, but on occasion a saying was at hand as neat as an invention of his own. In his treatises on the law he twice set down the maxim he helped to make famous. The almost unnoticed use occurs in the discussion of a statute of Elizabeth,²¹¹ contrived

²⁰³ "Equity is a roguish thing; for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is higher or narrower so is equity." Selden, quoted in Tudsbury, *Law Merchant and the Common Law*, (1918) 34 L. Q. REV. 392, 400.

²⁰⁴ Powicke, *Per Iudicium Parium Vel Per Legem Terrae*, MAGNA CHARTA COMMEMORATION ESSAYS (1917) 121.

²⁰⁵ *Norway Plains Co. v. Boston and Maine R.R.*, *supra* note 9, at 286.

²⁰⁶ FITZHERBERT, *BOKE OF HUSBANDRIE* (1534) § 118.

²⁰⁷ FITZHERBERT, *NAT. BREV.* (1534) 94 c. The reference is to an action upon the case at common law.

²⁰⁸ 2 *BOROUGH CUSTOMS* *supra* note 68, at 183. The date is 1562. "It was proverbial in France, '*qui n'ouvre pas yeux doit ouvrir la bourse*.'" *Ibid.* lxxxiii.

²⁰⁹ Compare the line: "To things of sale a seller's praise belongs." SHAKESPEARE, *LOVE'S LABORS LOST*, Act IV, Scene 3, l. 240.

²¹⁰ The word *caviat*, as a noun, was coming into use in the sixteenth century. It is, as a lay word, a-take-care, and as a legal term an injunction or prohibition. 2 *A NEW DICTIONARY ON HISTORICAL PRINCIPLES* (Oxford, 1893) at 203 lists from various sixteenth century writers. "A caveat to be ware of to moche confidence" (1557); "It pleased the goodness of God by giving the law to put in a caveat . . . for the tranquillitie of mankinde." (1577); "Fumbleth at the matter with a folis caveat" (1579); "Such caveats as I to the friendly can utter" (1583). A seventeenth century writer scribbled, "A caveat to you how you live" (1646).

²¹¹ Statute of 31 ELIZABETH, 12, concerning Sellers of Horses in Fairs and Markets (1589), in VI *STATUTES AT LARGE* (1763), 419. The statute provided that the sale be made in a place that is overt, that a credible

to lessen the temptation of horse-stealing by providing for sale in open market.²¹² The much quoted passage comes from a discussion of landlord and tenant and concerns warranty of land.²¹³ It makes reference to the further discussion of real property;²¹⁴ even as a parenthesis it can hardly have reference to the title or the quality of wares of trade. It runs, "Note that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, either in deed or in law; but the common law bindeth him not, for *caveat emptor*."

But even Coke cannot make an ancient maxim canonical; it is, accordingly, interesting to observe the unconventional way in which it broke into the law reports. A celebrated cause²¹⁵ concerned with the ravishment of a wealthy ward came along early in the seventeenth century. It had to do with a *fecme covert*, the value of a marriage, and other matters of the law of estates. In an inquiry into the just use of law in *odium spolitoris*, the learned judge had occasion to consider, and to put aside as irrelevant, a rule of law urged upon him by counsel. It reads, "*Caveat emptor, qui ignorari non debuit quod alienum jus emit*,"²¹⁶ and it comes with the authority of Second Westminster. The ancient statute has been accurately quoted except in two particulars.²¹⁷ The first is that *emit* is followed by the qualifying clause "*usque ad etatem warranti sui de warrantia habenda*." The second is that the word which precedes *emptor* is not *caveat* but *expectet*.²¹⁸ But the changes, due to imperfect memory or

person avouch the seller, that the price be entered in the toller's book, that a note in writing be given to the purchaser, that the true owner might redeem within six months for so much money as the purchaser paid, and that all accessories to a felonious sale be deprived and put from all benefit of clergy. The act, with amendments, is still in force.

²¹² COKE, THE SECOND PART OF THE INSTITUTES (1642) 714.

²¹³ Co. Litt. (1633) 102a; L. 2. C. 7 S. 145.

²¹⁴ *Ibid.* L. 3. C. 13.

²¹⁵ Moore v. Hussey, Hobart 93, 80 Eng. Rep. 243 (1601).

²¹⁶ *Ibid.* 99; 80 Eng. Rep., at 249.

²¹⁷ The statute of Westminster II, c. 40 (1295), in STATUTES AT LARGE, (edited by Owen Ruffhead 1763) 106. The citation given in Hobart, c. 14 is incorrect. The substitution of 14 for 40 seems to indicate that the confusion was of ear rather than of eye. The context seems to indicate that it was the attorney rather than the judge who made the substitution in verbs.

²¹⁸ It may perhaps be of interest to record the whole chapter and to note the neatness with which the lines were lifted from their context and the profit to meaning by the substitution of a single word: *Cum quis alienat jus uxoris sue concordatum est quod decetpro sceta mulicris vel ejus heredis non differatur post obitum viri per minorem etatem heredis qui*

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warrantizare debet sed Expectet QUI IGNORARI NON DEBUI QUOD ALIENUM JUS EMIT usque ad etatem warranti sui de warrantia sua habenda. The translation, given *ibid*, runs: Where any doth aliene the Right of his Wife, it is agreed, That from henceforth the suit of the Woman, or her

inexact reading, are very cleverly contrived. The omission of a condition and the conversion of a special injunction to wait into a general warning are quite purposive. The words form a universal maxim for future use as legal convenience demands.²¹⁰ Even today the sonorous line "*caveat emptor qui ignorari non debuit quod alienum jus emit*" survives in ponderous works of reference.²²⁰ Its plentitude is convincing, and it bears no lingering traces of the alien context of feudal law from which it has been deftly removed.

The cause of the unfortunate ward has been forgotten; only a sentence lives on. But a very different case, decided at about the same time, was destined to give the prestige of authority to the rising doctrine of *caveat emptor*. A suit for the recovery of the value of a worthless bezoar stone, which had been bought in all good faith, became in the fulness of time the foundation of the common law rule of warranty. The disappointed purchaser brought an action on the case against the seller for deceit. The King's Bench gave a judgment in his favor; but in the Exchequer, on appeal, all the barons save Anderson were of opinion that a warranty by the goldsmith and an allegation that he knew the jewel was not what it was affirmed to be were necessary to a cause of action. The judges added that the warranty must be made at the time of the sale. The dissenter regarded the act of selling the precious stone for what it was not as enough to establish deceit.²²¹ Thereupon a new writ was sued out; it was, with quaint propriety, set down that the seller, knowing it was not good, but a false and fictitious stone, asserted it to be good and sold it to the buyer who was ignorant of the goodness thereof. The attorneys for the purchaser urged that an action for deceit lay if the vendor affirmed more than was true of his wares; the opposing counsel plead the necessity for express warranty and invoked *caveat emptor*. As to whether the source of the deceit lay in the seller's conscious misrepresen-

Heir, after the Death of her Husband, shall not be delayed by the Nonage of the Heir that ought to warrantise, but let the Purchaser tarry, which ought not to have been ignorant that he bought the Right of another, until the age of his Warrantor to have his Warranty.

²¹⁹ It is of note that the mistake in citation has been corrected neither in the reprint by Chilton in 1724 nor in the English reports. The general reference works usually cite "Hobart 99" without correcting the citation or pointing out the inaccuracy of the quotation from Westminster II. The only exception among a goodly number at hand is BURRELL, A NEW LAW DICTIONARY AND GLOSSARY (1850) where citation and text are properly given.

²²⁰ The glib sentence, abstracted from its context, is easily lifted from book to book. A modern book of reference, which is not without its uses, sets it down in the form above in black type across a page. 11 C. J. 44. There it is cited from 1 U.C. Jur. OS 1931.

²²¹ Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (1603).

tation or in the credulity of the buyer, the court divided. It was, however, admitted by all that if *scicns le defcndant* were omitted, the plaintiff could not recover.²²² Although a casual reference in a later report²²³ records the buyer's victory, the result is left in doubt.

It is not easy to extract the law of that day from the uncertain record of the case. Accident contributed to meaning;²²⁴ the first action was reported and was given a place in the life history of the doctrine of warranty; the second action, which escaped the reports and was not published until long afterwards, contributed not even a corrective touch to the explanation. As a result a cause whose concern was the validity of a declaration was treated as if it disposed of the cause. The contemporary documents reveal no causes enough like it in kind to take away the uncertainty of its meaning. The cases from which support is drawn concern such unlike things as the sale of a tun of corrupt wine,²²⁵ the playing of the game of Five or Nine with false dice,²²⁶ the very profitable use of a counterfeit letter,²²⁷ the disposition of tithes by a vicar who was far from being established,²²⁸ and the reception of presents by a damsel who refused to go to the altar.²²⁹ The concept warranty presents its difficulties; it is, as used by common-law judges, a word from the technical vocabulary of real property, applied to the rather immobile chattels²³⁰ of an agrarian society, and likely to bring to the wares of trade the rigidities of the land law. From the contemporary reports one gets a picture of a learned bench, far more at home with solemn covenants, the leisurely resort to parchment, and the decorous use of seals than with the bustle of activity and the informal understandings which attend an expanding commerce. The text presents its difficulties; the only record which had a chance to make judicial history was not printed for a half century; in the stirring days of the Stuarts

²²² *Ibid.*; Note (1894) 9 HARVARD L. REV. 282.

²²³ The statement of counsel in *Southern v. How*, Cro. Jac. 468 (1618).

²²⁴ Even an incorrect date has made its contribution to the interpretation. An authority set the year down as 1625, and this has been copied without a check by a number of writers. The difference of twenty-two years is rather appreciable since 1606 is the date usually set down as the real beginning of the administration of the law merchant in the king's courts.

²²⁵ 1 Roll Ab. (1688) 90, pl. 1, 2. See also *Ibid.* 90, pl. 3.

²²⁶ *Harris v. Bowden*, Cro. Eliz. 90, 78 Eng. Rep. 348 (1587).

²²⁷ *Tracy v. Veal*, Cro. Jac. 223, 79 Eng. Rep. 194 (1610).

²²⁸ *Roswel v. Maughan*, Cro. Jac. 196, 79 Eng. Rep. 171 (1608).

²²⁹ This action was brought, not for deceit, but in *assumpsit*. *King v. Robinson*, Cro. Eliz. 79; 78 Eng. Rep. 339 (1587).

²³⁰ A horse may be defined, in terms of legal theory, as the detachable agrarian chattel through which the common-law concept of warranty, indigenous to real property, was carried over to the wares of commerce.

opinion was changing fast; and the reporters were not disposed to refrain when a touch here and there would give to their readers the true law. The printed report sets it down²³¹ that in the action on the case warranty²³² and *scienter*²³³ are necessary allegations; it is parlous to find in it more than a statement of standards to which an action in deceit, sounding in tort, must conform.

It is, however, the case recreated, rather than the case decided, which takes its place in history. The partial record of the cause of the bezoar stone stood in the annals almost in solitary detachment; it invited conversion into an ancient land-mark of the law by the technique of the interpreter's trade. The authoritarian common sense which was still unquestioned, the doings of courts of leet and borough, the usual resort of the trader to the law merchant, the lack of evidence in the contemporary rolls of more than an occasional concern by His Majesty's Justiciars with commercial litigation were overlooked. The decision of King's Bench, the dissent in the Exchequer Chamber, and the divided opinion when the case came on anew passed into oblivion. The formalities of procedure were stripped away, and there was to be discovered the substantive rule under which the buyer was to recover for an inferior ware. He had a cause of action if he had exacted an express warranty at the time of the

²³¹ For discussions of the case, see McClain, *Implied Warranties in Sales* (1893) 7 HARV. L. REV. 213; 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 68-69. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 378-380; LEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) 209-211.

²³² A dictum set down in *Chandelor v. Lopus*, *supra* note 221, at 4, is "the warranty ought to be made at the same time as the sale." The line is repeated in *Roswel v. Vaughan*, *supra* note 228, at 196, with the statement that "the affirmation was made upon the ninth of June, and the sale was 16th June after." There was an insistence that the proper form of declaration was "warrantizando vendidit" not "warrantizavit et vendidit." See also the later case *Mew v. Russell*, 2 Shower 284 (1682).

²³³ Although a writ in *assumpsit* was known, its use was limited. For a grievance of this kind an action in tort for deceit seems to have been a common law remedy too rarely employed, or reported, to be called usual. The whole matter bristles with engaging questions and with difficulties. A discussion of the emergence of the action for deceit out of trespass and of the relation of actions for deceit and in *assumpsit* is beyond the limits of this paper. The reader is referred to AMES, LECTURES ON LEGAL HISTORY (1913) 136ff, and to STREET, *op. cit. supra* note 231, at 173ff. The use of *assumpsit* in regard to the non-performance of undertakings by persons belonging to "the common callings" is discussed by AMES, *ibid.*, and by Atterburn, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411. The published material is scanty and interpretation is highly treacherous going. It seems to me that in early modern times the common callings were far from being the narrowly restricted category usually set down. We shall perhaps not be able to know the obligations attached to them or to discover the legal remedies usually employed in case of non-fulfillment without research into the records of the local courts.

sale from a seller who knew his representations to be false. An affirmation, no matter how many holy saints were invoked, fell short of a warranty; latent defects, however impervious to ordinary vision, were the purchaser's own lookout. When in time writs were accommodated more sharply to specific complaints, the "and" of the holding gave way to an "or", and the buyer had the alternative of a suit in assumpsit on express warranty or in deceit by proving a *scienter*. The exactions of a ceremonial were set down as an injunction to the buyer to look to himself for protection.²³⁴

The raw materials of a judicial doctrine of *caveat emptor* were scant enough. An excerpt or two from Fitzherbert or whoever wrote his books, a neat distinction between the civil and the common law pried from its context in Coke, a persuasive but doctored line of Latin lifted from a venerable document, the prescribed tests for the validity of a declaration in deceit, the dubious support of a handful of none too relevant cases,—and that was all. But the words were there, ready to bear the ideas of a later age; and interpretation, the great creator, was to prove equal to the occasion.

VIII

The anxious suitor, with or without his hundred pounds, left the court, and we hear of him no more. We read little, too, of the issue which his worthless jewel raised; for the reports from decade to decade are almost barren of resort to the courts to protect the integrity of mercantile sales.²³⁵ It is not until near the end of the eighteenth century that cases in point come along in sufficient volume to give meaning to general rules of law. But the late eighteenth century reveals another world than that of the Stuarts.

The first half of the seventeenth century ushered in a crisis which had long been in the making. A course of unintended and

²³⁴ "There can be no such thing as a warranty without an express agreement." 1 STREET, *op. cit. supra* note 231, at 379. "The view then prevailing" was "to the effect that an affirmation cannot amount to a warranty." *Ibid.* 381, n. 2. "The only importance of the decision today is, in any event, not the point decided but the language of the court which is enlightening as to the view taken at that time in regard to what constituted an express warranty."—WILLISTON, *THE LAW GOVERNING SALES OF GOODS* (1909) 247, n. 79.

²³⁵ WILLISTON, *op. cit. supra* note 234, at 247-248. The cases of *Cross v. Gardner*, 1 Shower 68 (1689), and *Medina v. Stoughton*, 1 Ld. Raym, 593 (1700), are concerned with sales by sellers who did not possess title. It is significant that, despite a plea in the first of a lack of *scienter* and in the second of an initial purchase in good faith, judgments were given against the sellers. It is of note in passing that quality of the ware is a matter far more alien to the established law than title to the chattel.

almost unperceived events brought confusion to the authoritarian system of control. In England the break with Rome had been no more than a formal separation; but a church, free from the Papacy, was not to withstand reformation; and protestantism, knowing not where to call a halt, multiplied sects and made the orthodoxy which all sought hard to discover. The Stuart kings, professing to rule by divine right, weakened the monarchy by trying to make it omnipotent; the state came to be a rival of a church which had fallen under its control. The conversion of an adventitious trade into established industries created markets, multiplied wares, and established commerce in regular and expanding channels. The goods were becoming too many, their uses too numerous, and their qualities too diverse to fit the stereotyped requirements which came intermittently from Westminster. The rise of traders into a powerful estate brought to common affairs a mercantile viewpoint quite at variance with a national ideal of ascetic origin. As the bourgeois came to be powerful they could not remain quietly tolerant of a studied supervision of their activities. They were not to be "over-thwarted by preachers and others that cannot skill of their dealings,"²³⁶ or by interfering busybodies dispatched from Whitehall.²³⁷ The men of business, great and small, found in the tolerant this-worldliness of Puritanism²³⁸ tenets much to their liking; in the Civil wars they furnished no small part of the support of the Parliamentary cause. The Christian courts of conscience, with their ecclesiastical discipline, were not proof against mercantile ways and social disorder and began their decline. The breakdown of the central government disorganized the system of market control which had come to be dependent upon national authority for power and supervision.²³⁹ Trade had to take the hazards of troublous times; but it enjoyed for the first time a rather large exemption from the solicitude of authority.²⁴⁰ In time a parliamentary system came to replace

²³⁶ DISCOURSE UPON USURY, *supra* note 27, at 64.

²³⁷ TAWNEY, *op. cit. supra* note 161, at 237.

²³⁸ 1 Weber, *Die protestantische Ethik und der Geist des Kapitalismus*, GESAMMELTE AUFSÄTZE SUR RELIGIONSSOZIOLOGIE (1920), assigns to Puritanism a role of importance in the creation of the political conditions and the ethical values out of which capitalism emerged. Baxter refers to "the merchants and middle sort of men that were Protestants." Quoted by Tawney, *op. cit. supra* note 161, at 203.

²³⁹ HASBACH, *DIE ENGLISHCHEN LAND ARBETIER* (1894) shows the incidence of the untoward disorder of the struggle between King and Parliament upon the integrity of the national scheme of regulation.

²⁴⁰ 2 CUNNINGHAM *supra* note 142, at 201-6, argues that with the decline of ecclesiastical discipline a greater burden was thrown upon the courts in which the common law was administered. His argument is that since there was no longer an agency powerful enough to enforce moral obligations, the only recourse was to plead legal obligations in courts of

the monarchical model; but an individualism, which was rather of fact than of idea and still too much in embryo to be clearly perceived, had been born.

As the eighteenth century wore on, an empirical was passing into a rational individualism. The pamphleteers had led the way,²⁴¹ the mercantile virtues were discovered, and the thinkers were busy in elaborating the crude notion of the goodness of every man's minding his own business into a great philosophical system.²⁴² Instead of each man to his station, as God hath appointed, each was to find for himself his own place in society. The appeal was to Nature and to Nature's God; the government became the villain and the individual the hero in the piece; each rational being could best pursue for himself his own true happiness. In penning a declaration of independence for the individual Adam Smith voiced the advanced thought of his day;²⁴³ his argument, in justification, that each person, in aiming only at his own advantage, "is led by an invisible hand to promote an end which is no part of his intention"²⁴⁴ won a growing approval. The age of natural law, of revolt against authority, of laissez-faire was emerging.

Nor had the legal system withstood the impact of shock. In a competitive struggle the common law courts had acquired a larger share of the business of justice. The local courts of custom lost their semi-independence, and the litigious business of traders

law. At the time, however, there were still legal agencies, other than common-law courts, and there is much evidence that the formalities of the King's justice did not immediately and easily accommodate themselves to the new need.

²⁴¹ A typical pamphlet is MANDEVILLE, *THE FABLE OF THE BEES* (1724). Its thesis is indicated by its sub-title, "or Private Vices, Publick Benefits." The particular vice, whose praise the muse is invoked to sing is "The root of Evil, Avarise," It has, if truth be told, done quite a lot of good in the world:

Thus Vice nurs'd Ingenuity,
Which joyn'd with Time and Industry,
Had carry'd Life's Conveniences,
Its real Pleasures, Comforts, Ease,
To such a Height, the very Poor
Liv'd better than the Rich before,
And nothing could be added more." — *Ibid.* 11.

A similar tribute to industry, to trade, and its freedom, is to be found in FRANKLIN, *POOR RICHARD'S ALMANAC*. An interesting discussion of the common-sense of mercantilism is to be found in the chapter on "*The Holy Economy*" in SOMBART, *THE QUINTESSANCE OF CAPITALISM*.

²⁴² An account of the beginnings of philosophical individualism in many domains of the mind is to be found in STEPHEN, *HISTORY OF ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY* (latest edition 1927).

²⁴³ A happy accident has put the publication of Adam Smith's *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, in the year of the American Declaration of Independence, 1776.

²⁴⁴ *Ibid.* bk. iv, ch. 2.

came before the ordinary tribunals. It is usual to date the administration of the law merchant by the King's courts from Coke and its incorporation into the common law from Mansfield.²⁴⁵ But neither in England nor in law does growth occur with such precision. Even before Coke became Chief Justice a trickle of commercial litigation flowed into the King's courts, and the court of piepowder was still to be found after Mansfield had left the bench.²⁴⁶ But if the central courts secured the business and collected the revenue, it was upon terms acceptable to men of business. The mercantile customs as well as the facts were referred to juries of merchants, and there was little law to be declared or to be set down in reports. It was usual not to apply the law merchant unless one of the parties was a genuine trader; but the courts showed at least a disposition to disregard this requirement²⁴⁷ and to allow subject-matter to be the determinant.²⁴⁸ Although he was not the first, Mansfield made a usage of consorting with merchants out of court and declaring their customs from the bench.²⁴⁹ Accordingly the closing decades of the eighteenth century are marked by the strain which attends the assimilation of mercantile custom²⁵⁰ into the body of the common law.

The picture which the reports present is of uncertainty and halting innovation. The usages of the law merchant were not of a kind with the solemnities of common law procedure; judges whose training had been in the ceremonial of the more reputable discipline moved clumsily from tort to contract; they were prone to meet novel cases with the older concepts. A special form of *assumpsit*, of which the disappointed buyer might avail himself, had quietly come into being. It may have developed from an older writ,²⁵¹ or it may have been an invention to handle causes formerly tried under the law merchant;²⁵² its use, as an alterna-

²⁴⁵ THE ELEMENTS OF MERCANTILE LAW, *supra* note 195, at 6-21.

²⁴⁶ THE LAW MERCHANT, I, xix, records an instance of a session of a court of pie powder as late as 1898.

²⁴⁷ It has been my privilege to consult an unpublished manuscript by Charles Aikin of the University of California entitled "The Law Merchant and the Law Making Process." On pp. 152-3, Mr. Aikin discusses the extension of the law merchant to the transactions of parties who were not merchants.

²⁴⁸ "It being objected that in this case there was no averment of the defendant's being a merchant, it was answered by the Court that the drawing the bill was a sufficient merchandizing and negotiating to this purpose." *Hodges v. Steward*, 1 Salk. 125 (1691).

²⁴⁹ 2 CAMBELL, LIVES OF THE CHIEF JUSTICES (1873).

²⁵⁰ For evidence of development in a very interesting legal domain see Vance, *The Early History of Insurance Law*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 98.

²⁵¹ WILLISTON, *supra* note 234, at 247-9.

²⁵² The form of "*assumpsit*" probably comes from the common law. But

tive to an action in deceit, was imperfectly understood, and it was not until after the turn of the century that the separate actions were given their distinctive provinces.²⁵³ Thus *caveat emptor*, whatever it was, was subject to the exceptions that the seller must make good a warranty and was liable for fraud. But such words are among the most catholic of concepts, and an excursion into the annals of the law is necessary to make it clear whether it was easy for the purchaser to prove his case or whether the vendor was allowed a generous indulgence in language.

An authoritative statement is not easy to discover. *Caveat emptor* appears frequently in the records, voiced more often by counsel than set down by court. In the treatises of the period, which bear evidence of the great transition through which the law was passing, the status of the good old rule for the encouragement of trade is far from established. The Great Commentator, whose opus came just in time to help make the law, mentions formalities of ancient writs, and then recites almost the exact language of the civil law; he uses the words "warrants" and "represents" as synonyms; excuses the seller "against defects that are plainly and obviously the object of one's senses"; holds that "an artifice" to disguise the goods is "equivalent to an express warranty," and writes down liability where the shortcoming cannot be discovered by "sight" and is a matter of "skill" or "collateral proof."²⁵⁴ The words are very nearly those of Thomas Aquinas; the standards may well be those which his friend Mansfield, whose weakness for the Roman code was well known, was bringing into the law.²⁵⁵ A quarter of a century later

it is not unlikely that the action is a borrowing from the law merchant. A suit in covenant, supported by a "tally" or an oral agreement, was entertained in courts of pie powder as early as the thirteenth century. Quite a bit of testimony supports an inference of importation into the common law, but I have been able to discover no direct evidence.

²⁵³ In *Williamson v. Allison*, 2 East 446; 102 Eng. Rep. 439 (1802), Lord Ellenborough declared, "the more modern practice of declaring in *assumpsit* in these cases has not prevailed generally above forty years." But, in *Stuart v. Wilkins*, 1 Doug. 19, 99 Eng. Rep. 15 (1778) Mr. Justice Buller said, "this mode has been in use ever since I have known anything of practice, and my brother Ashurst remembers it much longer."

²⁵⁴ BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Am. ed. 1772) 165-66. The text remains unaltered in the last edition revised by the author.

²⁵⁵ There is, of course, no necessary antithesis between the freedom of trade from governmental interference and the insistence upon fair dealings in trade by the courts. Where trade has cut its channels the mercantile class is likely to insist upon both. In the hurly-burly which marks the passage of an agrarian into an industrial society a legislative *laissez-faire* is likely to be accompanied by a judicial *caveat emptor*. The intellectual association of the maintenance of free contract with the reduc-

another Vinerian Professor remembers *caveat emptor* as a "very unconscientious maxim," which seems "to have prevailed"; his allusion is probably to the inflexibility of the common law actions. He refers to it as, happily, "now exploded,"²⁵⁶ and sets down the seller's "skill in the way of his business" and his acquaintance with "the value of his wares" as accepted presumptions.²⁵⁷ In spite of the "difficulty in applying general rules to particular cases" he asserts that "a man is not supposed in the contract for sale, to part with his money, without expecting an adequate compensation," and holds that "a fair price implies a warranty."²⁵⁸ On the contrary a writer on Equity, in a discussion of "mistake," which touches alike upon lands and chattels and wares, sets it down for the common law, that the general rule is *caveat emptor* and that the buyer has a legal remedy only because of "express warranty," deceit "to disguise defects," and "provisions unwholesome at the time of delivery."²⁵⁹

The appeal from treatise to case, from principle to holding, reveals the same uncertain place of *caveat emptor* in the private law. The cases of record are a mere fragment of a large volume of litigation which is beyond access. The reports are hard going; the verbalisms of the common law are used to describe the most unlike things; they show scant regard for their ancient usage, and blur the line between the litigious affairs of a landed gentry and those of an estate of business; the incidental matter, the record of judicial hear-say, the casual references to undated and unrecorded cases of long age give to them something of the quality of the year-books. In their pages²⁶⁰ warranty, probably due to the taint of commercial litigation, has lost something of its post-feudal stiffness; deceit is less of an ordeal for one who undertakes its proof. . . . A seller who undertook and faithfully

tion of contractual protection to a minimum belongs rather to judges than to men of business.

²⁵⁶ 2 WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND (1793) 415-6.

²⁵⁷ 3 *ibid.* 199.

²⁵⁸ 2 *ibid.* 415.

²⁵⁹ 1 FONBLANQUE, A TREATISE OF EQUITY (1793) 109-10, 373-4.

²⁶⁰ In addition to the cases mentioned here, a number of others should be consulted, not so much because they are in point as because of their repeated citation in later judicial discussions of *caveat emptor*. In *Springwell v. Allen*, Aleyn 91, 82 Eng. Rep. 931 (1648), the buyer could not recover, because he could not prove that the seller knew the horse was not his own. In *Paget v. Wilkinson*, 102 Eng. Rep. 440, note (a) by the editor, it is reported, "unless the vendor" of lottery tickets "knew them to be the property of another or warranted them," neither an action on the case nor *assumpsit* would lie. In *Bree v. Holbech* 2 Doug. 654, 99 Eng. Rep. 415 (1781), it was held that the assignee could not "recover back the mortgage money," although he did not discover for six years that the mortgage was a forgery.

promised that a mare was sound, contriving and fraudulently intending to injure the buyer, was held to account because of the latent defect of windgalls.²⁶¹ The purchaser of two pictures which turned out to have been painted by the wrong artist was left without redress; it was a near-antique and the name of the painter set down in the catalogue represented no more than the opinion of the dealer.²⁶² The buyer of twenty-four bottles of claret which proved to be unfit for export was not compelled to allege *scienter* against the seller and recovered upon a warranty.²⁶³ . . . A price had been paid for a bar of metal, calculated upon the basis of an assay made by an expert. The judges professed a high regard for the abstract rule of *caveat emptor*, but found that neither party had exercised his own judgment, and allowed the sale to be rescinded.²⁶⁴ . . . An article, bought and delivered, revealed so much of a taint that it did not answer the character of prime singed bacon; the trial judge held that the contract amounted to a warranty, rejected a custom of the trade that a defect must be reported before a certain time, and upheld a judgment for the buyer.²⁶⁵ . . . An advertisement offered for sale a copper-fastened vessel which was to be taken with all faults, without allowance for any defects whatsoever; the purchaser, who had full opportunity to examine, later discovered it to be only partially copper-fastened; but, inasmuch as the meaning of the advertisement was that the seller would not be responsible for any faults which a copper-fastened vessel might have, the buyer was allowed his recovery.²⁶⁶

Each of these cases presents its own testimony as to the state of the law in a critical period. But the famous hops case, which came with the beginning of the new century, is so illuminating as to deserve its separate paragraph. A cargo consisting of five pockets of hops was sold by sample. The sample was good, but one after another the pockets began to rot and proved worthless. It was discovered that the fault lay, not with the seller

²⁶¹ In *assumpsit*. *Stuart v. Wilkins*, *supra* note 253.

²⁶² The action was for debt. *Jendwine v. Slade*, 1 Esp. 572, (1797).

²⁶³ An action on the case in tort for a breach of warranty. *Williamson v. Allison*, *supra* note 253. To the same effect see *Denison v. Ralphson*, 1 Vent. 365, 86 Eng. Rep. 235 (1682). In *Dowding v. Mortimer* 2 East 449, 102 Eng. Rep. 440 (1798), note (a) 3 by the editor, the declaration states "that the plaintiff . . . bargained with the defendant to buy of him a certain musket as and for a sound and perfect musket" and the defendant sold it "knowing the said musket to be unsound, broken, and imperfect." It is stated, *Williamson v. Allison*, *supra* note 253, at 449-50, that Lord Kenyon was of opinion "that the *scienter* was necessary to be proved."

²⁶⁴ *Assumpsit*. *Cox v. Prentice*. 3 M. & S. 344; 105 Eng. Rep. 641 (1815).

²⁶⁵ Action upon a sale note. *Yates v. Pym*, 6 Taunt 446, 128 Eng. Rep. 1107 (1816).

²⁶⁶ Case for the breach of a warranty. *Shepherd v. Kain* 5 B. & A. 240, 106 Eng. Rep. 1180 (1821).

who was ignorant of the latent defect, but with the grower who had watered the grain to enhance his price. An attempt of the buyer to collect from the perpetrator of the fraud failed; a suit was then brought against the seller, and the issue became which of the two innocent parties should bear the loss. The attorneys for the plaintiff plead an implied warranty, insisted that great inconvenience would attend the reduction of every future contingency to formal understanding, and relied upon the common faith and the usages of trade, which is bottomed in confidence. The barristers who represented the defence plead a lack of express warranty and an absence of deceit, and claimed the rule of *caveat emptor*. The bench insisted that the buyer had had his opportunity to inspect; and that if he had doubted, he might have insisted upon a formal warranty or have refused to purchase. The judge who at the trial had decided for the plaintiff recanted; upon further consideration he was persuaded that his rule could not apply to other cases, namely horses. Ellenborough, whose great passion was not for Mansfield's contributions to law, refrained from participation because he had been concerned in the cause, but could not restrain an expression of his entire concurrence in the judgment.²⁶⁷ Here is to be found customs of merchants and law of the land, concepts of the common law and the usages of trade, ancient rules and echoes from Blackstone and Wooddeson. Through the eleven pages of record all the winds of doctrine blow. If the sum of it all seems inconclusive, it bristles with potential meaning. It is impossible for the reader of the several opinions to escape the conclusion that the innocence of the dealer, who was a party distinct from the fraudulent grower, was the dominant consideration with the bench. Yet the hops case came to be a mighty support to judicial *caveat emptor* second in importance only to the judgment in the cause of the bezoar stone.

But, however dubious its status, individualism was to have its triumph; for even legal rules are not proof against the commonsense of the judges who must employ them. The courts of King's Bench and of Common Pleas never quite lost sight of the actualities of commerce; the Court of the Exchequer proved much the more willing to leave business to its own devices. . . . A ship, at the moment stranded upon a rock in the Gulf of St. Lawrence, was disposed of by sale in London. There was no proof that the seller knew of the mishap, and the question was whether a

²⁶⁷ In *assumpsit*. *Parkinson v. Lee* 2 East 314, 102 Eng. Rep. 389 (1802). An interesting side-light upon the scarcity of published cases is the reliance of counsel for plaintiff upon *Stuart v. Wilkins*, *supra* note 253, and the reference to it by one of the judges as "the case in Douglas." It is of note that whereas that case decided that the buyer might sue in *assumpsit* upon a warranty, it is referred to here as holding that an "express warranty" is essential to the success of the action.

ship, although on shore, with the possibility though not the probability of being got off, was still a ship. The court admitted that the vessel was not a ship under the law of insurance and probably was not a ship for so secular a purpose as sailing. But, as a subject of contract, it had not ceased to answer to the description and still bore the character of a ship, even though damaged, unseaworthy, and incapable of being beneficially employed.²⁶⁸ A brewer ordered a patent smoke-consuming furnace to be installed in his establishment. Its performance failed to bear testimony to the appropriateness of the name; but the court, as yet unschooled in functional jurisprudence, held that the seller had performed his part of the contract by delivering a defined and well-known machine.²⁶⁹ A cargo of cotton had been purchased by sample, and nearly one-third of the bales turned out to be falsely packed; the outside layers, from which alone the sample could be drawn, were good, but the interiors were bad. The court noted that the seller was a dealer, discovered that the representation was not false to the party making it, refused to take notice of the customs of the trade, and held that the rule of *caveat emptor* applied.²⁷⁰ The refusal of protection was extended even to the sale of provisions;²⁷¹ yet a strange twist of circumstance and two causes were necessary to turn the trick. A farmer purchased the carcas of a pig from a butcher, but having business to do left it in the vendor's custody. A second farmer came along, took a fancy to the same piece of meat, awaited the return of its owner, and purchased it of him. Although eyes had been deceived and the flesh was corrupt, one farmer could not recover from another who had not been dealing as a common trader.²⁷² But a rule which applied to a farmer and a private sale might, with the help of common sense and a little ingenious straining, be made to govern a butcher and a public market; so a later court held that a vendor, who had no reason to suspect the unfitness of his meat, could not be held for an implied warranty.²⁷³ Cases such as these can, with little loss of color, be recited at length.²⁷⁴

But, if a more compelling authority is demanded, it is to be had from the highest court of the realm. In a famous cause,²⁷⁵ which bears a twentieth century date, the House of Lords trans-

²⁶⁸ Barr v. Gibson, 3 M. & W. 389 (1838).

²⁶⁹ Chanter v. Hopkins, 4 M. & W. 399 (1838).

²⁷⁰ Ormrod v. Huth, 14 W. & W. 651 (1845).

²⁷¹ Roswell v. Vaughn, *supra* note 238.

²⁷² Burnby v. Bollett, 16 M. & W. 644 (1847).

²⁷³ Emmeston v. Mathews, 7 H. & N. 585 (1862).

²⁷⁴ It is of note that in these later cases, American writers, especially Story and Kent are quoted and American cases cited by counsel for defendants. The seller's law in the making receives contributions from across the water.

²⁷⁵ Heilbut, Symons and Co. v. Buckleton, [1913] A.C. 30.

lated the trust reposed by an investor in an underwriter into credulity and denied recovery. The Lord Chancellor took his stand upon general principles, invoked time-honored decisions, and lamented the tendency disclosed even in the Law Reports, to slip from one legal conception to another which is quite different.²⁷⁶ He uses the terms *assumpsit* and *case*, but pleads for a return to the clear-cut distinction²⁷⁷ between two legal actions set down with such precision in the judgment in the case of the bezel stone.²⁷⁸

As the law is, so has it always been. The buyer who at the time of the sale has failed to exact positive assurances against future contingencies deserves to take the consequences of his slothfulness.

IX

We must, however, turn from England to America to witness the real triumph of *caveat emptor*. In the new republic the tradition of authority did not linger long after the war for independence, the intellectual individualism was reinforced by the spirit of the frontier, an emerging industrial system was not to be shackled by formal control, and the courts were quite loath to take up the shock of business friction. The common law, with rule and precept, had been accepted; the lines of precedents were useful to judges who had little first-hand acquaintance with the society whence they came; their scanty text was to be read in the light of reason and of sense.

The early decisions in New York present the norm of doctrine

²⁷⁶ In *Medina v. Stoughton*, *supra* note 235, heard before Holt, C. J., it was held that, "where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty." In *Pasley v. Freeman*, 3 B & E 51, 57, (1789), Holt, C. J., is quoted, "that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended." Lord Haldane, *supra*, note 275, at 38, sets it down, "that an affirmation can only be a warranty provided it appear on evidence to have been so intended." Holt sat in the case, but the original statement is not imputed to him by the reporter; the original and the quoted statements have reference to different matters. But it is more significant that Holt was attempting to extend protection by enlarging a concept, and Haldane invokes his authority to refuse protection by narrowing it. The topic, "The Utility of the Word 'Only' in Law" invites a most engaging essay, which might, among other things, contain at least a paragraph upon "the tendency . . . to slip from one legal conception to another which is quite different."

²⁷⁷ The passage, *ibid.* 38, is an excellent example of the sincere and uncritical way in which current judicial meanings are read back into ancient terms.

²⁷⁸ "That good old doctrine for the encouragement of trade, known, as *caveat emptor*, has received no such support for many years." Williston, *Representation and Warranty in Sales* (1913) 27 HARV. L. REV. 1, 13.

which came to prevail. They differ from the contemporary run of judicial utterance only in their more studied workmanship. The leading case is a bare two years later than the judgment of King's Bench in the matter of the hops; its concern is a sale, without a formal warranty, of peachum wood for braziletto. The plaintiff, though a servant, and the defendant, who was the consignee, alike had opportunity to examine the cargo, and neither discovered it to be worthless. The court wasted few words on the facts, recited appropriately the right decisions, found neither express warranty nor conscious deceit, and dismissed the suit with a *caveat emptor*. . . .²⁷⁹ A cargo of kelp, consigned by merchants abroad to their factors in this country, was sold at auction as barilla. The products differ materially in alkali content and in their usefulness in the manufacture of soap; they can be distinguished only by scientific analysis. The court insisted that the description of the article as barilla was an opinion and not a warranty, and that the buyer exercised his judgment on it, and bought it at his own risk. . . .²⁸⁰ A manufacturer of starch purchased of a commission merchant some three hundred barrels of flour for which he paid a fair price; the flour, milled from grown wheat, turned out to be useless for his purposes or even for conversion into ordinary bread. The court held that the flour was merchantable since it was fit for some purposes, insisted that the purchaser had failed to protect himself, and laid it down that his judgment was his only warrantor. . . .²⁸¹ There were, even in the early nineteenth century, decisions to the contrary;²⁸² but this typical sequence indicates the judicial disposition not to encourage multiplicity of actions.

²⁷⁹ *Seixas and Seixas v. Woods*, 2 Caine R. 48 (N. Y. 1804). Kent was a member of the court and wrote a concurring opinion. It is of interest that in many of the early cases, as here, there was a dissent.

²⁸⁰ *Sweet v. Cilgage*, 20 Johns. 190 (N. Y. 1822).

²⁸¹ *Wright v. Hart*, 18 Wend 449 (N. Y. 1837). The state of opinion can best be described as divided. The vote of the court for the correction of errors was 15 to 9. For the decision of the supreme court, which reversed the trial court, and was sustained by the court of errors, see *Hart v. Wright*, 17 Wend. 267 (N. Y. 1837).

²⁸² In a case involving the sale of paint by sample, the Supreme Court of Pennsylvania found that "a sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they are described" and allowed damages. *Borrekins v. Bevan*, 3 Raule 23 (Pa. 1831). The case is interesting because Mr. Chief Justice Gibson dissented in a plea for clear-cut categories and hard-headed law. The dissenting view proved to be the more dominant; in fact, as late as 1909, Williston wrote that "Pennsylvania alone of the United States seems to have retained" the older notions about express warranty. *THE LAW GOVERNING THE SALE OF GOODS*, *supra* note 234, at 253-4. See also *Emerson v. Brigham*, 10 Mass. 197 (1813).

The tomes of American law are full of like judgments; but far more important than holdings are the prevailing ideas which narrowed or broadened concepts and drove arguments to their conclusions. The case system had not yet come to reduce the self-revelations of judicial opinion to mere dicta. The men of the age had a firm faith in first principles, and law was not to escape the creed of fundamentalism. The general values which make rules do their bidding were set down in leading cases and in solemn treatises, and were universally regarded as important. To Thompson the doctrine of *caveat emptor* was best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts."²⁸³ Cowan regarded the rigid definitions of warranty and of fraud as necessary to "avoid at least a pilgrimage of litigation, if not a total subversion of the common law rule."²⁸⁴ Tracy feared "extending each case a little beyond the rule of the case immediately preceding it, instead of measuring it by the original standard principle."²⁸⁵ Richardson saw as a threat the endowment of the courts with "a species of eminent domain to make or break contracts."²⁸⁶ Gibson found a departure from the strict rule to be contrary to the usages of trade; "a chapman praises his own commodity with no other view than to enhance its value in the eyes of his customers, who in turn deprecates it with a view to cheapen it," and yet for all the verbal to-do it never entered the head of either that he acted "on anyone's judgment but his own."²⁸⁷ They were one and all opposed to the broad discretions and the nice discriminations which seemed to attend the loose and litigious principle of the civil law.

The views of judges in state courts won the approval of unquestioned legal authority. Kent, in his commentaries, shares Cicero's regret that the principles of the higher ethics are "too austere in their texture and too sublime in speculation for actual use," admits that human laws "are not so perfect as the dictates of conscience" and that "the sphere of morality is more enlarged than the limits of civil jurisdiction," and defends the *caveat emptor* which "very reasonably requires the purchaser to attend, when he makes his contract, to the quality of the article he buys."²⁸⁸ Story finds that in spite of all that may be said against it the old rule "is now too firmly established to be open

²⁸³ Seixas and Seixas v. Woods, *supra* note 279, at 54.

²⁸⁴ Hart v. Wright, *supra* note 281, at 275.

²⁸⁵ Wright v. Hart, *supra* note 281, at 461.

²⁸⁶ Harrington v. The Commissioners of Road of Newberry District, 2 McCord 400 (S. C. 1823).

²⁸⁷ Borrekens v. Bevan, *supra* note 282, at 46-7.

²⁸⁸ 2 KENT, COMMENTARIES ON AMERICAN LAW (4th ed. 1840) 490, 491, 478.

to legal controversy.”²⁸⁹ Mr. Justice Davis, speaking for the United States Supreme Court,²⁹⁰ declared *caveat emptor* to be of “such universal acceptance” that, with a single exception, “the courts of all the States in the union, where the common law prevails, sanction it.” The proper office of usages of trade, as they exist in various localities, is to help to make clear “the meaning and the intentions of the parties;” but they are never, directly or by implication, to be allowed to replace the natural terms of the contract which impose upon the buyer “the risk of purchase” and relieve the seller “from liability for latent defects.” If *caveat emptor* were to yield to mercantile custom, “the whole doctrine” would be “frittered away.”²⁹¹ The ancient maxim²⁹² met the needs alike of trade and of justice.

A doctrine so acceptable was destined to linger long in the pages of the law reports. It finds pithy expression in a text from Gibson, whom many persons of discernment placed above even the great Marshall himself; “the naked averment of a fact is neither a warranty itself nor evidence of it.”²⁹³ The power of the creed of judicial *laissez-faire* was in evidence in the early years of the present century. The statement that a mare which had lapsed from the good estate of health was all right,²⁹⁴ that swine which rather incontinently succumbed to disease were sound,²⁹⁵ and that a hay stacker, which was certainly not the world’s best, would do its work more economically than any other machine²⁹⁶ were more than representations, but somewhat less than warranties A letter “to confirm” the sale of “No. 3 and No. 2 wheat,” was not a legal assurance that the grain was of the specified grades when the buyer had had his opportunity to inspect.²⁹⁷ A sample, which was good, served well enough to effect a sale of eggs, but did not relieve the buyer from paying a full price for a mouldy lot²⁹⁸ An “express understanding” that a radio would give satisfactory results allowed the court to invoke judicial notice and find an excuse in the current imper-

²⁸⁹ STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (1st ed. 1836) 221.

²⁹⁰ *Barnard v. Kellogg*, 77 U. S. 383, 388 (1870).

²⁹¹ *Ibid.* 394.

²⁹² An English writer of the age, not without his influence, focuses upon the ancient adage eleven closely-packed pages of law. BROOM, A SELECTION OF LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED (ed. of 1845). The motto on the title page, a quotation from Sir James Mackintosh, is significant: “Maxims are the condensed Good Sense of Nations.”

²⁹³ *McFarland v. Newman*, 9 Watts 55 (Pa. 1839).

²⁹⁴ *Walker v. Kirk*, 72 Pa. Super. Ct. 534, 536 (1919).

²⁹⁵ *Van Horn v. Stautz*, 297 Ill. 530, 540, 131 N. E. 153 (1921).

²⁹⁶ *Carver-Shadbolt Co. v. Loch*, 87 Wash., 453, 151 Pac. 787 (1915).

²⁹⁷ *St. Anthony and Dakota Elevator Co. v. Princeton Rolling Mill Co.* 104 Minn. 401, 116 N. W. 935 (1908).

²⁹⁸ *Cudahy Packing Co. v. Narzisenfeld*, 3 Fed. (2d) 567 (C. C. A. 2d, 1924).

fect state of electric technology²⁹⁹ The assurance that certain vapour stoves possessed rather extraordinary properties and would sell like hot cakes fell well within the elastic language of truth as salesmen spoke it.³⁰⁰ The display of advertising³⁰¹ is rather a general invitation to trade than a proffer of specific merchandises.³⁰² Courts have not yet ceased to make a meticulous assay of the verbal coinage which passed at the time of the sale; nor has the notion departed that assurances by seller that all is well with their wares are a mere Simian accompaniment to the high theme of trade. Even today at least a lingering "justice" is to be done without driving the seller "into the toils of an imaginary contract."³⁰³

The source of the vitality in late judicial utterance is not far to seek. It lies not in the decadent rules of a seller's law as applied by literal-minded judges but in the compelling power of an individualistic common sense which has not yet spent itself. It comes from the law behind the law in the classic lines of the early cases. There are to be met Fitzherbert and Coke and the persuasive Latin, archaic lines from far-off causes and holdings fresh from abroad, the omnipresent pockets of fermented hops and the ghost of the inescapable bezoar stone. Even Blackstone, by judicious quotation, is made to do conscript service in the worthy cause. It is an imposing intellectual structure, all of it deft and quite sincere and very purposive, an example of the art of giving text and precepts detached from their setting current employment. Behind it all, selecting, trimming, adjusting, and directing the stately march of the argument is reason as it was currently understood. The judges knew that one man was as good as another; they believed in the economic virtues; they made their decisions in private actions a declaration of public policy. Their common sense gave to a mass of verbal fragments from unknown climates of opinion the pulsing life of American democracy.

X

The coming of *caveat emptor* into the public law demands no lengthy account. The occasional attempts of the legislature to keep unworthy wares out of the buyer's reach have had the

²⁹⁹ *Cool v Fighter*, 239 Mich. 42, 214 N. W. 162 (1927).

³⁰⁰ *Detroit Vapor Stove Co. v. J. C. Webster Lumber Co.*, 61 Utah 503, 215 Pac. 995 (1923).

³⁰¹ For the strictures placed upon advertising see Note (1922) 17 A. L. R. 672, 707; Note (1925) 39 A. L. R. 992, 999.

³⁰² An adept in the art of advertising declares that copy is addressed to "to whom it may concern" and is signed "caveat emptor." *On Being Fired* 56 NEW REPUBLIC 228 (1931).

³⁰³ Mr. C. J. Gibson, in *McFarland v. Newman*, *supra* note 293, at 60.

attention they deserve. The silence of the law-making body is the truest comment upon the dominion of the accepted adage.

In England a supervision of the market, which was more than pretense and less than reality, was maintained until well past the Restoration. But a shattered authority never made a complete recovery from the shock of civil war, and its formulas were much too elementary to contain the turbulent life of an expanding commerce. As an ideal it could not survive the protracted crisis which attended the coming of industrialism. The laws contrived for the protection of the consumer were repealed or forgotten; the machinery of law enforcement fell into disuse. The matter of the quality of the ware, passed out of the province of government into the economic order. In the market,³⁰⁴ as the schoolmen of the day were wont to argue, sellers were balanced against buyers, each was in his mercenary efforts checked by the competition of others of his kind, and quality even as price was neatly accommodated to individual want.³⁰⁵ The regulation of weights and measures and a lax supervision of provisions alone remained to tell of a great scheme of control which was gone. The freedom to express its will over affairs that needed not its solicitude was still left to the legislature.

In America fact conspired with law to make even more enduring the absence of legislation. The dubious prestige of authoritative control could not withstand the impact of a continent of resources inviting the exploitation of a machine technique. The common sense of individualism was captured and imprisoned in words engrossed upon parchment; the Constitution of the United States in due time came to recognize a province of private right into which a government with limited powers could not intrude. As the threat of legislation appeared, liberty and property passed under the protection of the supreme law of the land. A freedom of contract, which comprehended the seller's right to determine the vendible qualities of goods, was to be abridged only when an insistent need could summon the police power to its support. Save in so exceptional an instance, an open market invited whosoever would to come and sell. In behalf of the right freely to bargain the judiciary might be invoked to declare a legislative act a nullity.

As long as laissez-faire was common sense, the judicial protection of the seller's liberties was a mere abstraction. As law-

³⁰⁴ A contemporary exposition of the neatness and dispatch with which all market problems are solved if left to the natural laws of competition is to be found in a once well-known discussion of "the relation of political economy to natural theology," WHELLEY, *INTRODUCTORY LECTURES ON POLITICAL ECONOMY*, (2d ed. 1832). The lectures are created out of just such ideological stuff as went into the judicial opinions of the day.

³⁰⁵ For an appraisal of the operation of "the economic law" see the article on *Competition* in 4 *ENCYCLOPEDIA OF SOCIAL SCIENCES*, 141 (1931).

making bodies began to busy themselves in the consumer's behalf it became a reality. For decades the power of the state even over impure foods, if not lost, was inert from disuse; for decades its negligent supervision took in little more than milk and meat. The domain of regulation has been stubbornly extended; the power of the legislature has been questioned, or the reasonableness of the method has been disputed, or lawful statutes have been made to serve alien ends. . . . The taxes imposed upon the sale of oleomargarine, found valid as health measures, have protected the market of rival dairy products. . . .³⁰⁶ An act decreeing that loaves of bread come within two ounces of their professed weight either denies to bakers a tolerance made necessary by their imperfect art or imposes upon them the expense of wrapping their bread in wax-paper. . . .³⁰⁷ A statute outlawing the use of shoddy in the manufacture of bed coverings recalls ancient prohibitions against mixing old with new; yet, in these later days when raw materials are artificially sterilized, it has been found to be a superfluous health measure. . . .³⁰⁸ An act of a state designed to protect aliens within its borders in the purchase of ocean steamship tickets is invalid, for the integrity of the domain of the federal government must be preserved. . . .³⁰⁹ A municipality cannot protect the harrassed housewife against canvassers who take orders for concerns without the state³¹⁰ A constitutional arsenal filled with an assortment of dialectical tools is an excellent help; the discussion usually runs in terms of reasonableness and jurisdictions and powers and limits of discretion; the substantive question, to regulate or not to regulate, often enough remains discreetly in the background.

The same disposition not to cramp the style of trade is elsewhere in evidence. The concept of fraud, at criminal law, has oftentimes been narrowly interpreted when commercial dealings have been passed in review. The courts have accorded to swindlers their legal deserts; but they have on occasion sharply distinguished "mere lies" from the grosser manifestation of untruth.³¹¹ As a buyer the national government takes its own pre-

³⁰⁶ *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992 (1888); *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154; *McCrary v. United States*, 195 U. S. 27, 24 Sup. Ct. 769 (1904). See also *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768 (1898), and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757 (1898).

³⁰⁷ *Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 Sup. Ct. 412 (1924).

³⁰⁸ *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. 320 (1926).

³⁰⁹ *Di Santo v. Pennsylvania*, 273 U. S. 34, 47 Sup. Ct. 267 (1927).

³¹⁰ *Dozier v. Alabama*, 218 U. S. 124, 30 Sup. Ct. 649 (1910); *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294 (1913); *Real Silk Mills v. Portland*, 268 U. S. 325, 45 Sup. Ct. 525 (1925); and cases cited therein.

³¹¹ *RADIN, op. cit. supra* note 169, at 47-49, 131; *Commonwealth v. War-*

cautions; it subjects rival products, not to the test of the senses, but to exhaustive scientific analysis, measurement, and experimentation; yet it refuses to furnish to its own citizens the results of its researches. Its devotion to *caveat emptor* has led it to help sellers to discover a pragmatic basis for the vendible qualities of their wares. A leaflet from the Department of Commerce informs the trade that in Belgium the chauffeur, through whose agency most automobile tires are bought, "is not so much interested in the quality as he is in the rebate which he is to receive from the dealers," and that accordingly, he is "not particularly attracted by tires whose long-wearing qualities make purchases too infrequent."³¹² Another tract, emanating from the same source, conveys to whom it may concern the information that the Chinese buy patent medicines "according to trademark" rather than by "their healing qualities," and that in India "the stronger the claims and apparent action of the product the more it is appreciated."³¹³

It is a far cry from authoritative control to modern mercantilism. The English borough sought to guard the gates of the market and deny entrance to unworthy goods. The up-to-date state undertakes to instruct producers how to subordinate goodness in their wares to vendibility. Yet *caveat emptor* claims to descend from an ancient lineage.

XI

All of this, after the manner of our day, is a hypothesis. The account has been written, so far as exposition allows, in the language of the documents. But words from ancient records are treacherous things; their meaning is inseparable from the little known worlds of facts and ideas which brought them forth. The men who set down the meager lines served their own purposes; they can be hailed into no scribbler's court for further questioning. The curious inquirer must constantly be on his guard lest he illumine their phrases with a reason and a sense which is not theirs. The materials were not made-to-order;³¹⁴ significant items may elude search, a number of serious gaps cannot be filled, unaccessible manuscripts may some day per-

ren, 6 Mass. 72 (1809); State v. Sampson, 10 N. C. 620 (1825); Commonwealth v. Springer, 8 Pa. C. C. R. 115 (1889).

³¹² *Market for Rubber Goods in Belgium*, U. S. DEPARTMENT OF COMMERCE, TRADE INFORMATION BULLETIN, No. 65 (1922).

³¹³ *Markets for American Pharmaceutical Preparations*. U. S. DEPARTMENT OF COMMERCE. TRADE INFORMATION BULLETIN, No. 149 (1923).

³¹⁴ The materials which are not set down here are quite abundant. Yet they are in general of a kind with the evidence presented. I have tried not to let any item escape this record which tells against the conclusion I have reached.

versely break into print. Yet, an aggregation of facts that hangs well together merits its record as a probable explanation. After all, interpretation is a venture.

The expression *caveat emptor* savors too much of the copy-book and the almanac to have a clear-cut history. A bit of wisdom may live long before it takes possession of a convenient verbal symbol; a collocation of words may be home to a succession of ideas. The notion that one had better look lest he rue his bargain is probably as old as trade; the phrase *caveat emptor* is a Latin proverb of late Anglican vintage. It hovered uncertainly on the fringes of respectability, but found no reputable place within the great authoritarian scheme by which Christian society was ordered. As a rule of law in the King's courts it was no more than shorthand for the want of an easy jurisdiction or the lack of a convenient writ. The common sense of individualism won for it judicial acceptance, fitted it out with legal trappings, and made it a vehicle of public policy. Its triumph was more complete in America than in England, in public than in private law. Not until the nineteenth century, did judges discover that *caveat emptor* sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.

The victory was never quite complete. The meaning of the maxim is to be discovered along the unstable and changing line which separates the buyer's protection from the seller's immunity. The law accepts proverbial wisdom on its own terms; an adage must make its truce with concept and rule and stand against the persistent attack of stubborn facts. The judges who made the maxim live were creating for the seller a domain of vocal freedom; in endowing judicial non-interference with antiquity and authority, they did protest too much. They were greatly bothered by judgments which did not fit in; in their homilies they lament the departures of other courts from time-honored precepts, and decry the insidious influence of the civil law. Their statements owe much to the contemporary existence of a contrary rule; the innovation, at which they are leveled, may well have been the older and more reputable law.

Yet, for all the protest, the frittering way, the going astray, the insidious pervasion went on apace. The concept of deceit was enlarged; an express warranty was in time joined by the subversive term implied warranty; the idea of negligence was borrowed, and increased measurably the seller's responsibility. The words which passed at the time of the sale made a place beside themselves for the usages of trade, and even the bugaboo of privity of contract had to fall back before the impersonal mechanisms of a market society. In time major premises gave way, rules were remade to take account of exceptions, and uni-

form sales acts established standards of legal rectitude for buyers and sellers. A lagging public law began to reassert a claim to an abandoned province of control. The account of the decline of *caveat emptor* is full of the dramatic stuff of concepts captured by newer reason, rules remade by exceptions, and precedents recreated in the likeness of current holdings. But that story,³¹⁵ which for some chapters runs parallel, lies beyond the limits of this inquiry.

But, lest there be mistake about it, *caveat emptor* is not yet a historical doctrine. The course of legal events has merely reduced its rule to a constitutional monarchy. The precept is still to be discovered behind enlarged rules of deceit, warranty, and negligence, behind established tests, inspection, and trade practice. The protection accorded the buyer is as yet neither broad nor certain. At best only a minimum of quality is assured and that in matters which do not invite great difference in opinion. Business is business and law is law, but neither insures quality to the book, long life to the garment, style to the furniture, or durability to the automobile. The market, to guard against an interruption in the stream of purchase, establishes its own standards, but the rational customs of modern merchants are bot-tomed in utility only so far as vendibility decrees. In many industries improvement is directed rather to points of the product which may be talked up than to features in need of mending. At best a seller's words have a limited currency in court; salesman are not limited to a simple recital of bare fact, and advertising has not ceased to be a creative art. The ordinary man, who ventures forth to market with only his senses as his chapmen finds himself face to face with the great collectivism of salesmanship, with its seried ranks to batter down resistance and render impotent his will. As an individual he cannot be sure the article he was induced to purchase satisfies a need he really feels. The doctrine which is now established freed from the crudities of its lowly origin, maintains a position worthy of its ancient lineage. But, in plain speech and at law, a refined *caveat emptor* still means that purchase is a game of chance.

³¹⁵ A penetrating account of this change, with an abundance of illustrative material from the reports, is to be found in LEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES, *supra* note 231, at 204-420.